REVIEW OF KENYA MEDICAL SUPPLIES AUTHORITY ACT OF 2013 AND RELATED POLICY DOCUMENTS

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1. Background

The Kenya Medical Supplies Authority Act, 2013 was first enacted in 2013 to provide a legal framework to govern procurement, warehousing, storage, and distribution of medical supplies and equipment to public health facilities in the country. In May 2019, this Act was amended through amendments introduced on the floor of the house during debate in the National Assembly of the Health Laws (Amendment) Act of 2019. The amendments made it compulsory for both national and county public health facilities to procure all their drugs and medical supplies from KEMSA.[1] The amendment even made it a criminal offence, punishable by a fine not exceeding two million shillings or imprisonment for a term not exceeding five years, or both, for any person responsible for procurement and distribution of drugs and medical supplies in a national or county public health facility to fail to obtain such supplies from KEMSA.[2] The Amendments also allowed the Council of Governors to recruit one person to the KEMSA Board of Directors.[3]

In October 2020, these Amendments were however, declared unconstitutional in a High Court judgment that also declared 22 other laws unconstitutional for having been enacted by the National Assembly without involvement of the Senate.[4] The Court suspended the declaration of invalidity for 9 months to enable the respondents to take measures that would ensure compliance with the constitutional requirements under Article 110(3) and regularize the Acts of Parliament in question.[5] As a result, new amendments to the KEMSA Act are included in the Health Laws (Amendment) Bill, 2021 currently pending before Parliament for consideration and enactment.[6] While the proposed amendments have abandoned the compulsory provisions introduced by the 2019 amendments, they have retained the provisions that allow the Council of Governors to recruit only one member to the Board of Directors.

This review document posits that the Kenya Medical Supplies Authority Act of 2013 is not properly or at all aligned to the devolved system of government. Furthermore, the Amendments of 2019, and the proposed amendments of 2021 do not adequately or at all address the problem of alignment of the law to the devolved system of government. The

[1] See Section 4(3) of the KEMSA Act introduced by the amendments to the Act contained in the Health Laws (Amendment) Act No. 5 of 2019.
[2] See Section 4(4) of the KEMSA Act introduced by the amendment to the Act contained in the Health Laws (Amendment) Act No. 5 of 2019.
[3] Section 5(1)(ea) of the MEMSA Act introduced by the amendment to the Act contained in the Health Laws (Amendment) Act No. 5 of 2019.
[4] Senate of the Republic of Kenya & 4 others vs Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties) [2020] eKLR paras 122 and 123.
[5] Senate of the Republic of Kenya & 4 others vs Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties) [2020] eKLR paras 145 and 146.
[6] The Health Laws (Amendment) Bill, 2021—amendments in respect of the KEMSA Act of 2013.

document demonstrates the areas in which the said laws have failed to align with devolution and makes recommendations on how best to ensure proper alignment that will lead to more efficient and effective delivery of health services by the national and county governments within the context of the devolved system of governance.

2. The unitary system anchorage of the original and the new KEMSAs

The original Kenya Medical Supplies Agency (KEMSA), the predecessor to the Kenya Medical Supplies Authority (KEMSA), was first established as a state corporation in 2001 through Legal Notice No. 17 of 2000 issued under the State Corporations Act (Cap. 446).[7] The objective was to improve a centralized system of procurement, warehousing, storage and distribution of medical supplies and equipment to public health facilities, a task that was previously undertaken by the Ministry of Health.[8]

Given that this was done under the unitary system, KEMSA was conceptualized and established as an entity of the then central government to discharge functions previously undertaken by the central government's Ministry of Health. KEMSA would therefore receive its funding from the central government and development partners as grants to the central government; and remained accountable to the central government through the Ministry of Health. Because of this KEMSA was originally established to function under the general direction of the Ministry of Health.[9] The 2013 KEMSA Act which establishes the new KEMSA has maintained these original unitary foundations and anchorage since the Act has not been aligned to the devolved system of government.

Although the State Corporations Act under which the original KEMSA was established was revised twice since the promulgation of the 2010 Constitution (in 2012 and 2015), the Act has not been aligned to the devolved system of government and by and large, remains anchored in the unitary system of government. Even on mundane things such as names of offices, the Act maintains its unitary and old constitutional nature when it still refers to offices of Vice President instead of Deputy President; Minister instead of Cabinet Secretary; and Permanent Secretary instead of Principal Secretary.[10]

Moreover, although the Report of the Presidential Task Force on Parastatal Reforms recommended the repeal of the State Corporations Act, through the enactment of a single overarching Government Owned Entities Act that is consistent with the 2010 Constitution and the devolved system of government; this recommendation has not been implemented. The recommended Government Owned Entities Act would provide a legal framework to govern national government owned entities and County government owned corporations and

[7] See section 3(3) of the KEMSA Act and Ministry of Health *Assessment of the Kenya Medical Supplies agency (KEMSA)* (April 2008) page 7.
[8] Ministry of Health *Assessment of the Kenya Medical Supplies agency (KEMSA)* (April 2008) page 7.
[9] Ministry of Health, Assessment of Kenya Medical Supplies Agency (2008) page 14.
[10] See sections 2, 4, 5, 6, 11, 12, 13, 14, 16, 18, 22 and 26 of the State Corporations Act Cap 446.

agencies.[11] The report notes that all entities previously known as State Corporations shall henceforth be known generally as Government Owned Entities (GOEs).[12] It then defines government owned entities in a manner that draws a distinction between those owned by national government and those owned by county governments. Entities owned by national government are in two categories—state corporations comprising commercial state corporations, and commercial corporations with strategic functions that are to be defined through the national development planning process; and state agencies comprising executive agencies, independent regulatory agencies, research Institutions such as public universities, and tertiary education and training institutions.[13] Entities owned by county governments are also divided into two categories—county corporations which are solely or partly owned by a county government for commercial purposes; and county agencies that focus on specific strategic county government objectives in delivery of public service and include county executive agencies and joint county authorities.[14] A commercial function for the purpose of this policy is a function the dynamics of which are governed by a competitive profit driven market and that can be performed commercially but also serves a strategic socio-economic objective.

However, the report fails to recognize the possible existence of and the need to define entities that are jointly owned by both national and county governments, and to provide a framework to govern their establishment and operations. Essentially joint ownership of an entity implies that both national and county governments exercise power and responsibility over the entity to appoint boards of directors; set and monitor objectives of the entity; and play an oversight role over the entity including holding it accountable. Likewise, this omission is noticeable in the Government Owned Entities Bill of 2014, which makes elaborate provisions relating to government entities owned by national and county governments but none for joint entities of national and county governments.[15] Yet Article 189(2) clearly recognizes the need and empowers national and county governments to establish 'joint committees and joint authorities' through which they can co-operate and perform their functions as well as exercise their powers.

Although the justification section of the 2021 Amendment Bill sets out the purposes of the Bill as being 'to amend the Kenya Medical Supplies Authority Act, (No. 20 of 2013) to align the appointment of the Chairperson of the Board, Board members and the Corporation Secretary to the Constitution and the Mwongozo: Code of Governance for State Corporations', the proposed amendments do not adequately or at all align KEMSA to the constitution and the

[11] Government of the Republic of Kenya *Report of the Presidential Task Force on Parastatal Reforms* (October, 2013) page xx.
[12] Government of the Republic of Kenya *Report of the Presidential Task Force on Parastatal Reforms* (October, 2013) page xvi.
[13] Government of the Republic of Kenya *Report of the Presidential Task Force on Parastatal Reforms* (October, 2013) page xvi.
[14] Government of the Republic of Kenya *Report of the Presidential Task Force on Parastatal Reforms* (October, 2013) page xvii.
[15] Government Owned Entities Bill, 2014.

devolved system. An examination of the Mwongozo: Code of Governance for State Corporations discloses that while the code seeks to align governance of state corporations with the constitution particularly, Article 10 that entrenches the national values and principles of governance; Article 73 that provides for leadership and integrity; and Article 232 that provides for values and principles of public service, the code fails to align the governance of state corporations with the devolved system of government.[16]

3. Necessity of a new KEMSA in the context of devolution

The constitution of 2010 introduced a devolved system of government under which the health functions are assigned to both national and county governments. While delivery of most of the essential health services are assigned to county governments, which have responsibility for county health facilities and pharmacies, ambulance services, and promotion of primary health care; the role of national government in the delivery of health services is restricted to national referral health facilities.[17] Implied in these functions is the obvious fact that the demands of the 47 county governments for medical supplies and equipment are higher than those of national government. Moreover, implied in the respective health service delivery functions of national and county governments are functions and powers to procure, warehouse, store and distribute medical supplies and equipment to their respective national referral health facilities and county health facilities and pharmacies.

These functions are best interpreted as being exclusive functions of each of the two levels of government, respectively. One level of government cannot therefore unilaterally take over the functions of the other and assign them to its own entity without the consent of that other level of government. While it is true that national and county governments need not themselves directly discharge their constitutional functions but can delegate them to entities they have established to discharge on their behalf; one level of government cannot however, unilaterally assign functions of another level to an entity of its own over which the other level of government has no control. The functions can only be delegated by the two levels of government through their own consent obtained through intergovernmental negotiations and agreement. For these reasons, it is imperative to review the role of KEMSA and align it to the constitutional distribution of health service delivery functions of the national and county governments under the devolved system. KEMSA can no longer continue to be conceptualized, established, and structured as an entity of national government only; but as a joint entity of both national and county governments, exercising functions delegated to it by them, and answerable and accountable to them.

4. Necessity of an intergovernmental process of enactment of the KEMSA Act

The constitution also assigns to national government the function of health policy, which implies and includes legislative and regulatory powers to make laws governing health matters. However, these legislative and regulatory functions and powers cannot be used to re-assign

[16] Public Service Commission and State Corporations Advisory Committee *Mwongozo: The Code of Governance for State Corporations* (2015) page xi.
[17] The Fourth Schedule to the Constitution of Kenya dealing with assignment of functions.

the constitutional functions of county governments without their informed consent and involvement. Moreover, these are not exclusive but concurrent functions of both national and county governments, since implied in the county governments' functions of county health facilities and pharmacies; ambulance services; and promotion of primary health care, are county policy and legislative powers to legislate in these functional areas and regulate how these functions are discharged. Similarly, the national government's function of capacity building and technical assistance to counties in health matters is also concurrent with the county governments' function to build their own capacities which is implied in their above-mentioned functions. For these reasons, the process of enacting a legislation such as the KEMSA Act which seeks to even delegate the functions of county governments to a statutory body known as KEMSA ought to be preceded by intergovernmental processes of negotiation by and agreement of the two levels of government. An intergovernmental committee of national and county governments to negotiate and agree on how to conceptualize, establish and structure KEMSA ought to be established. The work of the IGR committee would lead to and IGR agreement out of which a KEMSA Act covering which functions can be delegated to KEMSA, how KEMSA is to be financed, and how it is to be held accountable to both national and county governments should arise.

5. Failure to align the KEMSA Act to the devolved system of government

The Kenya Medical Supplies Authority Act which was enacted in 2013 after the promulgation of the Constitution did not seek to and eventually did not effectively or at all align the system of procurement, warehousing, and distribution of medical supplies to public health facilities, to the devolved system of government. This is demonstrated in the following ways.

5.1 Limited objects of the Act

The objects of the Act as set out by the long title of the KEMSA Act are limited to making 'provisions for the establishment of the Kenya Medical Supplies Authority and for connected purposes'. The Amendments of 2019 and those of 2021 did not address this limitation in the objects of the law. Even though the stated intention of the 2021 Amendment Bill is to align the appointment of the Chairperson of the Board, Board members and the Corporation Secretary to the Constitution and the Mwongozo: Code of Governance for State Corporations', this falls short of the full object of an Act of this kind. Ideally this long title should have been explicit about the intention of the Act to align the procurement, warehousing, storage and distribution of medical supplies and equipment to public health facilities, to the devolved system. It is proposed that the long title of the Act be amended to read something like:

An Act of Parliament to provide a legal and institutional framework to govern and align the procurement, warehousing, storage and distribution of medical supplies and equipment to public health facilities, to the constitution of 2010 and the devolved system of government; establish the Kenya Medical Supplies Authority (KEMSA) as a joint entity of national and county governments; delegate some of the national and county government functions and powers to KEMSA; strengthen the mechanisms of accountability of KEMSA; and provide for connected purposes.

5.2 Lack of provision for consultation with county governments

The Act in various respects fails to make provision requiring consultation with county governments when decisions on matters relating to procurement, warehousing, storage and distribution of medical supplies and equipment to public health facilities in the country are made. For example, section 2 of the Act dealing with interpretation of the provisions of the Act defines "strategic reserve stock" in a manner that fails to recognize the need to involve county governments in the determination of the list of prescribed medical supplies that constitute strategic reserve stocks. While the section provides for determination of this list by the Cabinet Secretary in consultation with the Authority, no mention is made of the role of county governments in this process. It is recommended that provision must be made to ensure that there is requirement for consultation with county governments whenever certain decisions are being made. The section should be amended to read as follows: **"strategic reserve stock" means at least six months stocks of a list of prescribed medical supplies to be identified and updated as and when required by the Cabinet Secretary in consultation with both the Council of Governors and the Authority.**

Similarly, section 21(1) which empowers the Cabinet Secretary to, on recommendation of the Authority, make Regulations generally for the better carrying out of the objects of the Act should be amended to ensure that the Cabinet Secretary makes such Regulations in consultation with the Council of Governors on behalf of county governments. The section should be amended to read as follows: **(1) The Cabinet Secretary in consultation with the Council of Governors may, on recommendation of the Authority, make Regulations generally for the better carrying out of the objects of this Act.**

5.3 Conceptualization, establishment, and structuring of KEMSA

The framers of the law ought to consider and determine whether KEMSA should be conceptualized, established, and structured as an entity of national government only, or a joint entity of both national and county governments. Although the report of the Presidential Task Force on Parastatal Reforms fails to recognize the need to define joint entities, it has been observed above that in terms of Article 189(2) of the constitution, situations may arise which require and necessitate the establishment of joint entities of national and county governments. This determination must be guided by an examination and consideration of one, the functions which the law assigns to KEMSA and how they intersect with the constitutional functions of the two levels of government; and two, the powers which the law confers upon KEMSA and how they affect the functions and powers of the two levels of government. If the functions and powers of KEMSA intersect and affect the functions and powers of only one level of government, then it would be advisable to conceptualize, establish and structure KEMSA as an entity of that level of government only. However, where the functions and powers of KEMSA intersect with and affect the functions and powers of

both levels of government, then it becomes imperative that KEMSA be conceptualized, established, and structured as a joint entity of both levels of government.

5.3.1 The functions assigned to KEMSA in the context of devolution

Section 4(1) of the KEMSA Act assigns to KEMSA five different sets of functions. Firstly, the authority is assigned the functions of procurement, warehousing and distribution of drugs and medical supplies for prescribed public health programmes, the national strategic stock reserve, prescribed essential health packages and national referral hospitals. Secondly, KEMSA is assigned the responsibility of establishing a network of storage, packaging and distribution facilities for the provision of drugs and medical supplies to health institutions. As already noted, the delivery of most essential health services has been assigned to county governments, while national government is responsible for national referral health facilities. The intersection between KEMSA's functions and those of national and county governments in these respects is obvious since implied in these functions of national and county governments are procurement, warehousing, storage, packaging and distribution of drugs and medical supplies.

Thirdly, KEMSA is assigned the responsibility of entering into partnership with or establishing frameworks with county Governments for purposes of providing services in procurement, warehousing, and distribution of drugs and medical supplies. Fourthly, the section assigns KEMSA the function of collecting information and providing regular reports to the national and county governments on the status and cost-effectiveness of procurement, the distribution and value of prescribed essential medical supplies delivered to health facilities, stock status and on any other aspects of supply system status and performance which may be required by stakeholders. Fifthly, KEMSA is assigned the responsibility of supporting county governments to establish and maintain appropriate supply chain systems for drugs and medical supplies. These three sets of functions are an acknowledgement by the framers of the law that indeed, they recognize that the health functions of county governments include procurement, warehousing, storage and distribution of drugs and medical supplies.

This is a clear demonstration that what KEMSA is established to do are constitutional functions of both national and county governments which cannot be unilaterally re-assigned by national government to an entity of national government. They can only be delegated by county governments to either a joint entity of county governments or to a joint entity of national and county governments. The Presidential Task Force on Parastatal Reforms emphasized the need to draw a clear distinction between commercial and non-commercial functions of government owned entities. The report states the following in this regard:

> The existing institutional arrangement created an environment where SCs had multiple reporting centres, which would at times provide conflicting policy direction, with resultant negative consequences in performance. To cure this state of affairs, the Taskforce has recommended that there should be a clear distinction between commercial and noncommercial functions in government owned entities. Where non-commercial activities are embedded in the activities of a commercial, but strategic

> state corporation, this will be treated as public service obligations and funding adequately provided to cover the same. In addition, there should be a clear separation between policy, regulatory and service delivery functions for the GOEs. The fusing of regulatory and sector development functions was considered appropriate and should be considered on a sector-by-sector basis.[18]

Based on this observation the functions of KEMSA discussed above are best classified as non-commercial and strategic functions of national and county governments to deliver health services. Although in terms of section 6(2)(g) of the Act, one of the powers of KEMSA is to incorporate, develop and operate a division or subsidiary of the Authority for the procurement, storage, and supply of medical supplies to health facilities and institutions on a competitive and commercial basis', the core functions of KEMSA by and large remain non-commercial in nature. Indeed section 6(2)(g) hastens to add that 'such commercial service shall be conducted without prejudice to the ordinary non-commercial supply system to public facilities'. KEMSA should therefore be conceptualized, established, and structured as a joint corporation of national and county governments performing strategic functions delegated to it by both levels of government.

It is thus submitted and recommended that the law ought to be re-phrased to reflect these two fundamental facts. Section 3(1) of the KEMSA Act should therefore be amended to provide as follows: **There is established an Authority that is a joint corporation of national and county governments to be known as the Kenya Medical Supplies Authority.** Likewise, section 4(1) of the Act should be amended to provide the following: **The functions of the Authority which are delegated to it by the national and county governments shall be to—.**

5.3.2 The Powers conferred on KEMSA in the context of devolution

The powers which Section 6(2) of the KEMSA Act confers upon KEMSA and which are to be exercised through the board of directors have a very direct impact on the constitutional functions of national and county governments. Firstly, the powers to control, supervise and administer the assets of the Authority in such manner as best promotes the purpose for which the Authority is established[19] affect the functions of national and county governments in the sense that the assets of the authority may include monies that are due to county governments but which have been directly released to the Authority to be used to purchase medical supplies on behalf of the county governments; and financial contributions from national and county governments allocated to KEMSA for performing functions which the two levels of government have delegated to KEMSA. The assets of the authority may also include medical supplies procured by the authority which the authority may be holding on behalf of the national and county governments.

[18] Government of the Republic of Kenya *Report of the Presidential Task Force on Parastatal Ref*orms (October, 2013) page xix.
[19] Section 6(2)(a) of the KEMSA Act.

Secondly, the powers to determine the provisions to be made for capital and recurrent expenditure and for the reserves of the Authority[20] affect the functions of the two levels of government in the sense that if less money is provided for recurrent expenditure to procure drugs and medical supplies, the functions of national and county governments to deliver health services efficiently and effectively will be undermined.

Thirdly, the powers to receive grants, gifts, donations or endowments and make legitimate disbursements from the same[21] affect the functions of national and county governments since such resources would be given for the purposes of performing the functions of KEMSA which are delegated functions of national and county governments.

Fourthly, the powers to levy fees for services rendered by the Authority as may be determined from time to time by the Board[22] are relevant in the sense that the income from such levies eventually forms part of the financial resources of KEMSA to be used in delivery of services.
Fifth, the powers to open banking accounts for the funds of the Authority as may be necessary[23] also directly affect the functions of the two levels of government in that if a choice of a wrong bank is made and money is lost, the delivery of health services would be affected.

Sixth, the powers to invest any funds of the Authority not immediately required for its purposes[24] has a direct impact on the functions because the decision that funds are not required may be subjective and thereby deny the two levels of government funds to deliver services. Moreover, if the choice of the investment is not well thought out, it may lead to losses that may affect the performance of the core functions of procurement of drugs and medical supplies.

Seventh, the powers to incorporate, develop and operate a division or subsidiary of the Authority for the procurement, storage, and supply of medical supplies to health facilities and institutions on a competitive and commercial basis[25] may affect the delivery of health functions by national and county governments if, say, there are a lot of expiries due to poor storage facilities.

Finally, the powers to enter into association with such other bodies or organizations, within or outside Kenya as may be considered desirable or appropriate in furtherance or for the performance of its functions under this Act[26] may lead to delays in deliveries of drugs and medical supplies thereby affecting the ability of national and county governments to efficiently deliver health services.

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[20] Section 6(2)(b) of the KEMSA Act.
[21] Section 6(2)(c) of the KEMSA Act.
[22] Section 6(2)(d) of the KEMSA Act.
[23] Section 6(2)(e) of the KEMSA Act.
[24] Section 6(2)(f) of the KEMSA Act.
[25] Section 6(2)(g) of the KEMSA Act.
[26] Section 6(2)(h) of the KEMSA Act.

These powers and their obvious effect on the functions of national and county governments justify the conceptualization, establishment and structuring of KEMSA as a joint entity of national and county governments.

5.3.3 The KEMSA Act Conceptualizes, establishes and structures KEMSA as an entity of national government

Section 3 of the Act which establishes KEMSA fails to recognize the need to conceptualize, establish and structure KEMSA as a joint entity of national and county governments, exercising functions delegated to it by both levels of government. Instead, section 3(2) conceptualizes and establishes it as a state corporation and entity of the national government. This is evident from section 5 which establishes a KEMSA management Board of Directors of nine members whose composition is limited to representatives and or appointees of national government only. In terms of this section, the board shall comprise a non-executive chairperson appointed by the President; the Principal Secretary for health or his representative; the Principal Secretary for finance or his representative; the Principal Secretary for devolution or his representative; four other persons appointed by the Cabinet Secretary for health; and the chief executive officer who shall be an *ex officio* member of the Authority. This is in total disregard of the fact that the functions of KEMSA which are discharged through the Board of Directors are clearly constitutional functions of both national and county governments.

The 2019 amendments to the Act reduced the membership of the Board from nine to eight with the chief executive officer being designated as a corporation secretary appointed by the board. Only one of these members is to be nominated by the Council of Governors and the Principal Secretary for devolution provided for in the 2013 Act being dropped from membership. The proposed amendments of 2021 provide for a board of nine members with the Attorney General who is also a representative of national government having been introduced as a new member. Only one of these members is to be nominated by the Council of Governors.

It is submitted that the introduction of one nominee of the Council of Governors is mere tokenism that demonstrates the intention to conceptualize and establish KEMSA as an entity of national government in which county governments do not have any serious role. If KEMSA is conceptualized as a joint entity of national and county governments, then this must be based on collaboration between the two levels of government informed by principles of equal partnership. Membership of KEMSA must thus be based on equal or near equal representatives or appointees of the two levels of government.

5.3.4 Unconstitutionality of the membership of national government officials in the Board

The KEMSA Act of 2013 as amended in 2019 and proposed to be amended in 2021 includes in the membership of the KEMSA Board of Directors members of the national government executive such as the PS for health, the PS for finance and the Attorney General. This inclusion is unconstitutional for two reasons—separation of powers and functions; and conflict of interest. The Constitution in principle, its spirit and structure of various institutions recognizes and emphasizes the doctrines of separation of powers and functions; and that of avoidance of conflict of interest. In particular, Article 174(f) includes among the objects of the devolution of governance that of enhancing 'checks and balances and the separation of powers'. Likewise, Article 175 includes among the principles of devolved government the requirement that 'county governments shall be based on democratic principles and the separation of powers'; while Article 185 requires county assemblies to respect the principle of separation of powers when they exercise oversight the county executive and other county executive organs. On the other hand, Article 74 includes among the responsibilities of leadership, that of selfless service based on public interest and demonstrated by declaration of any personal interest that may conflict with public duties.

In the case of a government owned entity in the form of a state corporation or authority such as KEMSA, there is need to separate the powers and functions of decision making and execution of such decisions from the oversight powers and functions to oversee the making and execution of such decisions. Whereas the Board of Directors of a government owned entity such as KEMSA has the powers and functions to make and execute decisions regarding the operations of KEMSA, the national government executive through the MOH as the parent Ministry has responsibility of oversight over KEMSA and its decision making and execution processes. This being the case there would be a conflict of interest in the roles and responsibilities for the PS for health to serve as a member of the KEMSA Board of Directors. The PS would not effectively discharge the oversight responsibilities if he or she is part of the making and execution of the KEMSA decisions he or she is supposed to oversight. The same principle applies to the membership of the PS for finance and the Attorney General in the Board of Directors. This arises out of the fact that the Kenyan members of Cabinet are subject to the principle of collective responsibility under which the PS for health would be constrained to question or oversight decisions of KEMSA in which his cabinet colleagues such as the PS for finance and the attorney General were part of the making and execution.

In arriving at this interpretation of the constitution and the law, lessons have bee drawn from the experiences of South Africa and the majority of OECD countries. In South Africa for example, Cabinet Ministers, Heads of Departments and other officials of the executive are barred from serving as members of Boards of Directors of government owned or government controlled entities on grounds, one, that there should be separation of functions of the Boards and the Ministry's oversight roles and responsibilities over such boards; two that there

would be conflict of interests on the part of the officials serving as members of the boards.[27] Similarly, in a majority of OECD countries, there is a growing consensus that, under no circumstances, should ministers, state secretaries, or other direct representatives of, or parties closely related to, the executive power be represented on boards of state owned entities.[28]

Having determined that KEMSA should be conceptualized, established, and structured as a joint entity of national and county governments, the same principles apply to bar officials of the county governments from being members of the Board of Directors. To address this problem therefore, it is proposed that the KEMSA Act should provide for establishment of one, KEMSA as an independent authority with a Board of Directors in which officials of the national government executive and county government executives do not serve as members, and two, a KEMSA oversight joint committee of national and county governments through the Council of Governors in which officials of the national government such as Principal Secretaries and representatives of COG on behalf of county governments serve. This approach is informed by a purposive interpretation of Article 189(2) which provides for the setting up of 'joint committees and joint authorities'. The two phrased used in the Article mean two different things and cannot be used interchangeably as if they mean the same thing. While a joint committee of the two levels of government may comprise or include officials of the two levels of government; a joint authority is an independent entity that may be owned or controlled by the governments and cannot comprise or include officials of the two levels of government due to the principle of separation of powers and functions and the doctrine of conflict of interests arising out of the different roles and responsibilities.

5.4 Financing of KEMSA and its activities in the context of devolved governance

The financing of the activities of KEMSA has since the adoption of devolution been a source of controversy between national and county governments. This has resulted from the lack of clarity in the financial provisions of the KEMSA Act; their continued anchorage in the unitary system; their failure to adequately or at all align with the devolved system; and the allocation of county government funds to national government through KEMSA disguised as conditional grants. A legal framework for financing of KEMSA that is consistent with devolution must clearly address the following pertinent issues.

First, there is need to draw a clear distinction between financing of the core functions of KEMSA; and financing of the operational running costs of KEMSA such as staff remuneration, rents, water bills, electricity bills, and travel expenses. This is necessary because the financing

[27] Department of Public Service Administration of the Republic of South Africa, Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions (2009) Chapter three.

[28] OECD (2018), Ownership and Governance of State-Owned Enterprises: A Compendium of National Practices at page 11.

of the core functions of KEMSA has implications for the sources of funds for KEMSA since those functions are delegated by the national and county governments. Furthermore, in respect of the funds meant for the core functions of KEMSA there is also need to draw a distinction between funds meant for procurement of drugs and medical supplies and those meant for development and maintenance of infrastructure such as warehouses and storages as well as equipment such as cold chain storage facilities.

Secondly, within the context of the devolved system of government the sources of funding for KEMSA must be informed by the devolution financial principle of funds must follow functions. Having noted that KEMSA is ideally a joint entity of national and county governments performing delegated constitutional functions of national and county governments, funds for performing these delegated functions ought to be contributions by the two levels of government based on the devolution financial principle of funds must follow functions. On the contrary however, section 14 of the KEMSA Act does not acknowledge that county governments should contribute to these funds. Whereas section 14(1)(a) of the Act provides that 'the funds of the Authority shall comprise of—such monies as may be appropriated by Parliament through a budget line to the authority for purposes of carrying out the functions of the Authority', there is no similar provision for appropriation of money to KEMSA by county assemblies. Notably although Parliament has authority to pass the Division of Revenue Act dividing revenue raised nationally between national and county governments and the Allocation of Revenue Act dividing the county equitable share among the 47 counties; it has no authority to appropriate funds of county governments to any entity on their behalf.

Thirdly, the above provision notwithstanding, national government has in practice been allocating to itself through KEMSA huge sums of county government funds disguised as conditional grants to county governments. This direct flow of funds meant for county health functions to KEMSA bypasses some of the accountability mechanisms the constitution establishes under the devolved system and raises the question of the constitutionality or otherwise of such direct flow of funds to KEMSA. Article 207 of the constitution for instance, requires all money received by or on behalf of county governments to go through each county government's Revenue Fund, unless such money has been reasonably excluded by an Act of Parliament. Moreover, the concept of conditional grants provided for by Article 202(2) of the constitution envisages that national government gives additional funds to county governments to be spend by county governments subject to conditions attached by national government. Those conditions cannot include national government managing and spending the money on behalf of county governments such as happens through KEMSA.

It is submitted and recommended that two provisions are necessary—one provision empowering Parliament to appropriate funds to KEMSA and another empowering each county assembly to appropriate funds to KEMSA. The provisions empowering Parliament to appropriate funds to KEMSA must clarify which of those funds are coming in as national government's contribution for its health procurement functions, and which funds are coming

in as additional conditional grants to each of the 47 counties for their health procurement of HPTs functions.

Fourthly, the KEMSA Act identifies one of the sources of KEMSA funds as being donations and grants. In terms of section 6(2)(c) of the KEMSA Act, KEMSA has the power to receive grants, gifts, donations or endowments and to make legitimate disbursements from them. Once again, the direct flow of these donor funds such as the Global Fund and the various USAID Funds meant for county health functions, including for diseases such as malaria, HIV, TB and now COVID sidesteps some of the accountability mechanisms the constitution establishes under the devolved system and raises the question of how these fits into the principle that funds must follow functions. It is recommended that the provisions empowering KEMSA to receive gifts, grants and donations from donors ought to provide clarity on where the donation is coming from; whether it is a donation that is like a block grant in nature which leaves KEMSA with discretion on how to use it or a conditional grant that is specific such as the Global funds that are meant for specific diseases such as malaria, HIV and TB. In both cases, the provision must also specify how much of the donor grants can be allocated to development of infrastructure and how much goes to procurement of HPTs as well as how funds are to be distributed among the 47 counties to add on each county's basket against which the county can be exercising its drawing rights.

It is recommended that to enhance the accountability mechanisms, the legal framework ought to reduce the discretion of KEMSA in the management of the huge sums of money it receives and handles by clearly categorizing the funds and putting them in specific baskets or compartments which would avoid co-mingling of funds. Such compartmentalized management of the funds can be exemplified by the creation of a cupboard that has 50 shelves of compartments—48 shelves for funds of each of the 48 governments, one shelve for donor funds, and one shelf for income earned by KEMSA in the course of its activities. First, there should be 47 shelves for funds received from each of the 47 counties or on behalf of each of them and meant for the health procurement functions of each of the counties. Each of the 47 shelves should also have compartments indicating which funds have come from the county government's equitable share and/or own revenue, those from national government as conditional grants, and those that have come from donors. Each shelve would also indicate how much of the funds are meant for procurement of HPTs, how much can go to development of infrastructure, and how much should go to operational costs. Secondly, there should be one shelf for funds received from national government or on behalf of national government and meant for national government health procurement functions. This shelf should also have compartments indicating how much of the funds have come from the national governments equitable share and how much from donor as well as how the funds are to be distributed to cover procurement of HPTs, development of infrastructure, and operational costs. Thirdly, there should be a third shelf for funds received from donors and meant for supporting procurement of HPTs and where specified, including funds for development of infrastructure such as warehouses and cold storage facilities. This shelf

should have compartments indicating different donors, funds that are like block grants and those that are for specific purposes with mechanisms for allocation to the different counties that have been identified as beneficiaries.

5.5 Accountability of KEMSA in the context of devolution

Given the conclusion that KEMSA should be conceptualized, established, and structured as a joint entity of national and county governments, and further, taking into account the fundamental nature of the functions of KEMSA and the huge sums of money it handles; it is imperative that the mechanisms of accountability should ensure KEMSA's accountability to both national and county governments. Furthermore, given the persistent allegations of lack of fiscal discipline, especially in this COVID period, it is necessary that the current accountability mechanisms be re-examined and re-engineered to strengthen and tighten them to protect public funds and the health of the citizens. This should be achieved through an approach that has two dimensions—the approval of the annual estimates of KEMSA; and the annual audit of the accounts of KEMSA.

First, section 16(1) and (2) empowers the Board of Directors to cause the annual estimates of the revenue and expenditure of the Authority which provided for the payment of the salaries, allowances and other charges in respect of directors and staff of the Authority; the payment of pensions, gratuities and other charges in respect of the staff of the Authority; the proper maintenance of the buildings and grounds of the Authority; the maintenance, repair and replacement of the equipment and other property of the Authority; and the creation of such reserve funds to meet future or contingent liabilities in respect of retirement benefits insurance or replacement of buildings or equipment, or in respect of such other matter as the Board may deem appropriate, to be prepared. While section 16(3) requires the annual estimates to be submitted to the Cabinet Secretary for approval and after the Cabinet Secretary's approval and subjects any future increase of the annual estimates to the consent of the Cabinet Secretary, there is no provision for involvement of county governments in such approval and consent for increase. It is recommended that the provisions should be amended to require involvement of county governments through the Council of Governors is such approval and consent for increment of the annual estimates.

(3) The annual estimates shall be approved by the Board before the commencement of the financial year to which they relate and shall be submitted to the Cabinet Secretary and the Council of Governors on behalf of county governments for approval and after such approval, the Board shall not increase the annual estimates of the Authority without the consent of the Cabinet Secretary and the Council of Governors on behalf of county governments.

Secondly, section 17 of the KEMSA Act provides for accountability of KEMSA by requiring the Board of Directors to keep its proper books of accounts of the income, expenditure, and assets and to submit the same to the Auditor-General or to an auditor appointed under this section, for audit and reporting in accordance with the Public Audit Act (No. 12 of 2003). It is evident that these audit mechanisms have proved to be inadequate accountability

mechanisms not only for KEMSA but many other government institutions which have continued to misuse public resources. The processes of the office of the Auditor General take too long and when its reports are submitted to Parliament and County Assemblies, no serious measures are taken against the culprits. It is recommended that the legal framework should require keeping of the proper books of account to include details such as are based of the cupboard with shelves model discussed in the previous section and to ensure avoidance of conflict of interest by the members of the Board of Directors.

Section 15 of the State Corporations Act which deals with the accountability of state corporations provides for summoning by the Public Investments Committee of the chief executive of a state corporation to appear and answer on behalf of the Board any question arising from a report, including a special report, of the Controller and Auditor-General concerning the state corporation.[29] This provision is inadequate and is not aligned to the devolved system as it does not recognize the need for accountability to both levels of government. It does not even recognize that the country now has a bicameral Parliament. Even section 18 of the State Corporations Act which establishes the office of the Inspector-General of state corporations is still cast in these unitary foundations as it does not recognize and provide a role for county governments in this accountability mechanisms. Moreover, the sanctions provided for by section 19 of the Act including surcharging of officials to recover misappropriated funds have proved ineffective in the management of state corporations.

Some lessons may be drawn from the report of Presidential Task Force on Parastatal Reforms which makes some recommendations regarding accountability of government owned entities. The reports states in the regard that:

> Further, the Taskforce recommends that the Government implement a ***Centralized Ownership and Oversight Model*** of all GOEs. At the national level, the ownership of all State Corporations and agencies will remain with the National Treasury as per the constitutional mandate. The shareholding role for commercial entities shall however be exercised directly by the National Treasury through a Holding Company, the Government Investment Corporation (GIC), which the National Treasury shall incorporate under the Companies Act. At the County level, ownership of all County Corporations and Agencies will remain with the County Treasury as per the Constitution of Kenya, 2010 and the County Governments Act. Exclusive oversight will be exercised for Kenya's Government Owned Entities as follows:
>
> - Government Investment Corporation (GIC) by the President;
> - National and County Agencies Oversight Office (NACAOO) by the President;
> - State Corporations by the Government Investment Corporation;
> - State Agencies by NACAOO

[29] It is important to note that under the constitution of 2010, the office of Controller and Auditor General has since been split in to two offices of the Controller of Budget, and the Auditor General.

- County Corporations & Agencies by County Executive on the basis of guidelines and standards/norms provided by NACAOO.[30]

This report however falls short of providing effective accountability mechanisms for KEMSA since it does not have provisions for oversight of government entities that are jointly owned by both national and county governments. The same shortcoming is apparent in the proposed Government Owned Entities Bill of 2014.

5.6 Need for provisions for performance audit mechanisms

In addition to the accountability mechanisms discussed above which often focus on audits based on the balancing of the books of account, there is need for provision for mechanisms for performance audits focused on ensuring value for money. In this regard section 19 of the KEMSA Act which provides for the manner of discharge of functions may be a good starting point. The sections states that:

(1) In discharging its functions under this Act the Authority shall put into place measures to ensure—

(a) maximum efficiencies;

(b) benefit from economies of scale;

(c) efficacy, safety, quality and affordability of drugs and medical supplies procured;

(d) a steady supply of drugs and medical supplies to public health facilities;

(e) maintenance and sustenance of strategic reserves of essential medicines and medical supplies;

(f) application of sound commercial principles in the procurement, storage and distribution of drugs and other medical supplies;

(g) the carrying out of technical or laboratory analysis of drugs and medical supplies to determine their suitability for procurement, use, storage or disposal by the Authority so as to ensure their compliance with the standards set by the relevant law;

(h) timely distribution of drugs and medical supplies to health facilities;

(i) a feedback mechanism to its consumers;

(j) an effective monitoring and evaluation mechanism; and

(k) availability of information relating to its operations.

These provisions need to be reinforced by provisions for performance audit to ensure that indeed, the Authority is discharging its functions in a manner that adheres to these operational principles. Such performance audit or monitoring and evaluation mechanisms must ensure accountability to both national and county governments.

5.7 Provisions on the conduct of business and affairs of the Board of Directors

[30] Government of the Republic of Kenya *Report of the Presidential Task Force on Parastatal Refor*ms (October, 2013) page xix.

Of specific interest in this regard is the issue of the meetings of the Board of Directors. Section 2(4) of the First Schedule to the KEMSA Act provides that 'the quorum for the conduct of the business of the Board shall be half of the total members including the Chairperson or the person presiding'. If the KEMSA is conceptualized, established and structured as a joint entity of the national and county governments based on equal or near equal representatives or appointees, then different considerations must inform the question of quorum for meetings. Would it be a proper quorum if half of the total members present are all representatives and/or appointees of one level of government? Shouldn't the quorum rules required attendance by representatives and/or appointees of both levels of government so that no meeting can take place with only representatives and/or appointees of one level of government as the only present and participating members?

What about decisions of the Board that are based on a vote of the members? Section 2(6) of the First Schedule to the KEMSA Act provides that 'unless a unanimous decision is reached, a decision on any matter before the Board shall be by a majority of the votes of the members present and voting, and in case of an equality of votes, the Chairperson or the person presiding shall have a casting vote'. Should a decision by vote require a majority that includes representatives and/or appointees of both national and county governments?

6. Conclusion and overall recommendation

The findings of this research are that the KEMSA Act of 2013 was anchored in the unitary system that informed the formation of the original KEMSA. This Act and all the subsequent amendments of 2019 and those of 2021 pending before Parliament are not sufficiently or at all aligned with the constitution of 2010 and the devolved system of governance it introduces. Thus, there is need for comprehensive KEMSA reforms to:

1. Align the system of procurement, warehousing, storage and distribution of drugs and medical supplies to public health facilities in the country, to the constitution of 2010 and the devolved system of governance and conceptualize KEMSA as a joint entity of national and county governments that performs functions delegated to it by both levels of government and that is accountable to both national and county governments.
2. Provide for the establishment and structure of KEMSA Board of Directors as a joint entity of national and county governments and provide for adequate representation of county governments through COG in the KEMSA Board of Directors.
3. Strengthen the mechanisms of accountability of KEMSA and the entire system of procurement, warehousing, storage and distribution of drugs and medical supplies to public health facilities.

These reforms should be undertaken through an intergovernmental process of both the national and county governments.

It is therefore recommended that:

1) The COG Health Committee adopts this position paper as a policy position of the Committee.
2) The COG Health Committee submits the adopted position paper to the full Council of the COG and recommends that the full council adopts it as a policy position of the COG.
3) The COG Health Committee recommends to the full Council that the matter be raised with the Submit for the Submit to establish a joint committee to undertake the comprehensive KEMSA reforms.
4) In the meantime, the COG Health Committee pushes for the inclusion and involvement of the COG in the Ministerial KEMSA Reforms Implementation Committee (KRIC) without detracting from the quest for comprehensive KEMSA reforms as stated above.