



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO 30 OF 2014

NATION MEDIA GROUP LIMITED1ST PETITIONER
STANDARD GROUP LIMITED2ND PETITIONER
ROYAL MEDIA SERVICES LIMITED3RD PETITIONER

VERSUS

ATTORNEY GENERAL1ST RESPONDENT
SPEAKER OF THE NATIONAL ASSEMBLY2ND RESPONDENT
SPEAKER OF THE SENATE3RD RESPONDENT
THE CABINET SECRETARY MINISTRY OF
INFORMATION COMMUNICATIONS AND TECHNOLOGY4TH RESPONDENT
COMMUNICATIONS AUTHORITY OF KENYA.....5TH RESPONDENT

CONSOLIDATED WITH

PETITION NO 31 OF 2014

KENYA EDITOR'S GUILD1ST PETITIONER
KENYA UNION OF JOURNALISTS2ND PETITIONER
KENYA CORRESPONDENTS ASSOCIATION.....3RD PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

AND

JUDICIAL REVIEW MISC. APPL. NO. 30 OF 2014

THE MEDIA COUNCIL OF KENYA1ST PETITIONER

VERSUS

THE CABINET SECRETARY MINISTRY OF

INFORMATION & TECHNOLOGY.....2ND RESPONDENT

RULING

1. The two petitions before the Court challenge the constitutionality of the **Kenya Media Council Act 2013** and the **Kenya Information and Communications (Amendment) Act 2013**. The petitioners ask the Court to declare the said Acts invalid, null and void.
2. While conceding that the Media Council Act, 2013 is constitutional, the ex parte applicant in Judicial Review Application No. 30 of 2014 challenges the actions of the Cabinet Secretary, Ministry of Information, Communications and Technology, in seeking to recruit members of the Media Council and the Media Complaints Commission, charging that the actions of the Cabinet Secretary are unlawful and in violation of the statute. As the petitions and the application relate to and raise similar issues which can be conveniently dealt with together, I have consolidated the three matters and shall refer hereafter to the petitioners and the ex parte applicant as the petitioners.
3. The petitioners seek conservatory orders stopping the Cabinet Secretary from proceeding to fill the positions in the Media Council and the Communications and Multimedia Appeals Tribunal pending the hearing and determination of the petitions.
4. They argue that the conservatory orders should issue since, once the Communications and Multimedia Appeals Tribunal is constituted as contemplated in the advertisements placed by the 4th respondent in the local media, the Tribunal will begin to apply the sanctions provided in the Kenya Information and Communications Act at Section 102(e)(1)(f), which penalties are likely to result in media houses and journalists being unable to practice their profession without fear, which would result in a violation of Article 34 of the Constitution.
5. The petitioners also allege that the management of the Communications Authority, which replaces the Communications Commission, will, under section 6(1), comprise, among others, of four of the most powerful Principal Secretaries in the country, which violates Article 34(3) which requires a body independent of government. They contend therefore that there are serious constitutional issues to be argued.
6. The petitioners further contend that there is a Media Council in place, whose term has not come to an end, and the Council should not be reconstituted before the petitions are heard; that the functions of the Multimedia Appeals Tribunal, which include dealing with complaints against the media, are the same as the functions of the Media Council, and there are therefore two sets of legislation dealing with complaints against journalists. They submit that not to issue conservatory orders would cause prejudice to the current members of the Media Council while issuing the orders would not be prejudicial to the respondents; and if conservatory orders are not granted the petitioners' applications will be rendered nugatory as the appointments will already have been made.
7. On their part, the respondents vehemently oppose the grant of conservatory orders. They contend that the grant of conservatory orders will be prejudicial to the belief in the constitutionality of any Act of Parliament; that if an entire Act of Parliament is to be declared null and void, it is necessary to provide evidence that the Act is unconstitutional.

8. The respondents contend further that if interim orders are issued and the fears of the petitioners later found to be unfounded, the orders will have done great harm to various processes; that the Cabinet Secretary will be unable to jump start certain processes if the orders are issued, a claim that is countered by the petitioners who assert that the Cabinet Secretary has power to extend timelines under section 7(13) of the Media Council Act.
9. The respondents also contend that it is not just the interests of the media that should be taken into account, but other interests; that the Media Council does not comprise only of the Principal Secretaries but has eight other members not in government whose recruitment the petitioners seek to stop; that it is not the media which is under threat, but society; and that the Media Council Act was necessary for regulating the media and protecting the interests of society.
10. It should be noted from the outset that in considering the question of whether or not to grant conservatory orders in this matter, I am not doing so after hearing the respective applications of the petitioners, and the responses from the respondents, substantially on their merits. The matters before me were brought under Certificate of Urgency, and I had the discretion to grant the orders sought on an interim basis ex parte. Instead, I directed that given the nature of the matter, the applications be served and all the parties be heard before any interim orders are issued, hence the submissions made before me on 28th January 2014.
11. I believe that all the parties recognise the importance of the matters in controversy in this matter. The important role that the media plays in a democratic society cannot be gainsaid, and the people of Kenya recognised this role, hence the express provisions in Article 34 on freedom of the media. Equally important, however, is the need to have a well-regulated media that is responsible and does not injure the rights and interests of individuals or of society. How to strike the balance between these two important concerns is at the core of the matter now before me.
12. The petitioners argue that failing to issue the orders sought will greatly prejudice them as what they perceive as draconian legislation will be in place and members of the institutions charged with imposing the penalties set out in the Act will have been recruited. It is also argued vehemently by Mr. Arwa for the Media Council that what the Cabinet Secretary seeks to do is an illegality and in violation of the very Act that the Cabinet Secretary purports to be implementing.
13. It is not in dispute that the High Court has jurisdiction to determine, under Article 165(3)(d) (i), **'the question whether any law is inconsistent with or in contravention of this Constitution.'** The High Court also has jurisdiction, under Article 23 (3)(c), to grant a conservatory order in matters brought under Article 22 relating to protection of fundamental rights and freedoms.
14. In the case of **Muslims For Human Rights (MUHURI) & 2 Others -vs- Attorney General & 2 Others High Court Petition No. 7 of 2011**, Ibrahim, J (as he then was), in considering the circumstances under which a Court should grant conservatory orders, observed as follows after considering several local and foreign authorities:

“What is clear to me from the authorities is that strictly a “Conservatory Order is not an injunction as known in Civil matters or generally in other legal proceedings but is an order that tends to and is intended to preserve the subject-matter or set of circumstance that exist on the ground in such a way that the constitutional proceedings and cause of action is not rendered nugatory. Through a Conservatory Order the court is able to “give such directions as it may consider appropriate for the purpose of securing of ... the provisions of the Constitution (see – BANSRAJ above)”. A Conservatory Order would enable the court to maintain the status quo or existing situation or set of facts and circumstances so that it would be still possible that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of the Petition and the trial was not a futile academic discourse or exercise.” (Emphasis added).

15. In my view, these words by the Learned Judge apply squarely to the proceedings now before me. The constitutionality of the Media Council Act and the Kenya Information and Communication (Amendment) Act 2013 have been challenged. Further, it is contended by the 7th petitioner that even if the Media Council Act is constitutional, the acts of the 4th respondent in seeking to appoint new members of the Media Council are in violation of the law and should therefore be prohibited and his decision quashed.
16. The argument from the respondents is that no conservatory orders should be issued as anything done by the respondents can be undone and no prejudice will be suffered. This, however, is an argument that I am unable to accept. Should the contentions of the petitioners be found to have merit upon the hearing of the petitions, then the recruitment of the members of the Tribunal and the Council, which will have been done at public expense and result in changes in the composition of the Council, may have been done in vain, yet would well have led to violation of the rights of the petitioners and their members.
17. In the circumstances of this case, and bearing in mind the words of Ibrahim J on the need to preserve the status quo and a certain set of facts and circumstances, I believe that issuing conservatory orders in this matter will best meet the ends of justice.
18. I will therefore exercise my discretion in favour of the petitioners and order that a **conservatory order be and is hereby issued prohibiting restraining and stopping the selection and appointment of the chairperson and members of the Media Council of Kenya and the Communications and Multimedia Appeals Tribunal as advertised and published in Gazette Notices No 186 and 187 respectively and contained in the Special Issue of the Kenya Gazette VOL CXV1-No 6 of 15th January 2014 and the appointment of the Complaints Commission until the hearing and determination of this Petition.**
19. It will be noted that I have issued conservatory orders pending the hearing and determination of the petitions. I believe that the interests of the parties will be best served by an expeditious hearing of the petition on its merits rather than spending time canvassing the same issues at an interlocutory stage.
20. Further, and as submitted by Counsel for the 1st -3rd petitioners, this matter raises substantial questions of law which merit consideration by an uneven number of judges in accordance with the provisions of Article 165(4) of the Constitution. Consequently, I am hereby referring the matter to the Chief Justice to appoint a Bench of an uneven number of judges to hear and determine the matter on a priority basis.
21. In the meantime, in order to facilitate the expeditious hearing of the matters before the Court, I further order and direct as follows:
- i. **That the ex parte applicant in JR Misc. Appl. No. 30 of 2014 (the 7th petitioner in the Consolidated Petitions) is granted leave to bring judicial review proceedings as prayed in the Chamber Summons Application dated 22nd January 2014, such proceedings to be filed and served within the next seven (7) days from the date hereof.**
 - ii. **The respondents shall file their respective responses to the petitions within 7 days hereof or 7 days from the date of service with the Notice of Motion filed in the judicial review application.**
 - iii. **The parties shall file and exchange written submissions within 21 days hereof.**

Dated Delivered and Signed at Nairobi this 31st day of January 2014

MUMBI NGUGI

JUDGE