



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.244 OF 2011

BETWEEN

MEDIA OWNERS ASSOCIATION PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

**THE MINISTRY OF
INFORMATION**

AND COMMUNICATION..... 2ND RESPONDENT

COMMUNICATIONS COMMISSION OF KENYA 3RD RESPONDENT

W.E.Z.N. INTERESTED PARTY

(AS CONSOLIDATED WITH JUDICIAL REVIEW MISC. APPLICATION NO. 284 OF 2011)

BETWEEN

MAGIC RADIO LIMITED APPLICANT

AND

THE COMMUNICATIONS COMMISSION OF KENYA RESPONDENT

RULING

Introduction

1. The Petitioner filed the present Petition alleging violation of the Constitution and of its fundamental rights and has therefore sought the following orders:

(1) A declaration that the Petitioners' rights under Article 34 of the Constitution have been infringed and threatened with violation by the 3rd Respondent and that in the discharge of its statutory mandate, the 3rd Respondent cannot act in a manner that infringes, violates or denies the Petitioners and its constituent members their constitutional right to property.

(2) A declaration that Article 34 (3) of the Constitution contemplates and envisages an independent broadcasting authority which is independent of Government, political interests or commercial interests.

(3) A declaration that the Public Notices issued on 5th August, 2011 and 11th November, 2011 are null and void as the 3rd Respondent has no constitutional mandate to license broadcasters under Article 34 of the Constitution.

(4) An order of injunction restraining the 2nd and 3rd Respondents from cancelling, stopping, suspending, restricting or in any way howsoever from interfering with the Petitioner's and its members' licences, frequencies, broadcasting spectrums and broadcasting services.

(5) The Respondents to pay the Petitioner costs of the Petition in any event.

2. The Petition was filed under a Certificate of Urgency together with an Application for interim reliefs and subsequently, this Court granted interim conservatory orders stopping the implementation of a notice that had been issued by the 3rd Respondent, the Communications Commission of Kenya. This Ruling however relates to the Notice of Motion Application dated 23rd February, 2015 only, the substance of which will be seen shortly.

The Applicant's Case

3. The Applicant, the Communications Commission of Kenya, filed the present Application seeking orders to the effect:

(a) ...

(b) That this Honourable Court be and is hereby pleased to discharge and/or set aside the interim conservatory orders subsisting in the present Petition as consolidated with JR Misc. Civil Application No. 284 of 2011, Republic vs The Communications Commission of Kenya ex parte Magic Radio Limited, which were initially granted by this Honourable Court in November, 2011 and were reinstated and extended by this Court on 4th July, 2014.

(c) That in the alternative, and without prejudice to the foregoing, the present Petition as consolidated with JR Misc. Civil Application No. 284 of 2011, Republic vs The Communications Commission of Kenya ex parte Magic Radio Limited, be struck out.

(d) The costs of this Application be provided for.

4. In the Affidavit in support, Mr. Francis Wangusi, stated that the Communication Authority of Kenya (the Authority) is the successor-in-title and function of the defunct Communications Commissions of Kenya (defunct Commission) and that on 2nd August, 2011, the latter had published a public notice in *The Standard* newspaper inviting broadcasters to apply for licensing under a new regulatory framework and a similar notice was also published in the *Daily Nation* newspaper of 5th August, 2011 wherein it was indicated that the deadline for receipt of the said applications was 15th November, 2011 and further that there would be cancellation of existing broadcast licences thereafter.

5. That on 11th November, 2011, the defunct Commission published a notice in the *Daily Nation* newspaper, which replaced and superseded the aforesaid notice of 5th August, 2011 and in that regard, the Media Owners Association, aggrieved by the said notice, filed the present Petition and Magic Radio Limited similarly filed a Judicial Review Application and both matters were subsequently consolidated under the present Petition and this Court issued interim conservatory orders stopping the defunct Commission from implementing the notice it had published.

6. According to the Applicant, the interim orders were granted on the basis that the defunct Commission was not the independent body envisaged under **Article 34 (5)** of the **Constitution** and therefore could not regulate the broadcasting industry in the manner proposed. In that regard, it was the Applicant's contention that the existence of the said interim orders have to-date severely impeded the Authority's mandate to regulate broadcasting services particularly, the licensing of new broadcasters.

7. The Applicant's further case was that vide a Judgment of the Supreme Court delivered on 29th September, 2014 in **SC Petition No. 14 of 2014, Communications Commission of Kenya and 3 Others vs Royal Media Services and 9 Others**, it was held that after the promulgation of the **Constitution, 2010**, the defunct Commission remained and was the lawful regulator of the broadcasting industry. For all intents and purposes therefore the Supreme Court had decided the legal basis of the present Petition. Additionally, that in a subsequent Ruling of 13th February, 2015, the Supreme Court brought to finality the issues of the legality and functionality of the Communications Authority of Kenya.

8. It was the Applicant's other contention that on 30th January, 2015, vide a public notice in *The Star* newspaper titled '**Revocation of the Public Notice on Licensing of Existing Broadcasters under the New Regulatory Framework**', the Authority revoked the defunct Commission's public notice of 11th November, 2011.

9. For the above reasons, the Applicant argued that in view of the said notice and the Supreme Court decisions, the orders sought in the present Petition have no factual nor legal basis and as such, it is imperative that the subsisting conservatory orders be lifted to allow for the process of licensing of broadcasters to the media industry generally, which process has remained in limbo since 2011 thereby impeding particularly the growth and regulation of the broadcasting sector. Additionally, that should the subsisting interim orders remain in force, they only have the effect of barring the Authority from carrying out its statutory and constitutional mandate of licensing of broadcasters and that would be to the detriment of the public.

10. In the Applicant's further view, the Supreme Court decision has effectively determined the matters substantially in issue in the present Petition and as such, the issues in the Petition are *res judicata* and this Court lacks the jurisdiction to hear and determine the Petition and it should dismiss or strike out the same.

11. The Applicant therefore urges the Court to allow the Application as prayed, in the interest of justice and the wider public interest.

The Petitioner's Response

12. The Media Owners Association opposed the present Application through its Grounds of Opposition dated 9th March, 2015. It was its argument that the Application is misconceived and an abuse of the Court process because the Applicant had earlier raised an objection that the issues in the Petition were *res judicata* and that the Petition had been overtaken by events but the same was dismissed in a Ruling delivered on 25th April, 2014.

13. Accordingly, it was its argument that the constitutional issues raised in the Petition on licensing procedures have not been determined by the Supreme Court or any other Court and therefore, the Application is unmerited. Additionally, that the question whether the Applicant or its successor can purport to licence broadcasters contrary to **Article 34 (2)** of the **Constitution** is an issue that requires determination at the hearing of the Petition herein and in no other proceedings.

Determination

14. The key question for determination is whether the present Application should be allowed and whether the orders sought therein should issue. In that regard, I note that in the Petition, the key question that falls for determination is whether the Petitioner's rights under **Article 34** of the **Constitution** have in any way been violated or threatened with infringement. The basis for the alleged contravention is the action of the

3rd Respondent in issuing the impugned notices. As can be discerned from the Petition, at paragraph 35, the Petitioner has identified issues that it wishes the Court to determine namely:

- i) Whether the 3rd Respondent is the Independent Body envisaged under the provisions of Article 34 (5) of the Constitution;**
- ii) Whether the threat by the 3rd Respondent to repossess the broadcasting spectrum and frequencies owned by the members of the Petitioner are in contravention of the Constitution;**
- iii) Whether the acts of the 3rd Respondent that are patently in contravention of the Constitution can deprive the Petitioner and its constituent members of the fundamental rights guaranteed by the Constitution and in particular the right to fair administrative action; and**
- iv) Whether the 2nd Respondent has any statutory power to purport to license broadcasters in contravention of the Constitution.**

15. Have the said issues been addressed by the Supreme Court and as such are barred by the principle of *res judicata* and have the orders sought in the Petition been overtaken by events?

16. In that regard the Supreme Court decision rendered on 29th September, 2014, was premised on an appeal from the decision of the Court of Appeal. The original Petition had been filed at the High Court on the 22nd of November 2013, by Royal Media Services, Nation Media Services and the Standard Media Group Ltd filed as **High Court Petition No.557 of 2013, Royal Media Services Limited and Others vs Attorney-General and Others**, seeking *inter alia*, an order compelling the Communications Commission of Kenya to issue them with Broadcasting Signal Distribution (BSD) licences and frequencies; and an order restraining the said Commission from switching off their analogue frequencies, broadcasting spectrums and broadcasting services pending the issuance of a BSD licence. The Supreme Court then outlined the following issues as those it deemed fell for determination:

“a. whether the Communications Commission of Kenya was the body contemplated under Article 34 of the Constitution;

b. whether the 1st, 2nd and 3rd respondents had a legitimate expectation to be issued with a Broadcast Signal Distribution (BSD) licence;

c. whether the 1st, 2nd and 3rd respondents’ intellectual property rights were infringed by the appellants;

d. whether the petition filed at the High Court was barred by “issue estoppel”, and amounted to an abuse of the Court process, for being a collateral attack against the decision by the Public Procurement Administrative Review Board [Tribunal];

e. whether the final orders of the Court of Appeal were in excess of the powers and jurisdiction conferred by the Constitution.”

17. On the first issue, the Supreme Court made the following finding:

“[181]This finding should dispose of the question regarding the constitutionality or otherwise of the CCK. But, in view of the several provisions of the Constitution that fall short of full clarity in meaning, we will give further consideration to the legal standing of the CCK, following the promulgation of the Constitution on 27th August, 2010.

[198] At the time the Constitution came into force, the Kenya Information and Communications Act had established the CCK as the body mandated to licence broadcasting and other electronic

media. The contest to the constitutionality of CCK is based on the perceived lack of independence in its composition. The 1st and 2nd appellants contended that since the Fifth Schedule provided a time-frame of three years, within which to enact the legislation contemplated under Article 34, CCK was legally mandated to continue operating pending the necessary legislative amendments.

[204] In our considered view, such court challenges will continue until a balance that aligns the legislation to the Constitution is found. In the meantime, there is no legal vacuum as we have upheld, the constitutionality of the CCK and its independence to consider and issue licences under Article 34(3) of the Constitution continues.

[205] In such context, can it be concluded that the promulgation of the Constitution, on the 27th of August, 2010 immediately rendered CCK and all its actions thereafter unconstitutional? Such is the conclusion the Appellate Court arrived at, and which occasioned the nullification of the licence that had already been issued to the 5th appellant herein. It is clear to us that this conclusion was based on the assumption that Article 34(3) and (5) had somehow envisaged the reconstitution of CCK. However, this assumption, although not devoid of logic, is not supported by the tentative cast of the two sub-Articles. The three-year time-frame within which legislation was required to be enacted, pursuant to the Fifth Schedule as read with Section 7(1) of the Sixth Schedule, should be understood to mean that the Constitution did not contemplate a vacuum in the licensing of airwaves.

[206] CCK had been established and mandated to, inter alia, license and regulate the airwaves and signal distribution, before the promulgation of the new Constitution (by the Kenya Information and Communications Act, 1998). Hence, having been in existence before the date of promulgation, CCK had a lawful existence, and its actions were not unconstitutional. The transition Chapter and clauses in the Constitution are meant not only to ensure harmonious flow from the old to the new order, but also to preserve the Constitution itself, by ensuring that the rule of law does not collapse owing to disruptions arising from a vacuum in the juridical order. Unless it is demonstrated that the legislation establishing CCK was incapable of being construed with the necessary alterations and exceptions, so as to bring it into conformity with the Constitution, pending the three-year legislative intervention, it would be improper in law and in principle, to declare CCK unconstitutional.” (Emphasis added)

The Supreme Court then concluded that:

“[209] Hence it is our conclusion that, CCK was not only legally mandated to regulate airwaves and licensing under the 1998 and 2009 Acts, but also, the promulgation of the Constitution of 2010 did not render its actions immediately unconstitutional.” (Emphasis added)

18. In a subsequent Ruling rendered on 15th February 2015 by the Supreme Court, the issue related to the monitoring of the compliance in regard to the orders that had been issued in the decision, partly quoted herein above, rendered on 29th January, 2015.

19. Juxtaposing the foregoing to the present Petition, it is crystal clear that the Supreme Court addressed the question in regard to the constitutionality of the Communications Commission of Kenya and whether it was by then the Authority envisaged under **Article 34 (5)** of the **Constitution**. That answers the question posed by the Petitioner in the Petition on whether the Communications Commission of Kenya was by then the Independent body envisaged under the Constitution.

20. I further recall that in the Ruling of this Court delivered on 25th April 2015 I expressed the view inter alia that:

“[18] Without saying more than I should, it is obvious that prayer (b) of the Petition has been answered by the Learned Judge but I am not bound by his holdings and the matter cannot be

said to have been settled when the same has not been affirmed by a higher Court. To shut out Parties from submissions on the point in limine would be unfair and unjust. It may well be that this Court, respectful as it is of my learned brother, may reach a different decision on the point....”

21. At the time the issue I was addressing was whether I should strike out the present Petition in view of the decision in **High Court Petition No. 557 of 2013 (supra)** which later led to the Supreme Court decision cited above. In the present circumstances and bearing in mind the provisions of **Article 163 (7)** of the **Constitution**, this Court is bound by all decisions of the Supreme Court. The Article states that:

All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.

It therefore follows that this Court is bound by the holding of the Supreme Court that the 3rd Respondent was by then the independent body envisaged under **Article 34** of the **Constitution** prior to the enactment of the statute contemplated for the establishment of such a body. That finding also addresses the issues in contention in the Petition because the impugned notices were issued at the time when the 3rd Respondent was the body lawfully mandated to issue the same. In my view therefore and in light of the Supreme Court decision, the substantive issue in the Petition has been addressed and the resultant and consequential issues have also been answered.

22. Where then does that leave the Petition? The Applicant has asked the Court to strike it out and in that regard, it must be remembered that the striking out of Petitions is a draconian measure that should only be done in clear and extreme circumstances.

23. With that caution in mind, elsewhere above, I reproduced all the prayers in the Petition and in summary, they relate to the question whether:

(i) If the 3rd Respondent is the independent broadcasting authority with the mandate to license broadcasters under Article 34 of the Constitution; and

(ii) Whether therefore the Public Notices issued on 5th August, 2011 and 11th November, 2011 are null and void as the 3rd Respondent has no constitutional mandate to license broadcasters under Article 34 of the Constitution.

(iii) Costs.

I have shown that issue No. (i) was conclusively determined by the Supreme Court in **S.C Petition No. 14 of 2014 (supra)** and so the same is moot. As regards issue No. (ii), it is not contested that by a notice issued on 30th January 2015, the prior notice issued on 11th November 2011 was revoked by the Communications Authority of Kenya and so there is nothing left for this Court to declare null and void even if there was merit in the Petitioner’s case in that regard. Lastly, costs are a matter of discretion on the part of the Court and that is a matter to be addressed shortly.

24. It is obvious from the above analysis therefore that there is nothing left to be determined in the present Petition and the Application dated 23rd February 2015 is merited. Where the substratum of a Petition has ceased to exist, it would be a waste of judicial time to engage in an academic exercise which is of no value to any party.

Disposition

25. For the above reasons, the proper orders that commend themselves to me are that:

(i) The present Petition as consolidated with JR Misc Application No. 284 of 2011, Republic vs The Communications Commission of Kenya ex parte Magic Radio Limited, is hereby struck out.

(ii) The interim conservatory orders subsisting in the present Petition as consolidated with JR Misc. Application No. 284 of 2011, Republic vs The Communications Commission of Kenya ex parte Magic Radio Limited, which were initially granted by this Court in November 2011 and were reinstated and extended on 4th July, 2014 are hereby discharged and set aside.

(iii) On costs, this dispute was effectively settled at the Supreme Court so each Party should bear its own costs.

(iv) Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Miss Mutua for Petitioner

Miss Okimamu for 3rd Respondent

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE