



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

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE MINISTRY OF INFORMATION & COMMUNICATION...2ND RESPONDENT

COMMUNICATION COMMISSION OF KENYA.....3RD RESPONDENT

AND

W.E.Z.N.....1ST INTERESTED PARTY

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND INTERESTED PARTY

AS CONSOLIDATED WITH JR. MISC. NO.284 OF 2011

BETWEEN

MAGIC RADIO LIMITED.....APPLICANT

AND

THE COMMUNICATIONS COMMISSION OF KENYA.....RESPONDENT

RULING

1. This Ruling was necessitated by the following circumstances;

2. The Petition in this matter is dated 14th November 2011 and the prayers sought were principally a determination of the questions whether the Petitioner's rights under **Article 34** of the **Constitution** had been violated and as a corollary to that question, whether **Article 34(3)** of the **Constitution** contemplates and envisages on Independent Broadcasting Authority which is independent of Government control, political or commercial interest.

3. For purposes of this Ruling, I will say nothing about **J.R. Misc. No.284 of 2011** as no party made Submissions based on it.

4. What triggered the filing of the Petition was a Public Notice in local daily newspapers of the 2nd and 5th August 2011 where the Communications Commission of Kenya (“CCK”, the 3rd Respondent) invited broadcasters to apply for licenses under a newly developed regulatory framework. A deadline of 15th November 2011 was given for compliance thereof. From a deeper reading of the Petition, it would seem that the main complaint by the Petitioner is that the CCK is not the body envisaged under **Article 34(5)** of the **Constitution** because it lacks independence since its Board of Directors established under **Section 6** of the **Kenya Communications Act, 1998** is composed of appointees of the President and the Minister in-charge of Communications and includes Permanent Secretaries in the Ministries responsible for Communication, Finance, Internal security as well as Information and Broadcasting.

5. For avoidance of doubt, **Article 34** of the **Constitution** provides as follows;

“(1) Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33 (2).

(2) The State shall not—

(a) exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or

(b) penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.

(3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that—

(a) are necessary to regulate the airwaves and other forms of signal distribution; and

(b) are independent of control by government, political interests or commercial interests.

(4) All State-owned media shall—

(a) be free to determine independently the editorial content of their broadcasts or other communications;

(b) be impartial; and

(c) afford fair opportunity for the presentation of divergent views and dissenting opinions.

(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.”

6. In the above context and before the Petition could be disposed of, on 22/1/2014 when parties were expected to make final submissions on it, Mr. Wambua Kilonzo, learned Counsel for the 3rd Respondent sought leave of Court to address the import of the passage of the **Kenya Information and Communication (Amendment) Act, 2013** to the present proceedings. I directed parties to file written

Submission on that issue and for a Ruling to be delivered whether the Petition had been spent or not.

7. In his Submissions, Mr. Kilonzo submitted firstly, that the present Petition is barred by fact of *res judicata* in that the place and standing of the CCK *vis-a-vis* **Article 34** of the **Constitution** has been settled in previous decisions of this Court viz:

- (i) **Royal Media Services vs A.G & 2 Others, Petition No.346/2012**
- (ii) **Royal Media Services & 2 Others vs A.G & 6 Others, Petition No.557/2012.**

Both decisions are apparently on appeal but the point made in that regard is that this Court has already pronounced itself on the said issue and it would be improper to relitigate it.

8. Secondly, that the question whether the CCK is the lawful independent institution contemplated by **Article 34** aforesaid has been settled with the establishment of the Communications Authority of Kenya under **Sections 2 and 3** of the **Kenya Information and Communications (Amendment) Act, 2013**. That since that question is the fulcrum on which the present Petition rotates, once it has been addressed, then to proceed with the present Petition would be tantamount to engaging in an academic exercise and an act in futility.

9. Thirdly, that for the above reasons and looking at the specific prayers made in the Petition, none can be properly granted in the circumstances and the Court should proceed and dismiss the Petition.

10. In further Submissions, Mr. Kilonzo also urged the point that since the filing of the present Petition, another Petition i.e. **Petition No.30 of 2014, Nation Media Group Ltd & 2 Others vs A.G & 4 Others** was filed. That the said Petition raises the issue whether the Communications Authority of Kenya is the body mandated to regulate airwaves and other forms of signal distribution under **Article 34** of the **Constitution**. That being the case, the present Petition is *res subjudice* and should be struck out.

11. In response, Miss Mutua for the Petitioner has urged the point and of relevance to the issues at hand, that the Communications Authority of Kenya was not in force when the present proceedings were commenced and therefore any submissions with regard to it are of no value. Further, that the complaints on record are still live and require resolution.

12. In any event, that *res judicata* cannot be properly invoked since the issues in the prior Petitions are different and the parties are also different. That the issues canvassed therein are also pending on appeal and are not settled. The Petition, in her view, should therefore proceed to trial on its merits.

13. Miss Cheruiyot for the 1st and 2nd Respondents supported Mr. Kilonzo's position while Mr. Onindo for the Interested Party supported Miss Mutua's position and added that the Notices, subject of the present proceedings, have never been withdrawn and are therefore still subject to challenge. That the Interested Party has also filed a Cross-Petition which requires to be canvassed and therefore both the Petition and Cross-Petition should be heard on their merits.

14. On my part I should begin by setting out verbatim the prayers in the Petition and Cross-Petition. They are as follows;

“Petition

(a) A declaration that the Petitioner's 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 Petitioner and its constituent member their constitutional right to property.

(b) A declaration that Article 34(3) of the Constitution contemplates and envisages an independent broadcasting Authority of Government, Political interest or commercial interests.

(c) A declaration that the public notices issued on 5th August 2011 and 11th August 2011 are null and void as the 3rd Respondent has no constitutional mandate to licence broadcasters under Article 34 of the Constitution.

(d) An order of injunction restraining the 2nd and 3rd Respondent from canceling, stopping, suspending, restricting or in any way howsoever from interfering with the Petitioner's and members licences, frequencies, broadcasting spectrum and broadcasting services.

(e) The Respondent to pay the Petitioner's costs of the Petition.”

Cross-Petition

15. In the Cross-Petition dated 29th January 2014 the Interested party seeks the following prayers;

“(a) The prayers sought by the Cross-Petitioner are all in the public Interest.

(b) An Order that CCK be compelled to free up the broadcasting airwaves consistent with the dictates of a transparent and accountable democratic society espoused by the Constitution.

(c) A declaration that unregulated cross media ownership is dangerous for the stability and nurturing of Kenya's young democracy and is unconstitutional.

(d) A declaration that FM broadcasting is local and that there is no reasonable and justifiable rationale for a national broadcast save for the national broadcast mandated under the Constitution.

(e) A declaration that, consistent with the Constitutional bar against overreaching “commercial interest”, a national broadcaster, or a broadcaster broadcasting from a different broadcast area, cannot compete with a local or regional broadcaster for advertising revenue within a broadcast area.

(f) A declaration that FM frequency spectrum is a scarce resource and no person shall be permitted to own more than one FM broadcast frequency per broadcast area in subsidiary or associated or related or affiliated or in other way connected with the holder of another FM broadcast frequency in the same broadcast area.

(g) A declaration that a licensed FM broadcaster must broadcast from the broadcast area in which the FM frequency has been issued.

(h) A declaration that a person controlling more than 20% of the audience in broadcast be declared a dominant broadcaster with a prohibition imposed on such dominance in order to protect the democratic principles and aspirations under the Constitution and to safeguard the twin legal mandates of diversity and plurality.

(i) A declaration that broadcast licensing must accommodate minority and gender ownership being new requirements imposed by the Constitution.

(j) Cost.”

In that regard, I wish to opine as follows;

(i) It will not take genius to notice that whereas the issues raised in the Petition seem to rotate around **Article 34** of the **Constitution**, the Cross-Petition has issues far wider in context and implication than the issue of a broadcasting Authority independent of Government, political or commercial interests.

16. If that be so, to strike out the Petition would not resolve the issues in the Cross-Petition and I have no application or submission from the 3rd Respondent that I should strike out the Cross-Petition.

(ii) I have perused **Petition No.30 of 2014**. The prayers in it are as follows;

“(1) A declaration that the National Assembly violated Articles 93, 94(5), 96(2), 110(3) and (4) in its consideration and passing of the Media Council Bill, 2013 and the Kenya Information and Communication (Amendment) Bill, 2013.

(2) A declaration that the Media Council Act, 2013 was passed in violation of the Constitution and therefore the Act is null and void.

(3) A declaration that the Kenya Information and Communications (Amendment) Act, 2013 was passed in violation of the Constitution and therefore the Act is null and void.

(4)A declaration that the Communications Authority of Kenya as established by the Kenya Information and Communications (Amendment) Act is in violation of the provisions of Articles 34(3) and (5) of the Constitution.

(5) A declaration that the provisions of the Media Council Act, 2013 and the Kenya Information and Communications (Amendment) Act, 2013 are inconsistent with and violate the provisions of Articles 29(f), 33, 34(2), (3) & (5) and Articles 50(1) and (2) of the Constitution.

(6)A declaration that the powers and authority conferred on the Complaints Commission and the Communications and Multimedia Appeals Tribunal are inconsistent with and violate the provisions of Articles 33, 34 and 50 of the Constitution.

(7) An order of Prohibition to prohibit the 4th Respondent from establishing the Kenya Communications and Multimedia Appeals Tribunal.

(8) An Order of Prohibition to prohibit the appointment of Chairperson and members of the Board of the 5th Respondent pending the hearing and determination of the Petition.

(9) the Respondents to pay the Petitioners costs of the Petition in any event.”

17. Again it does not take genius to tell that the above prayers are wholly different from those in the present Petition and whereas prayer 4 above may have a correlation with prayer (b) of the Petition, it is obvious that each may be determined on its own merits as they are actually different in substance.

(iii) Having stated as above, the 3rd Respondent has urged the point that prayer (b) of the Petition was settled when Majanja J. stated as follows in **Petition No.346 of 2012 Royal Media Services vs A.G (supra)**;

“I think this view ignores the proper reading of the entire Constitution. It is now well established that the Constitution must be read as a whole and to accede to the Petitioner's position would be akin to legislating a vacuum in the regulation of the airwaves (see Olum & Another vs Attorney General of Uganda [2002] 2 EA 508). Law, like nature, abhors a vacuum and the promulgation of the Constitution did not happen in a vacuum. It was superimposed on an existing legal framework. I therefore agree with the Respondents' argument that the framers of the Constitution intended that over time this framework would be transformed by legislative acts to accord with the Constitution. It is for this reason that by dint of Article 261(1) parliament is required to enact the legislation contemplated under Article 34(5) within 3 years as set out in the Fifth Schedule to the Constitution ...

These provisions mean that the statutes in force governing media regulation remain in force subject to such modifications as are necessary to bring it in conformity with the Constitution. It follows that the Kenya Information and Communications Act, 1998 and all the regulations made thereunder remain in force subject to the Constitution and the transitional provision I have cited above. CCK is established by legislation currently in force and is empowered to, inter alia, licence and regulate postal, information and communication services.

In the circumstances, I find and hold that the CCK is properly constituted and empowered to carry out its statutory responsibilities including regulation contemplated under Article 34 until such time as the body contemplated under Article 34(5) is established”

The learned Judge in **Petition No.557 of 2013 Royal Media Services & 2 Others vs AG (supra)** further stated thus;

“Under KICA, CCK is the body mandated to regulate broadcasting and other electronic media by way of licensing. Under Section 5 of KICA, the CCK is established “to license and regulate postal, information and communication services in accordance with the provisions of this Act.”

.....

The circumstances of CCK have not changed and until the transition is completed by implementation of the Kenya Information and Communications (Amendment) Bill, 2013, CCK as currently established remains the body entitled under the Constitution and the law to continue to regulate the media and airwaves in accordance with the Constitution and existing law.”

18. Without saying more that 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. This was the case in **Taib vs Minister of Local Government [2007]** eKLR citation where Hon. Justice Serگون disagreed with a legal position taken by other judges of the High Court and it took the Court of Appeal to settle the issue. In any event, while agreeing with the expression of the principle of *res judicata* in **Kenya Hotel Properties vs Willisden Investments Limited and 4 Others [2013]** eKLR, that principle is not applicable, in my humble view, to the present case and it is obvious why. For avoidance of doubts in that case, the Court of Appeal stated thus;

“Res judicata, is a doctrine of law founded on public policy and aimed at ensuring two objectives, namely, there must be a finality to litigation and that parties who have gone through litigation should not be subjected to the same tests. See the provisions of Section 7 of the Civil Procedure Act which provides;

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court (See also Mulla the Code of Civil Procedure 16th Ed. Vol. Pg 161.”

This doctrine has been explained by the Court of Appeal in a number of cases - See the case of James Katabazi and 21 Others v The Attorney General of the Republic of Uganda EACJ where the Court stated that for the doctrine to apply;-

- *the matter must be 'directly and substantially' in issue in the two suits,*
- *the parties must be the same or parties under whom any of them claim, litigating under the same title; and*

The matter must have been finally decided in the previous suit (See also the case of Wille v Michuki & 2 Others (2004) KLR 357) wherein the Court reiterated the afore set out principles and stressed that for the doctrine of Res judicata to apply three basic conditions must be satisfied namely that there was a former or proceeding in which the same parties as in the subsequent suit litigated the matter in issue in the latter suit must have been directly and substantially in issue in the former suit and lastly that a Court competent to try it had heard and finally decided the matter in controversy between the parties in the former suit.

We agree with the aforesaid construction that the doctrine of res judicata is aimed at achieving firstly finality to litigation and secondly that an individual should not be harassed on account of the same litigation more than once.”

I have elsewhere above indicated why all the Petitions cited by the 3rd Respondent are wholly different from the present one and so the point made is moot.

(iv) As to whether the enactment of the **Kenya Information and Communications (Amendment) Act, 2013** has rendered the present Petition superfluous and overtaken by events, and that all proceedings between the parties should be determined in **Petition No.30/2014**, I will only state that the issue has been answered partly above and in any event, since I am presiding over both matters, it is best to leave that question to submissions in depth at the relevant time.

19. Lastly, it is obvious that I find no favour in all the issues raised by the 3rd Respondent and I hereby direct that submissions on the merits or otherwise of the Petition and Cross-Petition should now be finalised for a judgment on their merits.

20. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF APRIL, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

No appearance for 3rd Respondent

Miss Mutua for Petitioner

Mr. Onindo for Interested Party

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE

Further Order

Submissions to be highlighted on 15/5/2014. Notice to issue.

ISAAC LENAOLA

JUDGE