REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO 98 OF 2012

WANANCHI GROUP (KENYA) LIMITED ….....……....…….PETITIONER

VERSUS

THE COMMUNICATIONS

COMMISSION OF KENYA…….…….……. 1ST RESPONDENT

KENYA BROADCASTING

CORPORATION…….…...…..……..…….2ND RESPONDENT

RULING

1. By an application dated 26th November 2013 and supported by an affidavit sworn on the same day by Mr. Felix Kyengo, its General Manage, the Interested Party in this matter, **Multichoice (Kenya) Limited**, seeks orders as follows:

    1. ***The Honourable Court be pleased to give directions as to whether the decree dated 28th May 2013 and issued on 5th July 2013 (the decree') is properly drawn.***

2. The Honourable Court be pleased to issue directions as to whether the decree made as paragraph 78 of the judgment dated and delivered on 28th May 2013 ('the judgement') should have been reflected in the decree;

3. Should the Honourable Court determine that paragraph 78 of the judgment should have been reflected in the decree, the Honourable Court be pleased to review that part of the judgment and consequential decree (as amended) that determined that the sale to consumers of locked set-top boxes limits the rights of the public under Article 33 of the Constitution, is not in conformity with the provisions of the governing law and violates the stated government policy with regard to information and communication as contained in the ICT Sector Policy guidelines and that such set-top boxes as may be sold to consumers should be open and operable between networks;

4. This Honourable Court be pleased to give such other or further orders and/ or directions as it may deem just and expedient in the circumstances of this case;

5. The costs of this application be provided for.

2. The application is founded on the grounds that:

i. ***The interested party is aggrieved by that part of the judgment as determined that the sale to consumers of locked set-top boxes limits the rights of the public under Article 33 of the Constitution, is not in conformity with the provisions of the governing law and violates the stated government policy with regard to information and communication as contained in the ICT SECTOR Policy Guidelines and that such set-top boxes as may be sold to consumers should be open and operable between networks;***

ii. ***The interested party has filled Notice of Appeal but considers that review would provide a more efficacious remedy arising from the circumstances outlined in the supporting affidavit;***

iii. ***The decree as presently drawn does not reflect the findings and order made at paragraph 78 of the judgment***

iv. ***Article 259 of the constitution requires the court to interpret the constitution in such a manner that promotes its purposes, values and principles and permits the development of the law;***

v. ***Notwithstanding the lack of an express power available to the court to review its decisions, the circumstances of this case warrant the exercise of the Court's inherent power;***

vi. ***The court has in Anders Bruel t/a Queencross Aviation vs Kenya Civil Aviation Authority & Another [2013]eKLR expressed the view that even if there is no specific provision in the Rules allowing the court to review its decision, the court is duty bound to do so in a proper case;***

vii. ***There is an error apparent on the face of the record in that:***

a. ***While the Learned Judge held that the requirement of "open and interoperable" under section 46 O(2)(d) of the Kenya Information and Commissions Act 1998 (sic) applied to the set-top boxes provided by a broadcaster to its consumers, that provision in fact only applied to the holder of a signal distribution licence;***

b. ***The Learned Judge made an order against the Interested Party and other broadcasters when there was no prayer in the petition for any such order as a consequence of which:***

i. ***The petitioner did not as required by Anarita Karimi Njeru vs The Republic [1976-80] 1KLR 1272 set out in the petition any constitutional right which had been infringed or how such right had been infringed by the interested party or other broadcasters.***

ii. ***As recognized in paragraph 54 and 58 of the judgment none of the parties addressed the issue;***

viii. ***No prejudice will be suffered by the petitioner which has also filed notice of appeal against the whole decision and the interested party can only presume that the petitioner is similarly dissatisfied with this aspect of the judgment.***

3. The application is opposed. The petitioner and 1st respondent have filed grounds of opposition dated 24th and 26th February 2014 respectively.

The Application

4. The application dated 26th November 2013 seeks review of the decree issued in this matter on 28th May 2013 pursuant to the judgment of the court made on 28th may 2013. The interested party submits that there is a divergence between the judgment and the decree and prays that the decree should be amended to reflect the finding of the Court at paragraph 78 with regard to set-top boxes. It contends that the petitioner did not seek any orders relating to set – top boxes and it contends therefore that the court went outside its jurisdiction by making orders relating to set –top boxes.

5. According to the interested party, the order on set-top boxes was based on section 46N and 46O) of

the Kenya Communication and Information Act; that these sections deal with licensing of signal distribution and not set-top boxes; and it therefore asks for a review of the judgment in respect of the two issues that they raise.

The Response

6. The petitioner opposes the application on the grounds that it does not seek a review of the judgment but a re-hearing of the petition. Mr. Amoko submitted on behalf of the petitioner that the application is raising matters appropriate to appeal and in respect of which the interested party has filed a notice of appeal, and thus forfeited their right of review; but that they are also essentially seeking a re-hearing of the matter. According to the petitioner, the interested party seeks, in the affidavit sworn by Mr **Felix Kyengo**, to introduce new evidence that was not before the court, which they had an opportunity to present to the court but did not do.

7. It is the petitioner's case that the impugned paragraph 78 of the judgment should not be read in isolation but must be read with paragraph 72 and preceding paragraph in which the court analysed the issue before it and found that the boxes violated article 33. It was Mr. Amoko's contention that the interested party has not shown how the interpretation constituted palpable error warranting review.

8. According to the petitioner, the interested party had made an informed decision on how to deal with this matter and it is not open to it to seek review; that it has a right to go to the Court of Appeal but the present application is an abuse of the court process.

9. Mr. Malonza submitted on behalf of the 1st respondent that the applicant was seeking both to appeal and review the decision of the court at the same time, which is not permissible under Order 45 of the Civil Procedure Code. According to the 1st respondent, it is not in dispute that the interested party has filed a notice of appeal in which it seeks to appeal against the entire judgment of the court, which includes the portion it now seeks to review. Having indicated its intention to appeal, the option of review is now completely unavailable to it.

10. It was also the 1st respondent's submission that even assuming the option of review was available to the interested party, it has not satisfied the requirements of Order 45 of the Civil Procedure Rules to warrant review. Mr. Malonza submitted that the interested party has not demonstrated an error apparent on the face of the record; that by its extensive averments in the affidavit of **Mr. Felix Kyengo**, it is seeking to demonstrate how the court should have arrived at a different judgment which, on the authority of **National Bank of Kenya Ltd vs Ndungu Njau (1997)eKLR,** was not proper in an application for review. Mr Malonza submitted further that the interested party is also required to show any other reason to warrant review, which it has not done. He echoed the petitioner's prayer that the application should be dismissed with costs.

11. Counsel for the 2nd respondent, **Mr. Ndambiri**, submitted that he was in agreement with the submissions of the petitioner and the 1st respondent and had nothing further to add.

12. In his reply to the submissions in opposition to the application, Mr. Fraser argued, on the authority of the case of **Yani Haryanto vs. E. D. & F. Man. (Sugar) Limited Civil Appeal No. 122 of 1992** that the filing of a notice as opposed to an appeal is not a bar to an application for review. He conceded that the interested party had filed a lengthy affidavit but submitted that had the question of set –top boxes been an issue at the hearing of the petition, the material set out in the affidavit is what the interested party would have placed before the court and relied on.

Determination

13. Having read the parties' pleadings and submissions, and having heard their oral highlighting of the respective parties' positions on the application before me, I take the following view.

14. The interested party's application raises two main issues. The first is whether the interested party, having filed a notice of appeal, is also entitled to seek a review of the judgment of the court in this matter. In the event that it is entitled to review, the next question is whether it has satisfied the conditions under which the court will entertain a review of a matter as provided under Order 45 of the Civil Procedure Code.

The Effect of a Notice of Appeal

15. The interested party has relied on the decision of this court in **Anders Bruel T/A Queenscross Aviation vs Kenya Civil Aviation Authority & Another. (2013) eKLR** to submit that the court has power to entertain an application for review in a constitutional petition. It has also relied on the same decision for the proposition that the filing of a notice of appeal is no bar to the filing of an application for review.

16. It is indeed true that the court held in the **Anders Bruel** case that even though there are no provisions directly providing for review of decisions in constitutional petitions, on the basis of the provisions of Article 22 and 159(2)(d), the court is duty bound, should sufficient reasons be established, to review its decision.

17. Under **Order 45 Rule 1 of the Civil Procedure Rules 2010, a** party aggrieved by an order or decree of a court from which an appeal is allowed, 'but from which no appeal has been preferred,' is entitled to seek review if there are new and important matters which have been discovered at the time of the hearing, or because of an error apparent on the face of the record.

18. In the present case, as in the **Anders Bruel** case, the petitioner and respondents have submitted that the applicant has lodged a Notice of Appeal against the decision made by this court on 28th May 2013, and is therefore not entitled to seek review of the said judgment.

19. As further submitted by the applicant, this court did hold in the **Anders Bruel** case, on the authority of the decision in **Gucokaniriria Kihato Traders & Farmers Co. Ltd -v- The Attorney General Nairobi High Court Misc Civil Appl No 1251 of 2002**, that a Notice of Appeal simply shows an intention to appeal and is not an appeal. I recognise, pursuant to further research, that there are several conflicting decisions on this point, both from the High Court but also from the Court of Appeal.

20. In the case of **Kisya Investments Ltd -vs- Attorney General Civil Appeal No. 31 of 1995,** the Court of Appeal held that a party who has filed a notice of appeal cannot apply for review, but that if an application for review is filed first, the party is not prevented from subsequently filing an appeal even if the application for review is pending.

21. However, in the earlier case of **Yani Haryanto vs. E. D. & F. Man. (Sugar) Limited** (supra)**,** the Court of Appeal had taken the view that:

"The facility of review under Order 44 of the Civil Procedure Rules is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review. A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including rule 79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed... What rule 4(1) of Order 41 of the Civil Procedure Rules prescribes for is an exception to the rule relating to the actual filing of the appeal which is rule 81(1) of the Court of Appeal Rules. The exception is the deeming of the appeal to be filed for the purposes of rule 4 of Order 41 only on the giving of the notice of appeal. Therefore despite the lodging of a notice of appeal the court has jurisdiction to entertain an application for review... An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 and the inclusion of a memorandum of appeal". *(Emphasis added)*

22. This is the decision that the High Court (Odunga J) followed in **R vs The Anti-counterfeit Agency & Another ex parte Surgipharm JR No. 11 of 2012** where it stated as follows:

"In light of the two decisions emanating from the same Court of Appeal, this Court is entitled to adopt either of the two decisions. In my view the Haryanto Case reflects the true legal position. A Notice of Appeal is not an appeal but just a formal notification of an intended appeal. In fact under Rule 77(1) of the Court of Appeal Rules it is provided that an intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal. Clearly, a strict reading of this rule contemplates a situation where a Notice of Appeal may even be served before the same is lodged. Where that happens I cannot see how such a Notice which has not even been lodged can by any stretch of imagination be equated to an appeal. Accordingly, the mere fact that a party has given a notice of intention to appeal does not amount to an appeal for the purposes of review…"

23. In **Tausi Assurance Company Limited –vs- NIC Bank Limited High Court Civil Case No. 458 of 2008 (2014)eKLR,** Havelock J considered various decisions dealing with the question of the effect of a Notice of Appeal. These include the decision in **Ujagar Singh vs Runda Coffee Estates Ltd. (1966) EA 263** in which the Court of Appeal held that:

> ***"(i) the word 'appeal' in r. 53 of the Eastern Africa Court of Appeal Rules, 1954, is used to describe the procedure started by filing a notice of appeal;"***

24. The Learned Judge further relied on the decision of the Court of Appeal in **Equity Bank Ltd –vs- West Link Mbo Ltd (2013) eKLR** in which Musinga JA**,** stated as follows:

"I must go back to the question – '*what is an appeal?*' The Constitution does not define what an appeal is. The Constitution is the fundamental law of the land and provides a general framework and principles that prescribed the nature, functions and limits of government or other institutions. Acts of Parliament and subsidiary legislation contain the details regarding its operationalization. I must therefore turn to *rule 2 (2)* of the *Court of Appeal Rules* which states that: '*appeal', in relation to appeals to the Court, includes an intended appeal.*

What is '*an intended appeal*'? *Rule 75 (1)* states as follows:

'Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.'

The first step in instituting an appeal is the filing of a notice of appeal. *Order 42 rule 6 (4)* of the *Civil Procedure Rules* is also relevant in considering what an appeal is. It states that:

'for the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.'

It follows therefore that as soon as a notice of appeal is lawfully filed, an appeal is deemed to be in existence….."

25. In the face of these conflicting decisions, and pending a definitive decision by the Court of Appeal on the effect of a Notice of Appeal, I take the position established in the **Yani Haryanto** case that the notice of appeal is not an appeal but evinces an intention to appeal. Consequently, I find and hold that the applicant is properly before me.

Whether Paragraph 78 of the Judgment should have been reflected in the Decree.

26. The applicant seeks a determination of whether paragraph 78 of the judgment of this court should be included in the decree, and if so, it seeks consequential orders of review.

27. The law with regard to the drawing of decrees is I believe, clear. As submitted by the petitioner in its written submissions, correctly in my view, in reliance on the decision of the Court of Appeal in **Commissioner General Kenya Revenue Authority –vs- Silvano Onema Owaki Kisumu Court of Appeal Civil Appeal No 45 of 2005,** the decree must conform with the judgment, not the reverse. Thus, if the decree as extracted is at variance with the judgment, then the decree must be corrected to conform with the judgment of the court.

Whether the Applicant has made out a case for Review of the Judgment.

28. Order 45 of the Civil Procedure Code provides as follows with regard to review:

> ***"(1) Any person considering himself aggrieved—***
>
> ***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> ***(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."***

29. To succeed in its application, the interested party needs to show either the discovery of new material or evidence that was not available, with the exercise of due diligence, at the time of the hearing, or demonstrate that there is an error apparent on the face of the record. The ground for this application that approximates the grounds set out under **Order 45** is ground **(vii)** in which the applicant asserts that there is an error apparent on the face of the record, and then proceeds to explain where such error exists as follows:

a. ***While the Learned Judge held that the requirement of "open and interoperable" under section 46 O(2)(d) of the Kenya Information and Commissions Act 1998 (sic) applied to the set-top boxes provided by a broadcaster to its consumers, that provision in fact only applied to the holder of a signal distribution licence;***

b. ***The Learned Judge made an order against the Interested Party and other broadcasters when there was no prayer in the petition for any such order as a consequence of which:***

i. ***The petitioner did not as required by Anarita Karimi Njeru vs The Republic [1976-80] 1KLR 1272 set out in the petition any constitutional right which had been infringed or how such right had been infringed by the interested party or other broadcasters.***

ii. ***As recognized in paragraph 54 and 58 of the judgment none of the parties addressed the issue;***

30. Black's Law Dictionary defines **apparent** as, ***"That which is obvious, evident or manifest."*** Does what the applicant allege amount to an ***"error apparent on the face of the record"?***

31. In **National Bank of Kenya Ltd vs Ndungu Njau** (supra), the Court of Appeal (Kwach, Akiwumi and Pall JJA) stated as follows with regard to review:

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of

law. Misconstruing a statute or other provision of law cannot be a ground for review.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it". (Emphasis added).

32. In similar vein in the case of **Nyamongo & Nyamongo Advocates -vs- Kogo CA No 322 of 2000**, the Court of Appeal stated as follows:

"There is a real distinction between mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error on the face of the record…. A mere error or wrong view is certainly no ground for a review although it may be for an appeal." (Emphasis added)

33. I have read the affidavit of **Mr. Kyengo** in support of the application. At paragraph 5 and 6 thereof, he states as follows:

> ***[5.] "The Interested Party is dissatisfied with that portion of the judgment that determined that the sale to consumers of locked set-top boxes limits the rights of the public under Article 33 of the Constitution, is not in conformity with the provisions of the governing law and violates the stated government policy with regard to information and communication as contained in the ICT Sector Policy Guidelines and that such set-top boxes as may be sold to consumers should be open and operable between networks, are desirous of lodging an Appeal to that effect. A true copy of the said Notice of Appeal is at pages 1 to 2 of the exhibit jointly marked 'FK-1' (hereinafter, 'the exhibit') annexed hereto.***
>
> ***[6.] The foundation of this application is the Interested Party's belief that the Honourable Court erred in its judgment by failing to distinguish between digital broadcasting transmission networks, which are used to transmit content to consumer premises, and set-top boxes ('STBs'), which are consumer reception apparatus by which a digital signal is converted to analogue signal for display on an analogue television set. As a result, the Court has made an order, the implementation of which is economically not feasible."***

34. The applicant then continues with a lengthy deposition, running into 49 paragraphs, on facts which were not before the court at the time of the hearing and determination of the petition in a bid to explain the manner in which the court erred in its judgment.

35. The applicant has alleged in its ground vii(b)(ii) that ***"As recognized in paragraph 54 and 58 of the judgment none of the parties addressed the issue***;" This allegation must arise from a misreading of the judgment, for paragraph 54 and 58 of the judgment did not address themselves to the issue in question at all. The Court stated as follows in those paragraphs:

> ***[54.] The question is whether the acts of the respondents impugned in this matter have indeed failed to accord with the policy and statute concerned, and have as a consequence thereof violated the rights of the petitioner and the public to freedom of expression under Article 33 and the rights of the petitioner under Articles 27 and 34 of the Constitution.***
>
> ***[55.]…***
>
> ***…***

[58.] This petition, however, is a constitutional petition alleging violation of the petitioner's constitutional rights under Articles 27, 33 and 34 of the Constitution. Does the failure of the 2nd respondent to apply for a licence as required under section 46N(1), and the failure by the 1st respondent to enforce the provisions by taking action in accordance with section 46N(2) violate the said Articles of the Constitution? "

36. I believe that the correct portion of the judgment that the applicant is dissatisfied with commences with an analysis from paragraph 72 and culminates with the impugned paragraph 78 which is contained in the portion of the judgment dispositive of the case. It is in the following terms:

[72.] The petitioner is also aggrieved by the fact that not only is KBC giving preferential treatment to the Interested Party by allowing it to broadcast on the digital platform, but it is also permitting it, through GoTV, to sell locked set-top boxes which can only receive content from GoTV. The petitioner views this as a violation of the right of the pubic to freedom of information.

[73.] I have noted that none of the respondents or the Interested Party have responded to this contention by the petitioner. In the ICT Sector Policy Guidelines, it is stated that the policy objectives include 'encouraging the growth of a broadcasting industry that is efficient, competitive and responsive to audience needs….' The Kenya Information and Communication Act requires that the licence issued to a signal distributor will require, among other things, that a signal distributor:

(d) provide an open network that is interoperable with other signal distribution networks.

[74.] "If it is indeed the case, as alleged by the petitioner and not denied by the respondents, that KBC and the Interested Party through their joint venture, GoTV, are providing locked set-top boxes that limit the consumer to content from only one provider, then they are not only in breach of the policy guidelines and the statutory requirements, but are also limiting the right of the public to receive information under Article 33.

[75.] Their actions cannot, in my view, be 'responsive to audience needs', and would limit the information available to consumers to only what the provider of the locked set-top boxes is willing to provide. This would, in turn, be a limitation of the right to freedom of expression, which CCK and KBC in accordance with the ICT Sector Policy Guidelines and the law, would be expected to foster rather than inhibit.

…

[78.] I do find and hold, however, that the sale to consumers of locked set-top boxes limits the rights of the public under Article 33 of the Constitution, is nor in conformity with the provisions of the governing law and violates the stated government policy with regard to information and communication as contained in the ICT Sector Policy Guidelines. I therefore direct that such set-top boxes as may be sold to consumers be open and operable between networks. Whatever decision will emanate from the court with regard to the issuance of broadcast licences now pending before the court, the body charged with issuance of such licences must ensure that the principles of fairness, equity and responsiveness to audience needs are respected."

37. With the greatest respect to the applicant, I am unable to find an error in the above analysis that can be the subject of review. What the applicant appears to be asking the court to do is to reconsider the facts that were before it at the hearing of the petition alongside the new facts that are set out in the affidavit of Mr. Kyengo and reach a different conclusion. It is, in effect, asking the court to re-open the case so that the applicant can present those facts and arguments that it did not present at the hearing of the petition. The court, in my view, has no jurisdiction to do this.

38. This case is similar in many respects to the **Anders Bruel** case that the applicant has referred the

court to. As in that case, the applicant wishes to present new facts by way of review on the basis that there was an ***"error apparent on the face of the record."*** However, as I held in that case:

"To consider them in an application for review would, in my view, amount to a re-opening of the [petitioner's] case and admitting evidence that was not before the court at the hearing of the petition. At any rate, these matters do not constitute an error 'apparent on the face of the record.' To take them into account would amount to permitting these matters to be adduced as additional evidence and a re-consideration of the facts presented before the court. What the court is being asked to do is not to review its decision because there are errors apparent on the face of the record, but to allow the introduction of new matters by the petitioner."

39. For the above reasons, I find no merit in the application before me. It is hereby dismissed with costs to the petitioner and the respondents.

Dated, Delivered and Signed at Nairobi this 17th day of September 2014

MUMBI NGUGI

JUDGE

Mr. Fraser and Mr. Ohaga instructed by the firm of Ochieng, Onyango, Kibet & Ohaga Advocates for the Applicant/Interested Party

Mr. Amoko instructed **by the firm of Oraro & Company for the Petitioner**

Mr. Malonza instructed by the firm of Sisule Munyi Kilonzo & Associates Advocates for the 1st Respondent

Mr. Ndambiri instructed by the firm of J W. Thongori & Co. Advocates for the 2nd Respondent