REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

(CENTRAL REGISTRY)
JR No. 317 OF 2013

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW IN THE FORM OF ORDERS OF CERTIORARI AND PROHIBITION
AND

IN THE MATTER OF THE DEVOLUTION OF HEALTH SERVICES TO COUNTY LEVEL
AND

IN THE MATTER OF THE FOURTH SCHEDULE TO THE CONSTITUTION OF KENYA 2010
AND

IN THE MATTER OF KENYA GAZETTE SUPP. NO. 116 (LEGAL NOTICES 137-182)

AND
IN THE MATTER OF THE TRANSITION TO DEVOLVED GOVERNMENT ACT, 2012

BETWEEN

REPUBLIC..APPLICANT

AND

THE TRANSITION AUTHORITY............................ RESPONDENT

COUNCIL OF GOVERNORS.....………………..…..INTERESTED PARTY

EX PARTE APPLICANTS:

1. **KENYA MEDICAL PRACTITIONERS, PHARMACISTS AND DENTISTS UNION (KMPDU)**
2. **KENYA NATIONAL UNION OF NURSES (KNUN)**
3. **KENYA HEALTH PROFESSIONALS SOCIETY (KHPS)**

JUDGEMENT

Introduction

1. The matter before us is a Notice of Motion dated 23rd September 2013 brought by the ex parte applicants herein, Kenya Medical Practitioners, Pharmacists and Dentists Union (KMPDU), Kenya National Union of Nurses (KNUN) and Kenya Health Professionals Society (KHPS) in which they seek the following orders:

1. **THAT the Honourable Court be pleased to issue an Order of Certiorari to remove into this Honourable 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. **THAT the Honourable 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 the grant of prayers (1) and (2) above the Honourable Court be pleased to issue such further directions as may be necessary to give effect to the foregoing orders.**
4. **THAT the costs of and occasioned by the Application be provided for.**

2. The Motion is based on the following grounds:

a. The Transition Authority is mandated under Section 15 of the Sixth Schedule to the Constitution and Sections 2, 3 and 4 (2) (c) of the Transition to Devolved Government Act, 2012 to provide a legal and institutional framework for a co-ordinated transition to the devolved system of Government while ensuring continued delivery of services to the Citizens.

b. Part of the services and functions set out for Devolution under Schedule 4 of the Constitution include County Health Services.

c. The said 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 provisions of the law.

d. In particular;

i. **The Constitution of Kenya 2010 at Article 175 requires that County Governments have reliable sources of revenue to enable them to govern and deliver devolved services effectively.**
ii. **The co-ordinated transition to the devolved system of Government envisaged in the Transition to Devolved Government Act must be undertaken side by side with the continued delivery of quality services to citizens which duty is vested on the Transition Authority ("The Authority") in Section 7 of the Act.**
iii. **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.**
iv. **The Authority has in contravention of the law and ultra vires caused to be published Kenya Gazette Supplement No. 116, Legislative Supplement No. 51 Containing Legal Notices No. 137 to 182 on the 9th of August 2013.**
v. **The Constitution devotes substantial attention to the ideals of good governance in Articles 10, 73 and 232 which form the platform for ensuring a smooth process of devolution which ideals the Authority has not fully complied with.**
vi. **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*.**

e. In acting contrary to the law the Respondent serving has acted irrationally, and in abuse of its 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 Applicants' Case

3. In support of the application, the applicants filed an affidavit sworn by **Sultani Matendechero,** the 1st applicant's Secretary General on 30th August 2013.

6. According to the deponent, since devolved Government and the objects and principles thereof form an integral part of the Constitution of Kenya 2010, to facilitate the process of devolution and distribution of functions as envisaged in the Constitution and in particular in Articles 185 (2), 186 (1) and 187 (2), the Constitution empowered Parliament under Article 261(1) to pass legislation to give effect to the Articles on devolution in the Fifth Schedule. As a consequence the ***Transition to Devolved Government Act***, 2012 (*"The Act"*) among other pertinent Acts was passed in which Act an Authority namely the Transition Authority, the Respondent herein, was established under Section 4 with a clear mandate in the Act for carrying out transfer of functions and devolving services to the citizens.
7. In carrying out its functions under the Act the Respondent is mandated under Section 15 of the Sixth Schedule to the Constitution and Sections 2, 3 and 4 (2) (c) of the Act to provide a legal and institutional framework for a co-ordinated transition to the devolved system of Government while importantly ensuring continued and quality delivery of services to the Citizens and that part of the services and functions set out for devolution under Schedule Four of the Constitution include County Health Services.
8. The deponent avers that in carrying out its statutory mandate the Respondent was required to ensure that the highest attainable standard of health was achieved. In addition the said Respondent was and is required to at all times to comply with the law and specifically the Constitution of Kenya 2010, ***The County Government Act 2012***, the Act and all other enabling Acts of Parliament. In doing so the Respondent was and is required by Article 175 of the Constitution and Sections 7 and 24 of the Act to ensure among other things that it determined the resource requirements for the transferred/devolved function; it prepared and validated an inventory of all the assets and liabilities of the County Governments, public entities and other local authorities; it provided mechanisms for the transfer of assets including vetting the transfer of assets during the transitional period; it had developed criteria pursuant to Section 15 (2)(b) of the Sixth Schedule of the Constitution to guide the phased or asymmetric transfer of functions to the Counties; it had developed criteria to determine the transfer of previously shared assets, liabilities and staff; it had carried out an audit of existing human resource of the Government and local authorities and advise on the effective and efficient rationalization and human resource deployment to either arm of Government; and it had assessed the capacity needs of National and County Governments and recommend necessary measures to ensure that the two levels of Governments had adequate capacity during the transition period to enable them undertake the assigned functions.
9. While carrying out this statutory mandate, and in terms of Sections 7 and 24 of the Act, the Respondent was required to ensure that the transfer of functions was systematic, audited, co-ordinated and statutorily compliant. It is deposed that as a guide the Constitution devotes substantial attention to the ideals of good governance in Articles 10, 73 and 232 which form the platform for ensuring a smooth process of devolution yet these ideals have not been fully complied with by the Respondent since without ensuring that the enabling law was strictly followed and in flagrant breach of these provisions the Authority published or caused to be published in the Kenyan Gazette, a Gazette Notice (*Kenya Gazette Supplement No. 116-Legislative Supplement No. 51*) (hereinafter referred to as the *"Legislative Supplement")* .
10. It is contended that in transferring these functions, the Respondent has *not engaged* the applicants' members and in particular medical practitioners and other key stakeholders in the process of transition, and policy making by the Authority; has disregarded the importance of a legislative framework underpinning the transfer of the health component in direct violation of Section 7 and 24 of the Act ; has not determined the readiness of Counties to take up devolved functions and in particular in relation to devolution of Health Services as stipulated by Sections 24 (d), (f) and (g) of the Act; has acted contrary to the ***County Governments Act 2012*** and has failed to take into account the provisions of Section 106 of the Act; has not established whether the Applicant's members (many of whom are employed by the Public Service Commission) are being laid off for subsequent re-hiring by the counties and whether any terminal benefits are due and will be paid;

has not standardized the system of personal emoluments and promotions and further the issue of pension and the manner in which it will be handled in the absence of the ***Public Service Superannuation Service Scheme Act*** has not been set out; and has not set out how inter County transfers will be handled.

11. It is further deposed that the 1st Applicant Union had prior to issuance of this Legislative Supplement and in the quest of trying to resolve this issue written to various authorities for purposes of trying to ensure proper application of and adherence to the law and that save for the responses by the PSC and the Senate, the Respondent has exhibited a resistance to divulge information on progress in respect to the transition. Apart from that all the Applicants and other stakeholders in the sector have also attended various meetings with the Executive and Parliament including with the Parliamentary Committee of Health in a bid to resolve these grave issues to no avail.
12. Despite these anomalies, shortcomings and lack of capacity, the respondent proceeded to issue the Legislative Supplement and transferred functions including County Health Services ostensibly pursuant to Section 24 of the Act which transfer in particular in relation to the transfer of health functions having failed to take into account the foregoing and the provisions of Section 24(1)(b), (f), (g) and (h) of the Act, it is contended is contrary to law. According to the deponent, at present Kenya has a shortage of 37, 000 doctors with a doctor-patient ratio of 1:17000 which is way below the World Health Organization recommendation of 1:1000 and based on an extract of a study done by the Ministry of Health dubbed "Kenya Health at a glance" the same situation prevails with a shortage in all fields of medical practice including but not limited to nurses, clinical officers and specialists, a position confirmed by the Ministry of Health's summary of Health Statistics from which confirmation it is evident that the situation at County to County level is dire as some Counties have less than the national average with Counties like Wajir, West Pokot, Turkana, Bomet, Busia, Bungoma, Kwale, Nandi, Nyamira among many others, having a ratio of or less than 5 doctors per 100, 000 people.
13. According to the applicants, these factors should have informed the Authority whilst transferring the Health function but was clearly not taken into account with the resultant effect that the blanket, un-coordinated and statutorily non-compliant transfer of that function will greatly prejudice the citizens of this country which is what has necessitated the present application because if the situation prevailing remains unchecked there will be interruption of services due to incapacity by various Counties to handle the transferred Health function thus defeating the lofty ideals of Article 43 of the Constitution and inconsistencies in payment of salaries will result in frequent boycotts and strikes by Medical Practitioners. To the applicants, this haphazard transfer of the Health function will further result in (and has already started resulting in) massive resignation of personnel and consequent brain drain thus affecting the very citizens that devolution is supposed to protect and serve.
14. According to the applicants, section 34 of the Act does not oust this Honourable Court's jurisdiction and that Parliament in its wisdom and in consonance with the Constitution indicated that the transition period would be a period of three years after the first elections under the said Constitution and further proceeded to set out in detail the manner in which the functions set out in Schedule 4 of the Constitution would be devolved. The deponent denied that the intention was to besmirch the character or conduct of the Respondent in this matter but to demonstrate the shortcomings in the manner the said Respondent conducted the process. In response to the allegation that the views of stakeholders were considered prior to the transfer the Applicants asserted that this assertion does not take in to account the fact that out of the three primary stakeholders: patients, health care workers and Government, only the third stakeholder namely Government seems to have been primarily and actively engaged in the processes/deliberations and reiterated that the applicants were not consulted or their views considered in the transfer process and further aver that in any event the said participation required by the Act is required to be extensive and not cosmetic as it was in this case and averred that as a consequence the ideals in Article 174 of the Constitution that require that among other things the objects of devolution should include: the promotion of democratic and accountable exercise of power; to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; and to protect the rights and interests of minorities and marginalized groups were not followed as is required and the process is therefore fundamentally flawed. To him, the Acts of

Parliament relied upon by the respondent are Acts of Parliament primarily passed before the onset of the Constitution of Kenya 2010 which by and large do not take into account the requirements of devolution and the ideals and objects thereof as set out in Article 174 of the Constitution with the result that the Health sector is not governed by either an Act of Parliament or a functional Health Policy that encapsulates the objectives of Devolution. To the applicants as an important and integral institution involved in the Devolution process the Respondent ought to have been cognizant of the importance of ensuring that the pending draft Health Bill and a draft Health Policy were passed into law so that the important objectives aforesaid were taken into account. In their view, since the said draft Health Bill that is yet to be law envisages a system of regulation, support and promotion of efficiency in the Health Sector and also envisages the establishment of a Health Service Commission whose importance will be to delink the Ministry responsible for health from health service delivery so that the ministry or ministries responsible for health focus on formulation of policies, standards, guidelines and regulations while the Commission focuses on health service delivery and a Health Service Authority whose critical function will be to advise the national and county governments responsible for health on formulation and implementation of necessary policies and measures, Bills and International agreements relevant to health*;* there is a lack of an efficient management system to ensure that all the ingredients of the system are functioning so as to realize the right to the highest attainable standard of health envisaged in Article 43 thus affecting the 42 million Kenyans in respect of whom the provision in the Constitution was meant to protect.

15. Based on the foregoing the deponent contends that the said transfer and in particular in relation to the transfer of health functions having failed to take into account the foregoing and the provisions of Section 24(1)(b), (f), (g) and (h) of the Act is contrary to law and that this is what has necessitated the present application because if the situation prevailing remains unchecked there will be possible interruption of services due to incapacity by various Counties to handle the transferred function of health thus defeating the lofty ideals of Article 43 of the Constitution and inconsistencies in payment of salaries will result in frequent boycotts and strikes by Medical practitioners. The said state of affairs will according to the applicants, similarly result in massive resignation of personnel thus affecting the very citizens that devolution is supposed to protect and serve hence it is crucial that the legislative Supplement in question be quashed so that the Respondent can properly carry out its functions in law to prevent a total collapse of the Health Sector. Since there is more than two years left as far as the Transition Period is concerned, it is the applicants' view that there is still sufficient time for the Respondent to properly engage all the stakeholders and ensure compliance with the law.
16. To the applicants, the intergovernmental forum only includes intergovernmental organs and bodies thus the Applicants are being shut out by the Respondent from crucial strategic meetings that have an impact on devolution and in particular on matters touching on the health function and contrary to the view taken by the Respondent, the Applicants' claim is not only tied to issue of salaries and emoluments but is broad based and covers the issues relating to non-compliance by the Respondent. To the applicants, the Respondent is skirting the important and crucial issue of the capacity of the Counties to take up the Health function which is a statutory requirement that has underpinning in both the Parent Act and the Constitution and had the applicants been engaged in the first place this issue would have been fully and properly addressed.
17. It is the applicants' case that the health function is a crucial function that must be transferred strictly according to law, the nature of the said component is such that a haphazard, statutorily non-compliant and rushed transfer will directly affect all the citizens of this country hence the allegation that the application before this Honourable Court infringes the Constitution and that the Applicants seek to oppose devolution is without substance as the Applicants have been at the forefront of working towards a framework that encapsulates the lofty ideals of the Constitution. To the contrary, while not being averse to the devolution, the applicants aver that in carrying out devolution and transferring functions to County Level and in particular transfer of such a crucial function as health the same must be done within the precincts of the law hence it is just and proper that all the reliefs sought as enumerated above be granted.
18. In support of the applicants' case **Mr Makori,** learned counsel for the applicants, submitted that the Court under Article 165(5) of the Constitution, has jurisdiction to hear and determine this matter and that the said provision vests in the Court the power to grant relief in form of Judicial

Review hitherto drawn from section 8 of the ***Law Reform Act*** and the ***Civil Procedure Rules***. It was therefore submitted that section 34 of the Act does not oust the Court's jurisdiction because it is ambiguous and secondly, the section violates the doctrine of public interest consideration contained in the Constitution. According to the applicants, the said provision does not pass the test of reasonableness and proportionality and further, the section would be contrary to Articles 10, 73 and 174 of the Constitution if it were construed to oust the jurisdiction of the Court. To the applicants, ouster clauses are usually grounded on public interest considerations and good administration, and there cannot be greater public interest than that expressed in the Constitution and since ouster clauses will be ineffective unless they pass the test of reasonableness and proportionality, section 34 fails on both fronts. According to the applicants, this is not a case between the two Governments *viz.* the National and County Governments so that the ***Inter Governmental Relations Act*** would apply. Since under Articles 6 and 189 of the Constitution reference to dispute resolution by reference to the law relating to intergovernmental relations is in relation to disputes primarily between the County and National Governments, the right in respect of which the action is premised is such that the Section cannot be used to oust remedial action. Referring to **Animistic –vs- Foreign Compensation Commission [1969]1 ALL ER 208**, at page 213, it is submitted that "It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly meaning, I think, that if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court." It is further contended that the section is in any event contrary to the spirit and letter of Articles 10, 73, 174, 175, 186 (1), 187 (2) and 232 of the Constitution and thus in-applicable and reliance is placed on the holding in **Republic vs. Public Procurement Administrative Review Board & Another Exparte Selex Sistemi Integrati [2008] eKLR** to the effect that "....unlike the English position where judges must always obey, or bow to what Parliament legislate, because Parliament is the supreme organ in that legal system. ………In the case of Kenya it is our written Constitution which is supreme and any law that is inconsistent with the Constitution is void to the extent of the inconsistency……. Our first loyalty as judges in Kenya is therefore to the Constitution and in deserving cases, we are at liberty to strike down laws that violate the Constitution".

19. Counsel further submitted that since the Respondent is a body mandated under section 15 of the Schedule to the Constitution of Kenya and sections 2, 3 and 4(2)(c) of the Act to provide a legal and institutional framework for a co-ordinated transition to the devolved system of Government, it is properly joined in the action.
20. In order to take into account the spirit of devolution encompassed in Article 174 of the Constitution which sets out the objects and principles of devolved Government which include promotion of democracy and accountable exercise of power and public participation, it was submitted that the drafters of the Act staggered the implementation of the devolved process. As a result thereof, the Act in the fourth schedule sets out two transition phases. With the first phase being the carrying out of 17 separate function including the actual transfer of the functions a majority of which the Respondent did not carry out. In ensuring the smooth success of the transition process, it was submitted that the Respondent was/is required to ensure that it properly carries out its mandate according to law and assists and facilitates the County Governments in performance of their functions while ensuring that the objectives and principles of Devolved Government set out in Article 174 of the Constitution are upheld.
21. It was submitted further on the authority of **David Mugo vs. The Republic Civil Appeal No. 265 of 1997** which was cited in the case of **Republic vs. Funyula Land Disputes Tribunal (2005) eKLR** that even had the Respondent carried out the function to completeness, this Court still has the jurisdiction to interrogate the process since where the body or authority against which Certiorari is sought has ceased to exist or become *functus officio* but its decision is still enforceable *certiorari* must issue to quash or nullify that decision, if it is bad. In this case, it is submitted that the decision/order made by the Authority is still enforceable and as the decision is bad having been made contrary to law, the Respondent still has a number of functions to perform under the Act and is thus correctly sued.
22. It was the applicants' further submission that the Respondent, failed in carrying out this mandate in respect to the transfer of the health function. Whereas the Respondent was at all times required to comply with the law and specifically the Constitution of Kenya 2010, ***The County Government***

Act 2012 and the Act, whilst transferring the health function it failed to do so in that it did not ensure strict compliance with Article 175 of the Constitution and in particular ensuring that the County Governments have reliable sources of revenue to enable them to govern and deliver devolved services effectively; that it failed to comply with the provisions of Section 7(2) of the Act; that it failed to ascertain that a clear system of effective and efficient rationalization of Medical Health Personnel was set up contrary to Section 7 (2)(m) of the Act prior to the transfer; and that it ignored the mandatory provisions of Section 24(1)(a) of the Act by failing to ensure that there was in place legislation relating to the health functions before transfer of that function.

23. It was therefore submitted that in acting contrary to the law as afore stated the Respondent acted irrationally, and in abuse of its statutory powers and if not prohibited as pleaded, will cause great hardship and loss both to the Applicant's members and the general public without justification in law.
24. It was the Applicants' further submission that the Respondent is guilty of procedural impropriety in that the process of transferring the health function was not followed as is statutorily required and in addition the rules of natural justice were not adhered to thus the principle of proportionality was not achieved. In the applicants' view, the Respondent has not demonstrated at all in the responses before Court that it has complied with Sections 7 and 24 of the Act hence the Applicants have set out and demonstrated that it has in these proceedings met and satisfied the ***Wednesbury test*** and this Court has power to grant the orders sought.
25. It was further submitted that it is necessary that the orders sought be granted for the following reasons: firstly, the transfer will have a negative effect on health services countrywide contrary to Article 43 of the Constitution which recognises that all persons have as a fundamental right, the right to the highest attainable standard of health which includes the right to healthcare services. In transferring the health function, the Respondent was required under Section 24 of the Act to, among other things ensure that the Counties had the requisite infrastructural framework to carry out the function so as to meet the aspirations of Article 43 of the Constitution yet this factor was not taken into account. To the contrary it has been demonstrated that there are inequities at the grassroots/County level and taking into account the fact that the country has a shortage of doctors the Respondent should have applied the test set out in Section 24 of the Act before transferring the health function. To the applicants, stay is very necessary as the resultant effect of this blanket, un-coordinated and statutorily non compliant transfer of the health function by the Respondent will greatly prejudice the citizens of this country.
26. Secondly, it is contended that failure to ensure rationalization will adversely affect the applicants' members since the Respondent has contrary to the law, not established whether the Applicant's members (many of whom are employed by the Public Service Commission) are being laid off for subsequent re-hiring by the counties and whether any terminal benefits are due and will be paid. The Respondent, it is submitted has failed to standardize the system of personal emoluments and promotions and further determine the issue of pension and the manner in which it will be handled in the absence of the ***Public Service Superannuation Scheme Act;*** further, that how inter County transfers will be handled has not been set out by the Respondent and therefore the sum total of the foregoing is that careers and terms of service and employment of all the medical personnel in the country is at stake and it is thus important that stay be granted so as to provide safeguards for the medical health professionals in Kenya.
27. Thirdly, it is submitted that the transition will perpetrate an illegality in that being an ongoing process, the Act at Section 7 and in Schedule 4 envisages a phased transfer and without grant of the orders sought the Respondent and other bodies acting under its directive will take to completeness the roles stated out in statute to the detriment of the Applicants' members and the general public. To the applicants, the Respondent is continuing with mechanisms to further entrench devolved health services at the County Level despite the fact that the law was not followed as the statutory requirements have not been met and it is submitted that in the event of a public body being guilty of abuse of power or guilty of a violation of the rule of law, a judicial review Court can intervene to stop the abuse or a violation of the rule of law since in that instance the public body is deemed not to have the powers in the first. Citing **Republic vs. City Council of Nairobi (*Ex Parte Callfast Services & 32 others*) 2013 eKLR** it is submitted that the actions of the Respondent have clearly undermined the legitimate expectations that the Applicants and indeed all Kenyans have in the transition process.

28. According to the applicants, in failing to comply with the pertinent provisions of the Parent Act (The ***Transition to Devolved Government Act***) and in particular Sections 7, 14 and 24 and the Constitution the subsidiary legislation that is the subject of these proceedings is thus incompetent

The Respondent's Case

29. In response to the application the Respondent (hereinafter referred to as the Authority) filed grounds of opposition as well as a replying affidavit sworn by **Kinuthia Wamwangi**, its Chairman on 3rd October 2013.
30. According to the deponent, the responsibility for providing a legal and institutional framework for a coordinated transition to devolved system of government rests with Parliament, and not the Respondent. The Respondent, it is deposed is *inter alia* an independent coordinating entity that facilitates and provides a mechanism for seamless transfer of functions assigned by the Constitution to the County Governments in accordance with the 6th Schedule to the Constitution during the transition period, firstly between the commencement of the Act (9th March 2012) and the date of the first election and next three (3) years after the first general elections under the Constitution.
31. It is deposed that the Authority has faithfully carried out its duties and functions as by law prescribed since its establishment and the allegations by the applicants are untrue and will unduly impact on public perception and cause dissension and disquiet particularly at a time when Kenyans are eager to test the benefits of devolution under the new Constitution. The transfer of some health functions were, according to the deponent, pursuant to Gazette Supplement No. 116 and Legislative Supplement No. 51, in accordance with the law and in so doing the Authority complied with the Constitution and the Act including facilitating public participation on numerous instances. In so transferring the said functions, the Authority considered the views of al stakeholders collected from time to time in different fora and held consultative meeting with all Ministries, Departments and Agencies of Government and non-state actors who provided services under the former Constitution in order to determine the capacity and preparedness of the Counties. It also considered the application for transfer of the functions by County Governments pursuant to section 23 of the Act including some of the counties identified by the applicants as having less than the national average of doctor to patient ratio. In transferring the said functions it is deposed that the Authority considered the presence of national staff in the counties and sub-counties, the inheritance of sub-district hospitals by the counties, the fact that the sub-district hospitals and dispensaries form the bulk of service delivery mechanisms required to perform the said functions, the fact that the Counties have already appointed County Executive Committee Members and County Chief Officers hence giving ample support to the administrative aspect of managing health matter therein, the fact that the National Government will continue working closely in providing technical backstopping to the Counties as the need arises, the fact that the health policy remains a function of the National Government and the existence of various pieces of legislation regulating different aspects of health. It is however deposed that the Authority has not transferred procurement of essential medical commodities, procurement of specialised health commodities, procurement of vaccines, implementation of programmes under the global Fund for Malaria, Leprosy, Tuberculosis and HIV, Communicable diseases control programmes and implementation of the payment of the existing medical staff which has been delayed for six months or such longer period as determined at the Intergovernmental Relations level.
32. According to the deponent, the issues raised by the applicants have been ventilated in the Health Sector Intergovernmental Forum hence the applicants' claim is speculative, lacks specificity and is substantially for the protection of the applicants' salaries and emoluments against some anticipated fears on the manner in which the members would be deployed to serve in the devolved system. According to the Respondent, the applicants have not demonstrated that their salaries are unpaid or that crystallised pension payments are unavailable to any of their members and in any event Section 138 of the ***County Governments Act*** provides for arrangements for public servants during the transition period. The Authority, it is contended is committed to facilitating seamless transfer of functions and delivery of services and to this end it issued an advisory on Human Resource Management to all Governors, County Assembly Speakers and Principal Secretaries which advisory was published in the local dailies and this was followed by a press released.

33. In the Respondent's view, the National Treasury underscored the imperative of the prudent use of public resources and compliance by Counties with the ***Public Finance Management Act***, 2012 and as some counties have received proportionate sums towards level 5 hospitals, it would be untenable for the Court to reverse the transfer of the functions as resources have already been released. While conceding that the health services in Kenya require improvement, including particularly, the ratio of doctors to population, the deponent contends that it is inexplicable how the challenge by the applicants of the transfer of the functions in any way addresses the said deficiency and that the infrastructure that currently exists is to be utilised even as the County Governments seek to improve health services.
34. The Respondent contends that since the present Constitution is a people's Constitution and the enabling provisions were enacted after wide public consultation, the applicants have not demonstrated in what respects they have not been consulted or that any discriminatory practices and or treatment have been visited on them; and there is, therefore, no justifiable basis for the proceedings herein.
35. On behalf of the Respondent, it was submitted by **Ms Lucy Kambuni** that since it is clear from the Legal Notices that the functions that the Respondent transferred to the County Governments took effect on the 9th of August 2013 the Respondent is *functus officio* and therefore the Respondent is wrongly enjoined (sic) in these proceedings. It was further submitted that the Applicants have not averred that the functions transferred to the County Governments are contrary to Article 186 and Part 2 of the Fourth Schedule of the Constitution and that pursuant to Article 203 of the Constitution of Kenya, 2010, (CoK, 2010) on equitable sharing, upon the transfer of the functions the Constitution requires contemporaneous transfer of funds to execute those functions on the basis of the criteria *inter alia* that County Governments are able to perform the functions allocated to them and that as is evident from the Press Release exhibited as **'KWM 17'** . Since the National Treasury has already released funds to County Governments for the functions transferred to them, it was submitted that this Court, in essence, is being asked to issue orders to the effect that the transferred functions should be returned to the National Government, in order to achieve the *status quo ante* a jurisdiction which the Court lacks as any transfer of functions between County Governments and the National Government or between the County Governments themselves may only be effected by the levels of Government pursuant to Article 187 of the CoK, 2010 and Sections 24-28 inclusive of the ***Intergovernmental Relations Act***, No. 2 of 2012. It is further submitted that in the event that a County Government is unable to perform its functions or fails to operate the requisite financial management system (currently as stipulated in the ***Public Financial Management Act, 2012***,) the National Government may only intervene in County Governments pursuant to Article 190 (3) of the CoK, 2010 and Section 121 of the ***County Governments Act***, No. 17 of 2012 since pursuant to section 5 of the ***Intergovernmental Relations Act***, 2012, one of the objects of intergovernmental structures is providing for mechanisms of transfer of power, functions and competencies to either level of government. Under Section 7 of the ***Intergovernmental Relations Act***, 2012, the National and County Government Coordinating Summit which is the apex body for intergovernmental relations comprising the President and the Governors of the 47 Counties, is established. The Summit provides a forum for, *inter alia*: consultation between the National and County governments; consideration of reports from other intergovernmental forums and other bodies on matters affecting national interest; evaluating the performance of National or County Governments and recommending appropriate action; considering issues relating to intergovernmental relations referred to the Summit by a member of the public, and recommending measures to be undertaken by the respective county government; facilitating and coordinating the transfer of functions and power or competencies. Therefore, in the event that there is a dispute (including in relation to transfer of functions), the National and County Governments are the entities that shall declare a dispute under the ***Intergovernmental Relations Act***, 2012 and are therefore the movers of the mediation process if found necessary. Further whereas Article 189 (3) and (4) of the CoK, 2010 provides that in any dispute between governments, the governments shall make every reasonable effort to settle the dispute, and the national legislation shall provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration, the enabling law is the ***Intergovernmental Relations Act***, 2012, which provides in section 31 that the National and County Governments shall take all reasonable measures to resolve disputes amicably and apply

and exhaust the mechanisms for alternative dispute resolution provided under the Act before resorting to judicial proceedings as contemplated by Article 189(3) and (4) of the Constitution.

36. While relying on sections 33(1), 34(1) and 35 of the ***Intergovernmental Relations Act***, it is submitted that the ***Intergovernmental Relations Act***, 2012 is facilitative of cooperative government and the CoK, 2010 prescribes that the Levels of Government should exercise circumspection and moderation and employ a spirit of consultation and mutual respect and explore alternative dispute resolution processes in order to objectively and sanely discuss matters that may fracture the fabric of the Nation with the judicial process being of last resort. Similarly, where the citizen has concerns over matters relating to the two levels of government (which have a bearing on intergovernmental relations) the citizen should in the spirit of the cooperative engagement envisaged by the Constitution address those concerns through the mechanisms provided by the CoK, 2010 and the law.

37. In its submissions the Respondent recognises that under the provisions of ***section 29 of the Intergovernmental Relations Act, 2012,*** public participation is provided for in the following terms *'The framework for public participation in the transfer or delegation of powers, functions or competencies by either level of government under this Part shall be provided by Regulations' and that* the subject Regulations have not been legislated. It is however contended that in the absence of such public participation, a logical approach should be for the Applicants to approach either the Summit or the Council of County Governors as provided in the ***Intergovernmental Relations Act, 2012;*** that whereas the Applicants lodged an undated Petition with the Council of County Governors there is no deposition on what further efforts were made by the Applicants to pursue the matter; and further that the Applicants did not, lodge a complaint with the National and County Government Coordination Summit, the apex body in intergovernmental relations which is the ultimate decision making body in matters of intergovernmental relations.

38. The Respondent submitted that since under the provisions of Article 96 of the CoK, 2010, the Senate protects the interests of County Governments, under section 23 (5), (6) and (7) of the Act, if the Respondent were to determine that a County Government does not meet the criteria for the transfer of function, the County Government may appeal that decision to the Senate. Therefore the Applicants were right in taking their complaint to the Senate, as stipulated in the ***Petition to Parliament (Procedure) Act***, Act No. 22 of 2012. The Applicants, however, abandoned their complaint after the Clerk to the Senate, by his letter dated 26th June 2013, requested the Applicants to amend their Petition to comply with the Standing Orders of the Senate. It is therefore submitted that the Applicants are in essence challenging the performance by the Respondent of its functions yet a dispute in that regard is to be resolved 'using the procedure set out in the law relating to intergovernmental relations' as provided by Section 34 of the Act. In interpreting the said Section 34 of the Act, it is submitted that the principles of statutory interpretation require that Courts should in the first instance apply the literal rule and give the words in a statute their ordinary and natural meaning in order to respect the will of Parliament and, and in reliance on the decision in **Adler vs. George (1964) QBD** it is submitted that it is only where the literal rule gives an absurd result, which Parliament could not have intended that the Court can substitute a reasonable meaning in the light of the statute as a whole.

39. According to the Respondent, a literal interpretation of section 34 of the Act and, particularly, the word 'section' in the second line would produce an absurd result for the following reasons: the Section falls under Part V1 of the Act titled 'Miscellaneous Provisions; the marginal note to the section reads ' Dispute resolution mechanism' and infers dispute resolution under the Act; there are no prescribed functions and powers in Section 34 that would trigger the dispute resolution process set out in the law relating to intergovernmental relations; the fact that the functions of the Respondent are set out in Section 7 of the Act and different aspects in respect thereof, elaborated throughout the Act; that it is evident from the *Hansard* that the intention of Parliament was that section 34 should provide for dispute resolution mechanism under the procedure prescribed in the law relating to Intergovernmental relations in the event that the performance by the Authority of its functions under the Act is questioned; and the fact that the Act is not a criminal statute and is therefore not subject to the rule that posits that ambiguity in a criminal statute should be resolved in favour of the accused.

40. The Respondent in the foregoing premises submits that this Honourable Court lacks the jurisdiction to determine these proceedings.

41. It is also submitted that the Applicants lack the *locus standi* to move this Honourable Court in these proceedings. To the Respondent the Applicants' claim is speculative, lacks specificity (and exhibits no dispute, therefore) and is substantially for the protection of the Applicants' salaries and emoluments against some anticipated fears on the manner in which their members would be deployed to serve in the devolved government as is evidenced by the following: the letter by the Clerk of Senate to the Applicants of 26th June 2013 to the Applicants titled *'Petition to Senate on the urgent need for reversal of rushed transfer to the county governments of salaries and allowances / personal emoluments to doctors'; the* Undated Petition by the Applicants to the Council of Governors titled *'Petition to the Council of County Governors on the urgent need for reversal of rushed transfer to the County Governments of salaries and allowances/personal emoluments due to doctors'; the* Applicant's letter to the Respondent dated the 16th of July 2013 titled *'Transfer to the Counties of personal emoluments due to doctors'* seeking to know *inter alia* which of the Applicant's officers shall have their personal emoluments transferred to the Counties and what criteria shall be used to identify such officers*;* the Applicants' letter to the Chairman of the Commission on the Implementation of the Constitution dated the 16th of July 2013 titled *'Transfer to the Counties of personal emoluments due to doctors'; and* Paragraph 23(e) of the Verifying Affidavit by **Sultani Matendechero** to the effect that the Respondent *'has not established whether the Applicants' members (many of whom are employed by the Public Service Commission) are being laid off for subsequent rehiring by the Counties and whether any terminal benefits are due and will be paid'.*
42. It is however submitted that the Applicants have not demonstrated that their salaries are unpaid or that crystallized pension payments are unavailable to any of their members. In any event, Section 138 of the ***County Governments Act*** provides for arrangements for public servants during the transition period as follows: Any public servant appointed by the Public Service Commission before the coming to effect of the Act and serving in the County as at the promulgation of the Constitution shall be deemed to be in service of the County Government from the National Government *(s 138 (1) (a);* The Officer's terms of service including remuneration, allowances and pension or other benefits shall not be altered to the Officer's disadvantage; The Officer shall not be removed from the service except in accordance with the terms and conditions applicable to the Officer as at the date immediately before the establishment of the County Government Act or in accordance with the laws applicable to the Officer as at the time of the commencement of the proceedings *(s 138 (1) (b);* Every public officer holding or acting in a public office to which the Commission had appointed the Officer as at the date of the establishment of the County Government shall discharge those duties in relation to the relevant functions of the County Government or National Government as the case may be *(s 138 (2);* and the body responsible for the transition to county governments shall in consultation with the Public Service Commission and relevant ministries facilitate the redeployment, transfers and secondment of staff to the National and County Governments *(s 138(3)).*
43. Apart from the foregoing, Article 235 (1) of the CoK, 2010 provides that a county government is responsible, within a framework of uniform norms and standards for inter alia establishing and abolishing offices in its public service. It is submitted therefore that it is unconstitutional for any public officer, and the Applicants specifically, to urge for differential treatment particularly when the outcome would be to offend Article 186 and Schedule 4 of the Constitution on responsibility for the execution of the assigned functions.
44. While reiterating the contents of the aforesaid replying affidavit, it is submitted that issues relating to pension benefits, gratuity or other terminal benefits, system of personal emoluments, promotions pension and gratuities for county public service employees are well catered for under the Constitution and relevant legislation. To the Respondent, the Applicants are urging a position contrary to constitutional prescription under Article 6 (2) of the CoK, 2010 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 under Article 189(1)(a). To the Respondent, in the event that a county officer is dissatisfied by either removal or disciplinary control exercised over him or her by the County Government, the affected officer may, under the provisions of Article 234(2)(i) lodge his or her appeal with the Public Service Commission. In the event, therefore, that the Applicants' dispute crystallizes, they will certainly have a remedy against the County Governments and that implementation of the Constitution is not a choice but rather a

mandatory prescription for all Kenyans, the Applicants included and devolution is not an event but a process.

45. It is therefore contended that the proceedings herein offend the doctrine of ripeness, are brought before this Honourable Court prematurely, are speculative and brought before this Court without locus standi and this Honourable Court lacks jurisdiction to presently determine the matter on account of the hierarchy of the intergovernmental dispute resolution processes that are prescribed by the CoK, 2010, the ***Intergovernmental Relations Act***, 2012 and Section 34 of the Act.

46. On the allegations of Illegality based *inter alia* on the fact that the Respondent 'is mandated under section 15 of the Sixth Schedule to the Constitution and sections 2, 3, and 4 (2) (c) of the Act to provide a legal and institutional framework for a co-ordinated transition to devolved system of government while ensuring continued delivery of services', it is submitted that this is a misapprehension of the law as it is the Act which is the legal and institutional framework that was legislated by Parliament and the Respondent has no constitutional mandate to enact principal statutes. On the allegation that the Respondent has ignored the mandatory provisions of Section 24 of the Act, and in particular has failed to ensure that there is in place legislation relating to the health function before transfer of that function, it is submitted that this premise has no basis as neither the National Government nor the County Governments have declared a dispute with regard to the transferred functions. Further, the Applicants, also, have not specified what law is necessary and is lacking relating to the health function and in any event, there is no lacunae in the law in view of the provisions of s. 7 of the Sixth Schedule of the Constitution to the effect that *'All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution'*. With respect to the allegation that the Respondent has failed to take into account the provisions of s. 106 of the ***County Governments Act***, 2012, it is submitted that this is a misapprehension of the subject provision, which, provides for integration of National and County Planning. On Irrationality based on the fact that the Respondent has acted contrary to the law, it is submitted that no elaboration of this ground is given and there is no basis for urging the same while on allegation of procedural impropriety and proportionality on the basis that the procedure prescribed by statute in respect of transfer of functions had not been followed and that 'rules of natural justice' were not adhered to, it is submitted that this ground is urged in very general terms and there is no legal basis whatsoever for reversing the action taken by the Respondent since adequate consultation and careful consideration and evaluation were undertaken before the transfer of the functions.

47. According to the Respondent, in Gazette Notices 137-182, the Respondent has given a proviso that *'the responsibility for 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'*. It is submitted therefore that the Applicants' fears are misplaced and the proceedings herein lack merit. While citing **Wednesbury Principles (derived from Associated Provincial Picture Houses Ltd –versus- Wednesbury Corporation [1947] EWCA Civ 1** it is contended that the Applicant's application lacks merit and should be dismissed with costs and that even assuming that the decision by the Respondent could be quashed by this Honourable Court the *Wednesbury Principles* have not been demonstrated namely: that the Respondent has acted out of jurisdiction; that the Respondent has taken into account matters it ought not to have taken into account or failed to take into account matters it ought to have taken into account; and that the Respondent has made a decision that 'is so unreasonable that no reasonable authority could ever come to it'. The Respondent further relied on Nairobi High Court Misc Application No. 621 of 2000 - **Samwel Muchiri W'Njuguna & 6 Others -versus- The Minister of Agriculture***; Nairobi Petition No. 190 of 2013 -* **The Law Society of Kenya and The Transition Authority & 2 Others** and submitted that this Honourable Court is an important cog in facilitating the nascent wheels of devolution. The disruption intended by the Applicants is unreasonable and would result in an assault on the Constitution and particularly Articles 6 (2), 186, 189 and the Fourth Schedule to the Constitution.

48. It is the Respondent's view that in the event that this Honourable Court accedes to the Applicants' prayers, it would occasion a discriminatory outcome since it is not the health functions alone that have been or are due to be transferred. All public servants that executed the functions in Part 2 of

the 4th Schedule of the CoK, 2010 are affected. The effect of the orders that are ultimately being sought is to remove the functions (the health component) that have already been transferred to the County Governments and return them to the National Government and this would set a dangerous precedent in view of all the other functions that have been transferred and would also constitute a discriminatory practice since it is not the health functions alone that have been or are due to be transferred.

49. Ultimately it was the Respondent's view that the Court should dismiss the Notice of Motion dated the 23rd of September 2013 with costs.

The Interested Party's Case

50. On behalf of the interested party, a replying affidavit was sworn by **Isaac Kiprono Ruto**, its Chairman on 9th October 2013.
51. According to the deponent, section 15 of the Sixth Schedule to the Constitution makes provision for devolution of functions to be made by an Act of Parliament pursuant to which the Act was promulgated which Act captured devolution of health services. He confirmed that all the Counties have in place effective structures/reliable sources of revenue to undertake devolved health services and in publishing the impugned Gazette Notices, the Authority transgressed neither the Constitution nor any legislation promulgated pursuant thereto.
52. In the deponent's view, apart from the rather generalised complaints made against the Authority, there is no assertion that the Counties are not in a position to perform the stated devolved functions and in any case there are clear legal processes ordained by law in dispute management relating to Counties which have not been exhausted.
53. To him the gazettement in any event is *fait accompli*, the functions have been devolved and the Authority is *functus officio*.
54. On behalf of the interested party it was submitted by **Mr Nyakundi**, its learned counsel that the Respondent, prior to the devolution of the material services, had indeed deployed and achieved all the efforts antecedent to proper transfer of the functions. According to the Interested Party, the functions have been devolved and budgetary issues attended to by the relevant authorities, hence the matters are beyond the jurisdiction of the respondent and the concerns of the applicants relate to the fate of its members with regard to personal emoluments which cannot justify the intervention of the court and the application ought therefore to be dismissed.

Determinations

55. We have considered the application, the supporting as well as replying affidavits and the submissions made on behalf of the parties herein together with authorities.
56. The issue of jurisdiction was extensively dealt with by the Court of Appeal in the case of **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** in which **Nyarangi, JA** while citing ***Words and Phrases Legally Defined*** **–** Vol. 3: I-N page 13 held:

"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

57. In that case the Court further held:

"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

58. It is therefore from the point of jurisdiction that we intend to start our determination since without jurisdiction we have no option but to lay down our tools. We therefore intend to proceed to examine the effect of ouster clauses on the Court's jurisdiction.
59. Under Article 165(2)(a) as read with Articles 162(2) and 165(5) of the Constitution the High Court has unlimited jurisdiction in Criminal and Civil matters save for matters reserved for the exclusive jurisdiction of the Supreme Court and matters relating to employment and labour relations and the environment and the use and occupation of, and title to, land. Whereas sovereign power under the Constitution is delegated to *inter alia* the Judiciary and independent tribunals, it is now well settled that judicial review applications are neither criminal nor civil in nature. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.** It follows that in determining judicial review applications the High Court is exercising "any other jurisdiction, original or appellate, conferred on it by legislation" under Article 165(3)(f) of the Constitution. In this instance the relevant legislation is the ***Law Reform Act***, Cap 26 Laws of Kenya. The ***Law Reform Act*** in Section 8 while recognizing the fact that the High Court has no jurisdiction either in its criminal or civil jurisdiction to issue prerogative orders of mandamus, prohibition or certiorari, provides that in any case in which the High Court in England is, by virtue of the provisions of section 7 of the ***Administration of Justice (Miscellaneous Provisions) Act***, 1938, of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order. It must, however, be noted that under Section 3(1)(c) of the ***Judicature Act***, Cap 8, the High Court applies the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date subject *inter alia* to the Constitution and all other written laws. In our view, where there is a particular procedure provided under the Constitution or any written law the provisions of section 7 of the ***Administration of Justice (Miscellaneous Provisions) Act, 1938***, of the United Kingdom ought not to be invoked if the invocation would amount to contravention of the provisions of an Act of Parliament passed by our Legislature. Accordingly, where there is an alternative remedy provided by an Act of Parliament which remedy is effective and applicable to the dispute before the Court, the Court ought to ensure that that dispute is resolved in accordance with the relevant statute. Accordingly, we agree with the decision in **Pasmore vs. Oswaldtwistle Urban District Council [1988] A C 887** that where an obligation is created by statute and a specific remedy is given by that statute, the person seeking the remedy is deprived of any other means of enforcement. As was observed by the Court of Appeal in **The Speaker of the National Assembly vs. Karume [2008] 1 KLR 426 (EP)**, Order 53 of the ***Civil Procedure Rules*** cannot oust clear constitutional and statutory provisions. However, as was stated in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728**, ouster clauses are effective as long as they are not unconstitutional, consistent with the main objectives of the Act and pass the test of reasonableness and proportionality. In the said case the learned Judge recognised that the Court's jurisdiction may be precluded or restricted by either legislative mandate or certain special texts. Where the ouster clause leaves an aggrieved party with no effective remedy or at all, it is our view that such ouster clause will be struck down as being unreasonable. We therefore agree with **Mwera, J** (as he then was) in **Safmarine Container N V of Antwerp vs. Kenya Ports Authority Mombasa High Court Civil Case No. 263 of 2010** to the extent that it is not only the Constitution that can limit/confer jurisdiction of the court but that any other law may by express provision confer or limit that jurisdiction. In his decision the learned Judge relied on Article 159 of the Constitution. Clause (2)(c) of the said Article provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. Courts and Tribunals cannot be said to be promoting alternative dispute resolution mechanisms when they readily entertain disputes which ought to be resolved in other legal forums.

Accordingly we agree that where there is an alternative remedy and procedure available for the resolution of the dispute that remedy ought to be pursued and the procedure adhered to. Nevertheless any provision purporting to limit the jurisdiction of the High Court must itself derive its validity from the Constitution itself and must do so expressly and not by implication unless the implication is necessary for the carrying into effect the provisions of the Act. In other words where the issue is whether the Court has jurisdiction, the Judge will lean against a construction, which purports to oust the jurisdiction of the Court and in the event that jurisdiction is to be excluded it will be done only on very clear words and the mere use of the word "shall" cannot oust the jurisdiction of the High Court because the word is not necessarily mandatory. As was held by **Ringera, J** (as he then was) in **Standard Chartered Bank Ltd. vs. Lucton (Kenya) Ltd. Nairobi (Milimani) HCCC No. 462 of 1997** the use of the word "shall" in a statute only signifies that the matter is prima facie mandatory and its use is not conclusive or decisive and it may be shown by a consideration of the object of the enactment and other factors that the word is used in a directory sense only.

60. However, in **Narok County Council vs. Trans Mara County Council & Another Civil Appeal No. 25 of 2000,** the Court of Appeal expressed itself as follows:

"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 otherwise 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".

61. In the result, we associate ourselves with **Justice Majanja's** view expressed in **Dickson Mukwelukeine vs. Attorney General & 4 Others Nairobi High Court Petition No. 390 of 2012** 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 pursue 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.

62. That leads us to the issue of the effect of purported limitation and/or restriction of the Court's jurisdiction. Whereas the existence of the alternative remedy and procedure may not necessarily

oust the jurisdiction of the Court, the Court is perfectly entitled to take into account the existence of such a remedy and its efficacy in deciding whether or not to entertain the dispute and may decline to do so not only on the ground of want of jurisdiction but also in order to avoid the abuse of its process where the process is being invoked to achieve some collateral purpose not recognized by the law as genuine. If therefore abuse of the Court process is shown to have happened, it would be wrong to allow the misuse of that process to continue. There is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it. See **The King vs. the General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington Ex Parte Princess Edmond De Polignac [1917] KB 486 at 495.**

63. In this case it is contended that section 34 of the Act ousts this Court's jurisdiction. We have already held that an Act of Parliament can only limit or restrict the Court's jurisdiction as conferred under the Constitution. The said section provides:

    A dispute regarding the performance by the Authority of its functions under this section shall be resolved using the procedure set out in the law relating to intergovernmental relations. [Emphasis ours]

64. As conceded by all the parties to these proceedings, the above section is ambiguous since it talks about disputes relating to its performance of its functions under the section when there are no functions contemplated under the section. However, the cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. The tribunal that has to construe an Act of a legislature or indeed any other document has to determine the intention as expressed by the words used and in order to understand these words it is natural to inquire what is the subject matter with respect to which they are used and the object in view. If the words of the Statute are themselves precise and unambiguous then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver. See **Craies on Statute Law (6TH ED.) at page 66.**

65. As was held by the Court of Appeal in **Kimutai vs. Lenyongopeta & 2 Others [2005] 2 KLR 317:**

    "It is elementary rule that a thing which is 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 for which the old law did not provide, and the remedy provided by the statute 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 is to be adopted. It is nolonger necessary for the judges to wring their hands and say, "There is nothing we can do about it". Whenever the strict interpretation of a statute gives 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."

66. In other words, it is 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 for which the old law did not provide, and the remedy provided by the statute to cure that mischief.

67. Therefore in line with the following principles we have no hesitation in finding that the phrase "this section" in section 34 of the Act is misplaced and ought to have been "this Act". Our

determination will therefore be based on the object which the legislature intended to achieve by the enactment of the said section. Under the said section, it is our view and we so hold that disputes regarding the performance by the Authority of its functions under the Act ought to be resolved using the procedure set out in the law relating to intergovernmental relations and it is agreed by the parties that the legislation dealing with such relations is the ***Intergovernmental Relations Act***, 2012.

68. The relevant part with respect to resolution of disputes is Part IV of that Act which is headed **"Dispute Resolution Mechanisms".** Section 30(1) of the ***Intergovernmental Relations Act***, 2012, however, provides that "dispute" means an intergovernmental dispute while under subsection (2) thereof it is provided that the said Part applies to resolution of disputes arising (a) between the national government and a county government; or (b) amongst county governments. Clearly, that Part does not expressly apply to disputes by ordinary citizens arising from the exercise of powers by and obligations placed upon the Authority. To interpret the said provisions to include disputes by individuals who are aggrieved by actions or omissions of the Authority would be overstretching the said provisions yet there is no ambiguity arising therefrom.

69. This position is, as rightly pointed out by the applicants, reflected in Article 189(3) and (4) of the Constitution which provide as follows:

    (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 inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.

70. In the circumstances, to hold that this Court has no jurisdiction to entertain the applicants' application would in our view leave the applicants with no avenue through which to ventilate their grievances. Can it therefore be said that the ex parte applicants have an effective remedy under the ***Intergovernmental Relations Act***, 2012? In our view we do not think so. Where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved. As was rightly stated in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008** it is the responsibility of the Court to ensure that executive action is exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court and the Court is perfectly within its rights to investigate the allegations. To fail to do so would be to engender and abet an injustice and as has been held before, a court of justice has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

71. The law being a living thing, a court would be shirking its responsibility were it to say, assuming that there be no existing recognised remedy covering the facts of a particular case, "Why then, this must be an end to it". The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which injures another. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238.**

72. The law must, of necessity, adapt itself; it cannot lie still. It must adapt to the changing social conditions. In the present case, the remedy which the Respondent would like the applicants to resort to is not within the reach of the applicants since the applicants are neither the National nor the County Governments. The court in the modern society in which we live cannot deny them a

remedy. The courts have recognised that unlawful interference with a citizen's rights give rise to a right to claim redress and if the ex parte applicants have a right they must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it: and indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. Whether or not they will be able to prove that their rights have been contravened or infringed is another matter altogether. See **Rookes vs. Barnard [1964] AC 1129** and **Ashby vs. White [1703] 2 Ld Raym.938; 92 ER 126.**

73. We accordingly are of the view and hold that this Court has the jurisdiction to entertain the applicants' claim.

74. On the issue of whether or not the orders cannot be granted on the ground that the Respondent is functus officio we agree with the decision in **David Mugo vs. The Republic Civil Appeal No. 265 of 1997** in which the Court of Appeal expressed itself as follows:

"The learned judge held that since the Court Brokers Licensing Board had ceased to exist as a result of repeal of Cap. 20, the appellants' application for certiorari was merely technical and academic. With respect here the judge fell in error of law. Certiorari was sought to quash the Board's decision revoking the appellant's licence. It (certiorari) was not to keep the Board in continuous existence. Where the body or authority against which certiorari is sought has ceased to exist or has become functus officio, but a decision it (body or authority) made is still enforceable certiorari must issue to quash or nullify that decision, if it is bad."

75. Accordingly the mere fact that the Respondent is alleged to have become functus officio does not bar this court from reviewing its decision.

76. That now leads us to the issue whether or not the applicants' claim is merited. The starting point in judicial review proceedings is that the remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision making process. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is not part of that purpose to substitute the opinion of the Judiciary or individual Judges for that of the authority constituted by law to decide the matters in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR*; Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

77. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **Council of Civil Servants Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** and held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.........Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such

authority exercises jurisdiction to make a decision."

78. The reason for saying this is due to the recognition that the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing. As was stated by **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998*:***

"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief.....The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket.......Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.......Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them............Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.........**The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."**

79. Similarly in **David Mugo vs. The Republic (Supra),** the Court of Appeal held that so long as orders by way of judicial review remain the only legally practical remedies for the control of administrative decisions, and, in view, of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review orders shall continue extending so as to meet the changing conditions and demands affecting administrative decisions.

80. This is however not to say that the Court will readily accede to claims based on speculation and conjecture without any grounds which are merely meant to vex the administrative body in question and thus delay the authority from carrying out its duties under the law. To do so would open floodgates to busybodies, cranks and other mischief-makers with misguided or trivial complaints or administrative error to institute frivolous, vexatious or hopeless proceedings with the intent of wasting the court's time and creating unnecessary and unjustified uncertainty in the management of public affairs. That would create a state of panic on the part of public officers and authorities as to whether they can safely proceed with administrative action while proceedings for judicial review of it are actually pending even though misconceived.

81. It is contended by the applicants that the Respondent failed to ensure strict compliance with Article 175 of the Constitution and in particular ensuring that the County Governments have reliable sources of revenue to enable them to govern and deliver devolved services effectively. The said Article which deals with principles of devolved government provides as follows:

County governments established under this Constitution shall reflect the following principles—

(a) county governments shall be based on democratic principles and the separation of powers;

(b) county governments shall have reliable sources of revenue to enable them to govern and deliver services effectively; and

(c) no more than two-thirds of the members of representative bodies in each county government shall be of the same gender.

82. On our part we are unable to fathom what role the Respondent has to play in ensuring that the principles of devolved government are achieved under the said Article. As rightly appreciated by the applicants, the Respondent is mandated under Section 15 of the Sixth Schedule to the Constitution of Kenya 2010 and Sections 2, 3 and 4 (2) (c) of the ***Transition to Devolved Government Act***, 2012 to provide a legal and institutional framework for a co-ordinated transition to the devolved system of Government. We do not read that mandate to encompass the duty to ensure that the principles of devolved government under Article 175 are complied with.
83. The Respondent is further accused of failure to comply with the provisions of Section 7(2) of the ***Transition to Devolved Government Act***, 2012. It is contended that the Respondent has not engaged the Applicants' members and in particular medical practitioners and other key stakeholders in the process of transition, and policy making by the Authority. No one doubts that participation of the people is one of the national values and principles of governance under Article 10 of our Constitution and that it is one of the principles which guides State organs, State officers, public officers and all persons whenever any of them makes or implements public policy decisions which is what the Respondent is tasked with.
84. However in paragraph 11 of the replying affidavit sworn by **Kinuthia Wamwangi**, the steps which were taken by the Respondent were outlined and one of the participants at a presentation organised by the Respondent was Association of Professional Societies of East Africa of which the applicants are members. In **Republic vs. The Attorney General & Another ex parte Hon. Francis Chachu Ganya, Nairobi High Court (Judicial Review Division) Miscellaneous Application No. 374 of 2012**, it was held as follows:

    "One of the issues raised in these proceedings is that the ex parte applicants were not consulted before the decision affecting them was made. It is not in dispute that under Article 10 of the Constitution the national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution, enacts, applies or interprets any law or makes or implements public policy decisions. It is also true that under Article 10(2) of the Constitution, national values include participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised and good governance, integrity, transparency and accountability. Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate their views. This requirement is also to be found in section 13(2)(b) of the *Trust Land Act* which provides that "the Council shall bring the proposal to set apart the land to the notice of the people concerned, and shall inform them of the day and time of the meeting of the Divisional Board at which the proposal is to be considered". In *Republic vs. Ministry of Finance & Another Ex Parte Nyong'o Nairobi HCMCA No. 1078 of 2007 (HCK) [2007] KLR 299*, **the Court held:**

    > **'Good public administration requires a proper consideration of the public interest. There is considerable public interest in empowering the public to participate in the issue. It ought to be the core business of any responsible Government to empower the people because the government holds power in trust for the people. People's participation will result in the advancement of the public interest. Good public administration requires a proper consideration of legitimate interests.'**

85. Once public participation is attained and the decision making authority after considering the views expressed makes a decision, the issue whether or not such decision ought to have been made, can nolonger be a subject of judicial review since the decision is no longer questionable on the process of arriving thereat but can only be questioned on the merits and that is not within the realm of judicial review. The Respondent, in the replying affidavit has averred that steps were taken with respect to the attainment of public participation and that an umbrella organisation comprising the applicants herein was represented in such fora. Whereas the adequacy and extent of the participation of the public in such forums and in the decision making process may be challenged, we are not satisfied that the applicants have demonstrated that the consultative process was

inadequate.

86. The applicants further contend that the Respondent has disregarded the importance of a legislative framework underpinning the transfer of the Health component in direct violation of Sections 7 and 24 of the Act and that the Respondent has not determined the readiness of Counties to take up devolved functions and in particular in relation to devolution of Health Services as stipulated by Sections 24 (d), (f) and (g) of the ***Transition to Devolved Government Act*** 2012. In support of this contention, it is deposed that the criteria for transfer of Health services under section 24 of the Act has not been satisfied. To substantiate this, the applicants contend that at present Kenya has a shortage of 37, 000 doctors with a doctor-patient ratio of 1:17000. That there is a shortage of doctors in this country is a well known fact. However can the failure be attributed to the Respondent so as to warrant an order prohibiting the Respondent from implementing the devolution of health services? We have not been referred to any provision which mandates the Respondent to ensure that the Country has adequate number of medical personnel before devolving the Health Services to the Counties. 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 country 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. We, however, do not see how the delay in devolving health services will change the situation with respect to poor health services in the short term since the shortage of personnel and poor infrastructure exists whether the health services are devolved or not. 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.

87. 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.

88. This is not to say that the Respondent is not under a statutory obligation to ensure that the criteria under Section 24 of the Act is complied with. However, based on the material placed before us we are unable to positively find that the said criteria has in fact not been met. It is not enough to simply state that statutory provisions have not been complied with. The applicant has to go further and elaborate on that allegation in order for the Court to make a finding in his favour otherwise the Court will be wrongly exercising a discretion. The decision whether or not to grant judicial review orders is an exercise of discretion and that discretion like any other judicial discretion must be exercised judicially. Accordingly, it has to be exercised on fixed principles and not on private opinions, sentiment and sympathy or benevolence but deservedly and not arbitrarily or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles. Bare statements of generalised and vague nature will therefore not suffice to persuade the court to grant judicial review remedies. In this case we are afraid that the applicants have not furnished the Court with sufficient material on the basis upon which the Court may find that the criteria under section 24 of the Act was not satisfied. We associate ourselves with the decision in Petition No. 190 of 2013 – **The Law Society of Kenya vs. The Transition Authority and 2 Others** that the authority and jurisdiction of the High Court to interpret the provisions of the Constitution and statutes including the authority to declare a statute unconstitutional does not exist in a vacuum and cannot be exercised in the absence of a real dispute.

89. The applicants also contend that the Respondent has ignored the mandatory provisions of Section 24(1)(a) of the ***Transition to Devolved Government Act***, 2012 by failing to ensure that there was in place legislation relating to the Health function before transfer of that function. There is currently no Health Act or even a National Health Policy in existence. Under the said section one of the criteria for transfer of the services is whether there is in existence legislation relating to the function applied for. It is clear that the Act does not require the enactment of new legislation but only requires the Respondent to determine whether the relevant legislation exists. The Respondent has averred that there are several pieces of legislation dealing with the provision of health

services. However, these legislation have been faulted by the applicants on the ground that they were enacted before the current Constitution. In our view the mere fact that the legislation were enacted before the current Constitution does not render them irrelevant. What is required under section 7 of the Sixth Schedule to the Constitution is that all existing laws are to be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the current Constitution. Under section 2(3)(b) of the said Schedule as read with Schedule 5 thereof laws relating to devolved government are to be enacted within three years. The applicants have not contended and we have not been convinced that the laws currently in place do not satisfactorily address the applicants' concerns.

90. There were other concerns raised with respect to the terms of service of the applicants' members. We have already indicated that those concerns can be adequately addressed and that the same cannot be resolved by the delay in the implementation of the devolved system of government. The applicants themselves have confirmed that they are not against the devolved system of governance and since those concerns can be addressed, there would be no reason to grant the orders of judicial review sought herein since, as we have stated hereinabove, judicial review does not deal with the merits but with the process. Devolution in this country is a new system of governance and in its implementation, there are bound to be disagreements in the manner in which it is being done. That, however, ought not to be a ground for derailing the process unless it is shown that there are no mechanisms through which contentious matters can be resolved.
91. The applicants have submitted that there is a risk that doctors may leave the country for greener pastures elsewhere as a result of the failure by the Respondent to address the issues raised herein. Whereas this Court appreciates that that would be very unfortunate, as was rightly opined by the Court of Appeal in **Dr. Christopher Ndarathi H Murungaru vs. Kenya Anti-Corruption Commission & Another Civil Application No. Nai. 43 of 2006 [2006] 1 KLR 77,** the Courts must stick to the rule of law even if the public may in any particular case want a contrary thing.
92. However, if, as seems clear, the concerns of the applicants with regard to their members' remuneration can be addressed, then the eventualities that the applicants predict with regard to resignations have no basis.

Conclusion

93. We have considered all the issues raised in the instant application and are not satisfied that the orders sought are merited.
94. Accordingly the order which commends itself to us is that the Notice of Motion dated 23rd September 2013 be and is hereby dismissed but in light of the fact that the issues raised therein were matters which affect the general public and are in our view issues of public interest there will be no order as to costs.
95. We must express our gratitude to counsel for thorough research and very eloquent submissions made in the prosecution and opposition of this application. If we have not referred to all the authorities referred to us by counsel, it is not due to disrespect or out of lack of appreciation for counsels' industry.

Judgement read, signed and delivered in court this 18th day of December 2013.

WELDON KORIR MUMBI NGUGI G V ODUNGA

JUDGE JUDGE JUDGE

Delivered in the presence of

Mr Makori for the applicants

Ms Lucy Kambuni for the Respondent

Mr Nyakundi for Mr Assa Nyakundi for the interested party