IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KOOME, OKWENGU & KANTAI (JJ.A)

CIVIL APPEAL NO. 362 OF 2014

BETWEEN

OKIYA OMTATAH OKOITI.....1ST APPELLANT

WYCLIFF GISEBE NYAKINA.....2ND APPELLANT

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE TRANSITION AUTHORITY.....2ND RESPONDENT

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

KENYA UNION OF NURSES.....4TH RESPONDENT

COMMISSION FOR THE IMPLEMENTATION

OF THE CONSTITUTION.....5TH RESPONDENT

KENYA MEDICAL PRACTITIONERS,

PHARMACISTS & DENTIST UNION.....6TH RESPONDENT

KATIBA INSTITUTE.....7TH RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi

(Lenaola, J.) dated 6th August, 2014 in Constitution Petition No. 593 of 2013)

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JUDGMENT OF THE COURT

[**1**] This appeal arises from the judgment of the Constitutional Court (**Lenaola, J**) in a petition which was filed by **Okiya Omtata Okoiti** and **Wycliffe Gisebe Nyakina** (1st and 2nd appellants respectively). The initial respondents to the petition were, the Attorney General (the AG), the Transition Authority and Council of Governors, (1st, 2nd and 3rd respondents respectively). Subsequently, the Kenya National Union of Nurses (4th respondent), Commission for the Implementation of the Constitution (5th respondent herein "Implementation Commission") and the Kenya Medical Practitioners Pharmacists and Dentists Union (6th respondent herein "KMPPDU"), were joined as interested parties and Katiba Institute (7th respondent) was joined as an *amicus curiae*.

[**2**] In the petition, the appellants alleged that the AG, the Transition Authority and the Council of Governors had contravened Articles 26, 27, 28, 29, 43, 46 and 62 of the Constitution, as well as Part 1 Section 23 of the Fourth Schedule to the Constitution, and the words "county health facilities and pharmacists" in Part 2 section 2 of the Fourth Schedule to the Constitution, by wrongly interpreting "national health referral facilities" as referring to only two hospitals, that is, Kenyatta National Hospital (hereinafter KNH) and Moi Teaching & Referral

Hospital (hereinafter MTRH). According to the appellants the reference to "national health referral facilities" means all public hospitals from Level 2 to Level 6. The appellants contended that county health facilities and pharmacies referred to health facilities formerly owned by the local authorities or those which the county governments are reasonably expected to establish. The appellants therefore prayed for several declaratory orders, mandamus and prohibition to stop what they deemed as "unconstitutional dismantling and transfer of the national health referral facilities from the national government to the county government".

[**3**] The petition was precipitated by notices published by the Transition Authority in Kenya Gazette Supplement No. 116, Legal Notices No. 137-182 of 9th August, 2013, giving notice of the transfer of certain functions from the national government to county governments with regard to health services. As already stated, the appellants took the position that the words 'national health referral facilities' refer to all the public hospitals in the country which include all levels 2, 3, 4, 5 and 6 hospitals, and all clinics, health centers, dispensaries and hospitals spread across the various counties within the country.

[**4**] The appellants maintained that Section 23 Part 1 of the Fourth Schedule of the Constitution assigns the ownership, management and running of Levels 2, 3, 4, 5 and 6 hospitals as National referral health facilities, and functions of the National Government; and that Sections 2(a) and 2(b) of Legal Notices No. 137-182 of 2013 purporting to transfer the health facilities to the County Governments, were unconstitutional for violating the Fourth Schedule of the Constitution on the division of functions between the National Government and other provisions of the Constitution.

[**5**] The appellants further alleged that the legal notices violated **Article 62(1)(b)** & **(2)(b)** of the Constitution, which states that land held, used or occupied by a National state organ, which in this case refers to all land where all the levels 2 to 5 hospitals stand, shall vest and be held by the National Government, and the respondents' act of transferring these hospitals to the County Government was in violation of **Section 21** of the **National Government Coordination Act, 2013** which categorically forbids the transfer of assets of the National Government to County Governments.

[**6**] The appellants posited that instead of dismantling the National referral system, as the AG, the Transition Authority and the Council of Governors purported to do, the National referral system should be strengthened between the various levels and an effective referral mechanism provided as a key element for the delivery of health care by the National Government. Furthermore, that the distribution of functions of the two levels of governments as envisaged under the Constitution, was meant to augment the national referral health system by creating a modern primary health care system administered locally within each county, without dismantling the National health referral system or replacing it with a county based system. This was in accordance with the World Health Organization (WHO) definition of a referral system as a network of service providers or facilities that adhere to similar referral protocols by providing for the existence of an effective referral systems that ensures a close relationship between all levels of the health system, thereby ensuring that people receive the best possible care closest to their homes.

[**7**] The appellants referred to the position before the promulgation of the 2010 Constitution, when health facilities were classified according to ownership between the central government and local authorities, with the Central Government running the National referral health facilities and the Local Authorities running the Municipal health facilities and dispensaries. They maintained that the transfer of level 2 to level 5 hospitals to the County Governments could only be done through an amendment of the Constitution as provided for under **Articles 255, 256** and **257** of the Constitution.

[**8**] The AG opposed the petition on grounds that the appellants' interpretation of the phrases **'national referral health facilities'** and **'county health facilities'** was narrow and defeats the purpose of devolution; that to adopt the interpretation given by the appellants would defeat the decentralization of the state organs, which was the core reason why Kenya chose a devolved system of government; that with the creation of the National Government and County Governments, the Fourth Schedule of the Constitution provides that national referral health facilities are a mandate of the National Government while the county health facilities are a mandate of the County Governments; that the interpretation proposed by the appellants will render **Articles 174 (h)** as read with **Article 186(1)** and **Sections 23** of **Part 1** of the Fourth Schedule of the Constitution together with **Section 2 Part 2** of the same schedule inapplicable.

[**9**] The AG urged that only two facilities, that is KNH and MTRH qualify the description of national referral health facilities, and both were established by constitutive instruments as the only national referral hospitals, while all other health facilities were listed as 'other hospitals'; that the definition and classification sought by the appellants was not in tandem with government policy which through the Ministry of Health, National Health Sector Strategic Plan 1999-2004, acknowledged health facilities as hierarchical and identifies KNH as the apex of the referral system, while level 2 to level 3 facilities are listed to include dispensaries, health centers, maternity/nursing homes that offer preventive care as well as some curative services, while level 4 to level 6 are listed as primary, secondary and tertiary hospitals which mainly offer curative and rehabilitative services.

[**10**] The AG maintained that the classification of these hospitals was not based on any geographical zoning but on the level of services that each facility was providing; that it would be wrong to interpret **Section 23 Part 1** of the Fourth Schedule of the Constitution as providing that all the facilities are national referral health facilities, as the section envisages KNH and MTRH as the national referral hospitals and the rest of the facilities are classified as county health facilities, thereby maintaining the hierarchical system even in the devolution.

[**11**] In addition, the AG asserted that **Sections 28, Part 1** of the Fourth Schedule to the Constitution places the formulation of the national health policy on the National Government; that the petition undermines the doctrine of separation of powers, as the appellants sought to have the court define various technical terms; and that the High Court lacked jurisdiction to direct the National Government and the County Governments on how and where to establish and operate national referral health facilities, and whether to establish community/Level 1 facilities within Counties.

[**12**] The Transition Authority opposed the petition through its answer to the petition, in which it raised a preliminary objection contending that the issues raised in the petition were *res judicata* as the same had been determined in **High Court Judicial Review Application No. 317 of 2013**. Secondly, that the petition offends the doctrines of separation of powers and ripeness, because classification of health facilities is a policy issue undertaken by the Executive. Thirdly, that the petitioner had not demonstrated any cause of action, and that the dispute is not capable of being resolved by the court, as Legal Notice Nos. 137-182 were not capable of suspension, the transfer of the health services

having taken effect on 9th August, 2013.

[**13**] Further, the Transition Authority posited that the definition of national referral and national health facilities in regard to the delivery of health service is a policy function of the executive; that County Governments were not synonymous with the defunct local authorities; that the promotion of primary health care is one of the many functions of County Governments and the listing of the health functions under Section 2 of Part 2 of the Fourth Schedule is not exhaustive; that County Governments have control over the financial and human resources, and these resources must follow and match the functions; that transfer of the functions between the County Governments and the National Government is provided for in **Article 187** of the Constitution, and **Sections 24** to **28** of the **Inter-governmental Relations Act;** and that the national government may only intervene in the activities of county governments pursuant to the provisions of **Article 190(3)** of the **Constitution** and **Section 21** of the **County Governments Act.**

[**14**] The Transition Authority also relied on the affidavit of its then chairman, **Kinuthia Wamwangi** sworn on 20th January, 2014. He gave details of the consultation and public participation process that was undertaken by the Transition Authority with County Governments, Health professionals, Health professional bodies and Associations in health sectors, Ministries, departments and agencies (MDA's) and the general public, before the transfer of the functions were undertaken. The affidavit also gave details of the considerations undertaken in transferring the functions in regard to Health facilities for levels 2-5. These included consultations through a process facilitated by Transition Authority guided by the Constitution and internationally recognised principles, resulting in proposals and consensus on the categorization of the health facilities. Mr. Wamwangi swore that the functions assigned to National and County Governments were generally broad and none specific, but clear definitions were provided through the aforestated process.

[**15**] The Council of Governors in opposing the petition argued that the 2010 Constitution, established a framework of governance where power is shared between the two levels of Government, at the National level and County levels, and that this structure is different from the previous Government system comprising of a Central Government and Local Authorities; that the distribution of functions between the two levels of government is contained in the Fourth Schedule of the Constitution and such distribution cannot be based on the legal and constitutional order that existed prior to the promulgation of the Constitution, 2010; that it is not correct that 'county health facilities' mean the health institutions which were run by former local authorities, because the health facilities were limited to the then Municipal Councils only. That only 5 Municipal Councils (Nairobi, Eldoret, Kisumu, Mombasa, Nakuru) had such health facilities; that the Constitution did not intend to limit these services to 5 out of 47 Counties, and that limiting the same to only 5 counties would be in violation of the spirit of devolution.

[**16**] Further, that **Article 6(1)** of the **Constitution** provides that the Governments at the National and County levels are distinct and inter-dependent; that they conduct their mutual relations on the basis of consultation and co-operation; that **Article 189** of the Constitution provide rules for cooperation between National and County Government to give effect to the mutual inter-governmental relations and that the Transition Authority duly exercised its statutory mandate under **Section 35(2)** of the **Transition to Devolved Government Act**, when it issued the impugned legal notices wherein it provided the scope of functions to be undertaken by Counties and key conditions to be followed for smooth transfer of the said functions.

[**17**] In addition, the Council of Governors maintained that unless there was a violation of the Constitution, the court cannot question a determination of the Transitional Authority on the assignment and unbundling of functions in the health sector; that the court should not be drawn into the dispute as to whether Level 1 to Level 6 hospitals are National referral facilities, since those are technical matters that are better addressed by the Transitional Authority in the transitional period, and eventually through legislation and policies.

[**18**] On the issue whether the words 'national referral health facilities' in Part 1 Section 23 of the Fourth Schedule to the Constitution, refer to Levels 2, 3, 4, 5 and 6 health facilities, the Council of Governors argued that the words "national referral health system" cannot be defined by the use of dictionary semantics, but has to be defined within the Constitution and the Health Sector Strategy, 2012-2017; that the WHO's definition is unsuitable for adoption as it violates the doctrine of separation of powers as the formulation of policies is a preserve of the Executive under the Fourth Schedule to the Constitution.

[**19**] The Council of Governors also relied on an affidavit sworn by the then Governor of Bomet County, Hon. Isaac Rutto, who was also the then Chairperson of the Council of Governors. In his affidavit, Hon. Rutto reiterated the position of the Council of Governors as already stated herein, contending that whether an institution is a national referral health facility is a question of fact; that only the Transition Authority was empowered to make that determination; and that unless there was an express violation of the Constitution, the court could not question the assignment and unbundling of functions in the health sector. Hon. Rutto posited that the petition was based on an erroneous interpretation of the Constitution.

[**20**] We have perused the record of the lower court and do find that the Nurses Union was granted leave by the court on 23rd December 2013, to participate in the proceedings as an interested party. On 20th January, 2014, the Nurses Union filed written submissions. The court gave directions on 13th January 2014, for the respondents and interested parties to file their responses to the petition. In addition, the court recorded a consent order on 28th January 2014, that the respondents and the interested parties file their responses within seven (7) days to facilitate the hearing of the matter on 6th March, 2014. Nevertheless, the Nurses Union does not appear to have filed any response to the petition, as we were not able to trace any in the record. We note that on 4th April, 2014, **Mr. Enunda**, counsel who appeared for the Nurses Union at the hearing of the petition, made oral submissions in which he relied on the written submissions together with the authorities. He did not make any reference to any other document. Therefore, it is evident that apart from the written submissions, there was no reply to the petition that was filed by the Nurses Union.

[**21**] The Implementation Commission, opposed the petition through an affidavit sworn by its chairman, **Charles Nyachae**. The Implementation Commission reiterated the position taken by the AG, adding that it would be impractical to have all Level 2 to Level 5 health facilities as 'national referral health facilities' envisaged by **Section 23, Part 1** of the Fourth Schedule to the Constitution; that the phrase 'county health facilities and pharmacies' does not refer only to health facilities which used to be managed by local authorities under the Local Government Act (now repealed); that the Constitution does not restrict a County Government from providing goods and services for persons from other Counties; that it is not impossible for a County Government to operate a specialized health facility that caters for referrals from other Counties, if such provision is funded by tax payers' money allocated by Parliament; that the referral of patients requiring

treatment between Levels 2 to level 5 health facilities in various counties is achievable, and is in fact provided for by the existing constitutional and statutory framework of devolved government through the provisions of **Articles 6(2), 10(2), 189(1) & (2)** of the **Constitution** and **Section 5(2)(e)** of the **County Government Act.**

[**22**] In addition the Implementation Commission contended that the structure and system of provision of health services in Kenya has traditionally been, and continues to be determined by the National Health Policy and Strategic Plan, whose formulation is vested by the Fourth Schedule to the Constitution on the national government, and not in any legislation; that even in the absence of implementing legislation, the definition of 'national referral health facilities' and 'county health services' has been left to the National Government except for the threshold duties assigned to County Governments under Section 2, Part 2 of the Fourth Schedule to the Constitution; and that as at 27th August 2010, there were only two National referral facilities, i.e. KNH and MTRH.

[**23**] The KMPPDU supported the petition and took the position that the transfer of functions done by the Transition Authority through Legal Notices No. 137-182 of 9th August, 2013 and in particular, Sections 2(a) & (b) materially affected and undermined the referral system as they only recognized KNH and MTRH as the only two referral facilities and this was contrary to the provisions of the Fourth Schedule to the Constitution, whose purport was to retain primary care facilities at the County level and all referral facilities to be run by the National Government. The KMPPDU posited that level 4, 5 and 6 hospitals overlap in the services they deliver, since they tend to serve multiple Counties and thus, the transfer of these hospitals to County Governments affected the seamless management and administration of the national referral system.

[**24**] Katiba Institute was joined as an *amicus curia* but limited to making written and oral submissions. It did not therefore file any reply to the petition. Katiba Institute filed detailed written submissions in which it concluded that the petition filed by the appellants involved complex policy and constitutional issues, which the Court should consider resolving by requiring the parties to address the issues through a cooperative mechanism that is predicated on good faith and is participatory, and which appreciates the technical work already completed in regard to health sector functional analysis.

[**25**] The learned Judge of the High Court, upon considering the contending arguments presented by all parties and the applicable law, found that the court had jurisdiction to hear the appellants' petition, and summed up the appellants' petition as centered on the meaning of the phrases "national health referral facilities" and "county health services."

[**26**] In a nutshell the findings and conclusions of the learned Judge can be summarized as follows:

(i) That the Principle of *res judicata* should be invoked sparingly in constitutional matters and only invoked in rights-based litigation in very clear cases.

(ii) *Res judicata* is not applicable because although the previous suit JR 317 of 2013 and the appellants' petition were both anchored on LN No.137 to 182 of 2013, the parties in the two suits were not exactly the same and the real issues in contest in the two suits were different.

(iii) Article 6 &189 of the Constitution provides that governments at county and national levels are distinct and interdependent, and consultations and cooperation in mutual relations is imperative. Dispute Resolution mechanism is provided through Intergovernmental Relations Act 2012, and judicial proceedings can only be adverted to as a final resort.

(iv) The dispute before the court is not between two levels of government, that is, national and county government, or between two counties. In fact, the national and county governments are in agreement with the impugned legal notices. The Petitioners do not fall in either camp.

(v) The intention of the legislature in section 30-35 of the Intergovernmental Relations Act, is to deal with disputes that are only concerning different levels of government or between different counties and not disputes involving any other party.

(vi) The petition before the court is invoking the court's jurisdiction under Article 165(3)(d) to interpret the Fourth Schedule to the Constitution, and the petitioners have locus under Article 258(1) to seek such remedy from the High Court, and the court therefore had jurisdiction to hear the petition.

(vii) Devolution has brought in a new structure of governance which cannot be compared with the Local Authorities system as formerly provided under the repealed Constitution and the Local Government Act (repealed). The county governments are now semi-autonomous governments but interdependent with the national government.

(viii) The position of the respondents, the interested parties and amicus, that classification of hospitals into levels to determine whether they belong to national referral health system or county health system, is a policy issue to be determined in accordance with section 15 of the Sixth Schedule, which establishes guidelines for the devolution functions to be made by an Act of Parliament, is the correct position.

(ix) The court's jurisdiction is limited to interpretation of the law and does not include either the enactment of policy or the law as that is the mandate of Parliament for national legislation and county assemblies for county legislation as well as the national and county executives in the case of policy.

(x) The classification is based on the 2005-2010 National Health Sector Strategic Plan which was not based on any geographical zoning, and which was made before the promulgation of the Constitution 2010.

(xi) The Constitution has not classified the health facilities into certain levels as that is a matter of policy. The court has neither the mechanism nor the ability to determine the criteria to be used in categorizing hospitals.

(xii) The conclusion is that the application of the Fourth Schedule in determining which health facilities fall within which category, is the preserve of the national government as it would be more informed in that regard by several factors and details, which may not be within the knowledge of this Court. Both Article 187 of the Constitution and section 24 of the Act, explains the transfer of functions and powers between national government and counties, and between two counties.

(xiii) Prayers (a), (b), (c), (d), (e), (f), (g), (h), (i) and (k) seeking orders regarding devolution of referral health facilities cannot issue as the court has no mandate to purport to determine what referral facility should be, and at what level.

(xiv) Similarly, prayers (j) and (l) relating to Legal Notices No.137 to 182 of 2013 dated 9th August 2013, cannot be granted as it would not be proper for this court to quash the Legal notices in issue in light of the court's findings.

On these grounds, the learned Judge dismissed the petition.

[**27**] Aggrieved by the judgment the appellants have filed a memorandum of appeal, listing 16 grounds which can be condensed as follows:

(i.) That the learned Judge erred in law and misdirected himself on the definition of the phrase 'national referral health facilities';

(ii.) That the learned Judge erred in law and fact by finding that classification of hospitals into levels 1 to levels 6 was a matter of policy undertaken only by the Executive;

(iii.) That the learned Judge misdirected himself in finding that the High Court cannot adjudicate on matters concerning transfer of functions between the national government and the county governments;

(iv.) That the learned Judge misdirected himself in finding that the appellants' petition was on classification of hospitals and not transfer and ownership of the hospitals;

(v.) That the learned Judge erred in law and fact in failing to determine whether ownership and responsibility of hospitals transferred to the county governments could be done by way of policy;

(vi.) That the learned Judge erred in fact and law in failing to distinguish between the distribution of functions between the national and county governments as provided in the Constitution and transfer of functions from the national government to county government, roles played by the legislature and executive; and

(vii.) That the learned Judge erred in law and fact by failing to find that the petition was on enforcement of Section 23 of Part one of the Fourth Schedule to the Constitution which vests the ownership and responsibility of the 'national health facilities' in the national government.

[**28**] The 1st and 2nd appellants filed joint written submissions under **Rule 100** of the Court Rules. At the hearing of the appeal, it was agreed between the appellants that the 1st appellant would argue the appeal and highlight the submissions on behalf of both appellants. The appellants identified the issues for determination in the appeal as follows:

(i) What constitutes national referral health facilities on the effective date of the Constitution?

(ii) What constitutes county health services on the effective dates?

(iii) Whether the Constitution leaves it to the political branches to determine national referral health facilities through policy.

(iv) Whether the transitional authority transferred or redistributed health functions.

(v) Whether the impugned redistribution of the health functions violated the Constitution and Statutes.

(vi) Whether there are glaring errors in the impugned judgment.

(vii) Who bears the costs of the appeal?

[**29**] In regard to what constitutes national referral health facilities, the appellants argued that if the intention of the drafters was to have the National Government responsible only for the apex hospitals, that is, KNH and MTRH, nothing would have been easier than simply stating it in Section 23 of the Fourth Schedule; that the word "facilities" was the operative word for interpreting the section, given the historical context in which the Constitution was drafted; and that the Kenya health sector referred to level 2 to level 6 hospitals as national referral health facilities in their entirety and as a single component.

[**30**] In addition, that the referral may be done from a unit of lower complexity to a unit with higher resolution capacity, or downwards from a higher resolution capacity to a lower capacity for less complicated cases; and that it was only within the primary level hospitals that no

referrals could take place as the focus is on prevention. The appellants identified some of the level 4 National referral hospitals which were in Counties as Mathare District Hospital in Nairobi County, Mbagathi District Hospital in Nairobi County, National Spinal Injury Hospital in Nairobi County, and Alupe Sub-District Hospital in Busia County. They argued that it was necessary for the National Government to maintain good quality service delivery in these referral hospitals across the country without regard to county boundaries.

[**31**] In regard to what constitutes county health referral hospitals on the effective date, the appellants submitted that the Fourth Schedule assigns curative health care to the National Government, and public health care which includes preventive health care and primary health care, to County Governments; that county health facilities and pharmacies are those from which a range of primary health care services are provided, and these include maternity hospitals, vaccination, nutrition, rehabilitation and rescue centers; fixed and mobile clinics, and first aid facilities. These were all facilities which were formerly operated by defunct Local Authorities under the **Local Authorities Act** (repealed).

[**32**] The appellants observed that the phrase "county referral health facilities" does not appear anywhere in the Constitution and only appears in the Legal Notices and Policy papers of the Ministry of Health, in 2012 long after the effective date of the Constitution. They maintained that the Constitution did not refer to referral health facilities at county level, because counties were only responsible for primary health service delivery; that the Transition Authority did not appreciate that levels 2, 3, 4, and 5 health facilities, including the hospitals in the counties, were an integral part of the National Referral health system; and that the Constitution clearly assigned these facilities to the national government.

[**33**] The appellants further argued that Section 23 Part 1 of the Fourth Schedule to the Constitution has no provision giving the executive authority to come up with a policy on what should constitute national referral health facilities; and that the redistribution of health functions as done by the Transition Authority was in violation of **Article 6(3)** & **Article 62** of the Constitution, and Section 21 of the National Government Co-ordination Act, 2013. Furthermore, **Section 23** of the Fourth Schedule referred to a specific and definite historic entity known as national referral health facilities, and the drafters' intent should be derived from the meaning of the words which were clear from the text; that **Section 23** read together with **Section 28 of Part 1 of the Fourth Schedule** shows that what constitutes national referral health facilities is outside the purview of policy, and is a function of the sovereign power of the people, through constitutive edicts. On whether the Transition Authority transferred or redistributed health functions, the appellants contended that facilities associated with curative health services were not devolved and only those associated with public health were devolved. Therefore, the Transition Authority overstepped its mandate and usurped the constitutive powers of the sovereign people as it could not transfer what had not been devolved. In addition, the action of the Transition Authority is a violation of **Article 132(5)** of the Constitution which obligates the President to ensure that international obligations of the State, are fulfilled through relevant Cabinet Secretaries. In addition, the purported redistribution of the health facilities and functions was a violation of **Section 21** of the **National Government Coordination Act 2013** which forbids the transfer of assets of the National Government to County Government, and pursuant to which land occupied by levels 2 to level 5 health facilities, which were built using National Government funds, belong to the National Government.

[**34**] The appellants also submitted that the learned Judge was wrong in holding that KMPPDU did not file an answer to the petition or participate in the proceedings when the record showed that KMPPDU fully participated in the proceedings; that the learned Judge failed to note that the dispute was not the classification of hospitals, but the meaning of the phrase "national referral health facilities" and that the appellants' case was that, as at the effective date, the Constitution assigned responsibility to the National Government for whatever fell under what was covered by the phrase "national referral health facilities".

[**35**] In regard to costs, the appellants submitted that the costs should follow the event and that the appeal be allowed with costs.

[**36]** During the hearing of the appeal, there was no appearance for the AG. However, the AG had filed written submissions in which he opposed the appeal and supported the findings made by the learned Judge reiterating the submissions that he had made in the High Court. The AG maintained that the issue concerning the definition of national and county health facilities was not for the court, as that was a constitutional function of the defunct Transitional Authority; that Section 15(2)(b) of the Sixth Schedule to the Constitution read together with the **Transition to Devolved Government Act, Cap 265 A**, leads to the conclusion that it was the function of the Transition Authority to identify and transfer functions from the National Government to the County Government; and that this entailed a detailed process of functional analysis and competency assignments.

[**37**] With regard to the meaning of the phrase "national referral health facilities" and "county health services", the AG submitted that the Fourth Schedule to the Constitution shows that national referral health facilities are a mandate of the National Government while County health services are a mandate of the County Governments; and that the crux of the appeal is the definition assigned to these classes of health facilities. The AG restated that the appellants' interpretation that the national referral health facilities are level 2, 3, 4, 5 and 6 health facilities, and that these belonged to the National Government. While the County health services facilities and pharmacies refer to primary health services inherited from Local Authorities, is erroneous and will lead to an absurdity as it defeats the decentralization of State organs, their functions and services from the Capital of Kenya, which is a core objective of devolution; that the interpretation is narrow and will defeat the purpose of devolution. The AG asserted that KNH and MTRH were the only health facilities in Kenya that qualify the description of National referral health facilities, and both were established as National referral hospitals through **Legal Notices No. 109 of 1997** and **78 of 1998**, respectively. The AG submitted that the appeal was an invitation by the appellants to define what constitutes national referral health facilities and county health facilities, which would entail taking over the function already carried out by the defunct Transitional Authority. The AG therefore urged the Court to dismiss the appeal.

[**38**] The Council of Governors filed written submissions and was represented at the hearing of the appeal by **Mrs. Njiri-Kamau**, who highlighted the submissions. In brief, the Council of Governors opposed the appeal contending that the petition was rightfully dismissed as the court was not the best arbiter in policy issues that were raised in the petition.

[**39**] The Council of Governors identified what constitutes national referral health facilities and county health facilities under the Fourth Schedule to the Constitution, as the main issue for determination in the appeal. The Council of Governors agreed with the position taken by the AG that national health referral facilities mean only KNH and MTRH and not all public hospitals of levels 2 to level 6. The 3rd respondent urged that in interpreting national referral health facilities and county health services, the court should read and interpret Articles

174, 175, 186, 187 and the Fourth Schedule to the Constitution harmoniously, and urged the Court to reject the interpretation of the appellants as it defeats the decentralization of health services; and that the meaning and application of the Fourth Schedule can only be achieved through the strategy and policy making documents.

[**40**] The Nurses Union also filed written submissions and was represented at the hearing of the appeal by **Mr. Jaoko**, who highlighted the submissions. In brief, the Nurses Union urged that the appeal was merited and should be allowed. The Nurses Union identified the issue in the appeal as the unlawful and improper redistribution of health functions of national referral health facilities by the Transition Authority, between the national and county governments, resulting in the removal of the ownership of the national referral health facilities from the National Government to the County Governments. The Nurses Union urged that the judgment of the High Court be set aside, maintaining that the removal of the ownership of national referral health facilities from the National Government to the County Government, could only be done through a referendum under **Article 255(1)** of the Constitution.

[**41**] The Implementation Commission whose mandate has since expired did not file any submission nor was it represented at the hearing of the appeal. Likewise, the mandate of the Transition Authority had expired by the time of hearing the appeal.

[**42**] KMPPDU also did not file any written submissions, but, its counsel Mr. **Edgar Washika** appeared during the hearing of the appeal, and made oral submissions. **Mr. Washika** faulted the learned Judge for totally failing to consider the evidence and submissions that were made by KMPPDU in the High Court. Counsel drew the attention of the Court to paragraph 57 of the judgment of the High Court wherein, the learned Judge observed that KMPPDU did not file any answer to the petition, nor did it participate in the proceedings. Counsel submitted that this was a misdirection as the record of appeal contains an affidavit that was sworn in support of the petition by one **Sultani Matendechero**, the Secretary General of KMPPDU. He also drew the Court's attention to the submissions filed by KMPPDU in the High Court which were in the record of appeal, and the copy of proceedings of the High Court which shows that the submissions were highlighted by learned counsel **Mr. Makori** who appeared for KMPPDU. Counsel also referred to the affidavit of **Dr. Kigundu** and annexures which KMPPDU relied upon as key evidence, and which the learned Judge appeared to have ignored.

[**43**] Katiba Institute filed written submissions that were duly highlighted by learned counsel, **Mr. Ochiel**. Katiba Institute generally agreed with the judgment of the High Court except on two issues. The first issue is the holding that the classification of health facilities is purely a policy issue not for determination by the court. While Katiba Institute agreed that the classification of the hospitals was a matter of policy, it disagreed with the view of the court that it is not within the purview of the Court to interpret the phrases "national referral health facilities" and "county health facilities". According to Katiba Institute, these terms are used in the Constitution and are intended to have a legal meaning and the courts are therefore best suited to interpret the terms.

[**44**] The second issue that Katiba Institute challenged, is the finding by the learned Judge that the National Government has the exclusive mandate to determine the classification of the health facilities. Katiba Institute submitted that the classification is a power that has to be exercised by the executive and the two levels of government in line with the requirements of **Article 1(4)** of the Constitution, which provides that the power of the people is to be exercised at both National and County levels, and **Article 6(2)** which provides that the governments at the national and county levels are distinct and interdependent, and shall conduct their mutual relations on the basis of consultation and co-operation. Katiba Institute urged that although the assignment of functions was a policy issue, it was a matter to be resolved through collaborative efforts between the National and County governments.

[**45**] Katiba Institute also pointed out what appeared to be a contradiction in the judgment of the High Court, on the one hand finding that it could not conduct a classification, while on the other hand holding that national health referral facilities must only refer to KNH and MTRH. Katiba Institute submitted that in regard to classification, there was need for "a nuanced approach" that is devoid of assignment merely on the basis of the designation of health facility levels.

[**46**] As the appeal before us is a first appeal, we are obliged to reconsider, re-evaluate and analyze the facts and the arguments that were made before the High Court, in light of the grounds of appeal, the submissions made before us, the authorities cited and the applicable law, in order to arrive at our own conclusions in determining the issues raised in the appeal. (See **Kenya Ports Authority v Kuston (Kenya) Limited [2000] 2 EA 212**). It is for this reason that we have gone to great lengths to recapitulate the facts and arguments as presented before the High Court and before this Court.

[**47**] In our view, two main issues were raised in the petition. First is the issue regarding the interpretation of the words "national referral health facilities" in **Section 23** Part 1 of the Fourth Schedule to the Constitution, and the words "county health facilities and pharmacies" in **Section 2(a)** Part 2 of the same schedule. The second issue is whether LN No. 137 to 182 violated the Fourth Schedule to the Constitution in regard to distribution of functions between National Government and County Governments.

[48] In regard to the issue of jurisdiction, **Article 165 (3)(d)** of the Constitution provides the interpretive jurisdiction of the High Court as follows:

> **"(3) Subject to clause (5), The High Court shall have-**
>
> **(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of –**
>
> **(i) the question whether any law is inconsistent with or in contravention of this Constitution;**
>
> **(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of this Constitution;**
>
> **(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and**

(iv) a question relating to conflict of laws under Article 191."

[**49**] A simple reading of Article **165(3)(d)** shows that the High Court has powers to hear any question regarding the interpretation of the Constitution. Thus, the High Court has an interpretive jurisdiction in regard to the Constitution, as well as the jurisdiction to protect the Constitution by ensuring that any person to whom the Constitution has entrusted powers, exercises that power within its confines and that the power is exercised fairly and in accordance with the process provided.

[**50**] **Article 165(3)(d)(iii)** specifically gives the court power to determine any question relating to "constitutional powers of State organs in respect of county governments, and any matter relating to the constitutional relationship between the levels of government". The learned Judge was also alive to **Article 189(3) & (4)** of the Constitution that provides for reasonable efforts to be made for settlement of disputes between the different levels of government, as well as the **Inter-Governmental Relations Act** of 2012, enacted pursuant to **Article 189(4)**. We are in agreement with the conclusion of the learned Judge that **Article 189** of the Constitution was not applicable because there was no dispute between the National and County governments. Both were on the same side in regard to the distribution of the powers and functions as effected through LN No. 137 to 182. Like the learned Judge, we are of the view that the High Court had jurisdiction under **Article 165(3)(d)** to interpret the Fourth Schedule to the Constitution.

[**51**] The issue that we must address is whether the learned Judge misdirected himself in finding that classification of hospitals is a matter of policy and that the jurisdiction of the High Court is limited to interpretation of the law, and does not include enactment or interpretation of policy. In this regard the learned Judge rendered himself as follows:

> ***"90. …the Constitution has not classified the health facilities into certain levels, as that is a matter of policy. I therefore politely decline to get into the arena of defining what the phrases 'national referral health facilities' and 'county health facilities' are or what hospitals belong to what category. I say so because the Court is not the maker of the health policy in Kenya. The Court has no ability or mechanism to determine the criteria to be used to categorize hospitals, and it does not have the capacity to examine the equipment, facilities and manpower available in the hospitals, as that is the exclusive mandate of the National Government through the Executive. I am therefore in agreement with the submissions by the Respondents, the 2nd Interested Parties and the Amicus Curiae that this Court cannot determine the issues raised herein as it would amount to implementing and making policies for and on behalf of the Executive. To paraphrase that finding, the Court will be stepping into the mandate of the Executive state organs and agencies which act is generally constitutionally frowned upon …***
>
> ***91. Accordingly, I am clear in my mind that application of the Fourth Schedule in determining which health facilities fall within which category is the preserve of the National Government as it would be more informed in that regard by several factors and details which may not be within the knowledge of this Court. I also find that issues of transition are best left to the relevant State organs and agencies such as the 2nd Respondent and the 2nd Interested Party as they would be the best judges of the merit of doing so and they would have all the necessary information critical in making such decisions."***

[**52**] In our view, the issue regarding the interpretation of the words "national referral health facilities" in **Section 23** part 1 of the Fourth Schedule to the Constitution and the words "county health facilities and pharmacies" in **Section 2(a) Part 2** of the same Schedule, are issues regarding the interpretation of the Constitution, in so far as the words are used in the Fourth Schedule in relation to the Constitution. The issue is whether the learned Judge properly interpreted the Constitution and the Fourth Schedule in holding:

> ***"that the classification of the hospitals into levels and eventually into national referral health facilities or national health system and county health facilities and system, is a policy issue to be determined in accordance with the provisions of section 15 of the Sixth Schedule which establishes guidelines for the devolution of functions to be made by an Act of Parliament."***

[**53**] In ***Re: The Matter of the Interim Independent Electoral Commission,*** [2011] eKLR, the Supreme Court stated that in interpreting the Constitution the courts should give constitutional provisions a liberal and purposive interpretation. The Supreme Court adopted the words of *Mohammed A. J* in the **Namibian case of S. V Acheson, 1991 (2) S.A. 205** where he stated that;

> ***"The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a 'mirror reflecting the national soul'; and the identification of the ideals and …. aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion."***

[**54**] In the same decision ***Re the Matter of the Interim Independent Electoral Commission,*** the Supreme Court reiterated that constitutional interpretation has its distinct features, as compared to ordinary statutory interpretation, the former consistently exalting substance and intent, rather than form. At paragraph 86 of that decision, the Supreme Court authoritatively stated as follows:

> ***"The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20 (4) and 259 (1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction… The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts."***

[**55**] The substantive constitutional provisions that underpin the Fourth Schedule to the Constitution, are **Articles 185(2), 186(1)** and **187(2).** In order to understand the Fourth Schedule, it is necessary to set out these provisions.

"185 (2) A county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule.

186 (1) Except as otherwise provided by this Constitution, the functions and powers of the national government and the county governments, respectively, are as set out in the Fourth Schedule.

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

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

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

(2) If a function or power is transferred from a government at one level to a government at the other level –

(a) Arrangement shall be put in place to ensure that the resources necessary for the performance of the function or exercise of the power are transferred; and

(b) Constitutional responsibility for the performance of the function or exercise of the power shall remain with the government to which it is assigned by the Fourth Schedule." (Emphasis added)

[**56**] Two key words, that is, "functions" and "powers" have been used repeatedly in the above quoted Articles, and it is important to decipher the meaning of these words in order to understand the Fourth Schedule to the Constitution. That Schedule is headed "**Distribution of Functions Between the National Government and the County Governments**." The use of the words "functions" and "powers" together in Articles 185 and 186 of the Constitution, and "function or power" in Article 187 of the Constitution, is evidence that the two words do not mean exactly the same thing. This is because the words "and" and "or" are both conjunctions whose use always accompanies two things. There would be no need to use both "functions" and "powers" with a conjunction if they mean the same thing. Article 185(2) and 187(1)(a) brings out the distinction clearly when it talks of perform/performance of functions and exercise of powers. This means that "*function*" refers to the actual activity that is to be performed or undertaken by the county or national government, and whose end result is the delivery of a public service, while the term "*power"* refers to the authority of a county or national government which is exercised through legislation, regulations, or administrative directions.

[**57**] A plain reading of **Article 185(2)** of the Constitution shows that it gives legislative authority to County Assemblies to make laws for the effective performance of the functions and exercise of the powers of the County Government, as assigned under the Fourth Schedule. **Article 186(1)** provides for the assignment of functions and powers of the National Government and County Government as stated in the Fourth Schedule, unless otherwise stated in the Constitution. **Article 187** is concerned with the transfer of the functions and powers between levels of government, with the constitutional responsibility for the performance of the function or exercise of the power remaining with the government to which it is assigned by the Fourth Schedule.

[**58**] Articles 185, 186 and 187, all talk of "functions" and "powers." Article 186(1) expressly provides that the "functions and powers" of the National Government and the County Governments, are as set out in the Fourth Schedule. This shows what the Fourth Schedule is intended to achieve, that is, distribution or assignment of functions and powers between the two levels of government. Therefore, the heading to the Fourth Schedule "distribution of functions between the national government and the county governments" must be read as referring to "functions and powers" in order to give effect to the intention of the framers of the Constitution. Both Part I and 2 of the Fourth Schedule must be interpreted in that light.

[**59**] In Part 1 of that Schedule, the functions of the National Government are listed in 35 sections. Under Section 23 of Part 1, ' **national referral health facilities'** is listed, while under Section 28 of the same Part 1, '**health policy'** is listed. Both are thus distributed as functions and powers assigned to the National Government. The parties are generally in agreement with that assignment. The dispute, in our view, is in the interpretation and understanding of what has been assigned to national government under what is listed as "national referral health facilities" or in other words, the content of that function and the power related thereto.

[**60**] Under Part 2 of the Fourth Schedule, the functions and powers of the County Governments are listed in 14 sections. In regard to health services, Section 2 of Part 2 lists the following;

"County health services, including, in particular –

(a) county health facilities and pharmacies;

(b) ambulance services;

(c) promotion of primary health care;

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

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

(f) cemeteries, funeral parlours and crematoria; and

(g) refuse removal, refuse dumps and solid waste disposal."

[**61**] The list is relatively clear, and consistent with our understanding of "functions" as already explained, as they show the activities that are to be performed. What is in issue is what is included in the content of the activities and the exercise of the powers related to "**county health facilities and pharmacies"** listed as a function of county government under Part 2 - 2(a) of the Fourth Schedule as opposed to "national referral health facility" listed as a function and power of national government under No. 23 in Part 1 of the Fourth Schedule. There appears to be some overlap in the distribution of functions between the two levels of government in regard to health services. We shall come back to this in a short while.

[**62**] **Article 186, 187 and 189** of the Constitution, provide appropriate direction in regard to the performance of functions and exercise of powers, transfer of functions, and cooperation in the functions and exercise of powers between the national and county governments as assigned in the Fourth Schedule. **Article 259(1)(a**) of the Constitution requires us to interpret the Constitution in a manner that promotes its purposes, values and principles as cautioned by the Supreme Court so as to give effect to the purpose of the Constitution, bearing in mind the historical, social and political realities (amongst others), that culminated in the devolved two tire system of government. Of importance here is **Article 174** of the Constitution that provides for the objects of devolution, which any interpretation thereof must give effect to.

[**63**] Regarding distribution of functions and powers, Section 15 and 16 of Part 4 of the Sixth Schedule to the Constitution, provides for transfer of functions to the County Governments to be made by Act of Parliament. We reproduce herein the sections:

"15.(1) Parliament shall, by legislation, make provision for the phased transfer, over a period of not more than three years from the date of the first election of county assemblies, from the national government to county governments of the functions assigned to them under Article 185.

(2) The legislation referred to in subsection (1) shall—

(a) provide for the way in which the national government shall—

(i) facilitate the devolution of power;

(ii) assist county governments in building their capacity to govern effectively and provide the services for which they are responsible; and

(iii) support county governments;

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

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

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

16. Division of Revenue

Despite Article 217(1), the first and second determinations of the basis of the division of revenue among the counties shall be made at three year intervals, rather than every five years as provided in that Article."

[**64**] Pursuant to Section 15 and 16 of the Sixth Schedule, Parliament enacted the Transition to Devolved Government Act, 2012. Sections 23 and 24 of that Act provides the procedure for phased transfer of functions as follows:

"Procedure for phased transfer of functions

23.(1) The Authority shall, by notice in the Gazette at least thirty days before the first elections under the Constitution, identify functions which may be transferred to the county governments immediately after the first elections under the Constitution.

(2) After the initial transfer of functions under subsection (1), every county government shall make a request in the prescribed manner to the Authority for transfer of other functions in accordance with section 15 of the Sixth Schedule to the Constitution.

(3) The Authority shall, upon the request of a county government under subsection (2), determine whether a county government meets the criteria set out under section 24, to allow the transfer of a function.

(4) The Authority shall— (a) consider and dispose of any application under subsection (2); and (b) make its determination within sixty days of receipt of such an application.

(5) The decision of the Authority under subsection (4) shall be based on the criteria for transfer of functions, provided under section 24.

(6) Where the Authority determines that a county government does not meet the criteria for the transfer of function under section 24, it shall propose clear and practical measures to build the capacity of the county government during the transition period to enable the county government undertake its functions within the shortest time possible.

(7) A county government may appeal to the Senate against a decision made under subsection (6).

(8) A decision of the Senate on the appeal, by majority vote in accordance with Article 123 of the Constitution, shall be binding on the Authority.

Criteria for transfer of function.

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

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

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

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

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

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

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

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

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

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

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

[**65**] The above provisions illustrate that the devolution of power, which includes transfer of functions from the National Government to the County Governments, was to be done as provided in the Transition to Devolved Government Act, 2012. In short, the initial transfer of functions was to be done at least 30 days after the first election under the Constitution; the functions were to be identified and transfer done in a phased manner, as provided in that Act. In addition, Section 23(2) provides for transfer of functions at the request of a County Government, after the initial transfer has been done. It is not disputed that the initial transfer of functions and powers to County Governments, was done through Legal Notice No. 16 of 2013.

[**66**] Legal Notices Nos. 137 of 2013 to 182 of 2013 which triggered the litigation before us, were individual notices in regard to each of the 47 counties, transferring functions to each of the County Governments. The legal notices which were all identical, transferred identical functions to each of the specific counties as mentioned in the specific legal notice. Our focus is the county health services function and we hereby reproduce the material particulars of Legal Notice No. 137 of 2013 which was in regard to Baringo County to show the contents of the notices in this regard.

"Legal Notice No.137

THE CONSTITUTION OF KENYA

THE TRANSITION TO DEVOLVED GOVERNMENT ACT, 2012

No. 1 of 2012

TRANSFER OF FUNCTIONS

Pursuant to section 15 of the Sixth Schedule to the Constitution as read with section 23 and 24 of the Transition to Devolved Government's Act 2012 and further to the Legal Notice No. 16 of 2013, the Transition Authority approves the transfer of the functions specified in the Schedule to the county government of Baringo, with effect from the 9th August 2013:

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

SCHEDULE

1. Agriculture

….

2. County health services:

(a) county health facilities and pharmacies including –

(i) county health facilities including county and sub-county hospitals, rural health centres, dispensaries, rural health training and demonstration centres, Rehabilitation and maintenance of county health facilities including maintenance of vehicles, medical equipment and machinery, inspection and licensing of medical premises including reporting;

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

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

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

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

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

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

(e) enforcement of waste management policies, standards and regulations; in particular-

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

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

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

(3) Control of air pollution …"

[**67**] As already stated, Legal Notice No. 16 of 2013 that is referred to in Legal Notices No. 137 of 2013 to 182 of 2013, was in regard to the initial transfer of functions and powers. It limited county health facilities and pharmacies to health services being provided by the relevant municipalities in Nairobi County, Kisumu County, Mombasa County, Narok County and Uasin Gishu County. LN No. 137 of 2013 addresses the transfer of functions after the initial transfer of functions. Under Section 23(2) of the Transition to Devolved Government Act, it is a transfer that is initiated by the county governments through a request to the Transition Authority.

[**68**] In LN. No. 137 of 2013, among the functions allocated to the County Governments is county health services, which includes county health facilities and pharmacies. County health facilities and pharmacies has been explained in the gazette notice as including county and sub-county hospitals, rural health centres, dispensaries, rural health training and demonstration centres, Rehabilitation and maintenance of county health facilities including maintenance of vehicles, medical equipment and machinery, inspection and licensing of medical premises including reporting. The county health pharmacies are indicated as including specifications, quantifications, storage, distribution, dispensing and rational use of medical commodities. Similarly, there is explanation of other functions such as promotion of primary health care and ambulance services. It is evident that there is an attempt in the gazette notice to interpret what "county health facilities" and "county health pharmacies" entail, and in the same vein what the "County health services" are expected to provide.

[**69**] The appellants interpreted Section 23 Part 1 of the Fourth Schedule to the Constitution as vesting the ownership and responsibility of the national health facilities in the National Government, thereby arguing that there has been a transfer of ownership of health facilities, ostensibly including the land on which the facilities sit. It is appropriate that we examine "*ownership*" as opposed to "*transfer of functions and powers."* According to Black's Law Dictionary, 10th edition, ownership is defined as;

> "**The bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others. Ownership implies the right to possess a thing regardless of any actual or constructive control. Ownership rights are general, permanent and heritable"**.

[**70**] Chapter Five of the Constitution is the reference-point, in seeking clarity on the issue of land ownership and land administration. **Article 61** of the Constitution affirms that all land belongs to the people of Kenya collectively, as a nation, as communities, and as individuals. **Article 62** of the Constitution specifies the manner in which public land vests, as well as the institution responsible for its administration. **Article 62(2)** of the Constitution provides that public land shall vest in and be held by a County Government, in trust for the people resident in the county, and shall in some specified instances be administered on their behalf by the National Land Commission, whilst in other specified instances, shall be vested in and held by the National Government in trust for the people of Kenya, and administered on their behalf by the National Land Commission.

[**71**] **Article 62(2)(b)** of the Constitution specifically vests in the County Government public land classified as lawfully held, used, or occupied by any State organ, other than as lessee under a private lease, but excludes land that is held or occupied by a National state organ. **Article 62 (4)** of the Constitution provides that:

> ***"[P]ublic land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use."***

[**72**] Given the definition that we have already given to "function" and "power" as an activity leading to delivery of public service, and authority of a county or national government, it is apparent that ownership of land as used in the Constitution is a totally different concept. Transfer of functions and powers between levels of government is articulated in **Article 187** of the Constitution that we have reproduced at paragraph 55 above. The key considerations for such transfer are effective performance or exercise of the function or power, and such transfer being consistent with the legislation under which the function or power is to be exercised. The issue of transfer of ownership of land occupied by the health facilities does not arise as that is public land. The Third Schedule simply lists the functions and does not deal with ownership. The issue of ownership of land cannot arise in the transfer of functions and powers, as the procedure provided in the Constitution is completely different. Ownership must therefore be separated from the issue of functions and powers under the Fourth Schedule.

[**73**] In addition, Article 187 requires the transfer of function and power to be done by way of an agreement between the two levels of government, and adequate resources necessary for the performance of the function to accompany the transfer. In our view, such resources do not necessarily include ownership of land. The transfer of functions may take the form of a legislative or executive transfer of authority, and it can be either a general transfer of functions where the function is transferred to County Governments across the whole country, or a specific transfer where only specific counties are assigned the function

[**74**] On the issue of distribution of functions, although section 23 of the Fourth Schedule assigns national referral health facilities as functions of national government, no definition or explanation of "national health referral facilities" has been provided in that Schedule or any other part of the Constitution. It is instructive that 'national health referral facilities' is referred to under Schedule Four as a function and a power not an asset. It is also worthy of note that LN No. 137/2013 to LN No.182/2013 has not made any mention of national health referral facilities, even though the Legal Notices includes county health facilities and pharmacies under county health services, and has explained county health facilities as already mentioned. The issue is whether the appellants' broad definition of national health facilities to include all referral health facilities, that is level 2 to level 5, is consistent with the Fourth Schedule. In our view, such an interpretation does not flow from the Fourth Schedule. The appellants appear to be applying what they consider to be the international standards in the health sector. However, it is apparent from the affidavits that were availed by the Transition Authority that the Authority undertook extensive consultation and we have no reason to believe that it did not take into account such international standards. The devolution process being a process unique to our country, international standards must be moulded to suit our system.

[**75**] We have already made reference to Section 15 and 16 of the Sixth Schedule pursuant to which the Transition to Devolved Government Act was enacted. In accordance with section 15 (2)(b) of the Sixth Schedule, the Transition to Devolved Government Act provides the criteria for the transfer of functions under Section 24. The factors to be taken into account include, the existence of legislation relating to the function applied for; the existence of a framework for service delivery to implement the function; the identification or establishment of administrative units related to the function; arrangements for and extent of further decentralization of the function; the existence of required infrastructure and systems to deliver the function; the existence of the necessary financial management system in the county government; the existence of an approved plan by the county government in relation to the function; any other issue as agreed following consultations between the Transition Authority, county government, the Commission for the Implementation of the Constitution and the Commission on revenue allocation. The Act requires such transfer of functions and powers to be initiated by the county governments, and the Transition Authority had the obligation to consider any application for transfer of functions and determine whether the necessary criteria for transfer of functions had been met. As already stated, the affidavits relied upon by the Transition Authority and the Council of Governors, were sufficient to demonstrate that there were necessary consultations and public participation, between the County Governments, the National Government, relevant bodies and the public before LN No. 137 of 2013 was enacted.

[**76**] In considering the national health referral facilities function, the issue of classification of hospitals arose. Neither the Fourth Schedule nor the Constitution makes any reference to classification of hospitals. From the submissions that were made before us, the 1st and 2nd appellants relied on the classification of hospitals as formerly existing in the former system of central government and local authorities. It was submitted that the central government ran health facilities from the lowest referral facility at level 2 to the highest referral facility at level 6, while local authorities had their own health facilities which included county health centres, municipal dispensaries and hospitals. This was deponed to in an affidavit sworn by **Dr. Simon Kigondu**, a consultant obstetrician gynecologist, who was at the time of swearing the

affidavit, the interim chair of the Kenya Medical Consultants Forum. Dr. Kigondu swore that apart from MRTH and KNH which are national referral facilities at level 6, there are other national referral health facilities at level 2, 3, 4 and 5. It is the transfer of the functions in regard to the national health referral facilities at level 2, 3, 4 and 5, to the county governments that is objected to.

[**77**] LN No.137-182 of 2013, relates to transfer of functions and as already adverted to, Section 15 of the Sixth Schedule to the Constitution read together with the Transition to Devolved Government Act, provide clear direction on how such transfer of functions is to be done. However, the Legal Notices have been challenged as effectively transferring assets of the National Government to County Government without following the laid down requirement, by transferring referral health facilities at level 2, 3, 4 and 5, which belonged to National Government, to the County Governments. We have already addressed and distinguished the issue of transfer of ownership, as opposed to transfer of functions and powers. The legal notices have only transferred functions and powers, and does not have any effect on ownership of land which is public land.

[**78**] Secondly, it was alleged that the transfer of functions in regard to the referral health facilities was done without appropriate consultations. The importance of public participation cannot be overemphasized. **In the Matter of the National Land Commission [2015] eKLR**, Mutunga, CJ underscored this as follows:

> ***"[352] The participation of the people is a constitutional safeguard, and a mechanism of accountability against State organs, the national and county governments, as well as commissions and independent offices. It is a device for promoting democracy, transparency, openness, integrity and effective service delivery. During the constitution-making process, the Kenyan people had raised their concerns about the hazard of exclusion from the State's decision-making processes. The Constitution has specified those situations in which the public is assured of participation in decision-making processes. It is clear that the principle of public participation did not stop with the constitution-making process; it remains as crucial in the implementation phase as it was in the constitution-making process…"***

[**79**] We note from the affidavit of **Kinuthia wa Mwangi** sworn on 20th January 2014, that consultation and public participation actually took place before the legal notices were issued. In his affidavit, Kinuthia wa Mwangi has given details of the consultation and public participation process undertaken by the Transition Authority with County Governments, health professionals, health professional bodies, associations in health sectors, Ministries, departments and agencies, as well as the public. The affidavit also gives details of the considerations that were undertaken in transferring the functions in regard to health facilities for levels 2 to 5. He explained that the consultations included proposals and consensus on the categorization of the health facilities as the functions assigned to the different levels of governments were generally broad and non-specific.

[80] Given the extent of consultation and participation that is required in the devolution exercise, the distribution of functions and powers to the two levels of government in the Fourth Schedule that were broad, was not by accident as this paved way for consultation and compromise to give content to the function during the transfer of the functions distributed. Such consultation and public participation is consistent with devolution and access to services as per Article 6(1) of the Constitution, and the objects of devolution as provided under Article 174 of the Constitution. Moreover, Article 189(1) of the Constitution requires cooperation between the two levels of government, and this includes consulting, assisting and supporting each other, exchanging information, coordinating policy and cooperating in the performance and exercise of powers. It is obvious that the appellants and some of the respondents may have been dissatisfied with the outcome of the consultations and public participation that the Transition Authority spearheaded. However, that did not vitiate the process. It is sufficient that there was meaningful participation and consultation, and that the decision to transfer functions from the National Government to County Governments as published in LN. No. 137 to 182 of 2013 was taken after elaborate participation and consultation.

[**81**] We concur with the learned Judge and reiterate that the issue of classification of Health facilities is not one that arises from interpretation of the Constitution, or the Fourth Schedule. While national referral health facilities is distributed as a function and power of the national government, that function is tied to policy function which is a mandate of the National Government to be undertaken in consultation, with public participation, and in accordance with the constitutional provisions. The general reference to international standards as regards devolved functions cannot apply, as Kenya has a unique devolution system which must be implemented in accordance with our local situation and laws.

[**82**] We cannot end this judgment without making reference to the Health Act, No. 21 of 2017, a statute that came into force on 7th July, 2017 during the pendency of this appeal. That statute provides for the classification of levels of health care and this has been done in the First Schedule to the Act, where levels of health care delivery are provided from level 1 to level 6. We are alive to the fact that this statute cannot act retrospectively. However, being an Act of Parliament that is now in place we cannot ignore it, and therefore take judicial notice of it. More so, since it confirms our position that neither the Constitution nor the Fourth Schedule to the Constitution provided for this classification, hence the necessity for the Health Act, 2017 that wholly addressed the issue. We conclude that the function of national referral health facility can only be understood in light of the Health Act that is now in place.

[**83**] As regards county referral health facilities, neither the Constitution nor the Fourth Schedule to the Constitution makes any reference to county referral health services. The Fourth Schedule makes reference to county health services and the activities related thereto, which have been listed by the Transition Authority in LN. Nos. 137 to 182. Thus the notices are consistent with the Fourth Schedule and the Constitution.

[**84**] In conclusion, we find no merit in this appeal. It is accordingly dismissed. As the appeal raised issues that were of public interest, each party shall bear their own costs in this appeal.

Dated and Delivered at Nairobi this 22nd day of May, 2020.

M. K. KOOME

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR