Pharmaceutical Society of Kenya & another v Attorney General & 3 others (Petition 85 of 2018) [2021] KEHC 85 (KLR) (Constitutional and Human Rights) (22 September 2021) (Judgment)

Pharmaceutical Society of Kenya & another v Attorney General & 3 others [2021] eKLR

Neutral citation: [2021] KEHC 85 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 85 OF 2018

WK KORIR, J

SEPTEMBER 22, 2021

BETWEEN

PHARMACEUTICAL SOCIETY OF KENYA ..... 1ST PETITIONER

KENYA NATIONAL UNION OF NURSES ..... 2ND PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

MINISTRY OF HEALTH ..... 2ND RESPONDENT

NATIONAL ASSEMBLY ..... 3RD RESPONDENT

SENATE ..... 4TH RESPONDENT

Sections 16, 17 and 33 and the First Schedule to the Health Act, 2017, are unconstitutional as they discriminated against certain health care professionals by barring them from holding administrative posts.

Reported by Beryl Ikamari

Constitutional Law *- fundamental rights and freedoms - right to equality and freedom from discrimination - where administrative posts in the health care system under the Health Act, 2017, were limited to members of the Medical Practitioners and Dentists Board to the exclusion of other health care professionals who were previously able to hold the posts - whether the provisions of the Health Act, which created those limitations were discriminatory - Constitution of Kenya, 2010, article 27; Health Act, 2017, sections 16, 17, 33 and the First Schedule.*

Jurisdiction *- jurisdiction of the High Court - jurisdiction to enforce the Bill of Rights and to determine the constitutionality of statutes - where certain provisions of the Health Act were alleged to be unconstitutional - whether the High Court had jurisdiction to entertain the matter - Constitution of Kenya, 2010, article 165(3).*

Constitutional Law *- institution of a constitutional petition - exhaustion of alternative remedies - petition to Parliament under article 119 of the Constitution as a remedy for unconstitutional enactments - whether the provisions of article 119 of the Constitution ousted the jurisdiction of the court to hear and determine questions of unconstitutionality of a statute, in the first instance - Constitution of Kenya, 2010, article 119.*

Constitutional Law *- national values and principles of governance - public participation - threshold to be met in fulfillment of public participation requirements - claim that there was lack of public participation in the enactment of the Health Act, 2017, and that the time given for public participation was inadequate - where claims of lack of public participation were not pleaded specifically and where claims of inadequate time given for public participation were not pleaded at all and were introduced through submissions - whether views collected through public participation had to be incorporated into the statute being enacted - whether there had been a failure to meet public participation requirements under the circumstances - Constitution of Kenya, 2010, article 10(2)(a).*

Brief facts

The 1st petitioner filed Petition No 85 of 2018 and the 2nd petitioner filed Petition No 123 of 2018. The two petitions were consolidated with the consent of the parties and Petition No 85 of 2018 was designated the lead file. The petitioners' main contention was about the constitutionality of sections 16, 19, 33, 45 and the First Schedule of the Health Act, 2017 which they alleged essentially placed health professionals with equal competence on unequal platforms. The effect of the provisions was to bar pharmacists and nurses from holding certain administrative posts which they had previously been able to hold. The introduction of the requirement that holders of such posts should be registered under the Kenya Medical and Dentists Board meant that professionals that were regulated under the Pharmacy and Poisons Board and the Nurses Council were not eligible for such posts.

The petitioners stated that they had expressed concerns on several clauses of the Bill that came before the enactment of the Health Act. Their concerns were not incorporated into the statute in question. An additional contention from the petitioners was that the Health Act breached the provisions of article 234(2)(a)(i) of the Constitution as it purported to create offices in the public service without authorization of the Public Service Commission.

The 1st and 2nd respondents responded to the 2nd petitioner's case by filing grounds of opposition. They advanced arguments that included the assertion that the impugned provisions of the Health Act enjoyed a presumption of constitutionality and that the presumption had not been rebutted. They stated that the Health Act was enacted in accordance with constitutional dictates. They contended that for various reasons the objects of the Health Act would be defeated without a justification if the prayers sought were granted. Among the reasons advanced was that there would be poor coordination of health services between the national and county governments and that there would be a lack of coordinated leadership between the national and county governments. The 1st and 2nd respondents also stated that the court lacked jurisdiction to entertain the matter as the petitioner had not exhausted an alternative mode of seeking redress (petition to Parliament) and that the matter should have been filed at the Employment and Labour Relations Court.

The Attorney General filed grounds of opposition in relation to both petitions. He also stated that the petitioner had not rebutted the presumption of constitutionality with respect to the impugned provisions of the Health Act. The Attorney General added that the petitioner had not exhausted alternative remedies (petition to Parliament) and that the court lacked jurisdiction to handle a matter about the employment of nurses either at the national or county level of government.

Issues

i. Whether the High Court had jurisdiction in relation to a claim where it was alleged that certain professionals in the health care system, including nurses and pharmacists, had been discriminated against by being barred from holding certain administrative posts.

ii. Whether the provisions of article 119 of the Constitution, which allowed any person to petition Parliament for any matter concerning an enactment, ousted the High Court's jurisdiction to entertain a matter about the alleged unconstitutionality of a statute, in the first instance.
iii. Whether there was adequate public participation in the enactment of the Health Act, 2017.
iv. Whether an issue that was not pleaded could be introduced for the court's consideration through submissions.
v. Whether the provisions of sections 16, 19 and 33 of the Health Act, 2017 and the first schedule to the Health Act, 2017, which limited the holding of certain administrative posts to members of the Medical Practitioners and Dentists Board, discriminated against other health care professionals, including nurses and pharmacists.

Held

1. The petitions before the court did not raise employment and labour relations issues but they raised issues that sought a determination relating to the constitutionality of statutory provisions, for which the court had jurisdiction under article 165(3) of the Constitution. Therefore, the court had jurisdiction to hear and determine the matter.
2. The Petition to Parliament (Procedures) Act, 2012, provided that every person had a right to petition Parliament to consider any matter within its authority, including questions as to whether Parliament ought to enact, amend or repeal any legislation. It was necessary to consider whether it was a viable remedy that the petitioner had outside the court.
3. The exhaustion doctrine served the purpose of ensuring that there was a postponement of judicial consideration of matters to ensure that a party was, first of all, diligent in the protection of his own interests within the mechanisms in place for resolution outside the courts.
4. Article 119 of the Constitution mandated every person to petition Parliament to consider any matter within its authority. That was one avenue for rectifying unconstitutional legislations that could have slipped through the keen eyes of parliamentarians. The remedy did not, however, oust the constitutional authority of the court to determine the constitutionality of any enactment by the legislature. Where there was a clear procedure for redress of any particular grievance prescribed by the Constitution or statute, that procedure should have been followed. However, the right to petition the court was a fundamental constitutional prescription that could not be deemed to be of a lesser effect than the right to petition Parliament. It was upon the parties to opt for what they deemed to be the most effective and efficient remedy. There was no merit in the assertion by the 1st and 2nd respondents that the petitioners failed to exhaust a statutory remedy.
5. Public participation was a constitutional dictate recognized in article 10(2)(a) of the Constitution. In the 1st petitioner's petition, the issue of lack of public participation in the enactment of the Health Act was mentioned in passing. The issue was mentioned casually and the manner in which it was violated was not specified. It was in the submissions where it was explained that the Legislature did not take into account the petitioner's views. The petitioners conceded that the Legislature called for the views of the public with respect to the impugned legislation and the petitioners expressed their views. The legal position with respect to public participation was that the Legislature had to facilitate public involvement in its enactments but that did not mean that any particular view that was expressed had to prevail.
6. The 2nd petitioner's submission included the assertion that the public was not given enough time to present its views as part of public participation but the argument had to fail. The issue was not pleaded but it was introduced through submissions and submissions could not replace pleadings. The petitioner did not give particulars as to how much time was actually given for purposes of public participation in order to assist the court to make a reasonable determination on that issue.
7. In determining the constitutionality of a given provision of a statute, the court had to consider its purpose and effect on constitutional provisions. If its purpose did not infringe a right guaranteed under

the Constitution, the court had to examine the effect of its implementation. If either the purpose or effect of the statute infringed on a right guaranteed by the Constitution, the impugned statute or section had to be declared unconstitutional.

8. A statute should be construed according to the intention expressed in the statute itself. The intention of a statute could be identified through a number of factors. Reference could be made to the precise words used, their particular documentary and factual context and, where identifiable, their aim and purpose.

9. It was sometimes necessary to treat people differently in order to achieve equality. Different treatment would not amount to discrimination if the criterion for differentiation was reasonable and objective. Equality before the law required that persons should be treated uniformly unless there was some valid reason to treat them differently. Therefore, it was necessary to determine whether there was a discernible justification in the Health Act 2017 for excluding members of the petitioners from occupying certain posts created under the Act. Lack of a justification would mean that the impugned provisions were discriminatory.

10. The Health Act, 2017 was purposely enacted to cater for the needs of the health care system in Kenya with the main goal of delivering quality health products and services to all persons in Kenya. The Act in its definitions revealed inclusivity of the health care professionals and at that point did not differentiate between one health care professional from another. A job qualification differentiation was introduced in the impugned provisions which specified that the said positions could only be filled by a medical practitioner registered by the Medical Practitioners and Dentists Board thereby excluding all other health care professionals.

11. There was no attempt by any of the respondents to explain and justify why certain posts in the health care system were preserved for medical practitioners registered by the Medical Practitioners and Dentists Board. It was not the case that the respondents were not aware that health care professionals were registered under various organisations. It had not been demonstrated that members of the Medical Practitioners and Dentists Board had unique administrative skills not available to the members of the petitioners hence justifying the reservation of the managerial positions to its members. The differentiation introduced in the impugned provisions was unreasonable as there was no valid reason to treat healthcare providers and healthcare professionals differently yet they all served in the same healthcare system with the aim of attaining the goals identified in the Health Act, 2017. Accordingly, the impugned provisions of sections 16, 19 and 33 of the Health Act, 2017 violated article 27 of the Constitution and were therefore unconstitutional.

12. The first schedule to the Health Act, 2017 provided a technical classification of levels of healthcare delivery. The problem with the schedule was that it limited the managers of certain facilities to registered clinical officers and medical officers. The affected offices were not defined in the Act and that could easily lead to the exclusion of the members of the petitioners from managing the health care facilities at the different levels. The first schedule to the Health Act was unconstitutional only to the extent that it locked up jobs for a specified group of health care providers or professionals.

13. Section 6 of the Health Act provided for reproductive health care and certain procedures to be done by a health professional with formal medical training at the proficiency level of a medical officer, a nurse, midwife, or a clinical officer who had been educated and trained to proficiency in the skills needed to manage pregnancy-related complications in women, and who had a valid license from the recognized regulatory authorities to carry out that procedure. The petitioners had not discharged the burden of proving that the provision was discriminatory.

14. Section 45 of the Health Act, 2017 established a statutory body known as the Kenya Health Professions Oversight Authority. Section 48 of the Act provided for the functions of the Authority. No reason was advanced as to why the provision should be found to be unconstitutional. Therefore, section 45 of the Health Act was constitutional.

Petition partly allowed.

Orders

i. *Declaration issued that sections 16(3)(a), 19(4)(a), 33(2)(a) of the Health Act and the notes in the First Schedule of the Health Act, 2017 were discriminatory of the members of the petitioners and were thus unconstitutional and null and void ab initio. For avoidance of doubt, the notes in the First Schedule were unconstitutional only to the extent that they excluded members of the petitioners with the necessary qualifications from being in charge of any of the six levels of the healthcare delivery hierarchy specified therein.*

ii. *Parties were to meet their own costs.*

Citations

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1. *Council of Governors & 3 others v Senate & 53 others* Petitions 381 & 430 of 2014; [2015] eKLR (Consolidated) - (Explained)
2. *County Government of Nyeri & another v Cecilia Wangechi Ndungu* Civil Appeal 2 of 2015; [2015] eKLR - (Followed)
3. *Federation of Women Lawyers Kenya (FIDA K) & 5 others v Attorney General & another* Petition 102 of 2011; [2011] eKLR - (Explained)
4. *Gakuru, Robert N & others v Governor Kiambu County & 3 others* Petitions 532 of 2013; 12, 35, 36, 42, & 72 of 2014 & Judicial Review Miscellaneous Application 61 of 2014; [2014] eKLR (Consolidated) - (Explained)
5. *Katiba Institute & another v Attorney General & another* Constitutional Petition 209 of 2016; [2017] eKLR - (Followed)
6. *Musembi, William v Moi Education Centre Co Ltd & 3 others* Petition 264 & 274 of 2013; [2014] eKLR (Consolidated) - (Explained)
7. *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)* Petitions 56, 58 & 59 of 2019; [2020] eKLR (Consolidated) - (Explained)
8. *Nyarangi, James Nyasora & 3 others v Attorney General* Petition No 298 of 2008; [2008] eKLR - (Followed)
9. *Ramogi, William Odhiambo & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* Constitutional Petitions 159 of 2018 & 201 of 2019; [2020] eKLR (Consolidated) - (Explained)

Tanzania

Ndyanabo v Attorney-General (2002) AHRLR 243 (TzCA 2002) - (Followed)

Uganda

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1. *Doctors for Life International v Speaker of the National Assembly & Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) - (Explained)
2. *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) - (Explained)
3. *President of the Republic of South Africa & Another v John Phillip Hugo* (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 - (Mentioned)

United Kingdom

Cusack v London Borough Council of Harrow [2013] 4 All ER 97; [2013] UKSC 40 - (Explained)

India

State of Kerala & another v NM Thomas & others 1976 AIR 490; 1976 SCR (1) 906 - (Explained)

United States

Regents of the University of California v Bakke 438 US 265 (1978) - (Applied)

Malaysia

Matadeen and Another v Pointu and Others (1998) 3 LRC 542; [1998] UKPC 9 - (Explained)

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Hogg, QM (Lord Hailsham) et al (Eds) (1995), *Halsbury's Laws of England* London: Buttersworth 4th Edn (Reissue) Vol 44(1) para 1372

Statutes

Kenya

1. Constitution of Kenya, 2010 articles 1; 2(5)(6); 3; 10(2)(a)(b); 19; 20; 21; 22; 23; 24; 27; 43; 47(2); 53; 93; 94; 109; 118; 119; 152; 162(2)(a); 165(3)(d)(iii)(5)(b); 209(3)(4)(5); 210(1);234(2)(a)(i); 258; 259(4)(b); Chapter 6- (Interpreted)
2. Health Act, 2017 (Act No 21 of 2017) sections 6, 16(3)(a)(b)(c); 19(4)(a); 33(2)(a)(b); 45; 48- (Interpreted)
3. Labour Relations Act, 2007 (Act No 14 of 2007) In general - (Cited)
4. Nurses and Midwives Act (cap 257) In general- (Cited)
5. Petitions to Parliament (Procedure) Act, 2012 (Act No 22 of 2012) In general - (Cited)
6. Pharmacy and Poisons Act (cap 244) In general - (Cited)
7. Societies Act (cap 108) In general - (Cited)

International Instruments

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981
   articles 2, 3
2. International Covenant on Civil and Political Rights (ICCPR), 1966
   article 26
3. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966
   article 2(2)

Advocates

None mentioned

JUDGMENT

1. The 1st petitioner, Pharmaceutical Society of Kenya, is a society registered under the *Societies Act*, Cap. 108.

2. The 2nd petitioner, the Kenya National Union of Nurses, is a trade union registered under the *Labour Relations Act 2007*.

3. The 1st respondent, the Attorney General, is the principal legal adviser of the national government and is constitutionally charged with representing the national government in court or in any other legal proceedings to which the national government is a party other than criminal proceedings.

4. The 2nd respondent, the Ministry of Health, is established under article 152 of the *Constitution of Kenya 2010* and is mandated to provide health services, create an enabling environment, regulate, and set standards and policy for health service delivery in Kenya.

5. The 3rd respondent, the National Assembly and the 4th respondent, the Senate, are the legislative arm of the government established under article 93 of the *Constitution* to carry out the legislative functions enumerated under article 94 of the Constitution.

6. The petitioners herein filed two separate petitions. The 1st Petitioner filed Petition No 85 of 2018 on March 8, 2018 and the 2nd petitioner filed Petition No 123 of 2018 on 4th April, 2018. The two petitions were consolidated with the consent of the parties on November 25, 2019 and Petition No 85 of 2018 was designated the lead file.

7. The main contention of the petitioners is the constitutionality of sections 16, 19, 33, 45 and the First Schedule of the *Health Act, 2017* which they allege essentially places health professionals with equal competence on unequal platforms.

8. It is important to state the cases of each of the petitioners as presented in their separate petitions. The 1st petitioner's case is premised on articles 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 43, 47, 93, 94, 109, 118, 234 and 258 of the Constitution, and the *Health Act 2017*. It is alleged that the impugned provisions of the law violate the fundamental freedoms and constitutional rights spelt out under articles 19, 20, 21, 22, 23, 24, 26 and 47 of the Constitution. The petition is supported by an affidavit sworn on 7th March, 2018 by the President of the 1st petitioner, Dr. Paul Mwaniki.

9. The 1st petitioner seeks the following reliefs:

    i A declaration that the limitation of the right of qualified pharmacists to hold offices created in the *Health Act* 2017 stands in repugnance to the constitutionally entrenched standards in view of limitation of rights.

    ii. A declaration that sections 6, 16, 19, 33, 45 and the First Schedule of the *Health Act* as passed by the respondents is unconstitutional as it is a violation of articles 209(3), (4) and (5), 210(1) and 234(2)(a)(i) of the Constitution.

    iii. An order of *certiorari* to bring to this Court and quash the decision of the respondents to pass sections 6, 16, 19, 33, 45 and the First Schedule which stands in inconsistence with the Constitution.

    iv. A prohibitory injunction to proscribe both levels of the governments from terminating or interfering with the tenure of pharmacists who hold office affected by these clauses.

    v. A mandatory injunction to indefinitely suspend the application of sections 6, 16, 19, 33, 45 and the First Schedule of the *Health Act*.

    vi. A mandatory injunction to compel the 2nd and 3rd respondents to amend sections 6, 16, 19, 33, 45 and the First Schedule of the *Health Act* to include the qualifications of pharmacists as beneficiaries of offices created thereby.

    vii. Costs of the Petition.

    viii. Any other order that this Honourable Court deems fit and just in the circumstances.

10. The petition is grounded on the assertion that sections 6, 16, 19, 33, 45 and the First Schedule of the *Health Act, 2017* which provide the qualifications for the named administrative posts are unconstitutional. It is averred that prior to the enactment of the *Health Act, 2017* the respondents, as

per the requirement for public participation, made a call for submission of memoranda which they honoured. In their memoranda, members of the 1st petitioner raised concerns on several clauses in the Bill which they deemed unconstitutional.

11. It is the 1st petitioner's contention that the law attempts to limit the rights of the professionals in the human health field from holding positions that they have held previously without a reasonable and justifiable cause. The 1st petitioner argue that administrative posts should be given competitively on an even playing field for all within the human health field. The 1st petitioner avers that its members have hitherto held and demonstrated competence in the positions from which they have been barred by the impugned provisions of the Act. It is deposed that the impugned Act has introduced a new condition for qualification to wit registration under the Kenya Medical and Dentists Board which as a result bars qualified pharmacists from the said positions since they are regulated by a different authority being the Pharmacy and Poisons Board established under the *Pharmacy and Poisons Act*, Cap 244. The 1st petitioner contend that the said positions are merely administrative and as such the inequitable prerequisites are unreasonable and unjustifiable.

12. It is additionally the 1st petitioner's case that the impugned Act offends the provisions of article 234(2)(a)(i) of the *Constitution* as it purports to create offices in the public service without authorization of the Public Service Commission which is charged with that mandate.

13. According to the 1st petitioner, it brings this petition against the respondents for violating the national values and principles of governance under article 10 of the Constitution, failure to include the views of the stakeholders while drafting the *Health Act, 2017*; and violation of its members' right to fair administrative action under article 47 of the Constitution as the respondents' actions were contrary to due process.

14. The 2nd petitioner's case is based on articles 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 27, 43, 47, 93, 94, 109, 118, 234 and 258 of the *Constitution* and the *Health Act, 2017*. According to the 2nd petitioner the case is for the enforcement of the fundamental rights and freedoms spelt out under articles 19, 20, 21, 22, 23, 24, 26 and 47 of the *Constitution*. The petition is supported by an affidavit sworn on April 4, 2018 by Seth Ambusini Panyako who is the General Secretary of the 2nd respondent.

15. The 2nd petitioner seeks the following reliefs:

    i. A declaration that the Petition is brought in public interest.

    ii. A declaration that limitation of the right of qualified nurses to hold offices created in the *Health Act, 2017* stands in repugnance to the constitutionally entrenched standards in view of limitation of rights.

    iii. A declaration that sections 16(3)(a), (b) and (c), 19(4)(a), 33(2)(a) and (b), 45 and the First Schedule of the *Health Act* , No. 21 of 2017 are unconstitutional as they are in flagrant violation of articles 10(2)(a) and (b), 27(1), (2), (4), (5), (6) & (7), 47(2), 209(3), (4) and (5), 210(1) and 234(2)(a)(i) of the *Constitution*.

    iv. A declaration that sections 16(3)(a), (b) and (c), 19(4)(a), 33(2)(a) and (b), 45 and the First Schedule of the *Health Act,2017* are void because they deny, violate, infringe and threaten the fundamental freedoms in the Bill of Rights and are not justified under articles 10(2)(a) and (b), 27(1), (2), (4), (5), (6) & (7), 47(2), 209(3), (4) and (5), 210(1) and 234(2)(a)(i) of the *Constitution*.

v. A prohibitory injunction to proscribe both levels of the governments from terminating or interfering with the tenure of nurses who hold office affected by the impugned sections of the *Health Act* , No 21 of 2017 to wit sections 16(3)(a), (b) and (c), 19(4)(a), 33(2)(a) and (b), 45 and the First Schedule.

vi. Costs of the Petition.

vii. Any other order that this honourable courtdeems fit and just in the circumstances.

16. The petition is grounded on the assertion that sections 16, 19, 33, 45 and the First Schedule of the *Health Act, 2017* which provide for the qualifications of the administrative posts stated therein are unconstitutional. It is averred that the 1st petitioner submitted memoranda prior to the enactment of the *Health Act, 2017* but the contributions were overlooked. It is deposed that the impugned law attempts to limit the rights of the professionals in the human health field from holding positions that they have held previously without a reasonable and justifiable cause. It is additionally the 2nd Petitioner's case that administrative posts should be granted competitively on an even playing field for all in the human health field.

17. The 2nd petitioner avers that its members who occupy the positions replicated in the impugned Act are qualified and have demonstrated their competence in those positions. According to the 2nd petitioner, the impugned Act has introduced a new condition for qualification to wit registration under the Kenya Medical and Dentists Board which as a result bars qualified nurses from the said administrative positions as they are regulated by the Nursing Council established under the *Nurses Act*, Cap 257. The 2nd petitioner asserts that this requirement offends the right to equality and freedom from discrimination under article 27 of the *Constitution*. It is the 2nd petitioner's case that the positions are merely administrative and as such the inequitable prerequisites are unreasonable and unjustifiable.

18. The 2nd petitioner further avers that the impugned Act offends the provisions of article 234(2)(a)(i) of the *Constitution* as it purports to create offices in the public service without authorization of the Public Service Commission which is charged with that mandate.

19. The 1st and 2nd respondents opposed the 2nd petitioner's case through grounds of opposition dated October 8, 2018 as follows:

i) The impugned sections 16 (3) (a), (b), (c), 19 (4) (a), 33(2)(a), (b), 45 and the First Schedule of the *Health Act, 2017* enjoy a presumption of constitutionality. In any event, the applicant has neither rebutted the said presumption nor demonstrated that rights and fundamental freedoms have been violated by the challenged sections.

ii) The challenged Act was enacted in accordance with the Constitution taking into account *inter alia* public participation and contribution of key stakeholders including the petitioner.

iii) The objects of the challenged Act will be defeated without any justified cause if prayers sought in the instant Petition are allowed in that inter alia:

a) The revamped administrative structure of the health sector will suffer immensely thereby leading to poor service delivery;

b) There will be poor coordination of health services between the national and county governments;

c) There will be lack of a coordinated leadership of the healthcare providers in the country;

d) The county governments will not benefit from the technical advice of a qualified medical practitioner in the provision of healthcare services;

e) The national and county governments will not benefit from the expertise of the various healthcare providers recognized under the impugned Act.

iv) The petitioner has failed to sufficiently demonstrate, with concrete evidence, any violation of the Constitution in the process of the enactment of the *Health Act, 2017*.

v) The petitioner has failed to appreciate the fact that differentiation in terms of qualifications reserved for a particular office holder does not in itself amount to discrimination.

vi) The petitioner/applicant has an alternative avenue provided under article 119 of the *Constitution* as read with the provisions of the *Petition to Parliament (Procedures) Act*, No 22 of 2012 to petition Parliament to enact, amend or repeal any legislation.

vii) By dint of article 165(5)(b) as read with article 162(2)(a) of the *Constitution*, this honourable court lacks the requisite jurisdiction to deal with the question touching on the tenure and/or employment of nurses either at the national or county levels of government.

viii) The notice of motion application and the Petition are unmeritorious, as such they otherwise form a classical description of an abuse of the due process of this honourable court.

20. The 1st petitioner through submissions dated November 24, 2019 argues that the elevation of medical doctors above the other health professionals is unconstitutional. The 1st Petitioner submits that the Constitution provides that every person is equal before the law and has equal protection of the law and thus people of the same status should be treated equally. It is their assertion that where this right is limited the reason must be justifiable in an open and democratic society. To buttress this argument reliance was placed on the case of *William Musembi v Moi Education Centre Co. Ltd & 3 others* [2014] eKLR where it was held that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of all human beings and articles 10(2) (b) and 19(2) of the *Constitution*.

21. It is submitted that the training and qualifications of pharmacists and medical doctors are the same and treating pharmacists unequal to their counterparts is discriminatory and unconstitutional since professionals in the health sector all play an integral part in the promotion of the right to the highest standards of health. It is accordingly urged that a qualified pharmacist should have an equal claim on the positions and jobs in the health sector created under the laws of Kenya and the only criteria should be that of merit.

22. On the claim that the impugned law is unconstitutional for creating new positions in the civil service without involving the Public Service Commission, the 1st petitioner submits that the positions created under the *Health Act, 2017* are not those excluded under article 234(3) of the Constitution and thus creating those positions without the involvement of the Public Service Commission is unconstitutional. The 1st petitioner argues that Parliament can only legislate on matters auxiliary or supplementary to the establishment or abolition of offices, appointments and confirmation of appointments.

23. As to whether the facts of this case raises a scenario of unequal protection of the law, the 1st petitioner commences by submitting that discrimination and unfair and prejudicial treatment of a person or group of persons based on certain characteristics is forbidden under article 27(4) as read together with article 259(4)(b) of the *Constitution*. Reliance is placed on the case of *James Nyasora Nyarangi & others v Attorney General*, Petition No 298 of 2008 as affirming this constitutional position. The South African case of the *President of the Republic of South Africa & Another v John Phillip Hugo* (1997) ZACC 4 was cited as holding that each case requires a careful and thorough understanding of the impact of the discriminatory action upon particular people in order to determine whether its overall impact is one which furthers the constitutional goal of equality or not.

24. According to the 1st petitioner, limitation of rights under article 24 of the *Constitution* must be inscribed in law and even then the limitation must be justifiable in an open and democratic society. It is urged that the burden of proving that an impugned law complies with the requirements of Article 24 lies on the person or body seeking to limit the enjoyment of a right, and the burden has not been discharged by the respondents in this case. The 1st petitioner relies on the United States case of *Regents of the University of California v Bakke* 985 Ct 2733 (1978) where a special admission program applying to economically or educationally disadvantaged members of a minority group was held to be invalid as it perpetuated reverse discrimination against other individuals. The court is urged to find that this is a quintessential case of violation of the doctrine of equal protection of the law which calls for the quashing of the impugned law.

25. The 1st petitioner finally submits that the court should allow the petition since this is a matter of public interest which seeks to uphold the sanctity of the Constitution while ironing out the chaotic environment that the *Health Act, 2017* has created in the health sector.

26. Through submissions dated 10th December, 2018, the 2nd petitioner contend that sections 16, 19, 33, 45 and the First Schedule of the *Health Act, 2017* limits the right of nurses in the public sector from holding certain offices in the health sector. According to the 2nd petitioner, although section 2 of the Act clearly defines a health care professional to include a person who has obtained health professional qualifications and who has been licensed by the relevant regulatory body, the impugned sections proceeds to limit the definition to 'a medical practitioner registered by the Medical Practitioners and Dentists Board'. It is submitted that the impugned provisions disadvantage other human health practitioners and nurses already holding positions as county executive committee members of health as they are openly biased against them.

27. The 2nd petitioner submits that the impugned provisions are discriminatory as they purport to openly favour one cadre of health professionals against all other health professionals in the management of the country's health system. According to the 2nd petitioner, section 19(4) of the *Health Act, 2017* and the other impugned provisions violate its members' constitutional right to equality and freedom from discrimination which is protected by article 27 of the Constitution. It is urged that Parliament is required by the Constitution to apply equitable standards in its legislative processes and refrain from limiting the rights of its citizens and where such a limitation exits the same must be reasonable and

justifiable in an open and democratic society. It is accordingly the 2nd petitioner's case that the exclusion of nurses from persons qualified to hold administrative posts simply because they are regulated by a different regulatory body is undeniably unreasonable and unjustified.

28. The 2nd petitioner submits that there was no public participation before the impugned Act, 2017 was passed as the time within which the Bill was passed was not sufficient to enable Kenyans express their views on the extensive complex legislation. To buttress this view reliance was placed on the case of *Robert N Gakuru & others v The Governor Kiambu County & others* [2014] eKLR where it was held that an invitation for public participation must give those wishing to participate sufficient time to prepare. It is additionally argued that the memorandum submitted by the 2nd Petitioner in the public participation process was not considered. Reliance was placed on the case of *Doctors for Life International v Speaker of the National Assembly & Others* (CCT12/05) [2006] ZACC 11 where it was held that merely allowing public participation in the law-making process is not enough and the court must balance the need to respect parliamentary institutional autonomy and the right of the public to participate in public affairs.

29. The respondents did not file any submissions.

30. From the pleadings and submissions filed by the parties in this case it emerges that the core issue for the determination of this court is whether the impugned provisions of the *Health Act, 2017* met the procedural and substantive constitutional requirements for the enactment of legislation.

31. Before I embark on the identified substantive issue, I must address three issues raised by the Attorney General in his grounds of opposition which appear to suggest that this Court lacks jurisdiction to entertain the petitioners' claims. Firstly, that the petitions violate the doctrine of presumption of constitutionality of statutes and that the petitioners have not rebutted the presumption that the impugned provisions of the *Health Act, 2017* are constitutional. Secondly, that the petitioners have not exhausted the available alternative dispute resolution mechanism provided under article 119 of the *Constitution* as read with the provisions of the *Petition to Parliament (Procedures) Act, 2012* of petitioning Parliament to enact, amend or repeal the impugned provisions. Thirdly, that by dint of article 165(5)(b) as read with article 162(2)(a) of the *Constitution*, this Court lacks jurisdiction to deal with a question touching on the employment of nurses either at the national or county levels of government.

32. As already indicted, the respondents did not file any submissions and the grounds of opposition are therefore not elaborated. On their part, the petitioners did not address these particular issues. The Court is therefore left in the dark as to the arguments the Attorney General intended to advance on these issues. Nevertheless, this Court has a duty to address the question of the alleged lack of jurisdiction.

33. By stating that this court lacks jurisdiction by dint of article 165(5)(b) as read with article 162(2)(a) of the *Constitution*, the Attorney General is implying that this is a matter falling within the exclusive jurisdiction of the Employment and Labour Relations Court. The simple answer to the 1st and 2nd respondents is that the issues raised in the petitions concern the constitutionality of certain provisions of the *Health Act, 2017* and its effect on the constitutional rights and fundamental freedoms of the members of the petitioners. In my view, the nature of the petitions before this court do not raise an employment and labour relations issue but one that falls within the jurisdiction of this court under article 165(3) of the *Constitution* as the petitions seek a determination of the constitutionality of legal provisions. This court therefore has the necessary jurisdiction to make a determination on the issues and questions raised by the petitioners.

34. The doctrine of presumption of constitutionality is indeed a valid one. In this case, I will only state that whether or not the impugned provisions meet the constitutional threshold of legislation is an issue to be answered once the court has considered the petitioners' arguments. I need not say more on the issue.

35. The third ground upon which the Attorney General seek to block this court from entertaining the consolidated petitions is that the petitioners violated the exhaustion principle by failing to first exhaust an available alternative dispute resolution mechanism before approaching this court for a remedy. According to the 1st and 2nd respondents, the alternative dispute resolution mechanism is provided under article 119 of the *Constitution*, as read together with the provisions of the *Petition to Parliament (Procedures) Act ,2012* which provides that every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation. The question therefore that arises for determination is whether there was a viable remedy for the petitioners outside this Court.

36. The doctrine of exhaustion was outlined in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR as follows:

> " 52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts..."

37. The court went ahead to outline the exceptions to the rule as follows:

> " 60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
>
> 61. The second principle is that the jurisdiction of the courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.
>
> 62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."

38. The High Court has on a number of occasions pronounced itself on the right to petition Parliament under the article 119 of the *Constitution*. In the case of *Katiba Institute & another v Attorney General & another* [2017] eKLR the Court held that:

> " 103. We emphasize that under article 2(4) of the *Constitution*, 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. Under article 165(3)(d)(i) and (ii) the High Court is clothed with the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law is inconsistent with or in contravention of the Constitution; and, the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution.
>
> 104. Therefore whereas the legislative authority vests in Parliament and the County Assemblies, where a question arises as to whether an enactment is inconsistent with the Constitution or is passed in contravention of the Constitution, the High Court is the institution constitutionally empowered to determine the issue. This is of course subject to the appellate jurisdiction given to the Court of Appeal and the Supreme Court. There is nothing like supremacy of the legislative assembly outside the Constitution. Under article 2(1) and (2), the *Constitution* is the supreme law of the Republic and binds all persons and all State organs at both levels of government. No person may claim or exercise State authority except as authorised by the Constitution.
>
> 105. Therefore there is only supremacy of the Constitution. Accordingly, every organ of State performing a constitutional function must perform it in conformity with the Constitution. It must follow that where any State organ fails to do so, the High Court, as the ultimate guardian of the Constitution, will point out the transgression. The contrary argument, in our view, runs counter to the constitutional provisions with respect to the jurisdiction of this Court.
>
> 115. It is therefore clear that the mere fact that Parliament has the power pursuant to a petition under article 119 of the Constitution to enact, amend or repeal legislation, does not bar this Court from carrying out its constitutional mandate; or, to fashion out an appropriate remedy."

39. Likewise, in the case of *Council of Governors & 3 others v Senate & 53 others* [2015] eKLR it was held that:

> " 71. It is useful, however, in closing on jurisdictional questions, to address ourselves to the provisions of article 119(1) of the Constitution. The AG submits that the petitioners ought to have approached Parliament in accordance with the provisions of article 119(1) prior to filing its petition. Article 119(1) and (2) are in the following terms:
>
> "Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal legislation.

2. Parliament shall make provision for the procedure for the exercise of this right."

72. The question is whether this provision is intended to take away the right of a party to question the constitutionality of an Act of Parliament, or indeed any action taken by the legislature, guaranteed under articles 22 and 258. Further, whether it can also be taken as ousting the jurisdiction of the Court under article 165(3)(d) to determine any question respecting the interpretation of the Constitution, including "the question whether any law is inconsistent with or in contravention of" the Constitution, or under article 165(3)(d)(iii), to determine any matter "...relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government""

73. In our view, the answer must be in the negative. Doubtless, article 119(i) will serve a useful purpose in allowing citizens to petition Parliament to consider matters of concern to them that are within the purview of Parliament, including the repeal or amendment of legislation. It appears to us, however, that article 119 is not intended to cover situations such as is presently before this Court. The question of the constitutionality of the impugned CGAA was raised with Parliament prior to its enactment. As deposed by Mr Charles Nyachae, the Chairman of CIC, in his affidavit sworn on September 19, 2014, the issue had been brought to the attention of Parliament through CIC's Advisory Opinion in the month of August 2014, prior to the enactment of the CGAA. Parliament, nonetheless, appears to have disregarded the concerns raised regarding its conformity with the Constitution and proceeded to enact the legislation.

74. It would therefore be, in our view, for the Court to abdicate its responsibility under the Constitution to hold that a party who considers that legislation enacted by Parliament in any way violates the Constitution is bound to first petition Parliament with respect to the said legislation. The constitutional mandate to consider the constitutionality of legislation is vested in the High Court, and articles 2(4) and 165(3(d)(i) mandate this Court to invalidate any law, act or omission that is inconsistent with the Constitution. This is in harmony with the mandate of the courts to be the final custodian of the Constitution."

40. I am guided accordingly and I find myself entirely in agreement with the cited authorities. The Constitution provides several avenues to the people of Kenya of finding solutions to the day to day governance issues. Article 119 mandates every person to petition Parliament to consider any matter within its authority. The authority of Parliament includes the enactment, amendment and repeal of legislation. That is one avenue for rectifying unconstitutional legislations that may have genuinely slipped through the keen eyes of parliamentarians. This remedy does not, however, oust the constitutional authority of this Court to determine the constitutionality of any enactment by the legislature. While the Court appreciates that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or statute, that procedure should be followed, the court takes note of the fact that the right to petition the court is a fundamental constitutional prescription which cannot be deemed to be of lesser effect than the right to petition Parliament. It is upon the parties to opt for what they deem to be the most effective and efficient remedy. I therefore

find no merit in the assertion by the 1st and 2nd respondents that the petitioners failed to exhaust a statutory remedy.

41. I now turn to the core issue in the consolidated petitions. According to the petitioners, the impugned provisions of the law did not meet the constitutional requirements for enactment of legislation and are also not coherent with the Bill of Rights. The petitioners assert that there was no public participation before the *Health Act, 2017* was passed as the time within which the Bill was passed was not sufficient to enable Kenyans express their views on the extensive and complex legislation. They also contend that the views which they submitted in regard to the impugned provisions were not considered by the legislature. In response, the 1st and 2nd respondents assert that the Act was enacted in accordance with the Constitution because public participation was conducted, and comments and views were received from key stakeholders who included the petitioners.

42. Article 10(2)(a) of the *Constitution* highlights public participation as one of the national values and principles of governance. Article 118(1)(b) specifically requires Parliament and its committees to facilitate public participation and involvement in its legislative affairs.

43. It has been observed in jurisprudence time and again that public participation should be meaningful and qualitative. In *Doctors for Life International v Speaker of the National Assembly & Others* (CCT12/05) [2006] ZACC 11, the Court identified the underlining standard and quality of public participation as follows:

> "Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement.
>
> What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided."

44. Locally, the standard of public participation was set in the case of *Robert N Gakuru & others v The Governor Kiambu County & others* [2014] eKLR where it was held that:

> "In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment

of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action."

45. Having established the applicable law, I now move to consider the evidence placed before this court on the question of public participation. It is important to restate the petitioners' cases in so far as the issue of public participation is concerned. In the 1st petitioner's petition, the issue of lack of public participation is mentioned in passing. At paragraphs 36 and 37 the respondents are accused of violating the national values and principles of governance found in article 10 of the *Constitution*. The 2nd petitioner's petition also casually alleges lack of public participation. The manner in which the principle of public participation was violated in the enactment of the impugned provisions is not specified.

46. It is only in the submissions that it is urged that the legislature did not take into account the petitioners' views. The documents containing the petitioners' views as submitted to Parliament have not been exhibited. It is therefore difficult for the court to conclude that Parliament did not take into account the petitioners' views. It is additionally noted that even though the 3rd and 4th respondents are required to consider the views of the public the same are not binding on them. This statement finds support in the holding in the South African case of *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* (CCT 41/07) [2008] ZACC 10 that:

> " The passages from the Doctors for Life majority judgment, referred to by the applicants, state reasons for constitutionally obliging legislatures to facilitate public involvement. But being involved does not mean that one's views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them. To say that the views expressed during a process of public participation are not binding when they conflict with Government's mandate from the national electorate, is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public."

Indeed, the petitioners concede that the legislature called for views of the public on the Bill and the petitioners acknowledge that they presented their views.

47. The 2nd petitioner changed tune in the submissions and argued that the public was not given enough time to present their views. This argument must fail on two grounds: firstly, that the issue was not pleaded but was introduced in the submissions and submissions cannot replace pleadings; and secondly, the 2nd petitioner does not disclose the actual time granted to the public to submit their comments and views on the impugned Act in order to assist this Court to make a reasonable determination on the sufficiency of the time given. It is additionally noted that as was observed in the case of *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others*

(Interested Parties) [2020] eKLR, it is sufficient for the legislature to facilitate the participation of the public in its legislative affairs. In that regard the court stated that:

> " 620. The principle of public participation does not require the legislature to conduct a census-like exercise of knocking at the door of every person residing in its jurisdiction with a view to confirming that the residents have given their opinions on a contemplated legislative measure, and where no comments are forthcoming, to 'forcefully' extract opinions from residents. The duty placed upon the legislature by the law is to inform the public of its business and provide an environment and opportunity for those who wish to have a say on the issue to do so."

48. From the foregoing analysis, it becomes apparent that the petitioners have not made out a case for declaring the impugned provisions of the *Health Act, 2017* unconstitutional for being enacted without the participation of the public.

49. On the alleged substantive defect of the impugned provisions of the *Health Act, 2017*, the petitioners' central argument is that they violate their rights under article 27 of the *Constitution*. It is the petitioners' case that article 27 requires that people of the same status should be treated equally. They submit that their training and qualifications are equal to those of the doctors and hence treating them unequally is discriminatory and unconstitutional. According to the petitioners, any limitation of a right must be backed by a justifiable reason.

50. Answering this question involves the interpretation of the alleged unconstitutional provisions as against the provisions of the Constitution which they are said to violate. It is accordingly vital to bear in mind the relevant guiding principles in the interpretation of the Constitution and statutes. The starting point is the observation that the spirit of the Constitution permeate the process of judicial interpretation and judicial discretion as stated in article 259 of the *Constitution*.

51. The principles for constitutional interpretation were well-summarised in the Tanzanian case of *Ndyanabo v Attorney-General* (2002) AHRLR 243 (TzCA 2002) as follows:

> " [19.] We propose, before commencing to examine the correctness or otherwise of counsel's arguments, to allude to general principles governing constitutional interpretation which, in our opinion, are relevant to the determination of the issues raised by counsel in this appeal. These principles may, in the interests of brevity, be stated as follows. First, the Constitution of the United Republic of Tanzania is a living instrument, having 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 time with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and rule of law. As was correctly stated by Mr Justice EO Ayoola, a former Chief Justice of The Gambia, in his paper presented at seminar on the Independence of the Judiciary, in Port Louis, Mauritius, in October 1998: A timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the constitution a stale and sterile document.'
>
> [20.] Secondly, 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, that our young democracy not only functions but also grows, and that the will and dominant aspirations of the people

prevail. Restrictions on fundamental rights must be strictly construed. Thirdly, until the contrary is proved, 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. Fourthly, since, as stated a short while ago, there is a presumption of constitutionality of a legislation, save where a clawback or exclusion clause is relied upon as a basis for constitutionality of the legislation, the onus is upon those who challenge the constitutionality of the legislation; they have to rebut the presumption. Fifthly, where those supporting a restriction on a fundamental right rely on a clawback or exclusion clause in doing so, the onus is on them; they have to justify the restriction."

52. In determining the constitutionality of a given provision of a statute, the Court has to consider its purpose and effect on constitutional provisions. This principle was stated in the Ugandan case of *Zachary Olum and Anor v Attorney General* [2000] UGCC 3 (06 June 2000) thus:

> " To determine the constitutionality of a section of a statute or Act of Parliament, court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the court has to go further and examine the effect of its implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional."

53. When a case like this is presented to the Court, the Court is required to interrogate the intention of the legislature. It is the duty of the courts to give effect to the laws as enacted by Parliament. This principle was affirmed by the Court of Appeal in the case of *County Government of Nyeri & another v Cecilia Wangechi Ndungu* [2015] eKLR as follows:

> " 14. Alive to the fact that we are called upon to interpret the aforementioned provisions, we remind ourselves of the cardinal rule for construction of a statute; that is, a statute should be construed according to the intention expressed in the statute itself. *Halsbury's Laws of England*, 4th Edition (Reissue), Butterworths, 1995, Vol. 44(1), para 1372 provides:-
>
> "The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context..."

The intention of a statute can be identified through a number of factors. In *Cusack –vs- Harrow London Borough Council* (2013) 4 All ER 97, the Supreme Court observed:-

> " Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors."

Further, in *Halsbury's Laws of England* (*supra*):-

> " It is one of the linguisitic canons applicable to construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act..."""

54. I now turn to the impugned provisions of the *Health Act,2017*. Section 6 legislates the right to reproductive health care as follows:

> 6. (1) Every person has a right to reproductive health care which includes—
>
> (a) the right of men and women of reproductive age to be informed about, and to have access to reproductive health services including to safe, effective, affordable and acceptable family planning services;
>
> (b) the right of access to appropriate health-care services that will enable parents to go safely through pregnancy, childbirth, and the postpartum period, and provide parents with the best chance of having a healthy infant;
>
> (c) access to treatment by a trained health professional for conditions occurring during pregnancy including abnormal pregnancy conditions, such as ectopic, abdominal and molar pregnancy, or any medical condition exacerbated by the pregnancy to such an extent that the life or health of the mother is threatened. All such cases shall be regarded as comprising notifiable conditions.
>
> (2) For the purposes of subsection (I) (c), the term "a trained health professional" shall refer to a health professional with formal medical training at the proficiency level of a medical officer, a nurse, midwife, or a clinical officer who has been educated and trained to proficiency in the skills needed to manage pregnancy-related complications in women, and who has a valid license from the recognized regulatory authorities to carry out that procedure.
>
> (3) Any procedure carried out under subsection (1) (a) or (1) (c) shall be performed in a legally recognized health facility with an enabling environment consisting of the minimum human resources, infrastructure, commodities and supplies for the facility as defined in the norms and standards developed under this Act.

55. Section 16 establishes the office of the Director-General for health as follows:

> 16. (1) There shall hereby be established the office of Office of the Director –General for health.

(2) The Director General for health shall be recruited by the Public Service Commission through a competitive process, vetted by Parliament and appointed by the Cabinet Secretary.

(3) A person appointed under subsection (2) must—

(a) be a medical practitioner registered by the Medical Practitioners and Dentists Board;

(b) at least be a holder of a Masters degree in public health, medicine or any other health related field;

(c) have experience of at least ten years in management of health services, five of which must be at a senior management position; and

(d) meet the provisions of Chapter Six of the Constitution of Kenya.

(4) The Director-General shall hold office for a term of five years renewable once.

56. Section 19 deals with the county health system and provides as follows:

19. (1) There shall be established with respect to every county, a county executive department responsible for health, which shall be in line with the health policy guidelines for setting up county health system and shall in all matters be answerable to the Governor and the County Assembly subject to the provisions of the Constitution and of any applicable written law.

(2) There shall be established the office of the County Director of health who shall be a technical advisor on all matters of health in the County.

(3) The County Director of health shall be recruited through a competitive process in conformity with the rules and regulations set from time to time by the County Public Service Board.

(4) A person appointed a County Director of health shall-

(a) be a medical practitioner registered by the Medical Practitioners and Dentists Board;

(b) be at least a holder of a Masters degree in public health, medicine or any other health related discipline; and

(c) have at least five years' experience in management of health services.

(5) The County Director of health shall-

(a) be the technical advisor on all matters relating to health within the County;

(b) be the technical advisor to the County Health Executive Committee member and the Governor;

(c) supervise all health services within the County;

(d) promote the public health and the prevention, limitation or suppression of infectious, communicable or preventable diseases within the County;

(e) prepare and publish reports and statistical or other information relative to the public health within the County;

(f) report periodically to the Director-General for health on all public health occurrences including disease outbreaks, disasters and any other health matters; and

(g) perform any other duties as may be assigned by the appointing authority and any other written law.

57. Section 33 creates the office of the Chief Executive Officer of Kenya Health Human Resource Advisory Council in the following words:

> 33. (1) The Public Service Commission shall, through an open and transparent process, recruit a Chief Executive Officer who shall be appointed by the Council.
>
> (2) A person is qualified for appointment as the Chief Executive Officer to the Council if the person—
>
> (a) holds at least a degree in medicine from a university recognized in Kenya, and is registered by the Medical Practitioners and Dentists Board;
>
> (b) has at least ten years' experience in the practice of medicine, five of which shall be experience at a senior management level; and
>
> (c) meets the, requirements of Chapter six of the *Constitution*.
>
> (3) The Chief Executive Officer shall serve the Council for a term of five years and shall be eligible, subject to satisfactory performance of his or her functions, for reappointment for one further term.
>
> (4) A person shall not be appointed as the Chief Executive Officer or an officer of the Council if such person has any direct or indirect interest in the health sector.
>
> (5) The Chief Executive Officer may be removed from office for gross misconduct, violation of the Constitution or any other law or any other ground as may be provided for in the contract of employment.
>
> (6) The Chief Executive Officer shall be responsible for the day to day operations of the Council.

58. Finally, section 45 establishes a statutory body known as the Kenya Health Professions Oversight Authority as follows:

> 45. (1) There is established an Authority known as the Kenya Health Professions Oversight Authority.

(2) The Authority shall be a body corporate with perpetual succession and a common seal, and shall in its corporate mane be capable of—

(a) suing and being sued;

(b) acquiring, holding and disposing of movable and immovable property; and

(c) doing or performing all such other things or acts as may be lawfully done by a body corporate.

59. As already stated, the petitioners' case in respect of the impugned provisions is hinged on article 27 of the *Constitution* which reads as follows:

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

60. The right not to be discriminated against is also protected by a number of International and regional instruments which are applicable in our jurisdiction by virtue of article 2(5) & (6) of the *Constitution*. One of those instruments is the *International Covenant on Civil and Political Rights (ICCPR)* which states at article 26 that:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such

as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

61. Another international law which provides for the said right is the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) which at article 2(2) states that:

> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

62. Likewise, articles 2 and 3 of the *African Charter on Human and Peoples' Rights* (also known as the Banjul Charter) states that:

> Article 2
>
> Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.
>
> Article 3
>
> 1. Every individual shall be equal before the law.
>
> 2. Every individual shall be entitled to equal protection of the law.

63. Courts here and abroad have given meaning to the right to "equality and freedom from discrimination." In the case of *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another* [2011] eKLR the court stated as follows:

> " ...At this stage, it is important to ask ourselves, 'what is equality and what is freedom from discrimination?' The two terms have been largely defined under Article 27(1) and (2). We have also tried to state a general perspective of what the two words mean.
>
> CEDAW (1979) defines discrimination as;
>
> "Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."
>
> And in the case of Jacques Charl Hoffmann Constitution Court of South Africa it was held;
>
> "At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in the society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding, the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim..."

64. The Court continued to state that:

> "On the other hand, the requirement of equal protection of the law does not mean that all laws passed by a legislature must apply universally to all persons and that the law so passed cannot create differences as to the persons to whom they apply and the territorial limit within which they are enforced. We are aware that individuals in any society differ in many respects such as age, ability, education, height, size, colour, wealth, occupation, race and religion. In our view any law made, must of necessity be clear as to the making of the choice and difference as regards its application in terms of persons, time and territory. Since the constitution can create differences, the question is whether these differences are constitutional. If the basis of the difference has a reasonable connection with the object intended to be achieved therefore the law which contains such a provision is constitutional and valid. On the other hand, if there is no such relationship, the difference is stigmatized as discriminatory and the provision can be rightly said to be repugnant to justice and therefore invalid."

65. In Indian case of *State of Kerala & another v NM Thomas & others* 1976 AIR 490; 1976 SCR (1) 906 the Court explained the concept behind the right to equality and freedom from discrimination as follows:

> "Discrimination is the essence of classification. Equality is violated if it rests on unreasonable basis. The concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Those who are similarly circumstanced are entitled to an equal treatment. Equality is amongst equals. Classification is, therefore, to be founded on substantial differences which distinguish persons grouped together from those left out of the groups and such differential attributes must bear a just and rational relation to the object sought to be achieved...
>
> The rule of parity is the equal treatment of equals in equal circumstances. The rule of differentiation is enacting laws differentiating between different persons or things in different circumstances. The circumstances which govern one set of persons or objects may not necessarily be the same as those governing ... set of persons or objects so that the question of unequal treatment does not really arise between persons governed by different conditions and different sets of circumstances. The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The legislature understands and appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category.

66. In a guidance issued by the Attorney-General's Department of the Australian Government titled 'Rights of equality and non-discrimination', it is stated that the right to equality affirms that all persons have the same rights and deserve the same level of respect and should therefore be accorded equal

treatment. This means that laws, policies and programs should not be discriminatory and that public authorities should not apply or enforce laws, policies and programs in a discriminatory or arbitrary manner. It follows that non-discrimination is an integral part of the right of equality as it ensures that no one is denied their rights based on race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

67. It is also rational to infer from the cited material that it may sometimes be necessary to treat people differently in order to achieve equality. Different treatment may not amount to discrimination if the criterion for the differentiation is reasonable and objective. In a nutshell equality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently as was held in Mauritius case of *Matadeen and Another v Pointu and Others* (1998) 3 LRC 542.

68. The question therefore is whether there is a discernible justification in the *Health Act, 2017* for excluding the members of the petitioners from occupying certain posts created by the Act. Failure to locate any justification will mean that the impugned provisions are discriminatory.

69. The preamble of a statute summarises the purpose of the law in question. A reading of the preamble of the *Health Act, 2017* discloses that the enactment is meant to 'establish a unified health system, to coordinate the inter-relationship between the national government and county government health systems, to provide for regulation of health care service and health care service providers, health products and health technologies and for connected purposes.'

70. The health system is defined as an organization of people, institutions and resources that deliver health care services to meet the health needs of the population, in accordance with the established policies. The Act proceeds at section2 define a 'health care professional' to include any person who has obtained health professional qualifications and is licensed by the relevant regulatory body. The same Section 2 also defines a 'health care provider' as a person who provides health care services and includes a health care provider.

71. In my view, the *Health Act, 2017* was purposely enacted to cater for the needs of the health care system in Kenya with the main goal of delivering quality health products and services to all persons in Kenya. The Act in its definitions reveal inclusivity of the health care professionals and at that point does not differentiate between one health care professional from another. A job qualification differentiation is introduced in the impugned provisions which specify that the said positions can only be filled by 'a medical practitioner registered by the Medical Practitioners and Dentists Board' thereby excluding all other health care professionals. It is on this basis that the petitioners contend that the inequitable prerequisites in the administrative positions are unreasonable and unjustifiable. Their case is that the positions should be based on merit and subjected to competitive recruitment.

72. There was no attempt by any of the respondents to explain and justify why these posts in the health care system were preserved for medical practitioners registered by the Medical Practitioners and Dentists Board. It cannot be that the respondents were not aware that health care professionals are registered under various organisations. In the already cited case of *State of Kerala & another v NM Thomas & others* 1976 AIR 490; 1976 SCR (1) 906, the Court opined that any differentiation in a matter of employment must be backed by justifiable reasons. In that regard the Court opined that:

> " This equality of opportunity need not be confused with absolute equality. Article 16(1) does not prohibit the prescription of reasonable rules for selection to any employment or appointment to any office. In regard to employment, like other terms and conditions associated with and incidental to it, the promotion to a selection post is also included in the matters relating to employment and even in regard to such a promotion to a selection

post all that article 16(1) guarantees is equality of opportunity to all citizens. Articles 16(1) and (2) give effect to equality before law guaranteed by article 14 and to the prohibition of discrimination guaranteed by article 15(1). Promotion to selection post is covered by article 16(1) and (2).

The power to make reservation, which is conferred on the State, under article 16(4) can be exercised by the State in a proper case not only by providing for reservation of appointments but also by providing for reservation of selection posts. In providing for reservation of appointments or posts under article 16(4) the State has to take into consideration the claims of the backward classes consistently with the maintenance of the efficiency of administration. It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration...

The present case is not one of reservation of posts by promotion. Under article 16(1) equality of opportunity of employment means equality as between members of the same class of employees and not equality between members of separate, independent class."

73. In the case before me, it has not been demonstrated that members of the Medical Practitioners and Dentists Board have unique administrative skills not available to the members of the petitioners hence justifying the reservation of the managerial positions to its members. Where I stand, I see a sharp contrast between the impugned provisions and the inclusive nature of the *Health Act, 2017* as discerned from the preamble and section 2. The impugned provisions make known that the positions are to be obtained by only one class of health care professionals rendering the petitioners' members lesser mortals.

74. What becomes apparent is that the impugned provisions of the Act fail to recognize the holistic approach in health care delivery as seen in the preamble. This is evident from the inadequate appreciation of the fact that fulfilling the duty to provide the highest attainable standards of health care requires a concerted effort that links concerns on access to health care, the cost of accessing these services and the quality of the services provided by the relevant bodies in the health care system. The limitations in these sections, in my view, are unreasonable as there is no valid reason to treat health care providers and health care professionals differently yet they all serve in the same health care system with the aim of attaining the goals identified in the *Health Act, 2017*. Owing to this fact it is my humble opinion that the impugned provisions of sections 16, 19 and 33 of the *Health Act, 2017* violate article 27 of the *Constitution* and is therefore unconstitutional.

75. The First Schedule of the *Health Act, 2017* provides a technical classification of levels of healthcare delivery. The problem with the Schedule is that there are notes that limit the managers of those facilities to registered clinical officers and medical officers. These are offices not defined in the Act and can easily lead to the exclusion of the members of the petitioners from managing the health care facilities at the different levels. For the reasons already stated, the First Schedule becomes unconstitutional only to the extent that it locks up jobs for a specified group of health care providers or professionals.

76. As regards section 6 of the Act, I take it that the 1st Petitioner is dissatisfied by the failure to list its members among the health professionals in sub-section (2) who can fulfil the right to reproductive health. There is no explanation by the 1st petitioner as to why it finds the provision to be discriminatory since the reason for the differential treatment is given as "a health professional with formal medical training at the proficiency level of a medical officer, a nurse, midwife, or a clinical officer who has been educated and trained to proficiency in the skills needed to manage pregnancy-related complications in women, and who has a valid license from the recognized regulatory authorities to carry out that

procedure." In order to prove that the provision is discriminatory, the 1st petitioner needed to establish through evidence that its members are "educated and trained to proficiency in the skills needed to manage pregnancy-related complications in women." Having failed to discharge that burden, this Court has no reason for faulting Parliament from excluding pharmacists from the list of health professionals who can provide services in fulfilment of the right to reproductive health. In the circumstances of section 6, they can only dispense medication under the direction of the health professionals listed in sub-section (2) of the section.

77. In regard to section 45 of the *Health Act, 2017* I note that the provision simply establishes a statutory body known as the Kenya Health Professions Oversight Authority. Section 48 of the Act provides that the functions of the Authority are:

    i. maintain a duplicate register of all health professionals working within the national and county health system;

    ii. promote and regulate inter-professional liaison between statutory regulatory bodies;

    iii. coordinate joint inspections with all regulatory bodies;

    iv. receive and facilitate the resolution of complaints from patients, aggrieved parties and regulatory bodies;

    v. monitor the execution of respective mandates and functions of regulatory bodies recognised under an Act of Parliament;

    vi. arbitrate disputes between statutory regulatory bodies, including conflict or dispute resolution amongst Boards and Councils; and

    vii. ensure the necessary standards for health professionals are not compromised by the regulatory bodies.

78. My understanding of this provision is that the Kenya Health Professions Oversight Authority is to be deemed as the ultimate authority when it comes to regulation of the health profession and quality oversight. The obligation to monitor and evaluate standards of performance of health professionals however remains with the respective regulatory bodies already established. In my view this Section is reasonable and justifiable as the rationale for quality control is the protection of the peoples' right to access health care from qualified and accountable personnel. The Authority is necessary so as to actively monitor the quality of health care while ensuring the set guidelines are upheld throughout the country. No reason has been advanced at all as to why this particular provision should be found to be unconstitutional. I accordingly find that section 45 of the *Health Act, 2017* is consistent with the Constitution hence constitutional.

79. Among the remedies granted to this court by article 23 of the *Constitution* is the power to issue "a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24." This is one of the prayers sought by the petitioners. In issuing such an order the court must be careful so as not to defeat the legislative intent of the statute or render the unaffected provisions impossible to implement. In the circumstances, I issue orders as follows:

    a. A declaration is hereby issued that sections 16(3)(a), 19(4)(a), 33(2)(a) and the notes in the First Schedule of the *Health Act, 2017* are discriminatory of the members of the petitioners and are thus unconstitutional and null

and void ab initio. For avoidance of doubt, the notes in the First Schedule are unconstitutional only to the extent that they exclude members of the petitioners with the necessary qualifications from being in-charge of any of the six levels of healthcare delivery hierarchy specified therein; and

b. These petitions being in the nature of public interest litigation, the parties are directed to meet their own costs of the proceedings.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2021

W. KORIR

JUDGE OF THE HIGH COURT