REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 391 OF 2017.

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI.

AND

IN THE MATTER OF: AMENDMENT OF SECTIONS 35A (5) & 35 I (B) OF THE PHARMACY AND POISONS ACT UNDER THE CLINICAL OFFICERS (TRAINING, REGISTRATION AND LICENSING) BILL, 2016

AND

IN THE MATTER OF: PHARMACY & POISONS ACT AND CLINICAL OFFICERS (TRAINING, REGISTRATION AND LICENSING) BILL, 2016

AND

IN THE MATTER OF: ARTICLES 21, 43, 109, 110, 113 118, 122 & 123 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTION 133 OF THE STANDING ORDERS OF THE NATIONAL ASSEMBLY ON COMMITTEE STAGE

AND

IN THE MATTER OF: THE DECISION ON 5TH APRIL, 2017 BY THE 1ST & 2ND RESPONDENTS TO PERMIT INTRODUCTION OF AMENDMENT TO PHARMACY AND POISONS ACT WITHIN CLINICAL OFFICERS' BILL 2016 AT COMMITTEE STAGE AND PASSAGE AND SUBSEQUENT ASSENT INTO LAW

BETWEEN

REPUBLIC……..APPLICANT

VERSUS

THE NATIONAL ASSEMBLY.....1ST RESPONDENT

THE SPEAKER OF NATIONAL ASSEMBLY..... 2ND RESPONDENT

THE SPEAKER OF SENATE.....3RD RESPONDENT

THE HON.ATTORNEY GENERAL…….....4TH RESPONDENT

AND

PHARMACY AND POISONS BOARD.....1ST INTERESTED PARTY

KENYA PHARMACEUTICALS

DISTRIBUTORS ASSOCIATION…….....2ND INTERSTED PARTY

NATIONAL DRUG QUALITY

CONTROL LABORATORY……..…….....3RD INTERSTED PARTY

EX PARTE DR. GEORGE WANG'ANG'A

JUDGEMENT

1. By a Motion on Notice dated 30th June, 2017, the ex parte applicant herein, **Dr. George Wang'ang'a,** seeks the following orders:

1. An Order of *Certiorari* to remove to this Honourable Court and quash all attendant proceedings and the decision of the 1st Respondent dated 5th April, 2017 that passed the motion to amend Sections 35 A (5) & 35 I (b) of the Pharmacy and Poisons Act under Clinical Officers (Training, Registration & Licensing) Bill 2016;

2. A DECLARATION that the amendment to Sections 35A(5) & 35I(b) of the Pharmacy and Poisons Act under section 34 of the Clinical Officers (Training, Registration & Licensing) Bill 2016 was passed in a manner that breached the express provisions of the Constitution and is thus unconstitutional.

Applicant's Case

2. According to the applicant, he is qualified and registered to practice as a pharmacist pursuant to sections 7 and 8 of the ***Pharmacy and Poisons Act*** (Cap. 244), Laws of Kenya (hereinafter referred to as "the Act") and holds a Bachelor of Pharmacy (B.Pharm) Degree from the University of Nairobi, and an MBA degree in management. He is employed by the Public Service Commission and has risen through the ranks and currently is an officer in Job Group "Q", stationed at the National Quality Control Laboratory (NQCL) as Deputy Director.

3. It was his case that the ***Clinical Officers (Training, Registration and Licensing) Bill, 2016*** (hereinafter referred to as "the Bill") which was a Private-member's Bill and was passed by the National Assembly on 5th April, 2017, was assented into law on 21st June, 2017. The said Bill makes provision for training, registration and licensing of Clinical Officers; to regulate their practice and to provide for the establishment, powers and functions of the Clinical Officers Council. The new law repeals and replaces the existing ***Clinical Officers (Training, Registration and Licensing) Act,*** Cap. 260 of the Laws of

Kenya.

4. It was however averred that section 34 of the said subject Bill amends sections 35A(5) and 35I(b) of the ***Pharmacy and Poisons Act*** and that the said amendments were inserted by the National Assembly in the Bill during the Committee Stage amendments to the Bill through a notice of Motion.

35. It was averred that the substantive amendment to the Act in the said Bill, is a different subject matter and unreasonably or unduly expands the subject of the Bill and is not in logical sequence to the subject matter of the Bill.

6. Based on Articles 21 and 43 of the Constitution, it was averred that one of the fundamental means by which any state may guarantee the highest attainable standard of health is by provision of, through internationally accepted standards of quality control systems, quality, efficacious and safe medicines to its citizens. According to the applicant, by the existing legislation, section 35I(b) as read with section 35A(5) and 35B of the Act, partly fulfilled the requirements of the aforementioned Article 21 of the Constitution, as a means of anchoring an internationally accepted standard quality control system for provision of quality, efficacious and safe medicines, by providing thus:

35I(b) The Director (of National Quality Control Laboratory) shall have power to inspect premises (Pharmaceutical Manufacturing Companies) and issue certificates of compliance:

35 A (5). The Director of the National Drug Quality Control Laboratory or any member of the Laboratory staff authorized by him shall have power to enter and sample any medicinal substance under production in any manufacturing premises and certify that the method of manufacture approved by the Board is being followed.

35B Every person who is granted a manufacturing licence under section 35A shall comply with the good manufacturing practices (GMP) prescribed by the Board.

7. It was the applicant's case that the issuance of the aforementioned statutory certificate of compliance to Good manufacturing Practices (GMP) is universal certification of GMP to the manufacturers of medicines by Governments and without which Pharmaceutical Manufacturing companies are at liberty to manufacture dangerous counterfeit and substandard medicines, which danger is imminent and real to the general Public.

8. It was contended that annexed and bound to the impugned Bill was an amendment to the Pharmacy and Poisons Act, by way of deletion of the above section 35I(b) and also, substitution of Director of National Quality Control Laboratory with the Pharmacy and Poisons Board in section 35A(5), which was then passed by the National Assembly on 5th of April, 2017. The applicant's case was that whereas the aim and or motivation of the amendment was to transfer the GMP inspection functions from the National Quality Control Laboratory to the Pharmacy and Poisons Board, the resultant imminent danger of exposure of Kenyan citizens to dangerous substandard and counterfeit medicines due to the deletion of section 35I(b) would have been mitigated had the National Assembly opted for substitution of the Director of National Quality Control Laboratory with the Pharmacy and Poisons Board, like was with section 35A(5), so as to retain the international certification system for control of manufacture of medicines.

9. It was revealed that the Chief of Staff and Head of Public Service, **Dr. Joseph K. Kinyua**, vide letter Ref: SH/9/7 Vol (18), on 18th April, 2017, wrote to the Attorney General **Hon. Prof Githu Muigai** requesting him to prepare an appropriate memorandum to the President, advising him not to sign the

impugned the Bill into law in its current form which letter was copied to the Speaker of the National Assembly, Cabinet Secretary of Health and the Majority Leader of the National Assembly.

10. It was contended that on 5th April, 2017, during the morning session when the National Assembly was debating the Bill at the committee stage of the whole house, an unrelated substantive amendment to ***Pharmacy and Poisons Act***, disguised as an amendment to the ***Clinical Officers (Training, Registration and Licensing) Bill, 2016***, was introduced as an amendment to the subject bill. In the afternoon, the same date of 5th April, 2017, the said substantive amendment to the Act, under the impugned Bill underwent the 3rd Reading and subsequently, passed by the National Assembly as part (section 34) of the ***Clinical Officers (Training, Registration and Licensing) Bill, 2016***.

11. The applicant described the proceedings on the said day in the National Assembly as follows:

i. **The 3rd Notice at page 7 of the Order paper of the business of the National Assembly orders of the day Wednesday, April 05, 2017 at 9.30 a.m, under the Clinical Officers (Training, Registration and Licensing) Bill, 2016, read thus:**

Notice is given that the Member for Kikuyu (Hon Kimani Ichungwah) intends to move the following amendment to the Clinical Officers (Training, Registration and Licensing) Bill, 2016 at the Committee Stage:

NEW CLAUSE 35

THAT ***the Bill be amended by inserting following new Clause immediately after clause34-***
35. The Pharmacy and Poisons Act is amended-

a. ***in section 35A by deleting the words ""The Director of the National Drug Quality Control Laboratory or any member of the Laboratory staff authorized by him" appearing in subsection (5) and substituting therefor the words " "The Board or any person authorized in writing by the Board"***

b. ***In section 35 I by deleting paragraph (b).***

c. ***(Annexed hereto and markedGW-2 is true copy of the order paper of the business of National Assembly on 5th April, 2017);***

12. It was averred that the Hansard of the National Assembly of the morning of 5th April, 2017 on the said ***Clinical Officers (Training, Registration and Licensing) Bill, 2016***, inter alia**,** provides thus;

New Clause 35

Hon. Ichung'wah: **Hon. Temporary Deputy Speaker, I beg to move:**
THAT, the Bill be amended by inserting following new Clause immediately after clause 34-Amendment of sections 35A and 35 I of Cap 244:

35. The Pharmacy and Poisons Act is amended-

(a) in section 35A by deleting the words "The Director of the National Drug Quality Control Laboratory or any member of the Laboratory staff authorized by him" appearing in subsection (5) and substituting therefor the words "The Board or any person authorized in writing by the

Board"

(b) In section 35 I by deleting paragraph (b).

The import of this amendment is to harmonise the powers of the Pharmacy and Poisons Board and those of the National Drug Quality Control Laboratory especially with respect to inspection of premises of registered pharmacists. What happens is that under the Pharmacy and Poisons Board Act, Section 35A erroneously gives the powers to inspect these premises to the National Drug Quality Control Laboratory, whereas, under the Act, the Laboratory was in principle not intended to be inspecting premises but just to look at issues to do with drugs that will be dispensed from those pharmacies. Therefore, the amendment is just to clear that ambiguity within the Act and give inspection powers to the Board. The director of the Laboratory can also be appointed as an agent to the Board. It is that simple

……

(Question, that the new clause be read a Second Time, put and agreed to)
(The new clause was read a Second Time--Question, that the new clause be added to the Bill, put and agreed to)

13. Further the Hansard of the National Assembly of the afternoon of 5th April, 2017 on the said ***Clinical Officers (Training, Registration and Licensing) Bill, 2016***, inter alia, provides thus;

*THAT, this House do agree with the Report of the Committee of the whole House on its consideration of the Clinical Officers (Training, Registration and Licensing) Bill (National Assembly Bill No. 27 of 2016) ……**Hon. Speaker:** It seems to be the desire of the House that I put the Question and I have confirmed the House has quorum. **(Annexed hereto and markedGW-3** is true copy of the Hansard of the National Assembly on 5th April, 2017);*

14. Based on legal advice, the applicant averred that the legislative enactment of laws by Parliament is regulated by constitutional procedure that is provided for in the Parliamentary standing orders and Article 109 of the constitution of Kenya states that:

109 (1) Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President;

(2) Any Bill may originate in the National Assembly.

(3) A Bill not concerning county government is considered only in the National Assembly, and passed in accordance with Article 122 and the Standing Orders of the Assembly.

(4) A Bill concerning county government may originate in the National Assembly or the Senate, and is passed in accordance with Articles 110 to 113, Articles 122 and 123 and the Standing Orders of the Houses.

15. The applicant also relied on sections 133(2), (4), (5) & (6) and 56(1) of the Standing Orders of the National Assembly which prescribes the procedure on the bills during the committee stage.

16. To the applicant, equally important, sections, 35A(5) and 35I(b) of the ***Pharmacy and Poisons Act***, which were amended by the impugned ***Clinical Officers (Training, Registration and Licensing) Act***,

deal with control of drugs; by enforcing compliance certification to Good manufacturing practices of medicinal substances: Which is, under section 13-part II of the fourth schedule of the constitution, a function of County Government. It was therefore contended that as such, once the impugned Bill was passed by National Assembly, the bill should have been submitted to the Senate for consideration, in line with Articles 109, 110 to 113, 122 and 123 of the constitution and the Standing Orders of the Houses.

17. It was however revealed that the two speakers of the National Assembly and Senate had agreed that the bill did not concern the Counties because the impugned provisions of the ***Pharmacy and Poisons Act*** were not part of the bill at the inception stage of the bill. However, consequent to the aforementioned Presidential assent, section 34 (instead of 35 because section 22 was deleted) of the ***Clinical Officers (Training, Registration and Licensing) Act*****,** reads thus:

The Board (Pharmacy and Poisons Board) or any person authorized in writing by the Board *shall have power to enter and sample any medicinal substance under production in any manufacturing premises and certify that the method of manufacture approved by the Board is being followed.*

18. According to the applicant, the ***Clinical Officers (Training, Registration and Licensing) Act/bill*** does not define or provide for Board and manufacturing premises but only provides for the Clinical Officers council that deals with the training and Registration of clinical officers and there is therefore absolutely no nexus between section 34 and the rest of the sections of the ***Clinical Officers (Training, Registration and Licensing) Act.***

19. The applicant averred that sections 35E and 35D of the ***Pharmacy and Poisons Act*** establishes the National Quality Control Laboratory as an autonomous body whose other related primary functions are-

a. Examine and test drugs and any material or substance from or with which and the manner in which drugs may be manufactured, processed or treated and ensuring the quality control of drugs and medicinal substances;

b. Perform chemical, biological, bio-chemical, physiological and pharmacological analysis and other pharmaceutical evaluation; and

c. Test, at the request of the Board and on behalf of the Government, locally manufactured and imported drugs or medicinal substances with a view to determining whether such drugs or medicinal substances comply with the Act or rules made thereunder

20. In the applicant's view, the stated amendment of sections 35A(5) and 35I(b) to the Act in the Bill if allowed, would have an unintended repeal of the above section 35D of the ***Pharmacy and Poisons Act***, by implication thus un-procedurally abolishing the National Quality Control Laboratory and create a lacuna for unscrupulous manufacture of counterfeit and substandard medicines. It was the applicant's case, based on legal advice, that a function conferred by statute cannot be transferred by the depository or by anybody else without statutory authority and placed reliance on sections 26 and 27 of the ***State Corporations Act*** (Cap. 446) which establishes the State Corporations Advisory Committee whose mandate, in consultation with the Attorney-General and the Treasury, is to among other things, advise the President on the establishment, reorganization or dissolution of State Corporations.

21. Apart from that it was the applicant's position that section 34 in the Bill amending sections 35A(5) and 35I(b) of the Act, deals with a different subject and proposes to unreasonably or duly expand the subject of the Bill and is not in logical sequence to the subject matter of the Bill. To him, although a

proposed law may cover a broad canvas and perhaps may require consequential amendments to a considerable number of other written laws, the nature of its subject matter should give it a fundamental coherence which the ***Clinical Officers (Training, Registration and Licensing) Bill, 2016***, lacks.

22. The applicant contended that a hazard that is much more difficult to deal with is the consequential effect of the repeal or amendment of a section on other written laws as no new law can stand alone but must be crafted to fit the whole fabric of the law, both statute law and case law. The impact of the proposals on existing laws must be stated and the extent to which existing laws need to be repealed or altered, either to achieve the objects of the proposals or as a consequence of those objects, must be set out.

23. It was further contended that because section 34 in the ***Clinical Officers (Training, Registration and Licensing) Bill, 2016***, which amended sections 35A(5) and 35I(b) of the ***Pharmacy and Poisons Act***, was introduced at the Committee stage of the whole house, public participation that include key interested parties and stakeholders like State Corporations Advisory Committee and Pharmaceutical experts, among others, was completely excluded from the processes in express violation of the provision of Articles 10 and 118. (1) (b) of the constitution: *Parliament shall—(b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees*

24. The applicant disclosed that in 2009, an officer of the Pharmacy and Poisons Board issued medicines import permit for importation of several containers of counterfeit medicines from China that were intercepted by officials of National Quality Control Laboratory. Further, the Efficiency Monitoring Unit (EMU) Report of 2011 on Pharmacy and Poisons Board confirmed that the Pharmacy and Poisons Board allowed importation of medicines from an Indian company which had failed its own compliance certification to Good manufacturing Practices. The said report further revealed that the Pharmacy and Poisons Board, nonetheless, registered medicines that failed the analytical sample testing of the National Quality Control laboratory.

25. According to him, Kenya is a regional herb for Manufacturing of medicines. There are over 40 local Pharmaceutical Manufacturing Companies and most of the medicines are sold out of the Country. In order to sell/tender medicines in or out of Kenya, the buying countries and institutions require Compliance certificate to the GMP as a technical requirement from supplying Countries or institutions and even internally, for instance, Kenya Medical Supplies Authority (KEMSA) requires compliant certificate to GMP in order to supply medicines. It was therefore his view that the inadvertent deletion of section 35I(b) render the manufacturers of medicines out of market hence loss of jobs and closure of the affected companies.

26. In a further affidavit, the applicant deposed that one of the objects of subjecting legislative process to the constitutional mandatory process of public participation is because of its open and public character, it acts as a counterweight to secret lobbying and influence peddling.

27. The applicant alleged that the Pharmacy and Poisons Board (Board members of the Pharmacy and Poisons Board), the 1st interested party herein, declined to be party to, and actually condemned the procedural legislation of the impugned amendments.

28. He averred that the role of the Attorney General on the Bill already passed by Parliament and awaiting Presidential is restricted to the scrutiny of its propriety of constitutionality for purposes of advising the President for assent and the same is no longer open to further public participation by stakeholders like the Ministry of Health for authentication of aspects of Policy.

29. It was disclosed that the Policy of the Ministry of Health as regards Pharmaceutical regulation is that the 1st and 3rd interested parties herein shall be merged into one single regulatory body and the aspect of Compliance certification to Good Manufacturing Practice (GMP) inspections shall remain with the Laboratory arm (3rd Interested Party) of the Single Regulatory body as stated at sections 62 and 63(1) (c) of the ***Health Act***, 2017; (*Conduct Laboratory testing and inspection of manufacturing, storage and distribution facilities of health products and technologies).* However, the function of entering medicines manufacturing premises for inspection and subsequent issuance of compliance certification of Good Manufacturing Practices (GMP) as stipulated under impugned sections 35A(5) and 35I(b) of the ***Pharmacy and Poisons Act*** concerns control of medicines manufacturing which is a mandate, power and or function matter provided for as a function that concerns County Governments at part II (13) of the fourth schedule of the Constitution and not policy issue as alleged.

30. It was the applicant's contention that the allegations by the 1st and 2nd Respondents on matters policy by the Ministry of Health and request by Pharmacy and Poisons Board were indeed secret lobbying and influence peddling that influenced the Attorney General's advice to His Excellency the President contained in letter Ref. 119/1/57 (T.F). which advise was on the face of it misleading for the factual content is at variance with the recommendation. However the Attorney General indirectly advised that the legislative process of the impugned amendments was unconstitutional for inter alia stating and advising thus;

Your Letter Ref. No. *SH/9/7 Vol (133) dated 18th April, 2017, please refer. We have duly considered the comments by the Director of the National Quality Control Laboratory regarding clause 34 of the Bill which is intended to amend sections 35 A (5) and 35 I (b) of the Pharmacy and Poisons Act, as well as his objection to the President assenting to the Bill in its current form. After reviewing the Bill, the applicable law and the Standing Orders of the National Assembly, the following is our advice on the issues raised:*

BACKGROUND/CONTENT

The Clinical Officers (Training, Registration and licensing) Bill 2016 was passed by the National Assembly on the 5thApril, 2017. The Bill seeks to provide for the training, registration and licensing of clinical officers; to regulate their practice; to provide for the establishment, powers and functions of the Clinical Officers Council of Kenya; and for connected purposes. Save for clause 34, the Bill does not differ substantially from other statutes enacted to regulate other professions such as the Nurses Act, the Medical Laboratory, Technicians and Technologists Act, 1999, or the Veterinary Surgeons and Veterinary Para-Professionals Act, 2011.

Clause 34, which is unrelated to the substance of the Bill and which was inserted during the Committee Stage, intends to amend sections 35A(5) and 351(b) of the Pharmacy and Poisons Act*. The proposed amendment to section 35 A (5) will transfer to the Pharmacy and Poisons Board the power of the Director of the National Quality Control Laboratory to enter and sample any medicinal substance under production in any premises and certify that the method of manufacture that was approved by the Board is being followed. The proposed amendment to section 35I(b) will transfer to the Board the Director's power to inspect any premises used for the manufacture of medicinal substances or to issue certificates of compliance for the same.*

Section 35 A (5) and 35 I (b) had been the subject of a Judicial Review Application at the High Court sitting in Nairobi in miscellaneous Civil Application No. 159 of 2016. The High Court on the 16th march, 2017 decreed that both the Board and National Quality Control Laboratory play complimentary roles. The court held that the Board sets the standards while the National Quality

Control Laboratory ensures that those standards are adhered to. The proposed amendments are intended to reverse the ruling of the High Court and place the mandate of both setting and enforcing standards in the Board.

Please note that though the National Assembly may not have acted strictly in accordance with its Standing Orders*, it is our considered opinion that the National Assembly was well within its constitutional mandate in amending the Bill in the manner that it did. Moreover, while the effect of clause 34 will be to reverse the ruling of the High Court regarding the mandates of both the Pharmacy and Poisons Board and the National Quality Control Laboratory, it is not an unconstitutional provision.*

We have consulted with the Ministry of Health regarding the Ministry's policy on this issue. It Is the Ministry's position that the Board has overall charge over the setting and enforcement of standards in the manufacture of medicinal substances. Furthermore, the Ministry has confirmed that the proposed amendments are acceptable as a matter of policy and that it has no objection to the amendments being effected In this manner.

RECOMMENDATION:.
We have scrutinized the Bill as passed and confirm that the Bill is consistent with the provisions of the Constitution and other existing laws. Consequently, His Excellency the President may assent to the Bill, if he approves.

31. According to the applicant, the Hon. Attorney General was well aware that;

a) The National Assembly did not act in accordance with its Standing Orders;

b) Clause 34 (impugned amendment) deals with a different matter from the subject Bill which seeks to provide for the training, registration and licensing of clinical officers; to regulate their practice; to provide for the establishment, powers and functions of the Clinical Officers Council of Kenya;

c) Clause 34 (impugned amendment) is unrelated to the substance of the above subject Bill-***The Clinical Officers (Training, Registration and licensing) Bill 2016***;

d) Clause 34 (impugned amendment) was inserted during the Committee Stage of the whole house yet it intends to amend sections 35A (5) and 351(b) of the ***Pharmacy and Poisons Act***;

e) The proposed amendment to section 35I (b) will transfer to the Board the Director's power to inspect any premises used for the manufacture of medicinal substances or to issue certificates of compliance for the same (The Attorney General is oblivious to the fact that the said section 35I(b) was indeed deleted, and hence there was no transfer of the same as stated)

f) The proposed amendments were merely intended to reverse the ruling of the High Court;

g) The Ministry's policy is that the Board has overall charge over the setting and enforcement of standards in the manufacture of medicinal substances and hence the proposed amendments are acceptable irrespective of the manner of amendments.

32. Your Lordship, in the premises, the Attorney General's advice does not carry clear message to the head of Public Service, it runs round in circles, and is self-nullifying, so that no meaning and no sincere advice emerges from it. He states that while the impugned substantive amendments to sections; 35A(5)

and 35I(b) of the Pharmacy and Poisons Act were sneaked into the ***Clinical Officers (Training, Registration and Licensing) Bill, 2016*** at the Committee Stage of the whole house and which amendments were neither consequential amendments nor amendments within statute law (Miscellaneous) Bill, the same dealt with a different subject or proposed to unreasonably or unduly expand the subject of the subject Bill, or were not appropriate or were not in logical sequence to the subject matter of the Bill; and further, that whereas no amendment should be moved which is inconsistent with any part of the Bill already agreed to or any decision already made by the Committee and thus the impugned amendments were unconstitutional, but nonetheless, his Excellency the President may assent to the bill into law!

33. To the applicant, the Hon. Attorney General did not only mislead the President that, *"The proposed amendment to section 35I(b) will transfer to the Board the Director's power to inspect any premises used for the manufacture of medicinal substances or to issue certificates of compliance for the same"* but should have instead acted in the public interest by being truthful to the President to advise him not to assent to the bill and have it returned to the National Assembly, at least on this account, so that section 35I(b) of the Act is restored and its function transferred to the 1st interested party as purposed.

34. To the applicant, there is no issue as regards the constitutional processes with which the actual ***Clinical Officers (Training, Registration and licensing) Bill 2016*** was subjected to: The 1st and 2nd Respondents only broke loose from their mandate when they introduced the impugned amendments by violating National Assembly Standing Orders 133 (5) & (6) and corresponding articles 109, 110 to 113, 118, 122 and 123 of the constitution.

35. The applicant noted that whereas the 3rd and 4th Respondents herein were duly represented upon service, they elected not to controvert my pleadings, by not filing a response, on the failure by the 1st and 2nd Respondents to submit the impugned bill to the 3rd Respondent and not commenting on the letter Ref. 119/1/57 (T.F).

36. While reiterating the foregoing, the applicant submitted that National Assembly Standing Orders 120 to 139, consequent to the provisions of Articles 109 to 113, 119, 122 & 123, provide for mandatory procedural requirements and sequence of passage of bills as follows:

i) The publication of the Bill;

ii) Determination through concurrence of speakers of both houses on whether or not the Bill concerns County Governments;

iii) First Reading of the Bill;

iv) Committal of the Bill to the relevant Committee to commit it to the Public Participation;

v) Second Reading of the Bill;

vi) Committal of the Bill to the Committee of the whole house;

vii) Third Reading of the Bill and passage into law

37. The applicant reiterated his position regarding Standing Order No. 133 of the National Assembly and contended that the said Standing Order No.133 ensures that No piece of legislation and or bill may be sneaked through without going through the twin constitutional mandatory requirement of;

i) All Bills concerning powers and functions of County Government be referred to the Senate after passage by National Assembly as provided for in Articles 110 to 113 of the constitution;

ii) All Bills should be subjected to the Public Participation, including facilitating the Public to do so, as provided for under Article 118 of the Constitution.

38. The ***Clinical Officers (Training, Registration and Licensing) Bill 2016***, which was passed by the National Assembly on 5th April, 2017, makes provisions for training, registration and licensing of Clinical Officers; regulate their practice and provide for the establishment, powers and functions of the Clinical Officers Council: And the Bill would repeal and replace the then existing ***Clinical Officers (Training, Registration and Licensing) Act***, Cap. 260 of the Laws of Kenya. The *Pharmacy and Poisons Act*, Cap. 244 Laws of Kenya, specifically sections 35 A (5) and 35 I (b), on the other hand is a different Act that deals with the Quality Control of Manufacture of Medicines and hence its introduction into the ***Clinical Officers (Training, Registration and Licensing) Bill 2016*** proposed to unreasonably or unduly expand the subject matter of the subject Bill, was not appropriate or was inconsistent and not in logical sequence to the subject matter of the Bill.

39. In the applicant's view, the impugned amendment to sections; 35A(5) and 35I(b) of the ***Pharmacy and Poisons Act*** within the ***Clinical Officers (Training, Registration and Licensing) Bill, 2016*** at the Committee Stage of the whole house was neither a consequential amendment nor an amendment within statute law (Miscellaneous) Bill and that no new law can stand alone, it must be crafted to fit the whole fabric of the law, both statute law and case law.

40. In support of his case the applicant relied on **Republic vs. Ministry of Health & 5 Others Ex-Parte Pius Wanjala & 2 Others [2017] eKLR**, where this Court held that the 1st and 3rd interested parties herein play distinctive and complimentary roles with one body having the regulatory role while the other ensuring quality assurance compliance, being two complimentary regulatory bodies under the ***Pharmacy and Poisons Act.***

41. It was submitted that section 62 & 63 of the ***Health Act, 2017*** buttresses the foregoing by apparent acknowledgement of existent of two complimentary medicines regulatory bodies, in Kenya that;

62. There shall be established by an Act of Parliament a single regulatory body for regulation of health products and health technologies;

63 (1) (c) The regulatory body shall- Conduct laboratory testing and inspection of manufacturing, storage and distribution facilities of health products and technologies;

42. However the applicant submitted that contrary to the assertions by the 1st and 2nd Interested parties that the new ***Health Act, 2017*** has created a single regulatory body to take over the functions of the 1st and 3rd Interested parties herein and that hence these proceedings are moot, the fact is that the ***Health Act, 2017*** has only envisaged the creation of such body through future legislative enactment in accordance to the aforementioned sections 62 & 63 of the Health Act, 2017 and hence, the effective and operational statutory law on regulation of medicines remains the ***Pharmacy and Poisons Act***, Cap 244 laws of Kenya. It was his view that whereas the intention of the National Assembly was to transfer the function of Good Manufacturing Practice **(GMP)** inspections and subsequent issuance of compliance Certification from the 3rd Interested party to the 1st interested Party herein, inadvertently, the impugned amendments returned;

a) Transfer of just one aspect of GMP inspections: Sampling of medicinal samples under production and

carrying out analytical testing for issuance of certificate of Analysis; provided for under sections 35 A (5) and 35K of ***Pharmacy and Poisons Act***;

b) However, the 1st interested party cannot issue certificate of analysis, which is the mandate of the 3rd Interested Party pursuant to section 35 K of the Act, which remains un-amended and further issuance of certificates of analysis requires a laboratory facility which is the domain of the 3rd interested party;

c) The actual known compliance certification of Good manufacturing Practice for quality assurance of medicines was inadvertently deleted from the statutory book and hence any purported GMP compliance certification by the 1st Interested party would lack statutory/legal force and hence unscrupulous manufacturers remain at liberty to manufacture substandard and or counterfeit medicines;

43. In the applicant's submissions, the foregoing confusion is as a result of the unconstitutional and un-procedural manner in which the impugned amendments were undertaken to the extent that in general, the National Assembly did not understand what was being amended or going on. This position was based on the fact that whereas the actual amendments concerned the transfer from the 3rd Interested Party to the 1st Interested Party of the function of GMP inspection of manufacturing premises at section 35A(5) and 35I(b) of the ***Pharmacy and Poisons Act***; it is however, on the *Hansard's* record, that the meaning, purpose and effect of the proposed amendment was to transfer from the 3rd Interested Party to the 1st Interested Party the function of inspection of premises of registered Pharmacists: but which function was and is already under the 1st interested party, provided for at a completely different part of the Act, at sections 19, 20, 21 and 23 that has always been the sole prerogative of the 1st Interested Party. Secondly, in accordance to the Hansard, the Hon. Member who was asked by the chair to propose or second the impugned amendment had no clue of what she was proposing/commenting.

44. In support of his case the applicant cited inter alia the Supreme Court decision in **Speaker of the Senate & Another vs. Attorney-General & 4 Others [2013] eKLR**, and the **Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic of Kenya & 10 Others [2015] eKLR** and submitted that based on the above legal principles and facts, the 1st and 2nd Respondents' decision to amend sections 35A(5) & 35I(b) of the ***Pharmacy and Poisons Act***, within the ***Clinical Officers (Training, Registration and Licensing) Bill 2016***,and in the manner referred to is amenable to judicial review.

45. It was submitted that the Respondents Decision to pass amendments to a different and unrelated Act from the subject Bill was unreasonable. By sneaking the impugned substantive amendments to sections; 35A(5) & 35I(b) of the Act into the Bill at the Committee Stage of the whole house, and which amendments were neither consequential amendments nor amendments within statute law (Miscellaneous) Bill; the 1st and 2nd Respondents not only violated the National Assembly Standing Orders 120 to 139 and consequent provisions of Articles 109 to 113, 119, 122 & 123 of the constitution, but their acts constituted permission of amendments that dealt with a different subject or proposed to unreasonably or unduly expand the subject of the Bill, or was not appropriate or was not in logical sequence to the subject matter of the Bill: And that further, the same was inconsistent with the already agreed upon Bill at the National Assembly Health Committee. It was reiterated that so absurd and unreasonable was the Respondents' decision that none other than the Head of Public Service and Chief of Staff requested the Attorney General to dissuade the President from signing the impugned Bill into law. In his view, the fact that the Respondents proposed and passed amendments to a different and unrelated Act within a different subject Bill referred to above make their decision susceptible to quashing by the Order of Certiorari as presently sought. Based on the ***Wednesbury Case*** he submitted that the Respondents' aforestated decision renders it so absurd that no sensible person could ever dream that it lay within their authority, such decision fits perfectly into the category of decisions anticipated under the *'Wednesbury Unreasonableness'* as amenable to the judicial review discretion of this Court.

46. It was submitted that the 1st and 2nd Respondents decision to permit the introduction of amendments to the ***Pharmacy and Poisons Act***, Cap 244 Laws of Kenya, specifically sections 35A(5) & 35I(b), a completely different Act that deals with different subject matter of the Quality Control of Manufacture of Medicines, into the ***Clinical Officers (Training, Registration and Licensing) Bill 2016***; proposed to unreasonably or unduly expand the subject matter of the subject Bill, was not appropriate or was inconsistent and not in logical sequence to the subject matter of the Bill, and thus the same was an act of express violation and contravention of the Standing Order No.133 (5) & (6). In this respect the applicant relied on the decision of the Supreme Court of Kenya**,** in **Speaker of the Senate & Another vs. Attorney-General & 4 Others [2013] eKLR** , **Coalition for Reform and Democracy (CORD) & 2 others vs. Republic of Kenya & 10 Others [2015] eKLR, Biti and Another vs. The Minister of Justice, Legal and Parliamentary Affairs and Another (2002) AHRLR 266 (ZwSC 2002) Supreme Court Judgment No SC 10/02**, **Attorney General vs. The Malawi Congress Party and Others**, **MSCA Civil Appeal No 22 of 1996,** and Uganda Constitutional Court Constitutional Petition No. 08 of 2014 [2014] UGCC 14 - **Oloka-Onyango & 9 Others vs. The Attorney General**, and submitted that the impugned enactment was unconstitutional and ultra-vires and, on that basis alone, this Court do issue the orders as sought.

47. It was further submitted that the Respondents' failure to refer the impugned amendments of the bill to the Senate violated Articles 109, 110, 112,113, 122 & 123 of the Constitution and National Assembly Standing Orders No. 121 to 123. According to the applicant the impugned substantive amendments to sections; 35A(5) & 35I(b) of the ***Pharmacy and Poisons Act***, within the ***Clinical Officers (Training, Registration and Licensing) Bill, 2016*** at the Committee Stage of the whole house, which was neither consequential amendment nor amendment within statute law (Miscellaneous) Bill, concerns control of drugs-control of manufacture of medicines. However Part II (2) (a) and (13) of the Fourth Schedule of the constitution provides that;

The functions and powers of the county are—

(2) (a) County health services, including, in particular— county health facilities and pharmacies;

(13) Control of drugs and pornography

48. He also relied on Article 109 (4) of the constitution which states thus:

A Bill concerning county government may originate in the National Assembly or the Senate, and is passed in accordance with Articles 110 to 113, Articles 122 and 123 and the Standing Orders of the Houses.

49. Article 110 (1) (a), 2 (a) (b), 3, 4 & 5 of the Constitution, on the other hand provide respectively that:

i. **(a) In this Constitution, "a Bill concerning county government" means–– a Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule;**

(2) (a) A Bill concerning county governments is-a special Bill, which shall be considered under Article 111, if it––

(2) (b) A Bill concerning county governments is-an ordinary Bill, which shall be considered under Article 112, in any other case.

(3) Before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill

(4) When any Bill concerning county government has been passed by one House of Parliament, the Speaker of that House shall refer it to the Speaker of the other House.

(5) If both Houses pass the Bill in the same form, the Speaker of the House in which the Bill originated shall, within seven days, refer the Bill to the President for assent.

50. In the foregoing, one of the functions of the National Assembly Standing Order No. 133 (5) & (6) is to protect and preserve Articles 109 to 114 and 122-123 of the constitution by ensuring that any introduction of a new subject matter (Bill) such as the impugned provisions of the Pharmacy and Poisons Act in the Assembly must go through the aforestated stages of Publication and determination, through concurrence of speakers of both houses on whether or not the Bill concerns County Governments;

51. It was however submitted that because the 1st and 2nd Respondents violated the said National Assembly Standing Order No. 133 (5) & (6) from the outset, the impugned substantive amendments to sections; 35A(5) & 35I(b) of the ***Pharmacy and Poisons Act***, within the ***Clinical Officers (Training, Registration and Licensing) Bill***, were not scrutinised and neither was there any concurrence by the Speakers of both houses on the same, yet, the said impugned amendments concerns the functions and powers of the County Governments aforestated. The decision was thus a violation of the constitution and this Court is obligated to declare the impugned substantive amendments to sections; 35A(5) & 35I(b) of the ***Pharmacy and Poisons Act***, within the ***Clinical Officers (Training, Registration and Licensing) Bill*** a nullity for failure to refer the passed amendments/Bill to the Senate yet it contains provisions that affect the functions and powers of the County Government provided under the 4th Schedule of the constitution aforementioned. In this respect the applicant relied on **Speaker of the Senate & Another vs. Attorney-General & 4 Others [2013] eKLR.**

52. It was submitted that the Respondents' decision of not subjecting the impugned amendments of the bill to the public debate-participation violated Articles 118 of the Constitution and National Assembly Standing Order No. 127. To the applicant, since, the impugned amendments were introduced to the subject Bill at the sixth stage of the Committal of the Bill to the Committee of the whole house, the subject Bill had already undergone the 4th stage, Public Participation, without the impugned substantive amendments to sections; 35 A (5) and 35 I (b) of the ***Pharmacy and Poisons Act***, and therefore the same was excluded from Public Participation. To him, the key stakeholders, the General Public, 1st and 3rd interested parties herein and the Pharmaceutical Society of Kenya, among others, were denied a chance to participate in the enactment of the impugned Bill/amendments in contravention of the provisions of Article 118 of the constitution. In this respect the applicant relied on **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR, Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic of Kenya & 10 Others [2015] eKLR** and **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 CC** and submitted that due to possible secret lobbying and influence peddling or otherwise, the impugned substantive amendments to sections; 35 A (5) and 35 I (b) of the Act were sneaked into the Bill at the Committee Stage of the whole house, which were neither subjected to the Public Participation nor the said Public was facilitated to participate in the process.

53. It was submitted that the Respondents considered irrelevant matters and excluded relevant matters in enacting the impugned amendments. It was submitted that the 2nd Respondent caused the 1st respondent to consider irrelevant matter of Good Manufacturing Practices (GMP) inspections and

issuance of certificate of compliance under sections 35A(5) & 35I(b) of the ***Pharmacy and Poisons Act***, which led to inadvertent deletion of the all-important section 35 I (b), instead of considering the relevant matter of inspection of premises of registered Pharmacists as stated by the Hon. Member who moved the impugned amendment, which is covered under sections 19, 20, 21 & 23 of the ***Pharmacy and Poisons Act***, which has always been the prerogative of the 1st interested party.

54. It was submitted that the Applicant and the General Public's legitimate expectation is that the respondents should not only have allowed but also facilitated the public participation over the impugned amendments. The Respondents acted in bad faith by insinuating that the contravention and or violation of the National Assembly Standing Orders No. 120 to 139 and particularly Standing Order No.133 (5 & 6) that led to the skipping of the public participation and referral of the impugned amendments to the Senate; was cured by subsequent observation of Standing Orders No. 133 (2, 4 & 11). Further, it is noteworthy that the 4th Respondent ignored and or refused to review and appropriately advise the Presidency over the impugned amendments as was requested by the Head of Public Service and Chief of staff.

55. In the applicant's view, this country has one of the most robust constitutions on the continent and indeed the world over. Thus, in this era, impunity should never be allowed to rear its ugly head in the conduct of public affairs. The 2010 constitution shut the era when laws could be enacted at the whims of a few. The Respondents' decision to allow secret lobbying and influence peddling or otherwise that orchestrate the impugned substantive amendments to sections; 35A(5) and 35I(b) of the ***Pharmacy and Poisons Act*** within the ***Clinical Officers (Training, Registration and Licensing) Bill, 2016*** at the Committee Stage of the whole house and which amendments were neither consequential amendments nor amendments within statute law (Miscellaneous) Bill threatens to nip in the bud the gains made in the Rule of law.

56. To him, a serious violation of the law has happened with potential serious anarchical ramifications if not checked and dealt with as sought. For, to allow a State functionary to disregard the law by totally disregarding the statutory and constitutional requirements in decision-making and thereby occasion great injustice to the public sets a bad precedent regarding impunity on the part of executors of important public service decisions. He submitted that the time is nigh for the perpetrators of impunity to be reminded that impunity has no place in the present Kenya and that, in this Superior court, lies the ultimate and formidable line of defence for the constitution and the People of Kenya.

57. He therefore prayed that this Court be pleased to grant the judicial Review prerogative Orders sought.

The 3rd interested party's case.

58. The application was supported by the 3rd interested party herein, **National Quality Control Laboratory** (hereinafter referred to as "the Laboratory).

59. Its case was however along the lines of the applicant and reiterated the position adopted by the applicant. Save for the disclosure that on his prompting, the clerk of National Assembly admitted that the procedure of the amendment offended the constitution and Standing Orders of the National Assembly and advised it to write to the Attorney General and Head of Public Service on the matter since the only remaining remedy was to have the bill, returned to the National Assembly so as to remove the proposed amendments to the ***Pharmacy and Poisons Act***.

1st and 2nd Respondents' Case.

60. The application was however opposed by the 1st and 2nd Respondents.

61. According to them, the National Assembly's mandate to enact, amend and repeal laws is derived from the Constitution. To them, the applicant's prayers threaten the legislative role of parliament and specifically the national assembly under Articles 1(1), 94 and 95 of the Constitution and seeks to restrict the National Assembly from carrying out its constitutional mandate derived from Articles 95(3) of the Constitution by enacting the ***Clinical Officers (Training, Registration and Licensing) Bill, 2016***.

62. It was disclosed that on 5th April, 2017 the ***Clinical Officers Training, Registration and Licensing) Bill, 2016*** was committed to the committee of the whole house after notice was given that the chairperson of the Committee on Health intended to move several amendments to the Act and on the same date, the committee of the whole house passed the amendments as proposed.

63. According to the Respondents notice was also issued that **Hon. Ichungwah** Member of Kikuyu intended to move an amendment to insert a new clause to the Bill immediately after clause 34 and that the new clause deleted the words "The Director of the National Drug Quality Control Laboratory or any member of the laboratory staff authorized by him" appearing in subsection (5) and substituting therefore the words "the Board or any person authorized in writing by the Board".

64. According to the Laboratory, the reasons for the amendments was to harmonise the powers of the Pharmacy and Poisons Board and those of the National Drug Quality Control Laboratory especially with respect to inspection of premises of registered pharmacists since it was the National Assembly's view that section 35A in the ***Pharmacy and Poison's Board Act*** erroneously gave the powers to inspect the premises to the National Drug Quality Control Laboratory, whereas under the same Act, the said body was in principle not intended to be inspecting premises but to look into issues to do with drugs that would be dispensed from pharmacies.

65. The Respondents were of the view that the 1st respondent had the constitutional mandate and authority to clear the ambiguity within the said Act by solely giving the inspection powers to the Board.

66. It was confirmed that the amendment was debated by the committee of the whole house, and was subsequently passed and formed part of the Bill pursuant to standing order 133(11). Based on legal advice, the Laboratory's position was that the process of including the new section 35A in the ***Clinical Officers (Training, Registration and Licensing) Bill, 2016*** was passed in accordance with the constitution and the standing orders and there did not infringe Article 43 of the Constitution because no right of the petitioner has been curtailed.

67. To it, the facts relied upon by the applicant are presumptuous and highly speculative as there is no evidence tendered to support the allegations.

68. The Laboratory asserted that the applicant's application contravenes the principles of presumption of constitutionality of legislation enacted by parliament and therefore the court should not entertain the same. Further, the application is also a threat to the doctrine of separation of powers and is an encroachment to the legislative mandate of parliament. An order by the court granting the petitioner's prayer would be a negation of the doctrine of separation of powers and this would be an interference of parliament's constitutional powers, by the judiciary.

69. To the Respondents, the orders sought by the applicant is tantamount to asking the honourable court to amend or repeal a piece of legislation. The court should decline to grant leave as the court cannot order amendment or repeal of legislation as this is the preserve of the legislative body in this case the

National Assembly.

70. The Court was therefore urged not to exercise its discretion to grant the orders sought in the said application as the applicant has not adduced any or any cogent consumption of counterfeit or substandard medicines as a result of implementation of the act and specifically section 35A.

71. It was their view that it would occasion grave prejudice to the 1st and 2nd respondent's if any of the orders sought in the said application are granted in the applicant's favour and therefore the application should be dismissed with costs.

72. It was further averred that

Determinations

73. I have considered the issues raised in this application.

74. Before delving into the issues raised before me in this application, it is important in determining them to appreciate the nature of the Constitution of Kenya, 2010. Our Constitution, it has been hailed as being a transformative Constitution since as opposed to a structural Constitution, it is a value-oriented one. Its interpretation and application must therefore not be a mechanical one but must be guided by the spirit and the soul of the Constitution itself as ingrained in the national values and principles of governance espoused in the preamble and *inter alia* Article 10 of the Constitution. The distinction between the two was made by **Ulrich Karpen** in ***The Constitution of the Federal Republic of Germany*** thus:

"…the value –oriented, concerned with intensely human and humane aspirations of personality, conscience and freedom; the structure-oriented, concerned with vastly more mundane and mechanical matters like territorial boundaries, local government, institutional arrangements."

75. Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality. This was the position adopted by the Supreme Court in **The Matter of the Principle of Gender Representation In the National Assembly and the Senate, SC Advisory Opinion No. 2 of 2012** where it was held that:

"A consideration of different constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and interact among themselves and with their public institutions. Where a Constitution takes such a fused form in terms, we believe a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other."

76. As appreciated by **Ojwang, JSC**, in **Joseph Kimani Gathungu vs. Attorney General & 5 Others Constitutional Reference No. 12 of 2010**:

"A scrutiny of several Constitutions Kenya has had since independence shows that, whereas the earlier ones were designed as little more than a regulatory formula for State affairs, the Constitution of2010 is dominated by a "social orientation", and as its main theme, "rights, welfare, empowerment", and the Constitution offers these values as the reference-point in governance functions."

77. As was appreciated by the majority **In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Sup. Ct. Advisory Opinion Appl. No. 2 of 2012** at para 54:

"Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in their scope for necessary public actions."

78. The Court is therefore required in the performance of its judicial function to espouse the value system in the Constitution and to avoid the structural minimalistic approach. The German Federal Constitutional Court in **Luth Decision BVerfGE 7, 198 I. Senate (1 BvR 400/51)** noted as follows:

"But far from being a value free system the Constitution erects an objective system of values in its section on basic rights and thus expresses and reinforces the validity of the basic rights. This system of values, centering on the freedom of human being to develop the society must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration and judicial decisions. It naturally influences private law as well, no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit."

79. The foregoing position was aptly summarised by the South African Constitutional Court in **Carmichele vs. Minister of Safety and Security (CCT 48/00) 2001 SA 938 (CC)** in the following terms:

"Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court: 'The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and the judiciary.' The same is true of our Constitution. The influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed."

80.Therefore the Constitution of Kenya, 2010, just like the post Nazi German Basic Law and the post-apartheid 1996 Constitution of South Africa, as "a transformative instrument is the key instrument to bring about a better and more just society". See **Michaela Hailbronner** in ***Traditions and Transformations: The Rise of German Constitutionalism***.

81. This was the position of the Supreme Court in **Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR** where it expressed itself as follows:

"Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute *social change* and *reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom*

and democracy. **This is clear right from the preambular clause which premises the new Constitution on – *"RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law."* And the principle is fleshed out in Article 10 of the Constitution, which specifies the "national values and principles of governance", and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government. The transformative concept, in operational terms, *reconfigures the interplays between the States majoritarian and non-majoritarian institutions*, to the intent that the desirable goals of governance, consistent with dominant perceptions of *legitimacy*, be achieved. A depiction of this scenario has been made in relation to the unique processes of constitution-building in South Africa, a country that was emerging from an entrenched racialist governance system. Karl Klare, in his article, "*Legal Culture and Transformative Constitutionalism*," *South African Journal of Human Rights*, Vol. 14 (1998), 146 thus wrote [at p.147]: *"At the most superficial level, South Africans have chosen to compromise the supremacy of Parliament, and correspondingly to increase the power of judges, each to an as-yet unknowable extent."*The scholar states the object of this South African choice: *"By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed…to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law."* The history of political change in South Africa will remain highly relevant for those African countries, like Kenya, seeking to evolve democratic constitutional systems out of a past of skewed and repressive governance. And by the settled technique of the comparative method in law, we draw from that country's achievements in constitutional precedent. We in this Court, conceive of today's constitutional principles as incorporating the transformative ideals of the Constitution of 2010".**

82. It is my view that our position is akin to the one described by the German Constitutional Court in **BVverfGE 5, 85** that:

"Free democratic order of the Basic Law…assumes that the existing state and social conditions can and must be improved. This presents a never-ending task that will present itself in ever new forms and with ever new aspects."

83. The general rule or principle applying to legislation is that there is a presumption of constitutionality of statutes. This position was reaffirmed by the Court of Appeal of Tanzania in **Ndyanabo vs. Attorney General [2001] EA 495** which was a restatement of the law in the English case of **Pearlberg vs. Varty [1972] 1 WLR 534**. In the former, the Court held that:

"Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative"

84. Similarly in the Supreme Court of India in **HambarddaWakhana vs. Union of India Air [1960] AIR 554** held that:

"In examining the constitutionality of a statute it must be assumed the Legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted.

Presumption is therefore in favour of the constitutionality of an enactment."

85. However, under Article 1 of the Constitution sovereign power belongs to the people and it is to be exercised in accordance with the Constitution. That sovereign power is delegated to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. There is however a rider that the said organs must perform their functions in accordance with the Constitution. Our Constitution having been enacted by way of a referendum, is the direct expression of the people's will and therefore all State organs in exercising their delegated powers must bow to the will of the people as expressed in the Constitution. If anyone is in doubt, Article 2 of the Constitution provides for the binding effect of the Constitution on State Organs and proceeds to decree that any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.

86. Where in my view, the Court is convinced that the orders ought to granted, I do not see why the Court should shy away from doing so. On this note I wish to associate myself with the holding of **Mulenga, JSC** in **Habre International Co. Ltd vs. Kassam and Others [1999] 1 EA 125** to the effect that:

"The tendency to interpret the law in a manner that would divest courts of law of jurisdiction too readily unless the legal provision in question is straightforward and clear is to be discouraged since it would be better to err in favour of upholding jurisdiction than to turn a litigant away from the seat of justice without being heard; the jurisdiction of courts of law must be guarded jealously and should not be dispensed with too lightly and the interests of justice and the rule of law demand this."

87. I similarly agree with this Court's decision in **Re Kadhis' Court: Very Right Rev Dr. Jesse Kamau & Others vs. The Hon. Attorney General & Another Nairobi HCMCA No. 890 of 2004** where it was held that:

"The general provisions governing constitutional interpretation are that in interpreting the Constitution, the Court would be guided by the general principles that; (i) the Constitution was a living instrument with a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. A timorous and unimaginative exercise of judicial power of constitutional interpretation leaves the Constitution a stale and sterile document; (ii) the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed."

88. Therefore while I appreciate the doctrine of the presumption of constitutionality of statutes, I associate with the position adopted in **Chege Kimotho& Others vs. Vesters & Another [1988] KLR 48; Vol. 1 KAR 1192; [1986-1989] EA 57,** that the Constitution is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle.It must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social

conditions. As appreciated **In the Matter of the Estate of Lerionka Ole Ntutu [2008] KLR 452:**

"Constitution of any country of the world should not represent a mere body or skeleton without a soul or spirit of its own. The Court would not like to discard the possibility of the court adopting broader view of using the living tree principle of the interpretation of the Constitution where they are "amongst others, ambiguity, unreasonableness, obvious imbalance or lack of proportionality or absurd situation."

89. Similarly in **Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006,**it was held that:

"…the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits."

90. Nyamu, J (as he then was) in **Richard Nduati Kariuki vs. Honourable Leonard Nduati Kariuki & Another [2006] 2 KLR 356** expressed himself as hereunder:

"The Constitution is a living document. It is a house with many rooms, windows and doors. It is conservative enough to protect the past but flexible enough to advocate new issues and the future."

91. In my view, the doctrine of constitutionality of statutes when in conflict with the constitutional obligation of the Court to investigate the constitutionality of a statute must give way to the latter.

92. In my view, when any of the state organs steps outside its mandate, this Court will not hesitate to intervene and this was appreciated **The Council of Governors and Others vs. The Senate Petition No. 413 of 2014**:

"this Court [is] vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the Petition before us alleges a violation of the Constitution by the Respondent and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. In fact the invitation to do so is most welcome as that is one of the core mandates of this Court".

93. In arriving at the said decision the Court cited with approval the decision **Kasanga Mulwa, J** in **R vs. Kenya Roads Board exparte John Harun Mwau HC Misc Civil Application No.1372 of 2000** wherein the learned Judge stated that:

"Once a Constitution is written, it is supreme. I am concerned beyond peradventure that when the makers of our Constitution decided to put it in writing and by its provision thereof created the three arms of Government namely the Executive, the Legislature and the Judiciary, they intended that the Constitution shall be supreme and all those organs created under the Constitution are subordinate and subject to the Constitution."

94. Subsequently, the Supreme Court in **Speaker of National Assembly vs. Attorney General and 3 Others [2013] eKLR** stated as follows:

"Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of "right" and "wrong" in such cases, short of a solution in plebiscite, is only the Courts."

95. This was the position adopted by the Supreme Court in **Zacharia Okoth Obado vs. Edward Akong'o Oyugi & 2 Others [2014] eKLR** where it was held that:

"Article 3(1) of the Constitution imposes an obligation on every one, without exception, to respect, uphold and defend the Constitution. This obligation is further emphasized with regard to the exercise of judicial authority, by Article 159(2) (e) which requires that in the exercise of judicial authority the Courts must pay heed to the purpose and principles of the Constitution being protected and promoted. However, all statutes flow from the Constitution, and all acts done have to be anchored in law and be constitutional, lest they be declared unconstitutional, hence null and void. Thus, it cannot be said that this Court cannot stop a constitutionally-guided process. What this Court would not do is to extend time beyond that decreed by the Constitution. However, a process provided for by the Constitution and regulated by statute can be stayed, as long as it is finally done within the time-frame constitutionally authorized. For that reason, this Court would, by no means be interfering with a constitutionally-mandated process, if the order for stay is granted. This is because an order for stay will be sufficient to bring to a halt the preparation of the by-election by the IEBC as well as stop the swearing in of the Speaker."

96. Nyamu, J was even more blunt in his opinion in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** where he expressed himself as follows:

"**To exempt a public authority from the jurisdiction of the Courts of law is, to that extent, to grant doctorial power…This is the justification for the strong, it might even be rebellious, stand which the courts have made against allowing Acts of Parliament to create pockets of uncontrollable power in violation of the rule of law…The law's delay together with its uncertainty and expense, tempts governments to take short cuts by elimination of the Courts. But if the courts are prevented from enforcing the law, the remedy becomes worse than the disease."**

97. Professor Sir William Wade in his authoritative work, ***Administrative Law***, 8th Edition at page 708 properly captured the failure of Parliamentary draughtsman as hereunder:

"The Judges, with their eye on the long term and the rule of law, have made it their business to preserve a deeper constitutional logic, based on their repugnance to allowing any subordinate authority to obtain uncontrollable power."

98. This was the view adopted by **Ngcobo, J** in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT 12/05) 2006 ZACC 11** the following manner:

"The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of

powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court. It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation."

99. The learned Judge continued:

"It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation. By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(a) does. While it imposes a primary obligation on Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, it does not tell Parliament how to facilitate public involvement but leaves it to Parliament to determine what is required of it in this regard. A review by a court of whether Parliament has complied with its obligation under section 72(1)(a) calls upon a court to intrude into the domain of a principal legislative organ of the state. Under our Constitution, this intrusion is reserved for this Court only. A construction of section 167(4)(e) which gives this Court exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative processes is therefore consistent with the principles underlying the exclusive jurisdiction of this Court. An order declaring that Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in its legislative process and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the principle legislative organ of the state. Such an order will inevitably have important political consequences. Only this Court has this power. The question whether Parliament has fulfilled its obligation under section 72(1)(a) therefore requires this Court to decide a crucial separation of powers question and is manifestly within the exclusive jurisdiction of this Court under section 167(4)(e) of the Constitution."

100. As was appreciated by **Langa, CJ** in **Hugh Glenister vs. President of the Republic of South Africa & Others Case CCT 41/08; [2008] ZACC 19** at para 33:

"In our constitutional democracy, the courts are the ultimate guardians of the constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds."

101. I associate myself with the positions adopted in these decisions and dare add that when any of the State Organs or State Officers steps outside its mandate, this Court will not hesitate to intervene. It is therefore my view that this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, as this petition alleges a violation of the Constitution by the Respondents, it is my finding that the principle of independence of the Legislature does not inhibit this Court's jurisdiction or prohibit it from addressing the Applicant's grievances so long as they stem out of alleged violations of the Constitution. To the contrary, the invitation to do so is most welcome as that is one of the core mandates of this Court.

102. My finding is fortified under the principle that the Constitution is the Supreme Law of this country all State Organs must function and operate within the limits prescribed by the Constitution. In cases where they step beyond what the law and the Constitution permit them to do, they cannot seek refuge in independence and hide under that cloak or mask of inscrutability in order to escape judicial scrutiny.

103. This was the position adopted by this Court in **Githu Muigai & Another vs. Law Society of Kenya & Another [2015] eKLR** where it was held that:

"In our view, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In *Republic vs. Kenya Revenue Authority Ex Part Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530*, it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others, and based on *East African Railways Corp. vs Anthony Sefu Dar-es-Salaam HCCA No.19 of 1971 [1973] EA*, Courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. Consequently, where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. Further, courts will not be rubber stamps of the decisions of administrative bodies. However, if Parliament gives great powers to statutory bodies, the courts must allow them to exercise it. The Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law."

104. In my view the doctrine of independence must be read in the context of our Constitutional framework and where the adoption of the doctrine would clearly militate against the constitutional principles that doctrine or principle must bow to the dictates of the spirit and the letter of the Constitution and the enabling legislation and it is not only the role of the Courts to superintend the exercise of such

powers but their constitutional obligation to do so. In effect the Legislature's independence under the Constitution only remains valid and insurmountable as long as it operates within its legislative and constitutional sphere. Once it leaves its stratosphere and enters the airspace outside its jurisdiction of operation, the Courts are then justified in scrutinizing its operations. This was the position in **Okiya Omtatah Okoiti & 3 Others vs. Attorney General & 5 Others [2014] eKLR,** this Court cited the decision of the Court of Appeal in **Commission for the Implementation of the Constitution vs. The Attorney General and Another, Nairobi Civil Appeal No. 351 of 2012**and proceeded to state that:

"The position enunciated so succinctly by the Court of Appeal is a position we wish to associate ourselves with. The Constitution disperses powers among various constitutional organs and when any of these organs steps out of its area of operation, this court will not hesitate to state so. It is this Court which is, by virtue of Article 165(d), clothed with jurisdiction to hear any question concerning the interpretation of the 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;"

105. I subscribe to the notion advanced by **Etienne Mureinik** in ***A Bridge to Where" Introducing the Interim Bill of Rights*** **(1994) 10 SAJHR 32,** that the Constitution instils a culture of justification, "in which *every exercise of power is expected to be justified".*

106. I wish to associate myself with the holding of **Mbogholi Msagha, J** in **Macharia vs. Murathe & Another Nairobi HCEP No. 21 of 1998 [2008] 2 KLR (EP) 189 (HCK)** where he expressed himself *inter alia* as follows:

"The learned counsel cited several authorities from the English jurisdiction to advance his submission that the Courts have no jurisdiction to question whatever takes place in Parliament. Britain does not have a written Constitution hence the sovereignty of Parliament. But in Kenya we have a Constitution whose supremacy as set out therein is unambiguous and unequivocal. In a democratic Country governed by a written Constitution, it is the Constitution which is supreme and sovereign...it is no doubt true that the Constitution itself can be amended by the Parliament, but that is possible because ...the Constitution itself makes provision in that behalf, and the amendment of the Constitution can be validly made only by following the procedure prescribed by the... [Constitution]. That shows that even when Parliament purports to amend the Constitution, it has to comply with the relevant mandate of the Constitution itself. Legislators, Ministers and Judges take oath of allegiance to the Constitution for it is by the relevant provisions of the Constitution that they derive their authority and jurisdiction and it is to the provisions of the Constitution that they owe their allegiance. Therefore, there can be no doubt that the sovereignty which can be claimed by the Parliament in England, cannot be claimed by any Legislature...in the literal absolute sense."

107. In the same vein, **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** pronounced himself as follows:

"The other reason why this Court cannot blindly apply the so called ouster clauses is that, unlike the English position where judges must always obey, or bow to what Parliament legislate, is, because Parliament is the supreme organ in that legal system. Even there judges have refused to

blindly apply badly drafted laws and have in some cases filled the gaps in order to complete or give effect to the intention of the legislature. 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 (see s 3). 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."

108. In my view, this holding is even more appropriate in cases where the Court is called upon to uphold the provisions of the Constitution.

109. In this case, the factual position is largely not in dispute. It is not in dispute that the ***Clinical Officers (Training, Registration and Licensing) Bill, 2016*** which repealed the existing ***Clinical Officers (Training, Registration and Licensing) Act,*** Cap. 260 of the Laws of Kenya makes provision for training, registration and licensing of Clinical Officers; to regulate their practice and to provide for the establishment, powers and functions of the Clinical Officers Council. It is also not in dispute that during the Committee Stage amendments to the said Bill were made with respect to sections 35A(5) and 35I(b) of the ***Pharmacy and Poisons Act*** which provisions deal with the Quality Control of Manufacture of Medicines by enforcing compliance certification to Good manufacturing practices of medicinal substances***.***

110. That Parliament is required to conduct its business according to its Standing Orders is clearly provided in Article 109 of the Constitution which provides that:

(1) Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President;

(2) Any Bill may originate in the National Assembly.

(3) A Bill not concerning county government is considered only in the National Assembly, and passed in accordance with Article 122 and the Standing Orders of the Assembly.

(4) A Bill concerning county government may originate in the National Assembly or the Senate, and is passed in accordance with Articles 110 to 113, Articles 122 and 123 and the Standing Orders of the Houses.

111. The stages through which a bill passes before being enacted are to be found in the National Assembly Standing Orders 120 to 139, which are made pursuant to the provisions of Articles 109 to 113, 119, 122 & 123 of the Constitution and these stages are:

i. *The publication of the Bill;*

ii. Determination through concurrence of speakers of both houses on whether or not the Bill concerns County Governments;

iii. First Reading of the Bill;

iv. *Committal of the Bill to the relevant Committee to commit it to the Public Participation;*

v. *Second Reading of the Bill;*

vi. *Committal of the Bill to the Committee of the whole house;*

vii. *Third Reading of the Bill and passage into law*

112. It is therefore clear that the public participation takes place between the First Reading and the Second Reading. In this case, the impugned amendments were introduced at the Committee Stage well after the period for the public participation. What then is the role of public participation" This Court in **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR dealt with the issue and relied on the South African case of Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)**, where **Ngcobo, J** who delivered the leading majority judgement expressed himself as follows:

"**In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist. Therefore our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the lawmaking processes. Parliament must therefore function in accordance with the principles of our participatory democracy…When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution to say so. And insofar as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty…The justification for this course is to be found in Article 2(4) of our Constitution which provides as follows:**

Any law, including customary law, which is inconsistent with this Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid. [Emphasis added].

113. Similarly in the **Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic of Kenya & 10 Others [2015] eKLR,** the court cited with approval the case of **Kenya Small Scale Farmers Forum & 6 Others vs. Republic of Kenya & 2 Others [2013] eKLR,** in which it was held as follows:

"One of the golden threads running through the current constitutional regime is public participation in governance and the conduct of public affairs. The preamble to the Constitution recognizes, "the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law." It also acknowledges the people's 'sovereign and inalienable right to determine the form of governance of our country…"Article 1 bestows all the sovereign power on the people to be exercised only in accordance with the Constitution. One of the national values and principles of governance is that of 'inclusiveness' and 'participation of the people."

114. He further referred to the case of **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 CC** in which the Constitutional Court of South Africa held that:

"[145] It is implicit, if not explicit, from the duty to facilitate public participation in the law-making process that the Constitution values public participation in the law-making process. The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of state that the Constitution contemplates that the public will participate in the law-making process."

115. Public participation is one of the national values and principles of governance enunciated in Article 10 of the Constitution which bind all State organs, State officers, public officers and all persons whenever any of them inter alia enacts, applies or interprets any law. One of the principles thereunder is the participation of the people. Dealing with this principle, the Court of Appeal in Nairobi Civil Appeal No. 224 of 2017 – **Independent Electoral and Boundaries Commission & Others vs. The National Super Alliance & Others**, was emphatic in paragraphs 80 and 81 that:

"80. In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforceable gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1)(a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.

81. Consequently, in this appeal, we make a firm determination that Article 10(2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate."

116. In fact Article 118(1) and (2) of the Constitution expressly provides that*:*

Parliament shall—

(1) (a) conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and;

(b) Facilitate public participation and involvement in the legislative and other business of Parliament and its committees;

(2) Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.

117. Therefore where the principle of public participation is not inculcated in the process of legislative enactment, the process of such enactment cannot be said to meet the constitutional threshold. In this case, it is not contended that after the amendment the Bill was re-subjected to public participation. The result is that the public's input in the said amendment was ignored. Dealing with similar circumstances, this Court in Constitutional Petition No. 3 of 2016 between the **Law Society of Kenya and the Attorney General and Others** expressed itself as hereunder:

"Whereas it is true that what were introduced on the floor of the House were amendments as opposed to a fresh Bill, it is our view that for any amendments to be introduced on the floor of the House subsequent to public participation, the amendments must be the product of the public participation and ought not to be completely new provisions which were neither incorporated in the Bill as published nor the outcome of the public input. This position is supported by the views expressed in *Merafong Case* (supra) to the effect that:

'Once structured processes of consultation were put in place, with tangible consequences for the legislative process and of central importance to the community, the principle of participatory democracy required the establishment of appropriately formal lines of communication, at least to clarify, if not to justify, the negation of those consequences. In my view, then, it was constitutionally incumbent on the Legislature to communicate and explain to the community the fact of and the reasons for the complete deviation from what the community had been led to believe was to be the fruit of the earlier consultation, and to pay serious attention to the community's response. Arms-length democracy is not participatory democracy, and the consequent and predictable rupture in the relationship between the community and the Legislature tore at the heart of what participatory democracy aims to achieve…I would hold that, after making a good start to fulfil its obligation to facilitate public involvement, the Legislature stumbled badly at the last hurdle. It ended up failing to exercise its responsibilities in a reasonable manner, with the result that it seriously violated the integrity of the process of participatory democracy. In choosing not to face the music (which, incidentally, it had itself composed) it breached the constitutional compact requiring mutuality of open and good-faith dealing between citizenry and government, and thereby rendered the legislative process invalid.'

To Sachs, J in the above case:

'Given that the purpose of participatory democracy is not purely instrumental, I do not believe that the critical question is whether further consultation would have produced a different result. It might well have done. On the facts, I am far from convinced that the outcome would have been a foregone conclusion. Indeed, the Merafong community might have come up with temporising

proposals that would have allowed for future compromise and taken some of the sting out of the situation. For its part, the Legislature might have been convinced that the continuation of an unsatisfactory status quo would have been better even if just to buy time for future negotiations than to invite a disastrous break-down of relations between the community and the government. Yet even if the result had been determinable in advance, respect for the relationship between the Legislature and the community required that there be more rather than less communication…There is nothing on the record to indicate that the Legislature took any steps whatsoever even to inform the community of the about-turn, let alone to explain it. This is not the sort of information that should be discovered for the first time from the newspapers, or from informal chit-chat.'

…by introducing totally new and substantial amendments to the Judicial Service Act, 2011 on the floor of the House, Parliament not only set out to circumvent the constitutional requirements of public participation but, with due respect, mischievously short-circuited and circumvented the letter and the spirit of the Constitution. Its action amounted to a violation of Articles 10 and 118 of the Constitution."

118. In this case it is clear that the introduced amendment to the ***Pharmacy and Poisons Act***, deleted section 35I(b) and also substituted the Director of National Quality Control Laboratory with the Pharmacy and Poisons Board in section 35A(5). While it is clear that the aim and or motivation of the amendment was to transfer the GMP inspection functions from the National Quality Control Laboratory to the Pharmacy and Poisons Board, the resultant effect of the deletion of section 35I(b) which deals with inspection of premises and issuance of certificates of compliance, left that important power unregulated. Therefore the applicant's view that the effect of the amendment was an exposure of Kenyan citizens to dangerous substandard and counterfeit medicines cannot be without merit.

119. By acting in the manner it did the 1st Respondent improperly ignored this Court's decision in **Republic vs. Ministry of Health & 5 Others Ex-Parte Pius Wanjala & 2 Others [2017] eKLR**, it held that the Board and the Laboratory play distinctive and complimentary roles with one body having the regulatory role while the other ensuring quality assurance compliance, being two complimentary regulatory bodies under the ***Pharmacy and Poisons Act.*** While I appreciate that it is within the province of Parliament to delineate the respective roles where an enactment leaves a particular role unregulated without expressly stating that that was its intention, it can only be deemed as a failure to consider relevant material.

120. It is true that Parliament has vide sections 62 & 63 of the ***Health Act, 2017*** contemplated a single regulatory body for the regulation of health products and health technologies in the following terms:

62. There shall be established by an Act of Parliament a single regulatory body for regulation of health products and health technologies;

63(1)(c) The regulatory body shall- Conduct laboratory testing and inspection of manufacturing, storage and distribution facilities of health products and technologies;

121. I however agree with the applicant that what is contemplated is the creation of such body through future legislative enactment in accordance with the aforementioned sections hence, the effective and operational statutory law on regulation of medicines remains the ***Pharmacy and Poisons Ac***t, Cap 244 Laws of Kenya since apart from the purported transfer of sampling of medicinal samples under production and carrying out analytical testing for issuance of certificate of Analysis provided for under sections 35A(5) and 35K of ***Pharmacy and Poisons Act***, it is the 3rd interested party's mandate to

issue certificate of analysis.

122. The effect of this amendment was clearly therefore not just a formal amendment but was a substantive one that required public input. The failure to seek the public input cannot therefore be brushed aside. **Ngcobo, J** dealt with the issue in **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)**, when he stated:

"**The obligation to facilitate public involvement is a material part of the lawmaking process. It is a requirement of manner and form. Failure to comply with this obligation renders the resulting legislation invalid. In my judgment, this Court not only has a right but also has a duty to ensure that the law-making process prescribed by the Constitution is observed. And if the conditions for law-making processes have not been complied with, it has the duty to say so and declare the resulting statute invalid. Our Constitution manifestly contemplated public participation in the legislative and other processes of the NCOP, including those of its committees. A statute adopted in violation of section 72(1)(a) precludes the public from participating in the legislative processes of the NCOP and is therefore invalid. The argument that the only power that this Court has in the present case is to issue a declaratory order must therefore be rejected."**

123. It is similarly my view that this Court not only has the power but the obligation to determine whether a particular legislation was in fact and in substance enacted in accordance with the Constitution and not to just satisfy itself as to the formalities or the motions of doing so.

124. Therefore by introducing totally new and substantial amendments to the ***Pharmacy and Poisons Act*** at the Committee Stage of the whole house, which was neither consequential amendment nor amendment within statute law (Miscellaneous) Bill, but concerned drugs-control of manufacture of medicines, Parliament not only set out to circumvent the constitutional requirements of public participation but, with due respect, mischievously short-circuited and circumvented the letter and the spirit of the Constitution. Its action amounted to a violation of Articles 10 and 118 of the Constitution.

125. That brings me to the circumstances when a Bill may be amended. Section 133(2),(4),(5) & (6) of the Standing Orders of the National Assembly which prescribes the procedure on the bills during the committee stage of the whole house thus:

(2) No amendment shall be moved to any part of a Bill by any Member, other than the Member in charge of the Bill, unless written notification of the amendment shall have been given to the Clerk twenty-four hours before the commencement of the sitting at which that part of the Bill is to be considered in Committee.

(4) A Member moving an amendment or a further amendment to any part of the Bill under paragraphs (2) and (3) shall explain the meaning, purpose and effect of the proposed amendment or further amendment.

(5) No amendment shall be permitted to be moved if the amendment deals with a different subject or proposes to unreasonably or unduly expand the subject of the Bill, or is not appropriate or is not in logical sequence to the subject matter of the Bill;

(6) No amendment shall be moved which is inconsistent with any part of the Bill already agreed to or any decision already made by the Committee, and the Chairperson may at any time during the debate of a proposed amendment, withdraw it from the consideration of the Committee if in

the opinion of the Chairperson, the debate has shown that the amendment contravenes this paragraph. [Emphasis added].

126. Similarly, section 56(1) of the said Standing Orders of the National Assembly that prescribes the procedure on the motions in the house, echoes the same principle as thus:

Every amendment shall be relevant to the Motion which it seeks to amend and shall not raise any question which, in the opinion of the Speaker, should be raised by a substantive Motion after notice given;

127. What was before the House was ***Clinical Officers (Training, Registration and Licensing) Bill, 2016*** which repealed the existing ***Clinical Officers (Training, Registration and Licensing) Act,*** Cap. 260 of the Laws of Kenya which made provision for training, registration and licensing of Clinical Officers; to regulate their practice and to provide for the establishment, powers and functions of the Clinical Officers Council. The ***Pharmacy and Poisons Act*** on the other hand is *"An Act of Parliament to make better provision for the control of the profession of pharmacy and the trade in drugs and poisons".* Section 34 (instead of 35 because section 22 was deleted) of the ***Clinical Officers (Training, Registration and Licensing) Act*****,** which came in by virtue of the said amendment however reads thus:

The Board (Pharmacy and Poisons Board) or any person authorized in writing by the Board shall have power to enter and sample any medicinal substance under production in any manufacturing premises and certify that the method of manufacture approved by the Board is being followed.

128. I agree that there is therefore absolutely no nexus between section 34 and the rest of the sections of the ***Clinical Officers (Training, Registration and Licensing) Act.***

129. Clearly by amending the provisions of the ***Pharmacy and Poisons Act*** which had nothing to do with the objectives of the ***Clinical Officers (Training, Registration and Licensing) Bill, 2016,*** the 1st Respondent purported to deal with a different subject and proposed to unreasonably or unduly expand the subject of the Bill and in a manner not appropriate or in logical sequence to the subject matter of the Bill. In other words 1st Respondent exceeded its powers conferred on it by the Constitution as read with the Standing Orders.

130. By its action, the 1st Respondent deleted a provision of the Act which there was no express intention to be deleted. In so doing I agree that the 1st Respondent failed to consider a relevant matter. As was held in **Minister for Aboriginal Affairs vs. Peko-Wallsend Ltd (1986) 162 CLR 24 at 39-40 and 55:**

"A decision-maker will err by failing to take into account a relevant consideration or taking an irrelevant consideration into account. These grounds will only be made out if a decision-maker fails to take into account a consideration which the decision-maker is bound to take into account in making the decision or takes into account a consideration which the decision-maker is bound to ignore. The considerations that a decision-maker is bound to consider or bound to ignore in making the decision are determined by construction of the statute conferring the discretion. Statutes might expressly state the considerations that need to be taken into account or ignored. Otherwise, they must be determined by implication from the subject matter, scope and purpose of the statute."

131. The holding in the *locus classicus* of **Associated Provincial Picture Limited vs. Wednesbury Corporation [1947] 2 All ER 680; [1948] 1 KB 223** best summarizes the situation that has prompted

the *ex Parte* Applicant to seek the court's intervention and protection in these proceedings, particularly in the words of Lord Greene MR at pages 681-682 thus*:*

"If, in the statute conferring discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question; they must disregard these matters...Unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that has all been referred to as being matters which are relevant for consideration...For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from consideration matters which are irrelevant to the matter that he has to consider. If does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably"...Similarly, you may have something so absurd that no sensible person could ever dream that it would lay within the powers of the authority..."

132. Had the 1st Respondent considered the effect of the late amendments no doubt it would not have passed the same in the manner it did.

133. It bears repetition that the ***Pharmacy and Poisons Act*** deals with the Quality Control of Manufacture of Medicines. It is therefore a piece legislation dealing with health. Article 110 (1) (a), 2 (a) (b), 3, 4 & 5 of the Constitution, on the other hand provide respectively that:

(1)(a) In this Constitution, "a Bill concerning county government" means–– a Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule;

(2)(a) A Bill concerning county governments is-a special Bill, which shall be considered under Article 111, if it––

(2)(b) A Bill concerning county governments is-an ordinary Bill, which shall be considered under Article 112, in any other case.

(3) Before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill

(4) When any Bill concerning county government has been passed by one House of Parliament, the Speaker of that House shall refer it to the Speaker of the other House.

(5) If both Houses pass the Bill in the same form, the Speaker of the House in which the Bill originated shall, within seven days, refer the Bill to the President for assent.

134. However Part II(2)(a) and (13) of the Fourth Schedule of the Constitution provides that:

The functions and powers of the county are—

(2) (a) County health services, including, in particular— county health facilities and pharmacies;

(13) Control of drugs and pornography

135. The Supreme Court in giving guidelines on Bills that ought to be referred to the Senate expressed itself in **The Speaker of the Senate & Another vs. The Hon. Attorney-General & Others [2013] eKLR**, at paragraph 102 as follows:

"The Court's observation in Re the Matter of the Interim Independent Electoral Commission is borne out in an official publication, Final Report of the Task Force on Devolved Government Vol. 1: A Report on the Implementation of Devolved Government in Kenya [page. 18]:

"The extent of the legislative role of the Senate can only be fully appreciated if the meaning of the phrase 'concerning counties' is examined. Article 110 of the Constitution defines bills concerning counties as being bills which contain provisions that affect the functions and powers of the county governments as set out in the Fourth Schedule; bills which relate to the election of members of the county assembly or county executive; and bills referred to in Chapter Twelve as affecting finances of the county governments. This is a very broad definition which creates room for the Senate to participate in the passing of bills in the exclusive functional areas of the national government, for as long as it can be shown that such bills have provisions affecting the functional areas of the county governments. For instance, it may be argued that although security and policing are national functions, how security and policing services are provided affects how county governments discharge their agricultural functions. As such, a bill on security and policing would be a bill concerning counties….With a good Speaker, the Senate should be able to find something that affects the functions of the counties in almost every bill that comes to Parliament, making it a bill that must be considered and passed by both Houses."

136. In this case it is expressly provided that control of drugs and pornography is the function of County Governments. The ***Pharmacy and Poisons Act*** deals with control of drugs. Therefore a bill proposing amendments to that Act must necessarily be deemed as a Bill concerning county governments pursuant to Article 110 of the Constitution. It must therefore be referred to the Senate.

137. It was however contended that the Speaker of the Senate having expressed his concurrence that the Bill did not concern county governments, that was the end of the matter and there was no need for the Senate to deliberate further on the same. At paragraph 131 of the above case, the Supreme Court held:

"Where the Speakers determine that a Bill is not one "concerning county government", such a Bill is then rightly considered and passed exclusively by the National Assembly, and then transmitted to the President for assent. The emerging, broader principle is that both Chambers have been entrusted with the people's public task, and the Senate, even when it has not deliberated upon a Bill at all the relevant stages, has spoken through its Speaker at the beginning, and recorded its perception that a particular Bill rightly falls in one category, rather than the other. In such a case, the Senate's initial filtering role, in our opinion, falls well within the design and purpose of the Constitution, and expresses the sovereign intent of the people: this cannot be taken away by either Chamber or either Speaker thereof."

138. In this case there is no evidence of concurrence. The process through which a decision of both Houses is arrived at in a Bill concerning Counties was elaborated by the Supreme Court in the **Speaker of the Senate & Another vs. Attorney-General & 4 Others [2013] eKLR** at paragraphs 142, 143,143 & 197, where it was stated thus:

"[142] How do the two Speakers proceed, in answering those questions or sub-questions" They must consider the content of the Bill. They must reflect upon the objectives of the Bill. This, by the Constitution, is not a unilateral exercise. And on this principle, it is obvious that the Speaker of the National Assembly by abandoning all engagement or consultation with the Speaker of the Senate, and proceeding as he did in the matter before this Court, had acted contrary to the Constitution and its fundamental principles regarding the harmonious motion of State institutions.

[143] Neither Speaker may, to the exclusion of the other, "determine the nature of a Bill": for that would inevitably result in usurpations of jurisdiction, to the prejudice of the constitutional principle of the harmonious interplay of State institutions.

[144] It is evident that the Senate, though entrusted with a less expansive legislative role than the National Assembly, stands as the Constitution's safeguard for the principle of devolved government. This purpose would be negated if the Senate were not to participate in the enactment of legislation pertaining to the devolved units, the counties [Article 96(1), (2) and (3)].

[197]One of the cardinal principles of the Constitution that can be gleaned from its architecture and wording is, "the more checks and balances, the better" for good governance. The relationship between the two Parliamentary Chambers should be reinforced by this principle. After all, legislative authority is derived from the people. Both Houses of Parliament represent the same people, and the resources at the core of this dispute, are owned by the people of Kenya. In the equitable distribution of resources owned by the people of Kenya, the principles of checks and balances, mediation, dialogue, collaboration, consultation, and interdependence are not necessarily conflictual, granted that they are all invoked in the interests of the people of Kenya.

139. In my view however the final decision as to whether a bill concerns county governments must rest on this Court. While the opinions of the Speakers of the two houses are entitled to their respect, the ultimate decision rests with the Court. In this case there is no evidence that the Bill in question was referred to and passed by the Senate as ought to have been done.

140. The Supreme Court of Kenya**,** in **Speaker of the Senate & Another vs. Attorney-General & 4 Others [2013] eKLR** at paragraph 62, that held that:

Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way.

141. Similarly in **Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic of Kenya & 10 Others [2015] eKLR,** the Supreme Court held that:

In our view, the principle that emerges from the above decisions read together with Article 124(1) of the Constitution is that in a jurisdiction such as ours in which the Constitution is supreme, the

Court has jurisdiction to intervene where there has been a failure to abide by Standing Orders which have been given constitutional underpinning under the said Article. However, the court must exercise restraint and only intervene in appropriate instances, bearing in mind the specific circumstances of each case."

142. According to the Zimbabwean Supreme Court case of **Biti and Another vs. The Minister of Justice, Legal and Parliamentary Affairs and Another (2002) AHRLR 266 (ZwSC 2002) Supreme Court Judgment No SC 10/02.**:

"There is therefore merit in the submission that, having made such a law, Parliament cannot ignore that law. Parliament is bound by the law as much as any other person or institution in Zimbabwe. Because standing orders arise out of the Constitution, and because the Constitution mandates Parliament to act in accordance with Standing Orders, they cannot be regarded merely as rules of a club'. Standing orders constitute legislation which must be obeyed and followed."

In a constitutional democracy it is the courts, not Parliament, that determine the lawfulness of actions of bodies, including Parliament. There is therefore no merit in the submission of Mr Majuru when he said that: "...this Honourable Court is precluded from enquiring into the internal proceedings of Parliament with regards to the third reading and passage of the General Laws Amendment Bill (now the General Laws Amendment Act Number 2 of 2002)." It is my view that this Court has not only the power but also the duty to determine whether or not legislation has been enacted as required by the Constitution. Parliament can only do what is authorised by law and specifically by the Constitution."

143. The Malawian Supreme Court in **Attorney General vs. The Malawi Congress Party and Others, MSCA Civil Appeal No 22 of 1996,** opined that:

"Our standpoint with regard to SO 27 is simply this. The Courts are not concerned with purely procedural matters which regulate what happens within the four walls of the National Assembly. But the Courts will most certainly adjudicate on any issues which adversely affect any rights which are categorically protected by the Constitution where the Standing Orders purport to regulate any such rights. In the case under consideration, we do not believe that a breach of SO 27 by the Speaker of the House affected any rights guaranteed by the Constitution"..... Stephen J summed up this point very clearly in Bradlaugh v. Gosset, at page 286, We also accept that over their own internal proceedings, the jurisdiction of the National Assembly is exclusive, but, it is also our view that it is for the Courts to determine whether or not a particular claim of privilege fell within such jurisdiction. We conclude by holding that by acting in breach of SO 27, the Speaker of the House did not infringe on any constitutional right which is justiciable before the Courts. The remedy for such breach can only be sought and obtained from the National Assembly itself."

144. What then happen where an enactment is passed in contravention of the Standing Orders" The Uganda Constitutional Court Constitutional Petition No. 08 of 2014 [2014] UGCC 14 - **Oloka-Onyango & 9 Others vs. The Attorney General** answered the issue in the following terms:

"Rule 23 of the Parliamentary Rules of Procedure require the Speaker, even without prompting by any Member of Parliament to ensure that Coram exists before a law is passed. We note that the Speaker was prompted three times by Hon. Mbabazi and Hon. Aol to the effect that there was no Coram in the house. The speaker was obliged to ensure compliance with the provisions of Rule 23 of the Rules of Procedure of Parliament. She did not. Parliament as a law making body should

set standards for compliance with the Constitutional provisions and with its own Rules. The Speaker ignored the Law and proceeded with the passing of the Act. We agree with Counsel Opiyo that the enactment of the law is a process, and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it. We have therefore no hesitation in holding that there was no Coram in Parliament when the Act was passed, that the Speaker acted illegally in neglecting to address the issue of lack of Coram. We come to the conclusion that she acted illegally. Following the decision of Makula International vs. Cardinal Emmanuel Nsubuga, supra failure to obey the Law (Rules) rendered the whole enacting process a nullity."

145. As regards the advice of the Attorney General, I reiterate the position in **Bank of Uganda vs. Banco Arabe Espanol [2007] EA 333** as cited with approval in **Republic vs. Cabinet Secretary, Ministry of Education & Another Exparte Thadayo Obanda [2017] eKLR,** that:

"The opinion of the Attorney General as authenticated by his own hand and signature regarding the laws…and their effect or binding nature or any agreement contract or other legal transaction should be accorded the highest respect by government and public institutions and their agents…It is improper and untenable for the Government…or any other public institution or body in which the Government…has an interest to question the correctness or validity of that opinion in so far as it affects the rights and interest of 3rd parties. As a country we must have and maintain an acceptable measure or standard of public morality and the Attorney General should be held to his bargain, both on the ground of public morality and on the principle of good faith *(pacta suntservanda).*"

146. However that opinion must itself be lawful. In this case, with due respect the office of the Attorney General, in a rather convoluted opinion, misdirected the President on the legality of the impugned amendments. The Attorney General, rightly in my view opined that clause 34, which was unrelated to the substance of the Bill and which was inserted during the Committee Stage, intended to amend sections 35A (5) and 35I(b) of the ***Pharmacy and Poisons Act***. He further opined that the National Assembly may not have acted strictly in accordance with its Standing Orders. Despite these clearly grave misgivings, the Attorney General proceeded to give the whole Bill a clean bill of health by confirming that the Bill was consistent with the provisions of the Constitution and other existing laws and that the President may assent to the Bill, if he approved.

147. Clearly and with due respect this opinion was unsupported by the law and the authorities*.* The Bill ought not to have been signed in the manner in which it was passed and the Attorney General ought to have advised the President along those lines as was rightly in my view proposed by the Chief of Staff and Head of the Public Service, **Joseph K. Kinyua**, on 18th April, 2017.

148 Having considered the issues raised in this application the inescapable conclusion I come to is that the manner in which sections, 35A(5) and 35I(b) of the ***Pharmacy and Poisons Act***, were amended by the impugned ***Clinical Officers (Training, Registration and Licensing) Act***, was clearly unprocedural, unlawful and ultra vires and was consequently unconstitutional.

149. I am aware that **on 21st July, 2017, the *Parliamentary Powers and Privileges Act*, No. 29 of 2017 was assented to by the President. Under section 38(1) of the said Act the *National Assembly (Powers and Privileges) Act* was repealed. However the commencement date of Act No. 29 of 2017 was indicated as 17th August, 2017.**

150. Section 23(3)(e) of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya

provides that:

"Where *a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not—*

……..

…….

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.

151. These proceedings were commenced before the commencement date of the said Act. Section 11 of the *Parliamentary Powers and Privileges Act* provides as hereunder:

No proceedings or decision of Parliament or the Committee of Powers and Privileges acting in accordance with this Act shall be questioned in any court.

152. According to *Statutory Interpretation* by **Francis Benion** (4th Edition):

"The essential idea of a legal system is that current law should govern current activities. Elsewhere in this work a particular Act is likened to a floodlight switched on or off, and the general body of law to the circumambient air. Clumsy though these images are, they show the inappropriateness of retrospective laws. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of the law '. . . those who have arranged their affair . . . in reliance on a decision which has stood for many years should not find that their plans have been retrospectively upset.

153. This was the position of the Supreme Court of Kenya in **Samuel K Macharia vs. Kenya Commercial Bank Limited and Others (Application no. 2 of 2011)** at paragraph 61 where it expressed itself as follows:

" As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective and retrospective effect is not to be given to them unless by express words or necessary implication, it appears that this was the intention of the legislature."

154. It was similarly held in Municipality of Mombasa vs. Nyali Limited (1963) E.A 371 thus:

"Whether or not legislation operate retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation, the courts are guided by certain rules of construction. One of these rules is that if the legislation affects the substantive rights, it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is a good reason to the contrary."

155. The foregoing position got approval in the case of **S.K Macharia & Another vs. Kenya**

Commercial Bank Limited & Others, SCK Application No.2 of 2011 where the Supreme Court stated that:

"A retroactive law is not unconstitutional unless it inter-alia impairs obligations under contracts, divests rights or is constitutionally forbidden. Cited in Overseas Private Investment Corporation & Others vs. Attorney General & Another Petition 319 of 2012 to buttress this, in Kenya Bankers Association & Others vs. Minister of Finance & Another (2002) 1 KLR 61, the Court noted that a statute which takes away or impairs vested rights acquired under existing laws, or creates new obligations or imposes a new duty in respect of transaction already past, must be presumed to be intended not to have retrospective operation"

156. There is no stipulation in the *Parliamentary Powers and Privileges Act* that it was meant to operate retrospectively. Before its commencement, the ex parte applicant had the right to challenge the amendments to the *Pharmacy and Poisons Act*.

157. My position is **supported** by the decision in the case of **De Lille & Another vs. The Speaker of the National Assembly (1998)(3) SA 430(c)** in which the Court stated as follows:

"The National Assembly is subject to the Supremacy of the Constitution. It is an organ of state and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution. It is subject in all respects to the provisions of our Constitution. It has only those powers vested in it by the Constitution expressly or by necessary implication or by other statutes which are not in conflict with the Constitution. It follows therefore that Parliament may not confer on itself or on any of its constituent parts, including the National Assembly, any powers not conferred on them by the Constitution expressly or by necessary implication."

158. On appeal the **Appellate** Court in **Speaker of National Assembly vs. De Lille MP & Another 297/98 (1999) (ZASCA 50)** rendered itself as follows:

"This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is Supreme- not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No parliament, no official and no institution is immune from Judicial scrutiny in such circumstances."

159. I also rely **on Doctors for Life International vs. Speaker of the National Assembly and Others CCT 12/05)[2006] ZACC 11** at para 38, where the Court held that:

"….Under our Constitutional democracy, The Constitution is the Supreme Law. It is binding on all branches of government and no less parliament when it exercises its legislative authority, Parliament must act in accordance with and within the limits of the constitution, "and the Supremacy of the Constitution requires that "the obligations imposed by it must be fulfilled" Courts are required by the Constitution "to ensure that all branches of Government Act within

the Law "and fulfil their constitutional obligations."

160. It is therefore my view and I hold that section 11 of the *Parliamentary Powers and Privileges Act*, No. 29 of 2017, assuming without deciding that the provision is in the first place constitutional, does not apply to these proceedings.

161. Apart from that sections 11 and 12 thereof provide that:

(1) No civil or criminal proceedings shall be instituted against any Member for words spoken before, or written in a report to Parliament or a Committee, or by reason of any matter or thing brought by him or her therein by a report, petition, Bill, resolution, motion or other document written to Parliament.

(2) No civil suit shall be commenced against the Speaker, the leader of majority party, the leader of minority party, chairpersons of committees and members for any act done or ordered by them in the discharge of the functions of their office.

(3) The Clerk or other members of staff shall not be liable to be sued in a civil court or joined in any civil proceedings for an act done or ordered by them in the discharge of their functions relating to proceedings of either House or committee of Parliament.

162. It is clear from the foregoing that section 12 only deals with civil proceedings. These are judicial review proceedings. It is now trite law that the High Court in the exercise of its judicial review jurisdiction exercises neither a criminal jurisdiction nor a civil one since the powers of the High Court to grant judicial review remedies is *sui generis*. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.**

163. It however suffices to state that in conducting its proceedings, Parliament is bound to adhere to the provisions of the Constitution and where its actions contravene the Constitution; the same is null and void.

Order

164. It follows that the Notice of Motion dated 30th June, 2017, succeeds and I issue the following orders:

1. An Order of *Certiorari* removing into this Court for the purposes of being quashed all attendant proceedings and the decision of the 1st Respondent dated 5th April, 2017 that passed the motion to amend Sections 35 A (5) & 35 I (b) of the Pharmacy and Poisons Act under Clinical Officers (Training, Registration & Licensing) Bill 2016;

2. A declaration that the amendment to Sections 35A(5) & 35I(b) of the Pharmacy and Poisons Act under section 34 of the Clinical Officers (Training, Registration & Licensing) Bill 2016 was passed in a manner that breached the express provisions of the Constitution and is thus unconstitutional null and void.

165. The applicant will have the costs of this application to be borne by the 1st to 3rd Respondents.

166. It is so ordered.

Dated at Nairobi this 17th day of January, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Wanjala Pius for Mr Wanyama for the applicant and appearing for the 3rd interested party

Mr Mwendwa for the 1st and 2nd Respondents

Mr Sisule for the 1st interested party

CA Ooko