IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 593 OF 2013

BETWEEN

OKIYA OMTATAH OKOITI.....1ST PETITIONER

NYAKINA WYCLIFE GISEMBE.....2ND PETITIONER

AND

THE ATTORNEY GENERAL ….....1ST RESPONDENT

THE TRANSITION AUTHORITY.....2ND RESPONDENT

THE COUNCIL OF GOVERNORS.....3RD RESPONDENT

AND

THE KENYA NATIONAL UNION

OF NURSES.....1ST INTERESTED PARTY

COMMISSION FOR THE IMPLEMENTATION

OF THE CONSTITUTION.....2ND INTERESTED PARTY

THE KENYA MEDICAL PRACTITIONERS, PHARMACISTS

AND DENTIST UNION……..…..3RD INTERESTED PARTY

AND

KATIBA INSTITUTE.....AMICUS CURIAE

JUDGMENT

Introduction

1. The Petitioners, Okiya Omtatah Okoiti and Nyakina Wyclife Gisembe in their Petition dated 18th December 2013, describe themselves as law abiding citizens of Kenya, public spirited individuals and human rights defenders. They are also members of Kenyans for Justice and Development Trust, a legal trust incorporated in Kenya and said to be founded on republican principles and set up with the purpose of promoting democratic governance, economic development and prosperity.
2. They have filed this Petition seeking *inter-alia* an interpretation of **Section 23, Part 1** of the **Fourth Schedule** to the **Constitution** and **Section 2**, **Part 2** of **Fourth Schedule** to the **Constitution 2010** as regards the meaning of the words "national referral health facilities" and "County health facilities". They particularly claim that the Respondents as well as the 2nd Interested Party, have given the wrong interpretation to the words "national referral health facilities" in **Section 23**, Part 1 of the **Fourth Schedule** and the words "county health facilities and pharmacies" in **Section 2(a),** Part 2 of the **Fourth Schedule** to the **Constitution**. According to the Petitioners, the words "national health referral facilities" do not mean only the Kenyatta National Hospital and Moi Teaching and Referral Hospital, but mean all public hospitals from Level 2 to Level 6, as designated by the Ministry of Health. Further, that the words" county health facilities and pharmacies" refer to health facilities previously managed by local authorities, or which presently, Counties may and are reasonably expected to establish.

3. The Petitioners are therefore seeking the following declarations and orders;

"(a) That this Court gives a declaration that the national referral health facilities existing before the effective date and referred to in Part 1 Section 23 of the Fourth Schedule to the Constitution were not devolved to the county governments, and remain a core function of the national government.

b. ***That this Court gives a declaration that the words "national referral health facilities" in Part 1 Section 23 of the Fourth Schedule to the Constitution refer to the Level 2, Level 3, Level 4, Level 5, and Level 6 health facilities belonging to the national government.***

c. ***That this Court gives a declaration that the words "County health service", including, in particular- (a) "county health facilities and pharmacies" in Part 2 Section 2(a) of the Fourth Schedule to the Constitution refer to primary health services inherited from local authorities and those to be established by county governments.***

d. ***That this Court declares that the WHO's definition of a national health referral system is applicable to Kenya.***

e. ***That this Court declares that for purposes of Article 6(3) of the Constitution, the national government must operate national referral health facilities within the boundaries of any and all counties.***

f. ***That this Court gives a declaration that each county government ought to establish community of Level 1 (i.e., entry point or initiating) facilities in their counties to enhance the provision of primary health care in the counties.***

g. ***That this Court gives a declaration that county governors and county governments do not have the capacity to hire and/or fire workers in Level 2, Level 3, Level 4, Level 5 and Level 6 national referral health facilities.***

h. ***That this Court gives an order ordering the 2nd and 3rd Respondents to keep off and stop interfering with the national referral health facilities.***

i. ***That this Court gives an order ordering the 1st Respondent not to dismantle the national referral health system and hand its facilities and human resources over to any third parties, including the 2nd and 3rd Respondents.***

j. ***That the Court do issue an order quashing all the legal notices, including Legal Notice Nos. 137 to 182 of 2013, dated 9th August 2013, purportedly devolving Level 2 , Level 3, Level 4 and Level 5 national referral health facilities to county governments issued by the 3rd Respondent.***

k. ***That the Court be pleased to issue a permanent order of Prohibition prohibiting the 1st, 2nd and 3rd Respondents, whether by themselves, or any of their employees or agents or any person claiming to act under their authority from proceeding to give effect, in any way whatsoever to the unconstitutional transfer of Level 2, Level 3, Level 4 and Level 5 national referral health facilities from the national government to county governments.***

- ***That this Court gives an order directing the 1st Respondent that, when Hon. Attorney General drafts the Bill for Parliament to enact legislation regarding national referral health facilities are protected.***

m. ***That this Court gives any other orders required to advance the cause of justice in this case.***
n. ***That the costs of this Petition be borne jointly and severally by the Respondents."***

Factual Background

4. The factual background to the dispute, if at all, leading to this Petition can be traced to Legal Notice No. 137 of 2013 published in the Kenya Gazette Supplement No. 116 on 9th August 2013 by the 2nd Respondent. The Transition Authority where in it gave notice of transfer of certain functions from the National Government to the County Government pursuant to the provisions of **Section 15** of the **Sixth Schedule** to the Constitution as read with **Sections 23** and **24** of the **Transition to Devolved Government Act, 2012** and in furtherance to Legal Notice No. 16 of 2013. In that Gazette Notice it stated as follows with regard to health services;

Legal Notice No.137 of 2013

THE CONSTITUTION OF KENYA

THE TRANSITION TO DEVOLVED GOVERNMENT ACT, 2012

(No.1 of 2012)

TRANSFER OF FUNCTIONS

PURSUANT TO Section 15 of the Sixth Schedule to the Constitution as read with Sections 23 and 24 of the Transition to Devolved Governments Act, 2012 and further to the Legal Notice No.16 of 2013, the Transition Authority approves the transfer of the functions specified in the Schedule to the county government of Baringo, with effect from the 9th August, 2013.

Provided that the responsibility for the personnel emoluments related to the discharge of the devolved functions shall be managed by the national government for a period not exceeding six months or as shall be agreed upon between the two levels of government, whichever comes first.

1. …

2. County health services

(a) county health facilities and pharmacies including-

(i) county health facilities including county and sub-county hospitals, rural health

centres, dispensaries, rural health training and demonstration centres, rehabilitation and maintenance of county health facilities including maintenance of vehicles, medical equipment and machinery, inspection and licensing of medical premises including reporting.

(ii) county health pharmacies including specifications, quantification, storage, distribution, dispensing and rational use of medical commodities:

Provided that until alternative intergovernmental arrangements are made, all counties shall procure medical commodities from the Kenya Medical Supplies Authority except where a particular commodity required by a county government is not available at the Kenya Medical Supplies Authority;

(b) ambulance services including emergency response and patient referral system;

(c) promotion of primary health care including health education, health promotion, community health services, reproductive health, child health, tuberculosis, HIV, malaria, school health program, environmental health, maternal health care, immunization, disease surveillance, outreach services, referral, nutrition, occupation safety, food and water quality and safety, disease screening, hygiene and sanitation, disease prevention and control, ophthalmic services, clinical services, rehabilitation, mental health, laboratory services, oral health, disaster preparedness and disease outbreak services. planning and monitoring, health information system (data collection, collation, analysis and reporting), supportive supervision, patient and health facility records and inventories;

(d) licensing and control of undertakings that sell food to the public including food safety and control;

(e) veterinary services to carry out, coordinate and oversee veterinary services including clinical services, artificial insemination, and reproductive health management; but excluding regulation of the profession; and;

(f) enforcement of waste management policies, standards and regulations; in particular –

(i) refuse removal (garbage) including, provision of waste collection bins, segregation of waste at source, licensing of waste transportation;

(ii) refuse dumps including zoning waste operation areas, conducting environmental impact assessment for the siting of dumps, fencing of dumps, controlling fires, monitoring waste characteristics and monitoring of waste water from the dumpsite (leachate); and

(iii) solid waste disposal including enforcement of national waste management policies, standards and laws with respect to landfilling, incineration with energy recovery, compositing, recycling and operation for transfer stations"

It is the above Gazette Notice as read with Part 1, Section 23 and Part 2, Section 2(a) of the Fourth Schedule that triggered the present Petition.

The Petitioners' Case

5. The Petitioners submitted that the Respondents have given the wrong interpretation to the words "national referral facilities" in Section 23 of Part 1 of the Fourth Schedule to the Constitution and to the words "County health facilities and pharmacies" in part 2, Section 2(a) of

the Fourth Schedule to the Constitution. The Petitioners contend as earlier stated, that the words 'national referral health facilities' do not mean only Kenyatta National Hospital *(hereinafter KNH)* and Moi Teaching and Referral Hospital *(hereinafter MTRH)* or any other hospital selected by whatever criteria, but the words mean the totality of the nationwide network comprising all public health facilities operated by the Ministry of Health, including; dispensaries, health centers, primary, secondary and tertiary hospitals classified as Level 2, Level 3, Level 4, Level 5 and Level 6 health facilities and upon which the national referral health system operates.

6. The Petitioners also claimed that the land upon which Level 2, Level 3, Level 4, Level 5 and Level 6 national referral health facilities are located is public land vested in the National Government as provided for in **Article 62(1)(b)** as read with **Article 62(2)(b)** of the **Constitution** and therefore the purported transfer from the National Government to County Governments of Level 2, Level 3, Level 4 and Level 5 national referral health facilities violates **Section 21** of the **National Government Co-ordination Act, 2013** which forbids the transfer of property, assets, rights, liabilities, obligations, agreements and other arrangements of the national government.

7. It was the Petitioners' further submission that Section 2(a), Part 2 of the Fourth Schedule to the Constitution states that health services are for the promotion of primary health care and primary health care denotes preventive and emergency healthcare provided at the community level. That the purpose of primary health care is to keep people healthy so that they are not in need of hospitalization and that means that primary health care does not include Level 2 to Level 5 national referral health facilities.

8. Further, that the words "county health facilities and pharmacies" do not merely refer to any public health facility located within the boundaries of a county. Instead they argued that county health facilities are those facilities which were previously owned by local authorities or which County Governments may and are reasonably expected to establish. They contended therefore that under Section 2, Part 2 of the Fourth Schedule, County Governments have a preventive function which is comprised of primary health care formerly provided for under **Section 160** of the **Local Government Act (Cap 265 Laws of Kenya).** That **Sections 161** to **167** of that Act had listed functions which were donated to local authorities which functions are similar to those in Section 1 to 14 of Part 1 of the Fourth Schedule to the Constitution, 2010.

9. In addition, the Petitioners contended that county health facilities comprise county health facilities and pharmacies which were established and previously operated by local authorities under **Section 145(i)** of the **Local Government Act** and included mobile units and ambulances for first aid. That those health facilities provide preventive care as opposed to curative care, and according to the World Health Organization (WHO), primary health care needs to be delivered close to the people and they include the following essential components;

(a) Education for the identification and prevention/control of prevailing health challenges

(b) Proper food supplies and nutrition, adequate supply of safe water and basic nutrition sanitation

(c) Maternal and child care, including family planning

d. Immunization against major infectious diseases

(e) Prevention and control of locally endemic diseases

(f) Appropriate treatment of common diseases using appropriate technology

(g) Promotion of mental, emotional and spiritual health

(h) Provision of basic drugs

They therefore claimed that any patient examined by a county primary healthcare provider or at an emergency care unit, who is deemed to be in need of specialized treatment or requires care and procedures that cannot be provided at the said level, must be referred to a national government's national referral health facility capable of providing the level of care the patient needs. The Petitioners then opined that the transfer of patients from one institution/unit of the national healthcare delivery network to another may be dangerous for the patient especially because specialized vehicles or planes may be required for the evacuation and it is not viable to expect each county to own such planes and vehicles. They thus further argued that the primary healthcare which the Constitution assigns to county governments ought to compliment the national referral system as per the provisions of **Article 6(2)** of the **Constitution**. And further, that counties should set and develop sufficient primary healthcare infrastructure and work for better integration between national referral health facilities and county based services. In any event, they claimed that the term 'county referral health facilities' does not appear anywhere in the Constitution and it appeared for the first time in the impugned Legal Notices and in policy papers prepared by the Ministry of Health, in 2012.

10. On the national referral health facilities, it was the Petitioners' contention that these are the infrastructure for the national referral health system and includes those dispensaries, health centers, primary hospitals, secondary hospitals and tertiary hospitals which are Level 2, Level 3, Level 4, Level 5 and Level 6 of the health facilities owned and operated by the Ministry of Health and spread across the country. They argued that Kenya's referral health system is structured in a step-wise manner so that complicated cases are referred to a higher level, or horizontally to where certain limited facilities and expertise exist, and less complicated cases are referred to a lower level or, horizontally to a facility of the same level. That the structure of the national referral system consists of;

(a) Primary/Community=Level 1(entry point or initiating facility- primary health care).

(b) Dispensaries=Level 2 (referral).

(c) Health centers=Level 3 (referral)

d. Primary hospitals=Level 4 (district/sub-district level referral)

(e) Secondary hospitals=Level 5 (provincial level referral)

e. Tertiary hospitals=Level 6 (national level referral)

11. The Petitioners thus claimed that based on the above structure, the Cabinet Secretary for Health can equip and graduate any lower level referral facility to the next higher level referral facility, up to Level 6, to address specific requirements. That depending on the facilities available, any of the Level 2 to Level 6 facilities could serve as a national referral centre for the management of specific health issues. For instance, they picked the following examples as some of the hospitals which serve as national referral hospitals;

a. Mathari District Hospital, a level 4 facility in Nairobi County which is said to be the national referral centre for psychiatric cases.
b. Mbagathi District Hospital, a Level 4 facility in Nairobi County is the national referral centre for tuberculosis and other respiratory cases.
c. National Spinal Injury Hospital, a Level 4 facility in Nairobi County which is said to be the national referral centre for spinal cord injuries
d. Alupesu District Hospital, a level 4 facility in Busia County which is said to be the national referral centre for leprosy and other skin diseases. Allupe is also an East African Regional referral

centre for leprosy and other skin diseases.

12. It was therefore the Petitioners' case that instead of dismantling the national referral system as the Respondents and the 2nd Interested Party have set out to do, the referral system should be strengthened between the various levels and that since all healthcare required cannot be obtained at any given level of the system, an effective referral mechanism is a key element for the delivery of health care by the national government.

13. Further, relying on the WHO definition of referral and counter-referral or return referral, the Petitioners contended that a health care delivery system must promote and encourage patients to access the health system through primary care at the community level and only in emergency cases should patients be allowed to access hospital care directly. And that for every referral, there must be a counter referral, and once the reason for referral has been resolved, the patient must be referred back to the originating attending healthcare provider for follow up. The Petitioners thus contended that the Constitution refers to primary healthcare and not to referral health facilities at county level because counties are responsible for primary health services.

14. It was the Petitioners' further submission that devolution to County Government is only autonomous in the implementation of distinct functions as listed in Part 2 of the Fourth Schedule, and the national government has a role to play at the County level by performing all the other functions which are not assigned to county governments as listed in Part 1 of the Fourth Schedule. They argued that in accordance with the principles of devolution set out under **Article 174** of the **Constitution,** education, the judiciary and the police services etc are not devolved and in the health sector, only the facilities which deliver primary healthcare services are subject to devolution. That the other healthcare facilities including the referral facilities remain under the responsibility of the national government under the Ministry of Health.

15. It was therefore the Petitioners' case that County Governments bear the overall responsibility for planning, financing, co-ordinating, delivering and monitoring county health services which include county health facilities and pharmacies towards the fulfillment of the right to the highest attainable standard of health under **Article 43(a)** of the **Constitution**. And the national government bears overall responsibility for planning, financing, coordinating, delivering and monitoring the national referral health facilities in fulfillment of **Article 45(a)** of the **Constitution**. It was therefore the Petitioners' further case that the Respondents have wrongly interpreted the Constitution and the Ministry of Health has produced a policy document titled, 'Health Sector Strategic and Investment Plan (KHSSP) for July 2013-June 2017, the Second Medium Term Plan for Health" and has in page 17 wrongly defined health services and interventions to be provided for each policy objective, by level of care and cohort as follows;

"80.1 <u>Community level</u>: The foundation of the service delivery system, with both demand creation (health promotion services), and specified supply services that are most effectively delivered at the community. In the essential package, all non-facility based health and related services are classified as community services – not only the interventions provided through the Community Health Strategy as defined in NHSSP II.

80.2 <u>Primary Care Level</u>: The first physical level of the health system, comprising all dispensaries, health centres, maternity/nursing homes in the country. This is the 1st level care level, where most clients' health needs should be addressed.

80.3 <u>County level</u>: The first level hospitals, whose services compliment the primary care level to allow for a more comprehensive package of close to client services.

80.4 <u>National level</u>: The tertiary level hospitals, whose services are highly specialized and complete the set of care available to persons in Kenya."

They thus contend in the above regard that the Respondents failed to appreciate that Level 2, Level 3,

Level 4 and Level 5 national referral health facilities are an integral part of the national referral health system, which has been assigned to the national government by the Constitution.

16. It was also the Petitioners' position that the transfer has violated the Fourth Schedule on the distribution of functions between the National and County Government, violates **Article 6(3)** of the **Constitution** on devolution and access to services and violates **Section 21** of the **National Government Coordination Act**. They thus claimed that Legal Notice No. 137 of 2013 aforesaid is illegal, null and void for purporting to transfer Level 2, Level 3, Level 4 and Level 5 national referral health facilities from the National Government to the County Governments.

For the above reasons they now seek the orders elsewhere set out above.

The 1st Respondent's Case

18. The 1st Respondent, The Attorney General, in his submissions dated 3rd April 2014, urged the point that, while interpreting the phrases "National referral health facilities" and "County health services", the Court should read and interpret **Articles 174, 175, 186, 187** and the **Fourth Schedule** to the **Constitution** harmoniously. That as per the provisions of **Article 186(1),** the functions and powers of the national government and the County Governments are set out in the Fourth Schedule and it is clear from the provisions of the said Fourth Schedule that National Referral Health facilities are a mandate of the national government, while county health services are a mandate of the County Government. As regards the Petitioners' interpretation to the effect that National Referral Health Facilities belonging to the National Government being Levels 2, 3, 4, 5 and 6 health facilities and County health services refer to primary health services inherited from local government, the Attorney General contended that such an interpretation is absurd as it defeats the decentralization of state organs, their functions and services from the Capital of Kenya. Further, that such an interpretation renders **Articles 174(h)** as read with **Article 186(1)** and **Sections 23** of **Part 1** of the **Fourth Schedule** and **Section 2** of **Part 2** of the **Fourth Schedule** inapplicable in respect to the health sector.

19. It was his position that only two health facilities in Kenya qualify for the description of National Referral Health Facilities, and these are the Kenyatta National Hospital and, Moi Teaching and Referral Hospital as can be drawn from these institutions' constitutive instruments as well as the National Health Sector strategic plans. In the case of Kenyatta National Hospital, he stated that it was established as a national referral hospital by the Kenyatta National Hospital Board Order, 1987 vide Legal Notice No. 109 of 1987 and in the case of Moi Teaching and Referral Hospital, it was established as a national Referral Hospital by the Moi Teaching and Referral Hospital Board Order, 1998 vide Legal Notice No. 78 of 1998. He therefore argued that from the constitutive instruments of the two health institutions, it is notable that the two health facilities are the only national referral systems while the other health facilities are 'other hospitals', and therefore the other health facilities such as dispensaries, maternity homes, health centers, nursing homes and clinics cannot be classified as national health facilities.

20. It was his submission that according to the Ministry of Health, National Health Sector Strategic Plan 1999-2004, health facilities are hierarchical and that Kenyatta National Hospital is at the apex of the health referral system in Kenya and with devolution, the same hierarchical system has remained in place.

21. He contended that the classification of health facilities on the basis of levels of care was introduced by the Ministry of Health, through the National Referral Sector Strategic Plan 2005-2010 and according to that plan, Levels 2 and 3 are facilities which include health centers, maternity/nursing homes which basically handle preventive care but also offer some curative services. Levels 4-6 (primary, secondary and tertiary hospitals) on the other hand, undertake mainly curative and rehabilitative activities in their service delivery package.

22. Further, that the classification of health facilities by the 2005-2010 policy was not based on

any geographical zoning, but the level of service which each facility was providing, and therefore, it would not be correct to state that save for Level 1 facilities, the rest of the facilities are national referral health facilities, contemplated by Section 23, Part 1 of the Fourth Schedule. That in any event, the referral system has always included National Referral Hospitals, Provincial and District Hospitals and he thus claimed that Section 23, Part 1 of the Fourth Schedule contemplated Kenyatta National Hospital and Moi Teaching and Referral Hospital as being the national referral health facilities and the rest of the facilities then assume the classification of county health services.

23. It was also the contention of the Attorney General that Sections 28, Part 1 of the Fourth Schedule to the Constitution places the formulation of the national health policy on the National Government. To that extent therefore, and as far as the Petitioner seeks definition of various technical terms from the Court, the Petition undermines the doctrine of separation of powers. He claimed therefore that the Court lacks jurisdiction to direct the National Government and the County Governments on how and where to establish and operate national referral facilities within counties or establish community/Level 1 facilities, respectively. He claimed that an attempt to do so would amount to this Court over-stepping its mandate and assuming the mandate of the Executive, he submitted.

24. As to prayers (j) and (i) of the Petition, the Attorney General submitted that this Court cannot issue those orders as the same were the subject matter of **Nairobi High Court JR No. 317 of 2013** where the Court declined to grant the said orders. He claimed that the said issue is *res judicata* as far as it attempts to re-litigate a matter already decided by a court of competent jurisdiction. Reliance was placed on the case of **Towhida Awo Shariff & 2 Others v Registrar of Titles & 4 Others (2012) e KLR** in support of that proposition.

25. On prayer (k), it was his submission that it cannot issue against the 1st Respondent as it is speculative and is beyond the mandate of the Attorney General since legislation is a role reserved for Parliament under Articles 93 of the Constitution.

26. The Attorney General thus urged the Court to dismiss the Petition with costs.

The 2nd Respondent's Case

27. The 2nd Respondent, the Transition Authority, in response to the Petition filed an answer to the Petition dated 20th January 2014 and an affidavit sworn by Kinuthia Wamwangi sworn on the same date. It also filed submissions dated 20th January 2014.

28. It was its submissions that the same issues raised in this Petition are *res judicata* as they were subject of the issues raised in **Nairobi High Court J.R No. 317 of 2013** where the Ex-parte Applicants, the Kenya Medical Practitioners, Pharmacists and Dentists Union (KMPDU), The Kenya National Union of Nurses (KNUN) and the Kenya Health Professionals Society (KHPS), who in the Present Petition are the Interested Parties, had sued the 2nd Respondent and the Council of Governors. That the issues raised in this Petition are actually similar to those in **JR. No. 317 of 2013** and the judgment in that regard was delivered on 18th December 2013 and therefore the present Petition is an abuse of the Court process. It relied on the cases of **Mombasa Maize Limited v Hassan Sura Dele & Another Mombasa High Court Civil Appeal No. 37 of 2012, , Mburu Kinyua v Gachini Tuti (1976-80) I KLR 790, Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others, Civil Appeal No. 36 of 1996, John Kilei Ndiema & 26 Others v Matasi Cooperative Society Ltd HCCC No. 59 of 2012, R v Minister for Agriculture & Others JR Misc Applic No. 78 of 2012** and **Edwin Thuo v Attorney General & Another Nairobi High Court Petition No. 212 of 2012**, all which espouse the law on *res judicata*.

29. In addition to that point, Kinuthia Wamwangi in his affidavit in support of the answer to

the Petition explains how **JR No. 317 of 2013** received wide publicity in both the print and television media and deponed that the Petitioners ought to have sought leave to be enjoined in those proceedings to enable them ventilate their argument that Levels 2-5 health facilities constitute national referral facilities and that Legal Notices Nos 137-182 of 2013 contained in Kenya Gazette Supplement No. 116 of 2013 issued by the 2nd Respondent ought to be quashed. That *res judicata* guards against the possibility of re-litigating the same cause of action in different perspectives and the principle is clearly applicable to the present Petition.

30. It was also the argument of the 2nd Respondent that the Petition offends the doctrine of separation of powers, is speculative and vague and ought to be dismissed. That the classification of health facilities, Levels 2-5 inclusive, as County Health Facilities and the reasons thereof is a policy undertaking by the Executive duly facilitated by the 2nd Respondent and other government agencies and also through public participation. That this Court cannot direct the National Government on its policies as that would amount to delving into policy making which is preserved for the National Government. Further, that the Court cannot issue the prayers sought at paragraph (e) and (f) as the Court would be making determinations of a policy nature and that the Fourth Schedule at Part 2(2)(c) already assigns the function of 'promotion of primary health care' to the County Governments. As to how that function is interpreted and rolled out is the business of the County Governments and this Court cannot prescribe that action and in any event, the county governments have just begun the implementation of the policy and the issue raised by the Petitioners is not ripe for litigation and can only be speculative as at now. And lastly on this point, that the Court cannot prescribe how the Executive shall interpret policy into draft law, as sought under prayer (k). That in that regard, the Petitioners should await legislation to be enacted and only then can they challenge it in court for failing to meet the constitutional test.

31. It was the 2nd Respondent's further position that the Petition as presented does not disclose any cause of action capable of being resolved by this Court and that the transfer to the County governments of health functions enumerated in Legal Notices No. 137-182 of 2013 took effect on 9th August 2013 and the enumerated County Health Services which are a component in the said Legal Notices were effectively transferred to the County Governments on 9th August 2013 and delivery of the impugned health services by the County Governments has taken full effect and is ongoing and therefore there is nothing capable of being suspended as prayed. Further that the Court in **JR No. 317 of 2013** having declined to quash the Legal Notices, any transfer of the functions between the County Governments and the national government may only be effected by the two levels of government pursuant **to Article 187** of the **Constitution** and **Sections 24** to **28** of the **Intergovernmental Relations Act**. And that the national government may only intervene in the activities of County Governments pursuant to the provisions of **Article 190(3)** of the **Constitution** and **Section** 21 of the **County Governments Act.**

32. It further alleged that the Petitioners have failed to demonstrate how the Constitution has been violated and have merely listed the provisions of the Constitution without demonstrating how those provisions have been breached. Further, that the Petitioners have not demonstrated any breach of their constitutional rights as alleged.

33. The 2nd Respondent submitted in addition that it has acted within its jurisdiction and followed statutory procedures in its actions and its decision are not unreasonable or in defiance of logic as established in the Wednesbury Principle. That if the orders sought were to be granted, there would be chaos and public inconvenience in the delivery of health services as finances have already been budgeted for, allocated to the County Governments and spending is ongoing.

34. It was also the 2nd Respondent's submission that adequate constitutional and legal safeguards have been provided in order to ring-fence the efficient delivery of services and provide the necessary back-stopping by the national government and the Petitioners have therefore not suffered any harm and indeed their right to health has been secured.

35. The 2nd Respondent went on to submit that county governments are not synonymous with the defunct local authorities and the previous system of governance under the Repealed Constitution which comprised of a central government with delegation of powers to local authorities. That under the Constitution, 2010 on the other hand, County Governments are distinct levels of Government and it is erroneous for the Petitioners to claim that county health facilities and pharmacies are those inherited from local authorities and further that county functions cannot be exercised beyond their administrative jurisdictions neither can counties purport to have the capacity to operate Level 4, Level 5 and Level 6 referrals which serve multiple counties.

36. It was the further position of the 2nd Respondent that the promotion of primary health care is one of the many functions of County Governments and the listing of the health functions under Section 2 of Part 2 of the Fourth Schedule is not exhaustive as the word 'including' is deliberately used. That the Section does not in any event anticipate that county governments will only provide referral healthcare but that they would also provide primary health care

37. In response to the Petitioners' argument that **Section 21** of the **National Government Co-ordination Act** has been violated due to the transfer of Levels 2-5 health facilities to the County Governments, the 2nd Respondent submitted that the said Section cannot override the provisions of the Constitution. That **Article 190(1)** of the **Constitution** provides that County Governments shall be given adequate support to enable them to perform their functions and **Section 121** of the **County Government Act** has operationalised this constitutional provision.

38. Lastly, it was the 2nd Respondent's submission that there is no basis for this Court to determine the questions raised by the Petitioners and urged the Court to issue only those orders that shall facilitate the implementation by the County Governments of its functions and not issue orders that seek to stall their operations. It therefore prayed that the Petition should be dismissed with costs.

The 3rd Respondent's Case

39. The 3rd Respondent, The Council of Governors, in response to the Petition filed an Affidavit sworn on 23rd January 2014 by Isaac Ruto, the Governor of Bomet County and the Chairperson of the 3rd Respondent. It opposed the Petition and claimed that it is based on an erroneous interpretation of the Constitution.

40. Mr. Ruto deponed that the Constitution, 2010, has established a framework of governance where power is shared between the two levels of government at the national level and county levels and that this structure is different from the previous government system comprising of a central government and local authorities. He thus contended that the argument that county governments can only manage the health facilities previously under the management of local government is wrong. That the distribution of functions between the two levels of government is contained in the Fourth Schedule of the Constitution and that such a distribution cannot be based on the legal and constitutional order that existed prior to the promulgation of the Constitution, 2010. That it cannot be true that 'County health facilities' mean the health institutions ran by former local authorities, because the health facilities were limited to municipal councils only and that only 5 Municipal Councils (Nairobi, Eldoret, Kisumu, Mombasa, Nakuru) had such health facilities. That the Constitution did not intend to limit these services to 5 out of 47 counties and further to that, limiting the same to only 5 areas will be in violation of the spirit of devolution.

41. It was its submission that **Article 6(1)** of the **Constitution** provides that the governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and co-operation. Further, that Article 189 of the Constitution has detailed rules of operation to govern and give effect to the cooperative government and co-operative inter-governmental relations. It relied on the South African case of **Ex Parte President of the Republic of South Africa, in Re: Constitutionality of the Liquor**

Bill 2000 (Liquor Bill Case) (no citation provided), where the South African Constitutional Court held that Chapter 3 of the South African Constitution introduced a new philosophy, namely that of co-operative government and its attendant obligations.

42. It was the 3rd Respondent's further submission that the 2nd Respondent has duly exercised its statutory mandate under Section 35(2) of the Transition to Devolved Government Act when it issued the impugned Legal Notices wherein it provided the scope of functions to be undertaken by counties and key conditions to follow for smooth transfer of the said functions. It thus submitted that unless there was a violation of the Constitution, this Court cannot question a determination of the Transitional Authority on the assignment and unbundling of functions in the health sector and this Court should not be drawn into the dispute as to whether Level 1 to Level 6 hospitals are national referral facilities since those are technical matters that are better addressed by the Transitional Authority in the transitional period, and eventually through legislation, policies etc

43. On the issue whether the words 'national referral health facilities' in Part 1, Section 23 of the Fourth Schedule to the Constitution refer to Level 2, Level 3, Level 4, Level 5 and Level 6 health facilities, the 3rd Respondent submitted that the words "national referral health system" cannot be defined by the use of dictionary semantics but within the Constitution and The Health Sector Strategy, 2012-2017 which differs with the Petitioners' views. Further, that the WHO's definition cannot be applied since it violates the doctrine of separation of powers as formulation of policies is a preserve of the Executive under the Fourth Schedule to the Constitution.

44. The 3rd Respondent then contended that the Petition lacks merit and ought to be dismissed with costs and urged the Court to hold that the unbundling of health service provisions from the National Government to County Governments vide Legal Notices Nos. 137-182 of 2013 and dated 9th August 2013, issued by the Transition Authority was done in accordance with the law.

The 1st Interested Party's Case

45. The 1st Interested Party, the Kenya National Union of Nurses supported the Petition and agreed with the Petitioners' submissions entirely as reproduced elsewhere above.

46. It submitted extensively on the issue of *res judicata* and in that regard urged the point that this Court should abhor technicalities and challenges to its jurisdiction and only look into the issues raised as long as there is an allegation of a constitutional violation. They relied on the case of **Nabori &9 Others v Attorney General (2007) KLR 331 and Moses Tompu Kuya & 5 Others v Attorney General & 2 Others Petition No. 65 of 2008** in support of that submission. It was also its submission that this Petition does not violate the provisions of Section 7 of the Civil Procedure Act on *res judicata* allegedly because the parties to this suit are not the same as those in **JR No. 317 of 2013** and the issues in that suit are different as to those in this Petition and which issues have never been addressed to their conclusion by a competent court. On that point it cited the case of **Kiprop Arap Biegon v John Arap Bii & Anor (2005) e KLR.**

47. In addition, it was its position that this Court has original and unlimited jurisdiction to hear any constitutional question and since the present proceedings seek for the enforcement of fundamental rights and freedoms, the doctrine of *res judicata* would not apply. That the Court should therefore determine the Petition on merit and cited the case of **Chokolingo v The Attorney General of Trinidad and Tobago (1981) 1 WLR 106** to buttress that point.

48. Further, it submitted that the National Government is devolving valuable assets to the County Governments without following due process and as a result its members are being forced to be absorbed in County Governments on new terms and separate contracts without proper arrangements being put in place. That by devolving health services, the Respondents have killed the referral system and allocated certain specialist institutions to the counties. They thus claimed that such action would amount to discrimination and a violation of Article 27 of the Constitution

as it would be difficult to cross-refer patients to county hospitals and it would also be difficult to get specialist services across the counties where a referral hospital is wrongly devolved. They also claimed that discrimination has also been visited on the 1st Interested Party's members since different benefits and preferential payments to staff of the 1st Interested Party will be accorded in the various counties. It relied on the cases of; **RM & Another v Attorney General (2008) 1 KLR (G7F) 574, Federation of Women Lawyers Kenya (FIDA) & 5 Otehrs v The Attorney General & Another Petition No. 102 of 2011, Nyarangi & 3 Others v Attorney General (2008) KLR 688** and **Prinsloo v Van Der Linder & Another 1997 (3) SA 1012 (CC**) in support of those arguments.

49. It was also the 1st Interested Party's contention that the Respondents have violated its members' right to fair labour practices by exposing them to extreme differential payments in the period before and after the devolution of the health services. That the Respondents have also created an unfavorable environment and the Interested Party claimed that their right to good health entitlement has been violated. Further, that their right to fair administrative action, and right to property have all been violated.

50. The 1st Interested Party thus urged the Court to grant orders in the Petition as prayed.

The 2nd Interested Party's Case

51. The 2nd Interested Party, the Commission for the Implementation of the Constitution, opposed the Petition. It filed submissions dated 4th March 2014.

52. It was its case that not all Level 2 to Level 5 health facilities have the capacity to perform policy functions and that it would be impractical and unworkable to include those health facilities as 'national referral health facilities' as envisaged by Section 23, Part 1 of the 4th Schedule to the Constitution. Further, that the phrase 'county health facilities and pharmacies' does not refer only to health facilities which used to be managed by local authorities under the Local Government Act.

53. That the Constitution does not restrict a county government from providing goods and services for persons from other counties and that it is not impossible for a county government to operate a specialized health facility that caters for referrals from other counties, as long as that provision is funded by tax payers' monies allocated by Parliament. Indeed that the referral of patients requiring treatment between Levels 2 to 5 health facilities in various counties is achievable and is in fact provided for by the existing constitutional and statutory framework of devolved government through the provisions of **Articles 6(2), 10(2) 189(1)** and **(2)** of the **Constitution** and **Section 5 (2)(e)** of the **County Government Act.**

54. It submitted in addition that the Petitioners' reliance on meanings and interpretations attributed to the WHO is misplaced because the structure/system of provision of health services in Kenya has traditionally been, and continues to be determined by the National Health Policy/Strategic Plan whose formulation is vested by the Fourth Schedule to the Constitution in the National Government and not any legislation. That even in the absence of implementing legislation, the definition of 'national referral health facilities' and 'county health services' has been left to the National Government, other than the threshold duties assigned to County Governments under Section 2, Part 2 of the 4th Schedule to the Constitution. It therefore submitted that as at 27th August 2010, there were only two national referral facilities i.e. Kenyatta National Hospital (KNH) and Moi Teaching and Referral Hospital (MTRH).

55. It also submitted that the transfer of health services to counties does not discriminate against health workers, as compared to teachers, police or other civil servants and public officers, since it is the Constitution that has differentiated the employment of certain public servants. Further, that **Sections 58** and **59** of the **County Government Act** establishes a county public

service board, in pursuance of **Article 235**, in each County, with the power to exercise disciplinary control similar to that of the Public Service Commission and promote in the county public service the values and principles referred to in **Articles 10** and **232** of the **Constitution.**

56. As regards the Petitioners' prayers, it contended that those prayers are unsuitable in law since they are asking the Court to make descriptive declarations that are in the nature of policy making and infringe on the national government's constitutional role of making national health policy. It thus urged the court to dismiss the Petition.

The 3rd Interested Party's Submissions

57. The 3rd Interested Party, the Kenya Medical Practitioners, Pharmacists and Dentists Union did not file an answer to the Petition nor did it participate in the proceedings at all.

The Amicus Curiae submissions

58. The Amicus Curiae, Katiba Institute (KI), submitted that the complexity of the issues involved, especially on the policy and administrative implications, makes this Petition unsuitable for the Court to make declarations as prayed by the Petitioners. That discussions on the complexity, meaning and application of the Fourth Schedule should be informed by several factors such as past institutional practices especially on technical aspects such as medical referral, strategies put through policies, expert assessment of the sector by specialists, the set standards and the transition period. That the court does not have all these details to determine the Petition on its merits.

59. It was its further submission that Courts are not the only means through which disputes relating to devolution must be resolved and that the Constitution has placed great emphasis in resolving disputes relating to devolution through an intergovernmental disputes resolutions mechanism as established under Chapter 11 of the Constitution and in particular under **Article 189(2)** of the **Constitution** and under the **Intergovernmental Relations Act, 2012**. It thus contended that matters touching on intergovernmental relations such as are in the present Petition should best be resolved at the first instance through the governmental relations mechanism contemplated under **Article 189** of the **Constitution**. Reliance was made in that regard on the case of **Law Society of Kenya v Transition Authority and 2 Others 92013) e KLR** and **National Gambling Board v Premier of Kwa Zulu-Natal & Others 2002 (2) SA 715 (CC).** It opined further that if at all there was any dispute capable of resolution, then it is either the National Government or the County Government that can declare the dispute and invoke the statutory provisions to do so and not the Petitioners. It submitted that even in disputes which private citizens have raised for resolution, like the present Petition the Court can provide proper guidance that ensures that the matters are resolved through recourse to the intergovernmental dispute resolution mechanism and the Court can also ensure that the said mechanism is undertaken in compliance with all relevant constitutional requirements, including further ensuring that it is as participatory as possible and is not just a government to government process.

60. It was its additional submission that a right-based approach to health would likely be the one that assigns significant responsibility of health care facilities, goods and services to the county governments while leaving the responsibility of developing health policy, national health strategy and harmonization standards to the national government. It thus argued that the centralization of health facilities and services would likely impede on service delivery and hence compromise the health rights provided for in **Article 43(1)(a)** of the **Constitution.**

61. It was also the submission of Katiba Institute that in order to understand the terminologies that form the subject of the Petition, it is important to understand the drafting history as an interpretation of the Constitution must take into account the historical background leading to the impugned enactment. In that regard therefore, the phrase 'county health facilities' may mean those hospitals that were formerly known as district hospitals, sub-district hospitals and dispensaries and

that what were previously referred to as provincial hospitals and should be considered as county health facilities but a special arrangement for funding and administration that involves heightened participation of the National Government as well as other counties must be established. That a hospital for several counties is the responsibility of the National Government, but it could also be established within a county for a group of counties, provided it was done with the involvement of all the counties it intends to serve. And lastly, that several counties could agree together to set up a joint hospital but argued that a hospital run by a single county, yet intended to serve several counties, with no involvement and no accountability to the people of those other counties is unconstitutional. In the end as amicus curiae, Katiba Institute left the Petition in the hands of the Court.

Determination

62. Before I turn to determine the merits or otherwise of this Petition, I recall that the issue of jurisdiction was raised extensively; that this Court has no jurisdiction to determine the Petition because the matters raised in it are *res judicata* and that even if it had such jurisdiction, the dispute herein is not ripe for determination as the dispute resolution mechanism established under the Constitution and the Intergovernmental Relations Act have not been exhausted. In that regard, the issue of jurisdiction is not an idle one as jurisdiction is everything and without it a Court of law must down its tools - See **Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd (1989) KLR 1**.

63. I will therefore begin by addressing the issue of *res judicata* and whether in view of the judgment in **J.R. No.317 of 2013,** I should down my judicial tools.

Res judicata

64. The law on *res judicata* in civil law is found at **Section 7 of the Civil Procedure Act** which provides as follows;

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

For *res judicata* to be invoked in a civil matter therefore, the issue in a current suit must have been decided by a competent court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title. (See the case of **Karia and Another v the Attorney General and Others (2005) 1EA 83).** It therefore follows that the essence of the doctrine of *res judicata* is to bring an end to litigation and a party should not be vexed twice over the same cause. This was what was held with approval in **Omondi v National Bank of Kenya Ltd and Others (2001) EA 177.**

Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of *res judicata* can and should only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the Constitutional Court and where the Court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.

65. Can the present Petition therefore and in the above context be said to be barred by the

principle of *res judicata*? In the instant Petition, the 3rd Interested Party, The Kenya Medical Practitioners, Pharmacists and Dentists Union, the 1st Interested Party, The Kenya National Union of Nurses together with The Kenya Health Professionals Society were the Ex-Parte Applicants while the Respondents herein were the Respondents in the **JR No. 317 of 2013.** As can be seen, the parties are not quite the same as in this Petition because the Petitioners are different. The first hurdle has therefore been passed.

66. As to the subject matter, the Court in **Henderson v Henderson (1843-60) ALL E.R 378** set out the extent of *res judicata* in the subject matter as follows;

> ***"… where a given matter becomes the subject of litigation in, and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The pleas of res judicata applies, except in special case, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time"***

67. Applying the same criteria in the present Petition, in **JR. No. 317 of 2013**, the Ex-parte Applicants sought the following orders in their Notice of Motion dated 23rd September 2013;

> ***"1. The Court be pleased to issue an Order of Certiorari to remove into this Court and quash Legal Notices No.137-182 (Kenya Gazette Supplement No.116) being a Notice issued by the Transition Authority on the 9th of August 2013 in relation to the transfer of County Health Services.***
>
> ***2. The Court be pleased to issue an order of Prohibition prohibiting the transition authority or any other body whether by itself, or any of its employees or agents or any person claiming to act under the direction of the said Authority from proceeding to enforce Legal Notice No.137-182 (Kenya Gazette Supplement No.116) in respect only to the transfer of functions relating to County Health Services.***
>
> ***3. That consequent to grant of prayers (a) and (b) above the Court be pleased to issue such further directions as may be necessary to give effect to the foregoing orders;***
>
> ***4. That the cost of and occasioned by the Application be provided for."***

The Motion was based on the following grounds;

> ***"(i) The Transition Authority is required to at all times comply with the law and specifically the Constitution of Kenya, 2010, the County Government Act 2012, the Transition to Devolved government Act 2012 and all other provision of the law and in particular;***

a. ***The coordinated transition to the devolved system of county Government Act must be undertaken side by side with the continue delivery of quality services to citizens which duty is vested on the Transition Authority ("The Authority") in Section 7 of the Act.***

b. ***The said Authority is required, while carrying out this statutory mandate, to comply with the provisions of Section 7 and 24 of the Act in toto and also ensure that the ideals of Article 43 of the Constitution of Kenya are at all times protected and effected.***

c. ***The Authority has in contravention of the law and ultra vires caused to be published Kenya***

Gazette Supplement No.51 containing Legal Notices No.137 – 182 on the 9th of August 2013.

d. ***In transferring the Health Component to the 47 Counties, the Respondent has grossly violated the provisions of Sections 7 and 24 of the Transition to Devolved Government Act (and other pertinent portions of the same statute) and has failed to adhere to the ideals of Article 43 of the Constitution in toto.***

i. ***In acting contrary to the law the Respondent has acted irrationally, and in abuse of statutory powers and if not prohibited, will cause great hardship and loss both to the Applicant's members and the general public without justification in law."***

The issue therefore is whether the subject matter of this Petition was also in issue in **JR. No. 317 of 2013**. On a serious consideration of the matter and in the specific circumstances of this Petition. I think not.

68. I say so because in **JR No. 317 of 2013**, the Ex Parte Applicants sought to quash Legal Notices No. 137 to 182 of 2013 on grounds *inter-alia* that in transferring the health component to the 47 counties, the Respondents had grossly violated the provisions of **Section 7** and **24** of the **Transition to Devolved Government Act** and had failed to adhere to the ideals of **Article 43** of the **Constitution**. Further, that the Respondents had acted irrationally and in abuse of statutory powers. In the instant Petition, the Petitioners are still aggrieved with the same Legal Notices but they claim that the wrong interpretation has been accorded to the words "national referral health facilities' as set out in Part 1 Section 23 of the Fourth Schedule and the words "county health facilities' as set out in Part 2, Section 2 of the Fourth Schedule to the Constitution. They therefore seek an interpretation from the court on the meaning of those two phrases. While the import of the quashing of the two Legal Notices may be the same, the real issue in contest now is different and this being a constitutional matter, I am not prepared to block the Petitioners from ventilating their constitutional grievances.

69. In the totality of things therefore I do not find that the Petition raises the same matters that were raised in **J.R. No.317 of 2013** and the principle of *res judicata* cannot therefore be invoked and I so find.

Import of Article 189 of the Constitution to these proceedings

70. I now turn to examine the import of the alleged ouster of the Court's jurisdiction under Article 189 of the Constitution. It was submitted by the Respondents and the Amicus Curiae in that regard that the Courts are not the only means through which disputes relating to devolution must be resolved. That the Constitution has placed great emphasis in resolving disputes relating to devolution through an intergovernmental dispute resolution mechanism and that is the proper mechanism to resolve the present dispute.

71. The starting point in addressing the issue is **Article 6** of the **Constitution** which must be read with **Article 189** of the **Constitution**. Article 6 provides that;

> ***"The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation".***

Article 189 of the **Constitution** has then provided as to how the co-operation between national and county governments is to be achieved. This Article provides that;

"(1) Government at either level shall—

> ***(a) perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level;***

(b) assist, support and consult and, as appropriate, implement the legislation of the other level of government; and

(c) liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.

(2) Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.

(3) In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.

(4) National legislation shall provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration."

72. The legislation contemplated in **Article 189(4)** has already been enacted i.e. the **Intergovernmental Relations Act of 2012**, which has established institutions and sets out mechanisms of resolution of intergovernmental disputes. The Preamble to this Act state that it is;

"AN ACT of Parliament to establish a framework for consultation and cooperation between the national and county governments and amongst county governments; to establish mechanisms for the resolution of intergovernmental disputes pursuant to Articles 6 and 189 of the Constitution, and for connected purposes."

73. As can be seen from the above, the Act was intended *inter-alia* to establish mechanisms for the resolution of intergovernmental disputes pursuant to the provisions of **Articles 6** and **189** of the **Constitution**. The dispute resolution mechanisms are then specifically established under Sections 30 to 35 of that Act. Section 30 stipulates as to when a dispute can be said to have arisen between the two levels of government as it provides thus;

"30.(1) In this Part, unless the context otherwise requires, "dispute" means an intergovernmental dispute.

(2) This Part shall apply to the resolution of disputes arising—

(a)between the national government and a county government; or

(b) amongst county governments."

74. The reasoning behind the above enactment is not hard to find; that alternative dispute resolution mechanisms should be sought in the first instance so as not to strain the relationship between the national government and the county governments and in the case of counties, among themselves. Article 6 of the Constitution has therefore mandated the two levels of government to conduct their mutual relations on the basis of consultation and co-operation. Section 31 has indeed provided for the measures to be undertaken in dispute resolution as follows;

"31. The national and county governments shall take all reasonable measures to—

(a) resolve disputes amicably; and

(b) apply and exhaust the mechanisms for alternative dispute resolution provided under this Act or any other legislation before resorting to judicial proceedings as contemplated by Article 189(3) and (4) of the Constitution."

The place of judicial proceedings in the dispute resolution mechanism provided for under the Act is clear; that judicial proceedings are a last resort and Section 35 specifically states that;

> ***"Where all efforts of resolving a dispute under this Act fail, a party to the dispute may submit the matter for arbitration or institute judicial proceedings."***

75. In applying the above provisions to this Petition, I am aware that the Court of Appeal as well as the High Court have in the past extensively dealt with the importance of exhausting the mechanisms contemplated by the Constitution or statute in dispute resolution before resorting to judicial proceedings. Such has been the gist of the cases like **The Speaker of the National Assembly v Karume (2008) 1 KLR 426.** In **Narok County Council v Trans Mara County Council and Another, Civil Appeal No. 25 of 2000**, the Court of Appeal expressed itself as follows in that regard;

> ***"Although Section 60 of the Constitution gives the High Court unlimited jurisdiction, it cannot be understood to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a Minister as part of his statutory duty; it is where the Statute is silent on what is to be done in the event of a disagreement …Where the Statute provides that in case of a dispute the Minister is to give direction, the jurisdiction of the Court can be invoked only if the Minister refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter, his decision can be challenged by an application to the High Court for a writ of certiorari because under the relevant Section the decision is to be made on a fair basis. But if the Minister simply refuses to discharge his statutory duty, his refusal can also be challenged in the High Court by way of mandamus to compel the Minister to perform his statutory duty but not by way of a suit … If the Court acts without jurisdiction, the proceedings are a nullity … The extent of the jurisdiction of the High Court may not only, be that which is conferred or limited by the Constitution but also, that which the Constitution or any other law, may by express provisions or by necessary implication, so confer or limit … The jurisdiction of the High Court can be ousted by an Act of Parliament and in such cases all that the High Court can do is to enforce by judicial review proceedings, the implementation of the provisions of the Act; certainly not, to usurp the powers of the Minister… Even though resort to the judicial review process, may in appropriate cases not be a bar to other proceedings such as a plaint, this may not apply in peculiar circumstances such as this one, so as to entitle the Judge to do not only what he was not requested to do, but also, to do what he had no jurisdiction to embark upon… Where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute."***

76. As to the place of alternative dispute resolution mechanisms in the Constitution 2010, Majanja J in **Dickson Mukwelukeine v Attorney General & 4 Others Nrb HCC Petition No.390 of 2012**, expressed himself as follows;

> ***"That alternative dispute resolution processes are complementary to the judicial process and by virtue of Article 159(2)(c) of the Constitution of Kenya, 2010, the Court is obligated to promote these modes of alternative dispute resolution and that it is not inconsistent with Articles 22 and 23 to insist that statutory processes be followed particularly where such processes are for the specific purpose of realising, promoting and protecting certain rights. Accordingly the Court is entitled to either stay the proceedings until such a time as the alternative remedy has been pursued or bring an end to the proceedings before the Court and leave the parties to purse the alternative remedy. In the result we are of the view and hold that the Court's jurisdiction under Article 165 can be limited and/or restricted by an Act of Parliament."***

I wholly agree with the learned Judge.

> 77. In the instant Petition, the question therefore is whether there is a dispute between the parties contemplated under **Section 33** of the **Act.** This issue is important in making a finding because the Act contemplates that there must be a formal declaration of the dispute. **Section 33** provides thus;
>
> > ***"33. (1) Before formally declaring the existence of a dispute, parties to a dispute shall, in good faith, make every reasonable effort and take all necessary steps to amicably resolve the matter by initiating direct negotiations with each other or through an intermediary.***
> >
> > ***(2) Where the negotiations under subsection (1) fail, a party to the dispute may formally declare a dispute by referring the matter to the Summit, the Council or any other intergovernmental structure established under this Act, as may be appropriate."***

It is clear therefore that the first step to have a dispute resolved amicably is the formal declaration of the dispute by the parties to it. As stated elsewhere above, the parties, subject of the dispute, are either the two levels of government (National and County) or amongst counties themselves. Do the Petitioners fall within this category? Obviously they do not.

> 78. In that regard, and further to my findings above, the *Amicus Curiae* submitted that the Petitioners are private citizens and have raised a matter that can be characterized as an intergovernmental dispute, and therefore the dispute can be resolved through recourse to the intergovernmental dispute resolution principles as contemplated in **Article 189** of the **Constitution** and the Intergovernmental Relations Act. I disagree with that argument. First, there is no dispute as between the National and County Governments. In fact, the County Governments through the Affidavit of Isaac Ruto are in agreement with the impugned Legal Notices issued by the Transition Authority. Accordingly, no dispute can be said to exist as between the two levels of Government to warrant me invoke the dispute resolution mechanisms contemplated under **Sections 30-35** of the **Intergovernmental Relations Act**. In so holding, it is clear to my mind that the intention of the Legislature was not to bring any issue, real or perceived, as a dispute by any person other than the two levels of government or as between counties, within the purview of the dispute resolution mechanisms under the Intergovernmental Relations Act. As was held by the Court of Appeal in **Kimutai v Lenyongopeta& 2 Others (2005) 2 KLR 317**;
>
> > ***"It is an elementary rule that a thing which is not within the letter of a Statute will, generally, be construed as not within the Statute unless it also be within the real intention of the legislature, and the words, if sufficiently flexible, must be construed in the sense which, if less correct grammatically, is more in harmony with that intention… It was necessary, in order to arrive at the real meaning, to get to the exact conception of the aim, scope and aspect of the whole Act, to consider how the law stood when the Statute to be construed was passed, what the mischief was of which the old law did not provide, and the remedy provided by the Statue to cure that mischief… The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of Statutes. The literal method is now completely out of date and has been replaced by the approach described as the "purposive approach". In all cases now in the interpretation of Statutes such a construction as will "promote the general legislative purpose" underlying the provision to be adopted. It is no longer necessary for the judges to wring their hands and say, "There is nothing I can do about it". Whenever the strict interpretation of a Statue give rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind"."***

I am duly guided and therefore it is necessary in order to arrive at the meaning of the provision of an Act,

to get the exact conception of the aim, scope and aspect of the whole Act. In this Petition, since no government has filed any dispute, the position taken by the Amicus Curiae is untenable, attractive as it may sound.

80. Secondly, the Petitioners have invited this court to address a specific problem caused by what they consider as the wrong interpretation of the words 'national referral health facilities' in Part 1 of the Fourth Schedule to the Constitution and the words 'county health facilities and pharmacies' in Part 2, Section 2(a) of the Fourth Schedule to the Constitution. It is therefore clear to my mind that the Petitioners have invoked the jurisdiction of this court to interpret the Constitution as provided under **Article 165(3)(d)** of the **Constitution**. For avoidance of doubt this Article provides,

"(1) There is established the High Court, which—

(2) …

(3) Subject to clause (5), the High Court shall have—

a. ***unlimited original jurisdiction in criminal and civil matters;***

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

b. ***jurisdiction to hear an appeal from a decision of a tribunal;***

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

i. ***the question whether any law is inconsistent with or in contravention of this Constitution;***

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article

191; and"

81. To my mind therefore, because the Petitioners have invoked this Court's jurisdiction to interpret the Constitution, then the Court indeed has jurisdiction to address the issue, the merits or otherwise notwithstanding. According to the Petitioners, therefore, the words 'national referral facilities' do not mean only Kenyatta National Hospital and Moi Teaching and Referral Hospital but mean all public hospitals from Level 2 to Level 6, which form, in their view, the national referral health system. To find that this Court has no jurisdiction to entertain that issue, would leave the Petitioners without an avenue to ventilate their grievances and in any event, **Article 258(1)** of the **Constitution** also grants the Petitioners the right to institute this Petition. This Article provides that;

"258(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention".

With that clarification, I am of the firm view and find that this Court has jurisdiction to entertain the Petitioners' claim and so I will.

Can the Petition be entertained as framed and argued?

82. Having so held, the next issue therefore is whether the Petition can be entertained on the specific issues raised by the Petitioners. As stated earlier, the Petitioners' case seems to mainly rotate around the meaning and application of the phrases "national health referral facilities" and "county health services". According to them, national referral health facilities refer to Level 2, Level 3, Level 4, Level 5 and Level 6 health facilities and not only to Kenyatta National Hospital and Moi Teaching and Referral Hospital. That the government should be guided by the definition of national referral system by WHO and as regards the County Health Facilities, which include 'county health facilities and pharmacies', the Petitioners contended that these are facilities which were established and previously managed by local authorities and which offer primary healthcare.

83. To my mind, the latter argument cannot suffice and for a good reason; that the Local Government Act has been repealed and the Constitution 2010, has created a new governance structure between the two levels of government. The Fourth and the Sixth Schedules to the Constitution, 2010, deal with distribution of functions between the National Government and the County Governments and transition provisions, respectively. The Petitioners must therefore understand and know that devolution has brought in a new structure of governance and it cannot be compared with the Local Authorities system as we knew it under the Repealed Constitution. County Governments under the Constitution, 2010 have now been elevated to the level of semi-autonomous governments but inter-dependent with the national government.

84. With that context in mind and looking at the provisions of Part 1 Section 23 of the Fourth Schedule to the Constitution, national referral health facilities are without doubt the function of National Government and there is no contest about that issue. Part 2 Section 2 of the Fourth Schedule on the other hand deals with county health services and states that;

"County health services, including, in particular—

a. ***county health facilities and pharmacies;***

b. ***ambulance services;***

c. ***promotion of primary health care;***

d. ***licensing and control of undertakings that sell food to the public;***

e. ***veterinary services (excluding regulation of the profession);***

f. ***cemeteries, funeral parlours and crematoria; and***

g. ***refuse removal, refuse dumps and solid waste disposal"*** are the preserve of County Governments

85. Looking again at the provisions of the Fourth Schedule, and the entire Constitution as well as the Statutes on devolution, nowhere have the words 'national referral health facilities' and 'County health facilities been defined'. Again, nowhere is it mentioned which health facilities belong to Level 1, Level 2, Level 3, Level 4, Level 5 and Level 6 so as to say that they specifically belong either to the national referral health system or county health system. To that extent therefore, I must agree with the Respondents, the 2nd Interested Party and the Amicus Curiae that the classification of the hospitals into levels and eventually into national referral health facilities or national health system and county health facilities and system, is a policy issue to be determined in accordance with the provisions of Section 15 of the Sixth Schedule which establishes guidelines for the devolution of functions to be made by an Act of Parliament. This Section provides that;

"(1) Parliament shall, by legislation, make provision for the

phased transfer, over a period of not more than three years from the date of the first election of county assemblies, from the national government to county governments of the functions assigned to them under Article 185.

(2) The legislation mentioned in subsection (1) shall—

a. ***provide for the way in which the national government***

shall—

i. ***facilitate the devolution of power;***

ii. ***assist county governments in building their capacity to govern effectively and provide the services for which they are responsible…***

iii. ***support county governments;***

(b) establish criteria that must be met before particular functions are devolved to county governments to ensure that those governments are not given functions which they cannot perform;

c. ***permit the asymmetrical devolution of powers to ensure that functions are devolved promptly to counties that have the capacity to perform them but that no county is given functions it cannot perform; and***

d. ***provide mechanisms that ensure that the Commission on the Implementation of the Constitution can perform its role in monitoring the implementation of the system of devolved government effectively."***

86. That provision requires no more than a literal interpretation and in addition, this Court's jurisdiction is limited to interpretation of the law and does not include either the enactment of policy or the law as that is the mandate of Parliament for national legislation and county assemblies for county legislation as well as the national and county executives in the case of policies.

87. The intended legislation under **Section 15** of the **Sixth Schedule** is the **Transition to Devolved Government Act No. 1 of 2012**. The Preamble to this Act states that it is;

"AN ACT of Parliament to provide a framework for the transition to devolved government pursuant to section 15 of the Sixth Schedule to the Constitution, and for connected purposes"

Sections 23 and 24 of the Act have then made provisions for transfer of certain services and I shall revert to those provisions shortly.

88. The Attorney General explained in his submissions that the policy governing the classification of the health facilities into Levels is contained in the Ministry of Health, "National Heath Sector Strategic Plan 1999-2004" and "Reversing the Trends, The Second National Health Sector Strategic Plan 2005-2010" and even with devolution, the policy in that document has remained the same; that of hierarchy of hospitals with Kenyatta National Hospital at the apex. The 2005-2010 Strategic Plan classified health facilities on the basis of Levels of care at various levels. The argument therefore by the Petitioners that counties have been given health facilities based on geographical locations cannot be true and I agree with the Attorney General's clarification. The Attorney General also confirmed that the 2005-2010 policy was not based on any geographical zoning, but the level of service that each facility was providing. Indeed the Attorney General also confirmed that per the 2005-2010 policy, it would be incorrect to state that Level 1 facilities are the only county health facilities and the rest of the facilities are national

referral health facilities. He stated that as contemplated under Section 23 of the Fourth Schedule to the Constitution, the referral system in Kenya has always included national referral hospitals (Kenyatta and Moi), as well as provincial and district hospitals. To that end therefore, the national referral facilities must only refer to KNH and MTRH and I wholly agree. I say so well aware that the said policy was made before the promulgation of the Constitution, 2010 and as to its applicability in the present constitutional dispensation, the Court in **Republic v The Transition Authority (supra)** stated as follows;

> ***"To the contrary in the Fourth Schedule, Part 1 No.28 to the Constitution, it is clear that the Health Policy remains a function of the National Government. The inadequacies of provision of health services in this County is a matter of national concern and it is the obligation of the National Government to ensure that every person's right to the highest attainable standard of health as stipulated under Article 43 of the Constitution is attained… The fact that Health services are devolved does not discharge the national Government from its obligation to ensure that its Constitutional obligations are fulfilled. In our view, under Article 1(3)(b) of the Constitution, there is only one State organ known as the Executive with structures at national level and in the county governments. Accordingly, we do not accept the contention that devolution of Health services ipso facto ought to necessarily lead to loss of jobs or disadvantageous terms of employment, salaries, Remuneration, pensions and gratuities which terms in our view ought to be determined by the Salaries and Remuneration Commission."***

I am in complete agreement and that also addresses the issues raised by the 1st Interested Party that the terms and conditions of service of its members have been affected by the health policy. In any event, the 1st Interested Party's claims were largely speculative and had no factual basis. I say so with respect, because they tendered no facts to support that very emotive issue.

89. I have deliberately discussed the submissions by the Attorney General because he has, in my view, answered the Petitioners' fears, and has to some extent clarified the Petitioners' views that there are other **national referral** hospitals in the referral system other than **KNH** and **MTRH.**

90. But even then, as I stated elsewhere above**,** the Constitution has not classified the health facilities into ***certain*** levels***, as that is a matter of policy.*** I therefore politely decline to get into the arena of defining what the phrases 'national referral health facilities' and 'county health facilities' are or what hospitals belong to what category. I say so because the Court is not the maker of the health policy in Kenya. The Court has no ability or mechanism to determine the criteria to be used to categorize hospitals, and it does not have the capacity to examine the equipment, facilities and manpower available in the hospitals, as that is the exclusive mandate of the National Government through the Executive. I am therefore in agreement with the submissions by the Respondents, the 2nd Interested Parties and the Amicus Curiae that this Court cannot determine the issues raised herein as it would amount to implementing and making policies for and on behalf of the Executive. To paraphrase that finding, the Court will be stepping into the mandate of the Executive state organs and agencies which act is generally constitutionally frowned upon and in that regard I am also in agreement with the High Court in **Republic v The Transition Authority (supra)** where the learned Judges stated;

> ***"The inadequacies of provision of health services in this County is a matter of national concern and it is the obligation of the National Government to ensure that every person's right to the highest attainable standard of health as stipulated under Article 43 of the Constitution is attained…."***

91. Accordingly, I am clear in my mind that application of the Fourth Schedule in determining which health facilities fall within which category is the preserve of the National Government as it would be more informed in that regard by several factors and details which may not be within the knowledge of this Court. I also find that issues of transition are best left to the relevant State organs and agencies such as the 2nd Respondent and the 2nd Interested Party as they would be the

best judges of the merit of doing so and they would have all the necessary information critical in making such decisions. They would also be responsible for setting, reviewing and maintaining the standards they set. In that regard, Section 24 of the Act states as follows;

"24. (1) Subject to section 23, the criteria for the transfer of functions shall include—

(a) whether there is in existence legislation relating to the function applied for;

(b) whether a framework for service delivery has been put into place to implement the function;

(c) whether, where applicable, the county government has identified or established administrative units related to the function;

(d) whether the county government has undertaken a capacity assessment in relation to the function;

(e) the arrangements for and the extent of further decentralization of the function and provision of related services by the county government;

(f) whether there is the required infrastructure and systems to deliver the function;

(g) whether the county government has the necessary financial management systems in place;

(h) whether the county government has an approved plan in relation to the function;

(I) any other variable as may be prescribed after consultations between the Authority, county governments and the Commission for the Implementation of the Constitution and the Commission on Revenue Allocation.

(2) The Authority shall perform the functions specified under subsection (1) in accordance with Article 187 of the Constitution."

In the same regard, **Article 187** of the **Constitution** deals with the transfer of functions and powers between levels of government. The Article states that;

"(1) A function or power of government at one level may be transferred to a government at the other level by agreement between the governments if—

(a) the function or power would be more effectively performed or exercised by the receiving government; and

(b) the transfer of the function or power is not prohibited by the legislation under which it is to be performed or exercised.

2. ***If a function or power is transferred from a government at one***

level to a government at the other level—

a. ***arrangements shall be put in place to ensure that the resources necessary for the performance of the function or exercise of the power are transferred; and***

b. ***constitutional responsibility for the performance of the function or exercise of the power shall remain with the government to which it is assigned by the Fourth Schedule."***

92. To my mind therefore, and in line with the above provisions of the law, it is very clear that the Court is not the best judge as regards the transfer of functions and powers between the two levels of government. The Constitution and Statutes have created adequate safeguards and institutional arrangements on the subject and the Court's intervention cannot be sought in the manner that the Petitioners have done.

Whether the orders sought should be granted

93. Having held as I have done above and looking at the critical issues to be addressed in the Petition, the prayers in the Petition can be grouped into two categories;

(i) those that seek orders regarding devolution of referral health facilities – prayers (a), (b), (c), (d), (e), (f), (g), (h), (i) and (k)

(ii) those relating to Legal Notices No.137 and 182 of 2013 dated 9th August 2013 – prayers (j) and (l)

I have already stated that this Court has no mandate to purport to determine what referral facility should be at what level and so the prayers in category (i) cannot be granted.

Similarly, in the context of the present Petition, it would not be proper for this Court to quash the Legal notices in issue and I have said why.

Regarding prayer (m) of the Petition, I am not able to issue any other orders to advance the cause of justice as I do not see what orders can issue in a matter such as the one before me although in the conclusion, I will digress and make one statement addressed to the Petitioners and the 1st Interested Party that have joined to support the Petition.

Conclusion

94. It is clear by now that the Court will not accede to any claims based on speculation and conjecture without any lawful basis being laid for their grant. I say so because the Petitioners, even after seeking the definition of the words "national referral health facilities" and "county health facilities" and seeking to quash Gazette Notices Nos. 137 and 182 0f 2013 made omnibus allegations and the Court therefore did not have the proper facts to determine if at all the Respondents, especially the 2nd Respondent, in issuing the impugned Gazette Notice, violated the Constitution in any way or acted in excess of its powers. This should also address the issue of land upon which hospitals have been built. But all is not lost, as I am aware that Parliament has moved to address the situation within its mandate under the Constitution and the Petitioners and those who support them can raise those issues there.

95. In any event, although this Court has previously directed the formulation of policy in **Satrose Ayuma vs AG & Others [2013] eKLR**, in the present case, I see no need to use the same approach as the policy and the law as it exists is not wanting and if it is, Parliament will deal with it.

96. It is obvious therefore that I see no merit in the Petition and it is hereby dismissed.

97. There will be no order as to costs since it seems to me that the Petitioners, as warriors of constitutionalism, were doing so in the public interest. I saw no personal benefit that they would accrue by pursuing the issues placed before me.

98. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 6TH DAY OF AUGUST 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Okoiti and Nyakina Petitioners present

Mr. Wanyama for 3rd Respondent

Miss Omuko for 2nd Interested Party

Mr. Wanyoike – Amicus Curia

No appearance for Interested Party

No appearance for 1st Respondent

Order

Judgment duly delivered.

Copies to be supplied to the Parties.

Copies of proceeding to be supplied to Parties.

ISAAC LENAOLA

JUDGE