



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISC. CIVIL APPLICATION NUMBER 494 OF 2017**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF  
CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF ARTICLES 10, 23, 34, 40 & 47 OF THE CONSTITUTION OF KENYA,  
2010**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF KENYA INFORMATION AND COMMUNICATIONS ACT**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**COMMUNICATIONS AUTHORITY OF KENYA.....RESPONDENT**

**EX PARTE:**

**AIRTEL NETWORKS KENYA LIMITED**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 15<sup>th</sup> August, 2017 the *ex parte* applicant herein, **Airtel Networks Kenya Limited** (also referred to hereinafter as “Airtel”), seeks the following orders:

- a. That an Order of Certiorari do issue to bring into this Honourable Court for the purposes of being quashed the Respondent’s decision contained in the letters dated 23<sup>rd</sup> June 2017 and 25<sup>th</sup> July 2017 demanding a sum of US\$20,025,000/= from the Applicant as alleged radio

frequency spectrum fees.

b. That an Order of Prohibition do issue to prohibit the Respondent by itself, agents, employees or whomsoever from taking any steps, actions and or measures to enforce its decision contained in the letters dated 23<sup>rd</sup> June 2017 and 25<sup>th</sup> July 2017 demanding a sum of US\$ 20,025,000/= from the Applicant as a condition precedent to issuance of the Applicant's radio frequency spectrum and operating licenses.

c. That an Order of Mandamus do issue directing the Respondent to issue the Applicant with a renewed Network Facility Provider Licence or such other documents confirming the renewal of the Applicant's Network Facility Provider Licence as well as the signed Licence Terms and Conditions.

d. That costs of this application be provided for.

### Applicant's Case

2. According to the applicant, it is a telecommunication company licensed in Kenya to provide electronic communication, voice and data services and to carry out its operations the Applicant previously held the following licenses:

a. Network Facility Provider license (main operating license) Content Service Provider License, Application Service Provider License.

b. Two (2) Frequency Licenses for the allocated 2G and 3G spectrum respectively.

3. By a letter dated 23<sup>rd</sup> January 2013, the Applicant requested the Respondent for a Licence renewal in line with relevant Regulations which require an operator to apply for licence renewal two years prior to expiry. In response to the aforesaid letter, the Respondent requested the Applicant to submit a detailed business plan with network and service roll out commitments for the next 10 years which the Applicant submitted on 24<sup>th</sup> June 2013.

4. It was averred that in late 2013, **Essar Telecom Kenya Limited** (hereinafter referred to as "Essar" or "ETKL") wanted to exit the market due to financial challenges and approached **Safaricom Limited** (hereinafter referred to as "Safaricom) and the Applicant with the undernoted proposal;

a. The Applicant to acquire Essar's subscribers, GSM Licences and subscriber related contacts.

b. Safaricom Limited to acquire Essar's passive infrastructure located on 453 sites and associated agreements, transfer of the ground leases on which the passive infrastructure is situated, Essar's Data Centre situated in its existing office space, Essar's existing office space and related infrastructure, Essar's right to use the spectrum granted under the Frequency Licence No. FL/004/001 and Essar's residual assets including IT infrastructure.

5. It was averred that by a letter dated 28<sup>th</sup> February 2014, the Applicant informed the Respondent of its intention to acquire a substantial part of Essar's Mobile business and as part of the transaction and that it intended to acquire;

a. Essar's subscribers

b. Essar's GSM Licences comprising;

i. NFP License No TL/NFP/T1/00002,

ii. ASP License No TL/ASP/00002,

iii. CSP License No TL/CSP/00002 and

iv. IGSSP License No TL/ULF/IGS/00002

c. Essar's subscriber-related contracts

6. By the aforesaid letter, the Applicant requested the Respondent's approval of the transaction and indicated that as part of the transaction between itself and Essar, the Applicant would like to have the Applicant's Spectrum Licences i.e. Frequency Licences No. FL/0003/001 and FL/003/002 so that the aforesaid licences could be linked to Essar's NFP Licence No. TL/NFP/T1/00002 subject to regulatory approval.

7. It was averred that by a letter dated 28<sup>th</sup> March 2014, the proposed acquisition of Essar's business by the Applicant was approved by the Respondent subject to fulfilment of specific conditions as set out in the aforesaid letter.

8. According to the applicant, by a letter dated 12<sup>th</sup> June 2014, the Respondent provided clarifications on the conditions including Condition No 1 which confirmed that the Respondent was in agreement with the proposal that the Applicant exercises its option to renew its license for a further period of 10 years by way of acquiring the Essar Licences and upon payment to the Authority of an upfront license fee of US\$ 5,400,000/=.

9. According to the applicant, pursuant to the approvals sought and obtained by the Applicant from the Respondent, the Applicant was allowed to renew its licences by way of taking the remaining term of 8 years on the Essar operating licence. It was also agreed that the Respondent would provide a mechanism for the Applicant's 2G and 3G spectrum to be synchronized with the Essar Licence spectrum.

10. The applicant averred that by a letter dated 11<sup>th</sup> August 2014, the Respondent notified the Applicant a 12 step process that was to be followed in order for the Applicant to be issued with renewed licences for a term of 10 years.

11. It was contended that by a letter dated 16<sup>th</sup> September 2014 addressed to the Applicant, the Respondent reiterated that upon payment of the required US\$ 5.4 million the Respondent would synchronize the Applicant's frequency licenses with Essar's license with an extended term to expire on 30<sup>th</sup> June 2024.

12. According to the applicant, by a letter dated 2<sup>nd</sup> October 2014, the Competition Authority of Kenya notified the Applicant that it had approved the implementation of the proposed mobile business by Essar to the Applicant and on 26<sup>th</sup> September 2014, the Respondent caused to be published Gazette Notice No. 6816 notifying the public that an application had been made to the Respondent by the Applicant for approval of the transfer of the GSM Telecommunications Licences and subscribers of Essar to the Applicant. By the aforesaid Gazette Notice, any person desirous of lodging an objection to the grant of the approval as sought by the Applicant was required to lodge the objection within thirty (30) days of the date of the notice.

13. It was the Applicant's case that by a letter dated 31<sup>st</sup> October 2014, the Respondent submitted to the Applicant an invoice for the sum of US\$ 5.4 million which would be the fees that the Applicant would pay in order to take over the unexpired term of 8 years of the Essar License and for its 2G and 3G Spectrum to be synchronized with the Essar License.

14. It was further disclosed that by a letter dated 3<sup>rd</sup> November 2014, the Respondent notified the Applicant that in light of the fact that no objections had been received in respect to the acquisition of Essar's mobile business, the Respondent had granted its regulatory approval in respect to the transaction, subject to the terms and conditions that had been communicated earlier to the Applicant.

15. Consequently by a letter dated 12<sup>th</sup> November 2014, the Applicant requested the Respondent to submit to the Applicant a revised invoice covering the renewal period up to 27<sup>th</sup> January 2025 instead of 30<sup>th</sup> June 2024 as reflected in the invoice that the Respondent had issued to the Applicant on 30<sup>th</sup> October 2014 as this would ensure that the Essar licence is synchronized with the Applicant's licence so that the Applicant would get the 10 year renewal with effect from 27<sup>th</sup> January 2015. In response, by a letter dated 24<sup>th</sup> November 2014, the Respondent notified the Applicant that the Applicant's request to have the licences that it intended to acquire from Essar extended from 1<sup>st</sup> July 2022 to 27<sup>th</sup> January 2025, had been considered and approved subject to the payment of an extra US\$ 1.575 Million. Consequently, the Respondent issued the Applicant an invoice for US\$ 6.975 million and a credit note of its earlier invoice to the Applicant for the sum of US\$ 5.4 million. Pursuant hereto, in December 2014, the Applicant paid the sum of US\$6.975 million to the Respondent and by a letter dated 15<sup>th</sup> December 2014, the Respondent confirmed that all regulatory fees in respect of the transaction had been settled. Accordingly, by a letter dated 27<sup>th</sup> January 2015, the Respondent confirmed that the Applicant was lawfully operating under the Essar licensing following the Applicant's fulfilment of the conditions set by the Respondent in respect of the Essar licenses acquisition and notified the Applicant that it would issue the Applicant with modified licences.

16. It was averred that by a letter dated 23<sup>rd</sup> February 2015, the Applicant acknowledged receipt of the draft licence terms and conditions and requested the Respondent to confirm whether the terms and conditions given to the Applicant are also the same conditions that have been issued to Safaricom which confirmation the Respondent did by letters dated 25<sup>th</sup> February 2015 and 2<sup>nd</sup> March 2015.

17. In the Applicant's view, once the payment in the sum of US\$ 6.975 million was made by the Applicant to the Respondent, the only outstanding item was the finalization of the actual terms and conditions of the main operating license which were discussed and concluded in February 2015. Despite the foregoing, it was contended that the Respondent has failed and or refused to issue the Applicant with a licence incorporating the new terms and conditions and bearing the Applicant's name. Instead, on 17<sup>th</sup> June 2015 the Applicant received a letter of the same date from the Respondent indicating that **"the Frequency Spectrum Initial renewal fees"** was a sum of **US\$ 27,000,000/=** though in the aforesaid letter, the Respondent acknowledged receiving a sum of **US\$ 6,975,000/=** from the Applicant. Thus the Respondent demanded a sum of **US\$ 20,025,000/=** from the Respondent as a condition for the renewal of the Applicant's radio frequency spectrum and operating licenses.

18. To this position, the by a letter dated 29<sup>th</sup> June 2015, the Applicant responded by reminding the Respondent of the foregoing and in light of the foregoing, the Applicant demanded withdrawal of the demand of the sum of US\$ 20,025,000/= as a condition for the renewal of the Applicant's radio frequency spectrum and operating licenses and proceeded to demand that the Respondent does issue the Licence. However in a subsequent letter dated 6<sup>th</sup> November 2015, the Respondent in response to the Applicant's letter dated 29<sup>th</sup> June 2015 the Respondent declined to review its position and reiterated that the Applicant would have to pay the invoiced spectrum fee of US\$ 20,025,000/= as demanded in the letter dated 17<sup>th</sup> June 2015 before the Applicant's license could be extended for 10 years as sought.

19. It was averred that by letters dated 23<sup>rd</sup> June 2017 and 25<sup>th</sup> July 2017, the Respondent has demanded that the Applicant pays a sum of US\$ 20,025,000.00/= in respect of radio frequency spectrum fees.

20. It was submitted on behalf of the Applicant by its learned counsel, **Mr Ngatia**, that the Respondent had confirmed to the Applicant that on the payment of an upfront fee of US \$ 5.4 million, the Respondent would vary and extend the term of the Applicant's existing licenses to the year 2024. The Respondent further confirmed that the eight (8) year term purchased from ETKL would be synchronized with the ten (10) year renewal option provided for in the Applicant's current licenses upon payment of the sum of US\$ 5.4 million as contained in the letter of 16<sup>th</sup> September, 2014. It was therefore the Applicant's legitimate expectation that upon payment of US\$ 5.4 million, the Applicant would be issued the License. In this regard the applicant relied on **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others**

**Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240.**

21. In the applicant's contention, the Respondent has no reason to depart from its position. The assertion of waiver imposed by section 4(1) of the **Public Finance Management Act**, Article 210(1) and (2) of the Constitution together with section 77 of **Public Finance Management Act 2012** is no answer since the Applicant was not asking for any waiver and at no point did the issue of waiver arise until the filing of the Response by the Respondent. To the contrary, the Applicant's position is that basing on the representations by the Respondent communicated through its letter dated 12<sup>th</sup> June, 2014, that the Applicant exercises its option to renew its license for a further period of 10 years by way of acquiring the Essar Licenses and upon payment to the Authority of an upfront license fee of US \$ 5.4 million and the elaborate procedures and time involved until forwarding of the terms and conditions to the Respondent, it was the Applicant's expectation that its license be renewed and not any other further demand. In support of this submission the applicant relied on **Republic -vs- Attorney General & Another Ex Parte Waswa & 2 Others [2015] 1 KLR 280.**

22. In this case, it was the applicant's submission, the Respondent represented to the Applicant the conditions upon which the Applicant had to fulfil in order that it would be granted a license once acquired ETKL's. These were communicated through the Respondent's letters dated 28<sup>th</sup> March, 2014 and 12<sup>th</sup> June, 2014. The Respondent went ahead and gave the Applicant a 12 step process through its letter dated 11<sup>th</sup> August, 2014 on the process through which the Applicant would follow in order that its license would be renewed for a period of ten (10) years. The Applicant followed the steps to the letter culminating into the Respondent issuing the Applicant with an invoice on 31<sup>st</sup> October, 2014 for the payment of US\$ 5.4 million. The said monies were paid by the Applicant and a confirmation of receipt of the said funds received from the Respondent on 27<sup>th</sup> January, 2015.

23. It was submitted that the Respondent has the constitutional and statutory mandate to license and regulate the Information, Communications and Technology (ICT) sector in Kenya in accordance with the provisions of the **Kenya Information and Communication Act** ("the Act") and that it is also not in doubt that under section 25 of the Act the Respondent has mandate to consider and where appropriate, issue telecommunication licenses as required under the Act. It is also not in doubt that the Respondent under section 36 of the Act has the authority to grant a license authorizing establishment of radio communication stations referred to as Frequency Spectrum License.

24. However, in exercising the above constitutional and statutory functions, the Respondent ought to act within the confines of the constitution and statute. The applicant cited sections 79 and 81 of the Act which obligates the Respondent to issue/renew an applicant's license once conditions for the issuance or renewal have been met. In this case, on 1<sup>st</sup> December, 2014, the Respondent acknowledged receipt of US\$ 6.975 million for extension of the expiry dates of licenses from 1<sup>st</sup> July, 2022 to 27<sup>th</sup> January, 2025 and official receipt issued on 15<sup>th</sup> December, 2014. The Respondent by a letter dated 27<sup>th</sup> January, 2015 confirmed that the Applicant was lawfully operating under Essar licensing following the Applicant's fulfilment of the conditions set by the Respondent in respect of Essar licenses acquisition. The Respondent notified the Applicant that it would issue the Applicant with modified licenses.

25. The Respondent was however accused of having failed to discharge its obligation vested upon it by the Constitution and sections 79 and 81 of the Act after the Applicant had met all the conditions and obligations required of it for the renewal of the license. This action by the Respondent, it was contended is therefore unreasonable, irrational and made without any basis and is therefore amenable to be quashed by this Honourable Court.

26. It was submitted that the Respondent's decision to demand a sum of US\$ 20.025 million from the Applicant as a condition for the renewal of the Applicant's radio frequency spectrum and operating licenses made on 17<sup>th</sup> June, 2017, was arrived at without giving the Applicant any reason as to why the Respondent departed from its earlier position communicated on 27<sup>th</sup> January, 2015 nor did the Respondent accord the Applicant a hearing prior to the making of the said decision section 4(3) of the **Fair Administrative Actions Act, 2015** as read with Article 47 of the Constitution.

27. It was submitted that having confirmed to the Applicant by a letter dated 27<sup>th</sup> January, 2015 that the Applicant was lawfully operating under ETKL's license following the Applicant's fulfilment of the conditions set by the Respondent in respect to ETKL's acquisition, it was unreasonable and without any justification for the Respondent to demand US\$ 20.025 million. If there was any basis for doing so the said position ought to have been communicated to the Applicant and the Applicant given adequate time to represent itself. The Respondent's action, it was contended is therefore contrary to Article 47 of the Constitution and section 4(3) of the **Fair Administrative Action Act 2015** which emphasizes the need for an administrative body to give the person affected by the decision a prior and adequate notice of the nature and reasons for the proposed administrative action and the opportunity to be heard. Further, the decision by the Respondent was made arbitrary, without any basis and ought to be quashed by this Honourable Court. To support this submission the applicant relied on **Republic -vs- County Government of Mombasa Ex-parte Outdoor Advertising Association of Kenya [2014] eKLR**, where the Court emphasized the need for Administrative bodies to uphold the rules of natural justice and to give persons likely to be affected by a decision the opportunity not only to be heard but also to be informed of the decision to be made.

28. According to the applicant, contrary to the position adopted by the Respondent, that the Applicant never sought nor obtained a waiver from the Treasury Cabinet Secretary as required by section 77 of the **Public Finance Management Act, 2012** as read together with Article 210(1) and (2) of the Constitution, the Applicant was not applying for any waiver of license fees. The application was made by the Applicant pursuant to section 25 of the **Kenya Information Communication Act**. It is therefore clear that the Respondent's decision to deny the Applicant a license is made under the wrong legal provisions and is therefore amenable to be quashed.

29. The Applicant's case was that it had demonstrated that the decisions contained in the Respondent's letters dated 23<sup>rd</sup> June, 2017 and 25<sup>th</sup> July, 2017 demanding a sum of US\$ 20.025 million were made in breach of the rules of natural statute, unreasonable and was arrived at in an irrational manner. The decisions also breached the Applicant's legitimate expectation that after the payment of US\$ 6.975 million and the fulfilment of the twelve (12) conditions issued by the Respondent, the Respondent would renew the Applicant's license. The Applicant has also demonstrated that the Respondent relied on irrelevant considerations in reaching the impugned decisions.

30. In his submissions, **Mr Ngatia** emphasised that the proposed transaction between the applicant and Essar was in respect of Operational Licence and the request was for the linking of the applicant's licence to Essar's Licence No. 00002 which still had 8 years to go hence the applicant was purchasing that licence with the unexpired term. The payment required in respect of this synchronisation was US\$ 5.4 million. It was explained that since the fee for ten years was US\$ 27 million, this translated to US\$ 2.7 million per year hence the two years would be US\$ 5.4 million. In essence the applicant was purchasing the 8 years of Essar and the two remaining years and as Essar had already paid for the 8 years only two years remained unpaid. However since there was an extra 7 months over and above the two years, the applicant was required to pay for the same at the cost of US\$ 1.575 million.

31. It was submitted that the terms and conditions which were to be negotiated referred to the roll out and not to the financial consideration and this was clear from the new licence terms which did not mention anything about finance arrangements which were already concluded.

32. It was contended that whereas the demand mentioned renewal of spectrum licence, there was no spectrum licence to be renewed for the said 10 years.

33. What triggered this action, according to Learned Counsel was the letter dated 23<sup>rd</sup> June, 2017, not from the Respondent, but from the Treasury. It was therefore contended that the Respondent was operating at the behest of the Treasury hence it allowed its statutory powers to be taken over by the Treasury. It was emphasised that the last letter from the Respondent was dated 6<sup>th</sup> November, 2015 and there was no further demand until two years thereafter on the directive of the Treasury.

34. The Court was therefore urged to quash the demand and to direct that the trading terms be concluded

and that no further demand be made from the applicant.

35. In his rejoinder to the Respondent's submissions, **Mr Ngatia** contended expounded that what the applicant was purchasing was the Operating/GSM Licence hence the renewal demanded of US\$ 5.4 million is referred to as bundled because it is in respect to those licences. It was explained that even prior to the transaction, it was for the GSM/Operational licence. The linkage was however between the applicant's licence and Essar's 00002.

36. Learned Counsel wondered how comes there was no demand other than the demand for US\$ 5.4 million and opined that there is no doubt that Essar's transaction played a pivotal role in the demand. It was submitted that legitimate expectation is not a static principle but is evolving though the case was not merely hinged on legitimate expectation but was also based on irrationality and error of precedent fact. According to learned counsel, the applicant has 2 Spectrum Licences and 4 GSM licences in addition to the 4 it acquired.

37. It was submitted that absent a request for waiver, the Cabinet Secretary had no role in the matter hence the Respondent showed that it was no longer its decision.

38. Regarding the prayer for mandamus, it was submitted that the applicant is in the business with the purchased licences hence the order of mandamus would be to conclude the terms in the manner set out in the letter. It was contended that there is no split in the figure of US\$ 27 million in respect of GSM Licences and the Frequency Licence but is a global figure.

39. The Applicant therefore prayed that the Notice of Motion dated 15<sup>th</sup> August, 2017 be allowed as prayed.

#### **Respondent's Case.**

40. The application was opposed by the Respondent.

41. According to the Respondent, it has the constitutional and statutory mandate to license and regulate the information, communications and technology (ICT) sector in Kenya, including broadcasting, telecommunications, electronic commerce and postal services in accordance with the provisions of the ***Kenya Information and Communications Act, 1998*** (KICA). Pursuant to the provisions of section 25 of the ***Kenya Information and Communications Act***, the Authority has the mandate to consider and where appropriate, issue telecommunication licenses as required under the said Act.

42. It was averred that the said section provides, *inter alia*, that the Authority may, upon application in the prescribed manner and subject to such conditions as it may deem necessary, grant licenses under this section authorizing all persons, whether of a specified class or any particular person to operate telecommunication systems; or provide telecommunication services. Further, section 36 thereof provides that the Authority has the mandate to grant a license authorizing establishment of radio communication stations - usually referred to as Frequency Spectrum License.

43. It was however contended that as provided for under section 25(3)(d) and (e) of the said Act, the issuance of a license is subject, *inter alia*, to the payment of such license fee and on fulfilment of such conditions as may be prescribed by the Authority.

44. The Respondent explained that the license in respect to operation of telecommunications systems and provision of telecommunications services is also known as the Operating License and that in respect to operating radio communication stations is the license known as the Frequency Spectrum License in accordance with section 25 and Section 36 of the KICA respectively.

45. According to the Respondent, on 27<sup>th</sup> January 2001 therefore, the Applicant after successfully bidding and being declared the winner of the second mobile operator licence was issued with an operating license to operate mobile telecommunications systems and provide mobile telecommunications services and a

frequency spectrum license to establish mobile radio communication stations. Further, pursuant to the provisions of section 81 of the **Kenya Information Communications Act**, a license issued by the Authority may, on application and subject to the payment of the prescribed fee, be renewed for such further period as the Authority may specify. In exercise of its mandate, the Authority wrote to the Applicant together with other Mobile Network Operators on 7<sup>th</sup> August 2013, informing them of the policy and process of renewal of the Initial License as follows:

- a. That as provided for in the license renewal framework, the renewal of the licenses shall be subject to compliance with the license terms and conditions in the current term;
- b. That the renewal shall be subject to the successful negotiations of new license terms and conditions; and
- c. That the renewal shall also be subject to an upfront payment of a one-time renewal fee of US\$ 27 Million.

46. It was averred that the Mobile Network Operators were also informed by the Authority that the stated renewal license fee was pegged on the amount determined through a competitive auction process of the third mobile operator which resulted in an amount of US\$ 27 Million. Further, the Mobile Network Operators were informed that the prescription of uniform fees was guided by the need to uphold parity and a level playing field in the industry. It was contended that the Authority took into account factors including but not limited to the consideration that all the then four operators had equal access to the marketplace and hence potential for any desired market share, that all four operators had been offered relatively equal amount of spectrum resources which was principally the main factor with regard to the level of initial and/or renewal fees.

47. The Respondent accepted that it was aware that the Applicant approached the Authority regarding the set renewal fee requesting that the same be reduced. However, the Authority did not accede to this request and explained its decision to the Applicant.

48. It was averred that in February 2014, **Essar Telkom Kenya Limited** informed the Authority that they were unable to sustain their operations in Kenya and were therefore planning to exit the Kenyan market. ETKL brought to the Authority's attention the fact that they had been seeking a single buyer of their business as a going concern both locally and internationally, without success and that only **Safaricom Limited** and the Applicant had proposed to jointly buy-out ETKL. In this respect, ETKL, Safaricom and the Applicant submitted proposals to the Authority to the following effect:

a) In respect of the Applicant

- i. Acquire ETKL's operating licenses (Network Facilities Provider License, Content Service Provider License, Application Service Provider License and International Gateway Systems and Services License); and
- ii. Transfer of ETKL's subscribers to ETKL and the re-allocation of ETKL's numbering resource;
- iii. Variation of the Applicant's Spectrum Licences;

b) In respect of Safaricom: Acquire ETKL's passive infrastructure located in four hundred and fifty three (453) sites and associated agreements, transfer of the ground leases on which the passive infrastructure is situated, ETKL's Data Centre, ETKL's existing office space and related infrastructure, ETKL's right to use the spectrum granted under the Frequency License No. FL/004/001 and ETKL's residual assets including infrastructure.

49. It was contended that effectively, the substance of the transaction between ETKL, Safaricom and the Applicant was that the Applicant was to acquire ETKL's Operating Licenses (in respect of the license to

operate telecommunication systems and to provide telecommunication services) while Safaricom was to acquire the Frequency Spectrum Licences of ETKL (in respect of the radio communication stations).

50. By its letter dated 12<sup>th</sup> June 2014 addressed to ETKL and copied to, *inter alia*, the Applicant, the Respondent set out the conditions necessary for the fulfilment by the parties to the transaction.

51. It was averred that after various engagements with the Applicant and other relevant players, the Authority granted its approval for the proposed transaction, subject to the payment of US\$ 6.975 million in respect of synchronizing ETKL's license (which had eight 8 years remainder validity) by adding two (2) years to add up to the 10 year renewal period. The Applicant paid the US\$ 6.975 million as invoiced.

52. It was however averred that though the negotiations of the terms and conditions of the new license commenced, the said negotiations have not been finalized as confirmed by the Applicant in the Statutory Statement at paragraph 23 and that all the terms for the proposed renewal of license have not been agreed upon. The Applicant's Operation and Frequency Spectrum Licences were both scheduled to lapse after the initial term on 27<sup>th</sup> January 2015. Having acquired the ETKL's Operating License, which was set to expire on 30<sup>th</sup> June 2022, the Applicant exercised the option of renewal of its Operating License. The renewal option is only granted by the Authority for a period of 10 years. There was therefore need for the period of the renewed Applicant's Operating License to be synchronized with the remainder of the period in the Operating License acquired from ETKL.

53. It was clarified that the Applicant did not acquire ETKL's Frequency Spectrum License as the same was acquired by Safaricom. As the Applicant's Frequency Spectrum Licenses expired on 27<sup>th</sup> January 2015, the Authority therefore has a legitimate right to demand for payment for the renewal of the Applicant's Frequency Spectrum License. Accordingly, the Authority made a demand for the payment of US\$ 20,025,000.00 in respect of the renewal of the Applicant's Frequency Spectrum License and Kshs. 30, 200,000.00 as renewal fee for Operating License through its letters dated 17<sup>th</sup> June 2015, 6<sup>th</sup> November 2015 and 23<sup>rd</sup> June 2017. It was explained that the US\$ 20,025,000.00 is the balance for the renewal of Frequency Spectrum Licence which is set at US\$ 27,000,000 .00 since the Applicant had already paid US\$ 6,975,000.00 as initially invoiced by the Authority based on the two (2) year difference of the Applicant's (10 years) and ETKL's ( 8 years) license period. The balance of US\$ 20,025,000.00 was to be invoiced upon expiry of the two years which would have been after 27<sup>th</sup> January 2015. Indeed on 17<sup>th</sup> June 2015, the Respondent made its first demand for payment of the US\$ 20,025,000.00.

54. According to the Respondent, the said monies are due and owing from the Applicant to the Authority for the benefit of the Kenyan public and the Authority has under section 4(1) of the **Public Finance Management Act** been designated as a National Government Entity (Regulatory Agency) through **Legal Notice Number 33 of 2015**. Consequently, under Article 210 (1) and (2) of the Constitution as read together with the provisions of section 77 of the **Public Finance Management Act, 2012**, only the Treasury Cabinet Secretary may waive the set renewal license fee imposed by the Authority as an entity of the National Government. Further and in any event, such waiver may only be granted upon authorisation by an Act of Parliament.

55. It was the Respondent's view that the effect of the Applicant's plea to this Court is to seek to waive the renewal of the license fee in respect of its Frequency Spectrum Licenses which waiver cannot be granted without the approval by the Cabinet Secretary in charge of the Treasury as sanctioned by an Act of Parliament.

56. It was therefore the Respondent's case that the Applicant cannot claim a legitimate expectation contrary to the Constitution and other applicable laws hence the reliance by the Applicant on legitimate expectation therefore has no basis in this matter.

57. It was the Respondent's case that the Applicant got value for the amount of US\$ 6.975 Million paid by the Applicant to the Authority. The effect of this was the renewal of the Airtel's Operator Licenses synchronized with the renewed Airtel Operator Licenses for a period of ten (10) years from 27<sup>th</sup> January

2015. There is therefore no basis for alleging that the representations made by the Authority to the Applicant have not been met. However, the decision to demand the amount of US\$ 20,025,000.00 is *not* unreasonable, irrational, made in bad faith, an abuse of power or in breach of the rules of natural justice as alleged. That demand, it was contended took into account relevant matters; that Airtel's Frequency Spectrum Licenses which were due for renewal on 27<sup>th</sup> January 2015 required to be renewed and the appropriate license fee paid in that respect.

58. It was therefore the Respondent's position that its decision is not in breach of section 4(3) of the ***Fair Administrative Action Act, 2015*** since to demand payment of a license fee which is within the statutory mandate of the Authority cannot be in breach of the said provisions. In the Respondent's view, the demand for payment is not an adverse decision against the Applicant requiring prior hearing but is a requirement of the law and the licensing procedures. The Applicant cannot therefore ask to be heard before a decision to demand for the payment of a renewal license fee is made or communicated. In this case, it contended, its demand for the payment of the US\$ 20,025,000 is made towards complying with the Constitution and the law.

59. It was the Respondent's position that this Court cannot determine the terms and conditions to be attached to the license as such proposition is untenable in law. Accordingly, this Court should not issue a mandatory order granting the license as prayed by the Applicant. To the Respondent, if the Court grants the orders as prayed by the Applicant, the effect is that the Court would have taken over the performance of the functions of the Respondent. The Court was therefore urged not to issue the orders sought but to exercise judicial restraint to allow to the Authority to do that which it is mandated by law since the grant of a license is within the mandate of the Authority.

60. It was submitted on behalf of the Respondent by its learned counsel, **Mr Nyaoga** and **Mr Imende**, that the alleged assurance or representation has been misunderstood and is being misrepresented to this Court. The approval (the representation) granted by the Authority to the Applicant and assurance that the Applicant was trading on the renewed licences does not cover the scope of what the Applicant purports that it does. The Approval and subsequent assurance given to the Applicant was limited in scope. The Applicant obtained the approval to acquire ETKL's Operator's License and thereafter had its license synchronized with that of ETKL in terms of duration. That is the scope of the approval and or representations made by the Authority.

61. It was therefore submitted that it is beyond the scope of the approval (representation/promise) given by the Authority to submit that not only did the Authority approve the Applicant's acquisition of ETKL's Operator License and synchronization of its duration with that of the Applicant's Operator License, but that the Authority also approved the renewal or synchronization of the Applicant's Frequency Spectrum License to the ETKL's Frequency Spectrum License which was acquired by Safaricom Limited. In the Respondent's submission, Frequency Spectrum license was therefore a separate matter, which was not part of the transaction or negotiations between the Authority and the Applicant and that the Frequency Spectrum fees was to be paid before issuance of the license.

62. According to the Respondent the parties submitted agreements to the transaction entered into with ETKL which was confirmed by the Authority which issued conditions precedent to the approval of the transaction. However, the Authority granted its approval for the proposed transaction, subject to the payment of US\$ 6.975 million in respect of synchronizing ETKL's license with that of the Applicant and fulfilment of thirteen (13) other conditions. It should be noted that the synchronization could only have been in respect of the Operating Licences since that was what the Applicant was purchasing from ETKL. It was reiterated that though the negotiations of the terms and conditions of the new license commenced, the said negotiations have not been finalized to date as confirmed by the Applicant in the Statutory Statement at paragraph 23 and that no new license has been issued to the Applicant. It was the Respondent's case that the Applicant did not acquire ETKL's Frequency Spectrum License as the same was acquired by Safaricom hence there was no Frequency Spectrum License acquired from ETKL with which to synchronize the Applicant's Frequency Spectrum License.

63. However as the Applicant's Frequency Spectrum Licenses expired on 27<sup>th</sup> January 2015, the

Authority therefore demanded for payment for the renewal of the Applicant's Frequency Spectrum License in the sum of US\$ 20,025,000.00 which is the balance for the renewal of Frequency Spectrum Licence which is set at US\$ 27,000,000 since the Applicant had already paid US\$ 6,975,000.00.

64. With respect to the principle of legitimate expectation, the Respondent relied on the decision by the Supreme Court of Kenya in **Communications Commission of Kenya and Others vs. Royal Media Services and Others Petition No. 14, 14A, 14B and 14C of 2014.**

65. According to the Respondent, the synchronization of the licences could only be within the context of what the Applicant was acquiring from ETKL. In a manner of speaking 'like-for-like'. There cannot be synchronization between unlike licences. Since the Applicant was only acquiring the ETKL's Operation License, any promise made by the Authority can only have been intended to refer to the synchronization of the ETKL's Operation Licence with that of the Applicant upon payment of the requisite fees. The Respondent emphasised that it is critical to note that the two types of licences are provided for in law. The license in respect to operation of telecommunications systems and provision of telecommunications services is also known as the Operating License while that in respect to operating radio communication stations is the license known as the Frequency Spectrum License and the two are issued pursuant to section 25 and section 36 of the *KICA* respectively.

66. It was therefore submitted that the Applicant therefore failed in demonstrating that there was a clear and unambiguous promise by the Authority to synchronise both its Operation and Frequency Spectrum Licences with those of ETKL. That would have been a technical impossibility given that the Applicant was not acquiring ETKL's Frequency Spectrum License.

67. It was contended that the Applicant had been informed by the Authority of the renewal fee for the initial licences at US\$ 27 Million which composite amount for the renewal of the initial licences has never been withdrawn or overturned. Consequently, in the context of the Applicant's transaction with ETKL vis-a-vis the Authority, the full renewal of the Applicant's Operation and Frequency Spectrum Licences, there remains a balance to be paid to the Authority. That is what the Authority has demanded from the Applicant.

68. It was further submitted that the Applicant's expectation is not reasonable. This is taking into account the fact that the Applicant's construction of the representation is premised on an assumption that unlike frequencies were to be synchronised in terms of their duration. As stated above, given that the Applicant was not acquiring ETKL's Frequency Spectrum Licence, synchrony of the durations of the Applicant's Frequency Spectrum License with those of ETKL's Operation License is impossible to achieve. Since the license in respect to operation of telecommunications systems and provision of telecommunications services is also known as the Operating License while that in respect to operating radio communication stations is the license known as the Frequency Spectrum License serve different purposes, they are therefore incapable of being 'cross-synchronized'.

69. It was submitted that the Authority had on 7<sup>th</sup> August 2013 communicated the renewal fees for the initial licenses to all Mobile Network Operators as US\$ 27 Million in line with the provisions of sections 79 and 81 of *KICA*. The Authority has under section 4(1) of the ***Public Finance Management Act*** been designated as a National Government Entity (Regulatory Agency) through ***Legal Notice Number 33 of 2015***. Consequently, under Article 210 (1) and (2) of the Constitution as read together with the provisions of section 77 of the *Public Finance Management Act, 2012*, only the Treasury Cabinet Secretary may waive the set renewal license fee imposed by the Authority as an Entity of the National Government. Further and in any event, such waiver may only be granted upon authorisation by an Act of Parliament. It was therefore submitted that it is therefore not within the Authority's mandate to unilaterally review and or revise the said fee yet the effect of the Applicant's submission is to cause the Authority to waiver or vary the renewal license fee.

70. It was submitted that since the Operating Licence and the Frequency Spectrum License are issued pursuant to section 25 and 36 of *KICA*, though capable of being used side by side, serve distinct functions. Consequently, it would be against the law for the Applicant to suggest that the renewal and

synchronization of its Operator License with ETKL's Operator License included synchronization of its Frequency Spectrum License with the same ETKL Operator License or ETKL's Frequency Spectrum License that was sold to Safaricom Limited.

71. It was therefore submitted that to the extent that the expectation proposed to be relied on by the Applicant goes against the provisions of Article 210 (1) and (2) of the Constitution as read together with the provisions of section 77 of the **Public Finance Management Act, 2012**, the same cannot be legitimate and therefore, unenforceable. In this respect the Respondent relied on the South African decision, **South African Veterinary Council vS. Szymanski** 2003(4) S.A. 42 (SCA) and **Republic vs. Nairobi City County & Another ex parte Wainaina Kigathi Mungai, High Court Judicial Review Misc. case No. 356 of 2013; [2014] eKLR** for the proposition that the law only protects expectations which are legitimate and that legitimate expectation cannot override the law.

72. It was submitted that the Applicant conflates the approval and authorization given by the Authority. Since the Applicant was acquiring ETKL's Operating Licence only, the synchronization and payment of renewal fees was based on that license only. Consequently, the confirmation given by the Authority in respect of the operations of the Applicant using the ETKL's licences was in respect of the licences that the Applicant acquired from ETKL. To the Respondent, there is therefore nothing unreasonable or irrational regarding the conduct of the Authority. It was further submitted that the Mobile Network Operators were informed as early as 7<sup>th</sup> August 2013 regarding the policy applicable to the renewal of initial license fees. Apart from complying with current license terms and conditions, there was a requirement to pay US\$ 27 Million and finally, negotiation of the terms of the new license. In this case the Applicant upon receipt of that letter made various representations regarding the said policy including asking that the amount set for initial license renewal be reduced. After corresponding with the Applicant, the Authority affirmed its position that the amount would remain as set in the policy. Having set the policy for the renewal of the initial license fees, there cannot be a legitimate expectation that when making a demand for payment of the monies due under section 81 of KICA, that the Applicant would be given a hearing in respect thereof. In this case, the Authority was making a demand for payment of the balance of the initial license renewal fee. There is no basis to submit that there ought to be a hearing when the government is pursuing the collection of taxes or due from a person or entity.

73. It was submitted that even assuming that there is a right to be heard as suggested by the Applicant that of itself does not take away the Authority's right to pursue the payment of the balance of the fee in respect of the renewal of initial license. The proper order, in the Respondent's submission would be that the Applicant be heard in relation to the demand (or proposed demand) before a decision is made. An order to prohibit the demand or collection of the said fee would encroach on the statutory and constitutional mandate of the Authority.

74. The Respondent relied on the decision of the Supreme Court of Kenya in the **Communications Commission of Kenya decision (supra)** in which the Court cited with approval the English case **In re Westminster City Council, [1986] A.C. 668 at 692.**

75. In this case, it was submitted that there is no promise or established practice of consultation in respect of demand for payment of license fees when the same fall due. Having informed the Mobile Network Operators of the renewal of licences policy, there would be no legitimate expectation that the Authority would consult and hear the Applicant when the same is being demanded.

76. It was the Respondent's case that the fee for the renewal of the initial licenses for the Mobile Network Operators was set at US\$ 27 Million. This was notified to, inter alia, the Applicant. Only part of this money has been paid by the Applicant. The Authority is only demanding payment of the balance thereof. There is therefore no irrelevant consideration made by the Authority in making the demand of the Applicant.

77. As regards the order for mandamus, it was submitted that it is not in dispute that the statutory mandate for the issuance of the Operator or Frequency Spectrum Licence under sections 25 and 36 of KICA is reposed in the Authority. Renewal of the licences is subject to the payment of the license fee as required

under section 81 of KICA. It is also conceded by the Applicant that the finalization of the terms of the terms and conditions of the license is outstanding. The Applicant states at paragraph 23 of its Statutory Statement that “*the only outstanding item was the finalization of the actual terms and conditions of the main operating license which were discussed and concluded in February 2015.*” It was submitted that since the determination of the terms and conditions of the licences to be issued is within the statutory mandate of the Authority this Court should exercise restraint based on **Kenya Communications Commission decision (supra), Trusted Society of Human Rights Alliance vs. Attorney General & others Nairobi Petition No. 243 of 2011 (2012) eKLR** and **Speaker of the Senate & Another vs. Hon. Attorney General & 3 Others (2013) eKLR.**

78. It was therefore the Respondent’s case that in making the plea before this Court, relies on a misconstruction of the decisions made by the Authority. The demand made by the Authority is legitimate and made in public interest. The monies demanded are for the use for and on behalf of the Kenyan taxpayers.

79. According to **Mr Imende**, in this case the applicant was engaged in two processes- renewal of its licences and the transaction involving Essar, Safaricom and the Applicant. The renewal fees had been set at US\$ 27 million. It was contended that what the applicant sought to achieve was not what was approved by the Respondent. It was explained that Essar had only one Frequency Licence which was to go to Safaricom while the applicant was only acquiring the Operating Licence hence the synchrony could only be on the term and what was being acquired.

80. It was submitted that the applicant’s licences were expiring in 2015 hence the commencement of the application in 2013. Therefore the demand by the Respondent of US\$ 20 million related back to the policy set by the Respondent that the initial renewal fee was US\$ 27 million and a credit was given for the payment made.

81. It was submitted that whereas the applicant seeks an order of mandamus to be issued with a licence, it is the statutory mandate of the Respondent to issue licences and to impose conditions. However the said terms and conditions have not been finalised as what is there is draft licence with tacked changes which has not been concluded.

82. With respect to the allegation that the Respondent abdicated its mandate, it was submitted that since the Respondent is gazetted as a National Government entity with the mandate to collect revenues, on behalf of the National Government, having set the renewal fee and as the licence was coming to an end, it was upon the Respondent to demand for the balance. However its designation as a National Government Entity entitles the National Treasury to seek or the payment hence the Respondent did not abdicate its mandate.

83. It was submitted that there is no evidence showing how much the applicant had spent in the transaction.

84. On his part, **Mr Nyaoga** submitted that this is not a case of revocation of a licence but a demand for outstanding fees. However the applicant seems to be seeking an order prohibiting revocation. While reiterating the foregoing submissions, learned counsel submitted that the principle of legitimate expectation was inapplicable to the circumstances of this case. It was explained that whereas there is no deposition that the applicant sought a waiver, the effect of the non-payment of fee amount to a waiver.

85. The Court was therefore urged to dismiss the Notice of Motion dated 15<sup>th</sup> August 2017 with costs.

### **Determinations**

86. I have considered the application, the various affidavits filed in support of and in opposition to the application as well as the submissions filed.

87. It is clear from the submissions made on behalf of the applicant, that the applicant’s case is to a large

extent based on the principle of legitimate expectation. It is therefore important to understand the scope and applicability of the said principle. What then is the rationale behind the principle? In **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240**, the Court stated as follows:-

**“...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted but on a higher public interest beneficial to all including the respondents, which is the value or the need of holding authorities to promises and practices that have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation...An abrupt change...targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way...Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has sufficient overriding interest to justify a departure from what has been previously promised.**

88. In **CCSU vs. Minister for the Civil Service [1984] 3 All ER, 935** where Lord Diplock states, at page 949:-

**“To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.”**

89. It is a requirement that for the doctrine of legitimate expectation to be successfully invoked, the expectation must in the first place be legitimate “in the sense of an expectation which will be protected by law”. See **R vs. Department for Education and Employment, ex p Begbie [2000] 1 WLR 1115, 1125C-D**. According to South African case of **South African Veterinary Council v. Szymanski** 2003(4) S.A. 42 (SCA) at [paragraph 28]:

**“The law does not protect every expectation but only those which are 'legitimate'.**

90. This was the view adopted in **Royal Media Services Limited & 2 Others vs. Attorney General & 8 Others [2014] eKLR** where it was held that:

**“...legitimate expectation, however strong it may be, cannot prevail against express provisions of the Constitution. If a person or a statutory body promises a certain relief or benefit to a claimant or undertakes to do something in favour of a claimant but in a way that offends the Constitution, the claimant cannot purport to rely on the doctrine of legitimate expectation to pursue the claim or the promise.”**

91. In other words since the doctrine of legitimate expectation is based on considerations of fairness, even where benefit claimed is not procedural, it should not be invoked to confer an unmerited or improper benefit. See **R vs. Gaming Board of Great Britain, ex p Kingsley [1996] COD 178 at 241**.

92. Similarly in **South Bucks District Council vs. Flanagan [2002] EWCA Civ. 690 [2002] WLR 2601 at [18]** it was held that:

**“Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say it would not be one to which he was entitled.”**

See also Rowland vs. Environment Agency [2002] EWHC 2785 (Ch); [2003] ch 581 at [68]; CA [2003] EWCA Civ 1885; [2005] Ch 1 at [67].

93. However as was held in Republic vs. Kenya Revenue Authority ex parte Shake Distributors Limited Hmisc. Civil Application No. 359 of 2012:

**“...the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a particular manner. For the promise to hold, the same must be made within the confines of the law. A public body cannot make a promise which goes against the express letter of the law.”**

94. The three basic questions were identified in R (Bibi) vs. Newham London Borough Council [2001] EWCA Civ 607 [2002] 1 WLR 237 at [19] as follows:

**“In all legitimate expectation cases, whether substantive or procedural, three practical questions rise, the first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do.”**

95. In De Smith, Woolf & Jowell, “Judicial Review of Administrative Action” 6<sup>th</sup>Edn. Sweet & Maxwell page 609 it is stated that:

**“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government’s dealings with the public.”**

96. In Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280 it was held:

**“The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine.”**

97. In this case, it is clear that the applicant’s licence was due to expire in 2015. In line with the relevant Regulations which require an operator to apply for licence renewal two years prior to expiry, by a letter dated 23<sup>rd</sup> January 2013, the Applicant requested the Respondent for a Licence renewal. In response to the aforesaid letter, the Respondent requested the Applicant to submit a detailed business plan with

network and service roll out commitments for the next 10 years which the Applicant submitted on 24<sup>th</sup> June 2013.

98. However since in late 2013, Essar was exiting the market due to financial challenges an agreement was reached between Essar and the Applicant by which the applicant acquired Essar's subscribers, GSM Licences and subscriber related contacts while Safaricom acquired inter alia Essar's right to use the spectrum granted under the Frequency Licence No. FL/004/001. It is therefore clear that what the applicant acquired was not Essar's Frequency Licence. However the Applicant requested the Respondent's approval of the linkage of the Applicant's Spectrum Licences i.e. Frequency Licences No. FL/0003/001 and FL/003/002 to Essar's NFP Licence No. TL/NFP/T1/00002 subject to regulatory approval.

99. According to the applicant, by a letter dated 28<sup>th</sup> March 2014, the proposed acquisition of Essar's business by the Applicant was approved by the Respondent subject to fulfilment of specific conditions as set out in the aforesaid letter, with condition No. 1 was stating as follows:

***Airtel paying to the government through the Authority an upfront licence fee of US\$ 5.4 million, being a variation of the license term, in order to synchronize the acquired assets with its licence period.***

100. At this point, it was therefore clear from the said letter that the US\$ 5.4 million was a variation of the license term, in order to synchronize the acquired assets with the applicant's licence period. The Applicant however relied on the letter dated 12<sup>th</sup> June 2014 in which according to it, the Respondent confirmed that it was in agreement with the proposal that the Applicant exercises its option to renew its license for a further period of 10 years by way of acquiring the Essar Licences and upon payment to the Authority of an upfront license fee of US\$ 5,400,000/=. The said letter, according to the Respondent was a clarification of Condition 1 in the letter dated 28<sup>th</sup> March 2014, referred to hereinabove.

101. What exactly did this letter of clarification provide? It was stated that:

***a. On the payment of an upfront fee of US\$ 5.4 million, the Commission will vary and extend the term of Airtel's existing licences to the year 2024. It should be noted that by entering into a transaction to purchase Essar Telecommunications Kenya Limited (ETKL) remaining term, Airtel will be exercising its option to renew its current licences for a further ten (10) year term.***

***b. The Commission wishes to synchronize the eight (8) year term purchased from ETKL with the ten (10) year renewal option provided for in Airtel's current licences.***

***c. On payment of the requisite fee and following negotiations and agreement with the Commission on the applicable licence conditions for the new term, the Commission will renew Airtel's existing licences for a further ten (10) year term commencing from the date of the payment.***

***d. Airtel will migrate with its current resources (including existing Frequency Licences No. FL/003/001 and FL/003/002) to its new licence once the parties conclude negotiations on the new licence conditions. Negotiations on the new licence conditions will commence once the proposed transactions take effect.***

***e. The Commission shall only approve the proposed transactions after the payment of the licence fee of US\$ 5.4 million by Airtel.***

102. A reading of this letter without more leads one to the understanding that by entering into a transaction to purchase Essar Telecommunications Kenya Limited (ETKL) remaining term, the applicant was deemed to have been exercising its option to renew its existing licences for a further ten (10) year term. In other words the mere fact of entry into that transaction was deemed to amount to an exercise of

the option without the necessity of an application to that effect. My understanding is based on the meaning ascribed to the term “deem” in Gatete and Another vs. Kyobe SCCA No. 7 of 2005 [2008] 2 EA 135 where it was held by the Supreme Court of Uganda that:

**“The word “deemed” is commonly used in legislation to create legal or statutory fiction. It is used for the purpose of assuming the existence of a fact that in reality does not exist. The word “deemed” is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would otherwise not prevail. Sometimes it is used to place beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.”**

103. This position was appreciated in Prof. Peter Anyan’g Nyong’o and 10 Others vs. Attorney General of Kenya & Others EACJ Reference No. 1 of 2006 [2007] 1 EA 5; [2007] 2 EA 5; [2008] 3 KLR (EP) 397 where the East African Court of Justice, citing St. Aubyn (LM) vs. AG [1951] 2 All ER 473 at 498 expressed itself as follows:

**“The word “deemed” is commonly used both in principal and subsidiary legislation to create what is referred to as *legal or statutory fiction* and the legislature uses the word for the purpose of assuming the existence of a fact that in reality does not exist...”**

104. The said clarification was clear that upon the payment of an upfront fee of US\$ 5.4 million, the Commission was to vary and extend the term of Airtel’s *existing* licences to the year 2024. Without deciding whether the said sum was meant to cover the renewal of the applicant’s existing licences, what was however clear was that upon payment of the said sum the applicant’s existing licences would be similarly extended to the year 2024. However, it was the Respondent’s intention that the 8 years remaining lifespan of Essar’s Licence be synchronised with the ten (10) year renewal option provided for in Applicant’s existing licences. However the renewal of the Applicant’s licence for the said period of ten (10) years was subject to payment of the requisite fees, which according to the letter was US\$ 5.4 million and the negotiations and agreement with the Commission on the applicable licence conditions for the new term.

105. I therefore agree with the Applicant that representations were made to the Applicant that upon the payment of the said US\$ 5.4 million and negotiations on the conditions of the licence, the applicant’s existing licence as synchronised with that of Essar would be renewed for the said period of ten (10) years. This however does not mean that the Respondent was waiving its policy requirement as communicated to the Applicant together with other Mobile Network Operators on 7<sup>th</sup> August 2013, that the renewal of the licenses would be subject to compliance with the license terms and conditions in the current term; that the renewal would be subject to the successful negotiations of new license terms and conditions; and that the renewal would be subject to payment of a one-time renewal fee of US\$ 27 Million. In my view what the Respondent was stating was that it would not insist on the upfront payment of the said US\$ 27 Million as a condition precedent to the renewal of the applicant’s licence as it was prepared to renew the licence upon payment by the applicant of the said US\$ 5.4 million.

106. The applicant is clear in its case that it is not seeking a waiver of payment of the said US\$ 27 Million in these proceedings. It is therefore not seeking that this Court directs the Respondent to waive the said payment or any part thereof. In fact I agree with the Respondent that pursuant to Article 210(1) and (2) of the Constitution as read together with the provisions of section 77 of the *Public Finance Management Act, 2012*, only the Treasury Cabinet Secretary may waive the set renewal license fee imposed by the Authority as an Entity of the National Government and that such waiver may only be granted upon authorisation by an Act of Parliament. That being an exercise of discretion, on the authority of Kenya National Examination Council vs. Republic, Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996 [1997] eKLR:

**“That now brings us to the question we started with, namely, the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public**

bodies such as the Council in this case. What does an **ORDER OF PROHIBITION** do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY’S LAW OF ENGLAND, 4<sup>th</sup> Edition, Vol. 1 at pg.37 paragraph 128...The next issue we must deal with is this: What is the scope and efficacy of an **ORDER OF MANDAMUS**? Once again we turn to HALSBURY’S LAW OF ENGLAND, 4<sup>th</sup> Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed...”

107. Therefore whereas I do not agree with the position adopted by the Respondent that the effect of the Applicant’s submission is to cause the Authority to waive or vary the renewal license fee, I agree that this Court cannot direct the Respondent to waive its policy with respect to the amount payable for the renewal of the licence.

108. It was also made clear that the negotiations on the new licence conditions was to commence once the proposed transactions took effect and the proposed transactions were to be approved after the payment of the licence fee of US\$ 5.4 million by the Applicant. The employment of the phrase “licence fee” in reference to US\$ 5.4 million as opposed to the “transaction fee” in my view means that the said US\$ 5.4 million was part of the fee required in order to renew the licence and was not just for the purposes of acquisition of Essar’s Licences by the Applicant, as the Respondent would like the Court to believe.

109. In my view, by entering into the transaction to purchase Essar’s said licence and paying the said US\$ 5.4 million the Applicant would be deemed to have exercised its option to renew its existing licence, would be entitled to renewal of its existing licences by way of taking the remaining term of 8 years on the Essar’s operating licence on terms and conditions to be agreed and the Respondent would provide a mechanism for the Applicant’s 2G and 3G spectrum to be synchronized with the Essar’s GSM Telecommunications Licences.

110. My view on this matter is supported by the letter dated 11<sup>th</sup> August 2014, by which the Respondent

notified the Applicant of a 12 step process that was to be followed in order for the Applicant to be issued with renewed licences for a term of 10 years, amongst which steps 6, 7 and 11 were stated to be as follows:

***Step 6; The Respondent would issue a letter approving the transfer of Essar Operating (NFP T1, ASP and CP) Licences to the Applicant.***

***Step 7; The Respondent would prepare an invoice for US\$ 5.4 million addressed to the Applicant. This would be in respect of the payment of the synchronization fees for Essar's operating licences and the Applicants operating and frequency licence to end on 27<sup>th</sup> January 2014.***

***Step 11; The Respondent would issue the Applicant with the new licences. The issued licences would have synchronized to end on 27<sup>th</sup> January 2024.***

111. As it can be seen there was no issue of the balance of US\$ 20,025,000.00 being paid before the renewal was to be done. To put the matter beyond doubt, the Respondent by its letter dated 16<sup>th</sup> September 2014 addressed to the Applicant, expressed itself as hereunder;

***CA confirms that on payment of the US\$ 5.4 Million, we shall on or before 26<sup>th</sup> January 2015 synchronize the renewed Airtel Licences with the acquired Essar licences to expire on 30<sup>th</sup> June 2024. For avoidance of doubt, at the renewal of the licences, you will be required to pay the usual Unified Licensing Framework (ULF) initial licence fee for all the licence to be renewed.***

112. It is not in doubt that by a letter dated 31<sup>st</sup> October 2014, the Respondent submitted to the Applicant an invoice for the sum of US\$ 5.4 million which would be the fees that the Applicant would pay in order to take over the unexpired term of 8 years of the Essar License and for its 2G and 3G Spectrum to be synchronized with the Essar License since the letter stated *inter alia* that;

***As you are aware, the Essar Telecom Kenya Limited licences you are acquiring are expiring in eight years on 30<sup>th</sup> June 2022. On the other hand, your current licences are due for renewal for a ten (10) year period. In order to synchronize the Essar licences you are acquiring with your licences renewal, you will be required to pay a licence renewal fee amounting to United States Dollars, Five Million, Four Hundred Thousand (US\$. 5.4 Million) to cover the two year difference for the period 1<sup>st</sup> July 2022 to 30<sup>th</sup> June 2024. An invoice to that effect is attached for your necessary action.***

113. However, by a letter dated 12<sup>th</sup> November 2014, the Applicant requested the Respondent to submit to the Applicant a revised invoice covering the renewal period up to 27<sup>th</sup> January 2025 instead of 30<sup>th</sup> June 2024 as reflected in the invoice that the Respondent had issued to the Applicant on 30<sup>th</sup> October 2014 as this would ensure that the Essar licence is synchronized with the Applicant's licence so that the Applicant would get the 10 year renewal with effect from 27<sup>th</sup> January 2015. In response, by a letter dated 24<sup>th</sup> November 2014, the Respondent notified the Applicant that the Applicant's request to have the licences that it intended to acquire from Essar extended from 1<sup>st</sup> July 2022 to 27<sup>th</sup> January 2025, had been considered and approved subject to the payment of an extra US\$ 1.575 Million. Consequently, the Respondent issued the Applicant an invoice for US\$ 6.975 million and a credit note of its earlier invoice to the Applicant for the sum of US\$ 5.4 million.

114. Again it is not in doubt that in December 2014, the Applicant paid the sum of US\$6.975 million to the Respondent and by a letter dated 15<sup>th</sup> December 2014, the Respondent confirmed that all regulatory fees in respect of the transaction had been settled. Accordingly, by a letter dated 27<sup>th</sup> January 2015, the Respondent stated thus;

*The Authority wishes to confirm that Airtel Networks Kenya Limited (Airtel) commenced operations under the Essar Telecom Kenya Limited's licences following the fulfilment of the conditions communicated to the Essar transaction parties.*

*However, as you are aware, the Authority will be issuing you with modified licences, incorporating new terms and conditions including the agreed new rollout obligations and bearing Airtel's name. The new licences will be issued after the finalization of the ongoing discussions between the Authority and Airtel on the licence terms and conditions.*

115. It is once more noteworthy that the issue of payment of the balance as a condition for renewal of the applicant's licence did not arise and a draft licence terms and conditions, was duly prepared and submitted to the Applicant for approval. That draft did not however mention the said balance of US\$ 20,025,000.00 so that it was clear that the said balance was not part of the terms and conditions for the renewal of the licence as contended by the Respondent.

116. I therefore agree with the Applicant once the payment in the sum of US\$ 6.975 million was made by the Applicant to the Respondent, in so far as the renewal of the applicant's licence was concerned, the only outstanding item was the finalization of the actual terms and conditions of the main operating license. If the said discussions were concluded as the Applicant contends, then the Respondent was bound to issue the Applicant with a licence incorporating the new terms and conditions and bearing the Applicant's name. This must be so since the Respondent appreciates that section 25 of the **Kenya Information and Communication Act** mandates the Authority to grant licenses thereunder authorizing all persons, whether of a specified class or any particular person to operate telecommunication systems; or provide telecommunication services.

117. That being a statutory discretionary power, I do not agree that the Court cannot inquire into the manner of its exercise. I belong to the school of thought that associate itself with the reasoning of **Prof Sir William Wade** in his book *Administrative Law* as cited in **R vs. Somerset County Council, ex parte Fewings and Others [1995] 1 All ER 513 at 524** that:

**“The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...”**

118. To my mind this Court is entitled to interfere with the exercise of such powers in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker

is irrational and unreasonable. See the decision of Nyamu, J (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

119. Therefore if the Respondent's failure to issue the licence is intended to frustrate the purpose of the Act donating to it the power or where it fetters the discretion given to it or where it fails to exercise that discretion, this Court is empowered by section 11 of the *Fair Administrative Action Act* to bring it back on track.

120. I agree with the Respondent's position that under section 25(3)(d) and (e) of the said Act, the issuance of a license is subject, *inter alia*, to the payment of such license fee and on fulfilment of such conditions as may be prescribed by the Authority. However where the Authority has represented to a person that it will not insist on its own policy, the Authority must be held to its representation and my view is supported by the decision in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240** in which while citing **Reg vs. Secretary of State for the Environment Ex Parte Nottinghamshire Country Council [1986] AC** it was held that:

**“The courts task is not to interfere or impede executive activity or interfere with policy concerns, but to reconcile and keep in balance, in the interest of fairness, the public authorities need to initiate or respond to change with the legitimate interests or expectation of citizens or strangers who have relied, and have been justified in relying on a current policy or an extant promise...[T]he Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations...The change of policy... must a pass a much higher test than that of rationality from the standpoint of the public body...A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness...and in so acting abuse its powers...I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law...[i]t is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it...Abuse of power includes the use of power for a collateral purpose, as set out in *ex-parte Preston*, reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals...failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief.”**

121. It is therefore my view that whereas the Respondent had expressed a policy regarding the fees payable for renewal of licences, nothing barred it from departing from the same and if it conducted itself in a manner suggesting that it had so departed and made a person to believe that it would not insist on that policy, for it to suddenly make an about-turn without notifying the person concerned of its intention to revert to its earlier position, would be frowned upon by the Court.

122. In my view whereas I am, based on the evidence before me, unable to find that the Respondent had completely varied its licence fee, it is clear that it represented to the applicant that it would renew its licence upon payment of the sum of US\$ 5.4 million and successful negotiations of new license terms and conditions. I therefore disagree with the Respondent's position that Frequency Spectrum license was a separate matter, which was not part of the transaction or negotiations between the Authority and the Applicant and that the Frequency Spectrum fees was to be paid before issuance of the license. I further disagree with the Respondent that the balance of USD 20,025,000.00 was to be invoiced upon expiry of the two years which would have been after 27<sup>th</sup> January 2015. That representation cannot, in my view amount to a contravention of the law in order to render it illegitimate.

123. While I agree that this Court cannot determine the terms and conditions to be attached to the license and cannot therefore issue a mandatory order granting the license as prayed by the Applicant, the Court can however compel the Respondent to carry out its statutory duty of completing the conditions and terms

of the licence and issuing the same to the applicant.

124. As regards the right to be heard, I am in agreement with the Respondent that having set the policy for the renewal of the initial license fees, there cannot be a legitimate expectation that the Applicant would be given a hearing in respect of the amount payable. I further agree that a right to be heard of itself does not take away the Authority's right to pursue the payment of the balance of the fee in respect of the renewal of initial license. In this case, however, the Respondent had assured the Applicant that upon payment of the sum of US\$ 5.4 million and successful negotiations of new license terms and conditions, the applicant's licence would be renewed. It is very clear to me that where an authority represents to a person that upon fulfilment of certain conditions, the person will enjoy certain benefits, and that person on reliance on the said representations fulfils the stated conditions, unless there is a change in circumstances that make it impossible to fulfil the promise, the authority must be held to the terms of the representation.

125. I am therefore of the view, which view the Respondent appreciates that in such circumstances the Applicant ought to have been heard in relation to how the balance of the licence fee was to be paid since the Respondent had clearly represented to the Applicant that it would not insist on the payment of the licence fee upfront as a condition to the renewal of the licence. In other words having varied its earlier policy it became necessary that consultation be undertaken with respect to the mode of the payment of the balance. That is my understanding of the holding in **Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280** where it was held:

**“A legitimate expectation arises where a person responsible for taking a decision has induced in someone who may be affected by the decision a reasonable expectation that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken. In such cases, the expectation ought not to be summarily disappointed.”**

126. The rationale for this doctrine was restated in **R vs. Devon County Council ex parte P Baker [1955] 1 All ER** where it was held:

**“...expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision.”**

127. It therefore my view that the Respondent was not entitled to unilaterally demand for the full payment of the balance without recourse to the applicant.

128. It was further contended that the Respondent abdicated its mandate to the Minister. Section 5A of the Act provides as hereunder:

***(1) The Authority shall be independent and free of control by government, political or commercial interests in the exercise of its powers and in the performance of its functions.***

***(2) In fulfilling its mandate, the Authority shall be guided by the national values and principles of governance in Article 10 and the values and principles of public service in Article 232(1) of the Constitution.***

129. This provision derives its origin from Article 34(5) of the Constitution provides as follows:

***(5) Parliament shall enact legislation that provides for the establishment of a body, which shall***

***(a) be independent of control by government, political interests or commercial interests;***

**(b) reflect the interests of all sections of the society; and**

**(c) set media standards and regulate and monitor compliance with those standards.**

130. An attempt was made on 15<sup>th</sup> December 2015 vide *Statute Law (Miscellaneous Amendments) Act 2015*, to amend, inter alia, section 5 of the *Kenya Information and Communications Act*. That attempt however fell flat on its face when this Court in Petition 45 of 2016 – **Okiya Omtatah Okoiti vs. Communications Authority of Kenya & Others** - expressed itself as hereunder:

**“That the 1<sup>st</sup> Respondent herein, Communications Authority of Kenya is the body contemplated under the above Article is not in doubt. It is also not in doubt that before the contentious amendments, under the *Kenya Information and Communications Act, 1998*, the 1<sup>st</sup> Respondent did not need to “consult” the Cabinet Secretary nor any other statutory body like the Competition Authority in the exercise of its functions. Consequently the gist of the amendments was that the 1<sup>st</sup> Respondent is now obliged to “consult” both the Cabinet Secretary and the Competition Authority before exercising some of its mandate. The question that arises is whether the requirement for consultation introduced by the amendments has the effect of eroding the independence of the 1<sup>st</sup> Respondent as envisaged under Article 34(5) (a) of the Constitution. The issue before me is not whether the said amendment was constitutional. Rather the question is whether such an amendment ought to have been introduced by way of a Statute Law Miscellaneous Amendment Bill. It is therefore my view and I hold that the position of the Respondents that the inclusion of the word ‘consultation’ in the Statute Law Miscellaneous Amendment Act 2015 does not ipso facto strip the 1<sup>st</sup> Respondent of its independence as the same merely connotes the seeking of an opinion, which opinion is not binding, cannot be true. To contend that even with the amendments by the Statute Law Miscellaneous Amendment Act 2015, the 1<sup>st</sup> Respondent is merely obligated to inform the 2<sup>nd</sup> Respondent of its policies and therefore not stripped of its independence as envisaged by Article 34(5) of the Constitution of Kenya, 2010, cannot be taken as a serious argument. In my view there is a world of difference between a requirement that the 2<sup>nd</sup> Respondent be informed or notified of the 1<sup>st</sup> Respondent’s action and a requirement that the 1<sup>st</sup> Respondent consults the 2<sup>nd</sup> Respondent before undertaking its constitutional and statutory mandates. In my view the amendments introduced to Kenya Information and Communications Act through the *Statute Law (Miscellaneous Amendments) Act* had an impact on Article 34(5) of the Constitution. In my view an amendment that has an impact on either the letter or the spirit of the Constitution however remotely cannot be termed as “minor non-controversial and generally house-keeping amendments.” Therefore while I decline to grant the other orders sought in the petition, I hereby quash all amendments made on 15<sup>th</sup> December 2015 to the *Kenya Information and Communications Act* by the *Statute Law (Miscellaneous Amendments) Act 2015*.”**

131. In that decision the Court restated the independence of the Respondent herein and disabused an attempt by the Legislature to water down that independence.

132. In this case whereas the Respondent vide its letter dated 25<sup>th</sup> July, 2017 demanded for payment of US\$ 20,025,000.00 without further delay, a demand which I have found hereinabove to have been improperly made without consulting the Applicant on the mode and manner of payment thereof considering the Respondent’s representations, in the letter dated 23<sup>rd</sup> June, 2017, the Respondent expressly stated that the direction emanated from the Treasury. The Respondent’s justification for this directive is that the Respondent’s designation as a National Government Entity entitles the National Treasury to make such demand.

133. With due respect, that interpretation flies in the face of both Article 34(5) of the Constitution and section 5A of KICA. In my view the Treasury has no power to direct the Respondent on how to carry out its mandate. By passively permitting the Treasury to do so, I find that the Respondent did abdicate its

mandate.

134. As was held by Lord Somervell in Vine vs. National Dock Labour Board [1956] 3 All ER 939, at page 951:

**“The question in the present case is not whether the local board failed to act judicially in some respect in which the rules of judicial procedure would apply to them. They failed to act at all unless they had power to delegate. In deciding whether a person has power to delegate, one has to consider the nature of the duty and the character of the person. Judicial authority normally cannot, of course, be delegated...There are on the other hand many administrative duties which cannot be delegated. Appointment to an office or position is plainly an administrative act. If under a statute a duty to appoint is placed on the holder of an office, whether under Crown or not, he would normally, have no authority to delegate. He could take advice, of course, but he could not, by a minute authorise someone else to make the appointment without further reference to him. I am however, clear that the disciplinary powers, whether “judicial” or not, cannot be delegated.”**

135. In the Uganda case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, it was held:

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

136. Similarly in Hardware & Ironmongery (K) Ltd vs. Attorney-General Civil Appeal No. 5 of 1972 [1972] EA 271, the Court expressed itself as follows:

**“What matters is the taking of the decision and not the signature. If the Director had taken the decision that the licence was to be cancelled, he then, properly, have told the Trade Officer to convey the decision to the parties. But it is clear from the officer’s evidence that this is not what happened. The fact that the Act makes express provision for delegation of the Director’s powers makes it, if not impossible, at least more difficult to infer any power of delegation. There is no absolute rule governing the question of delegation, but in general, where a power is discretionary and may affect substantial rights, a power of delegation will not be inferred, although it might be in matters of a routine nature. The decision whether or not the licence should be revoked required the exercise of discretion in a matter of greatest importance, since it involved weighing the national interest against a grave injustice to an individual. It was clearly a decision to be taken only by a very senior officer and was not one in respect of which a power of delegation could be inferred.”**

137. Closely related to the instant case was the decision in Midland Finance & Securities Globetel Inc vs. Attorney General and Another Nairobi HCMCA No. 359 of 2007 [2008] KLR 650, where

Nyamu, J (as he then was) held that:

**“Counsel for the second respondent submitted that there is nothing wrong with the Ministry entering into a contract with PWC but my view is that the Commission cannot delegate its core business to the Ministry of Finance who in turn contract it out to a private entity. It is a violation of the Commissions independence and mandate. It is patently clear that the Ministry’s initiative is outside the relevant Law and violates in particular s 13(2) of ACECA. Section 10 of ACECA reads:- “In the performance of their functions, the Commission and the Director shall not be subject to the direction or control of any other person or authority and shall be accountable only to Parliament.” An aggrieved party may therefore challenge the exercise of the Ministry’s powers in a situation where another body, namely the Commission is specifically empowered. Whether the Ministry in entering in the PWC, is exercising executive power or assumed power or statutory power, judicial orders would lie if the power is non existent or being improperly exercised”**

138. This position is restated in section 7(2)(a)(i)(ii) and (iii) of the *Fair Administrative Action Act, 2015* where it is provided that a court or tribunal may review an administrative action or decision, if the person who made the decision was not authorized to do so by the empowering provision; acted in excess of jurisdiction or power conferred under any written law; or acted pursuant to delegated power in contravention of any law prohibiting such delegation.

139. It is therefore my view and I hold that the letter dated 23<sup>rd</sup> June, 2017 had no basis in law.

140. It was the Respondent’s case that the reliance on the principle of Legitimate Expectation is contra statute and the money owed by the Applicant is monies to be used for the benefit of the people of Kenya. The Respondent therefore believed that the said monies are due and owing from the Applicant to the Authority for the benefit of the Kenyan public. The answer to this position is to be found in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240**, where the Court stated as follows:

**“In this case imposing a liability of 1 billion on the applicant to be paid within 14 days though attractive in terms of enhanced public revenue and perhaps for the zeal of meeting annual tax targets, I find is not such an overriding interest for the reasons set out in this judgement including failure to satisfy the principles of legality. In order to ascertain whether or not the respondents decision and the intended action is an abuse of power the court has taken a fairly broad view of the major factors such as the abruptness, arbitrariness, oppressiveness and the quantum of the amount of tax imposed retrospectively and its potential to irretrievably ruin the applicant. All these are traits of abuse of power... It is no defence for a public body to say that it is in this case rational to change the tariffs so as to enhance public revenue.”** [Emphasis added].

141. It is therefore my view that the Respondent’s decision to demand that the Applicant pays US\$ 20,025,000.00 within 14 days from the date of demand, in light of the Respondent’s conduct and representations though attractive in terms of enhanced public revenue and perhaps for the zeal of meeting annual tax targets, is not such an overriding interest for the reasons set out in this judgement to justify its failure to satisfy the principles of legality and it is no defence for the Respondent to say that it is in this case rational to do so, so as to enhance public revenue.

142. Having considered the issues raised in this application, whereas I cannot fault the Respondent’s decision to insist on the Applicant paying the balance of the fees amounting to US\$ 20,025,000.00, it is my view and I hold that the manner in which it went about demanding for the same violated the principle of legality. I reiterate that the renewal of the licence and the issuance thereof as well as the completion of the negotiations of the terms of the licence ought not to have been subjected to the payment of the said sum.

143. It is therefore my view and I hold that the Applicant properly moved this Court in these proceedings.

## **Order**

144. Accordingly, the orders which commend themselves to me and which I hereby grant are as follows:

a. That an Order of Certiorari is hereby issued removing into this Court for the purposes of being quashed the Respondent's decision contained in the letters dated 23<sup>rd</sup> June 2017 and 25<sup>th</sup> July 2017 demanding a sum of US\$20,025,000/= from the Applicant as alleged radio frequency spectrum fees within Fourteen (14) days from the date of receipt thereof or without any further delay.

b. That an Order of Prohibition prohibit the Respondent by itself, agents, employees or whomsoever from taking any steps, actions and or measures to enforce its decision contained in the letters dated 23<sup>rd</sup> June 2017 and 25<sup>th</sup> July 2017 demanding a sum of US\$ 20,025,000/= from the Applicant as a condition precedent to issuance of the Applicant's radio frequency spectrum and operating licenses. c. An Order of Mandamus do issue directing the Respondent to conclude the terms of the renewed Network Facility Provider Licence or such other documents confirming the renewal of the Applicant's Network Facility Provider Licence as well as the signed Licence Terms and Conditions.

d. Taking into account the fact that the Applicant has expressly stated, and rightly so in my view, that in these proceedings it is not seeking a waiver of payment of the licence fees each party will bear own costs of these proceedings.

145. It is so ordered.

Dated at Nairobi this 18<sup>th</sup> day of December, 2017

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Ngatia for the Applicant***

***Mr Imende for the Respondent***

**C Ooko**