

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

PETITION NO. 346 OF 2012

BETWEEN

ROYAL MEDIA SERVICES LTDPETITIONER

AND

THE HON ATTORNEY GENERAL1ST RESPONDENT

THE MINISTER OF INFORMATION

AND BROADCASTING.....2ND RESPONDENT

THE COMMUNICATION

COMMISSION OF KENYA.....3RD RESPONDENT

RULING NO. 6

1. On 18th January 2013, I delivered a judgment wherein I dismissed the petitioner’s case. The petitioner has now filed a Notice of Motion dated 22nd January 2013 under the provisions of **sections 1(A), (B) and (C) and 3A** of the *Civil Procedure Act* and **Orders 42 rule 6 and 40** of the *Civil Procedure Rules* where it seeks the following prayers;
 1. *That the 3rd respondent be restrained by itself, its servants and or agents from interfering with the petitioner’s broadcasting using frequency 94.2 Mhz assigned at Mazeras pending the lodging, hearing and determination of the petitioner’s appeal against the judgment delivered herein on 18th January 2013.*
 2. *That the 3rd respondent be restrained by itself, its servants and or agents from interfering with the petitioner’s broadcasting using frequency 100.4 Mhz assigned at Kisumu pending the lodging, hearing and determination of the petitioner’s appeal against the judgment delivered herein on 18th January 2013.*
 3. *That the 3rd respondent be restrained by itself, its servants and or agents from interfering with the under mentioned frequencies pending the lodging hearing and determination of its intended appeal against the judgment delivered herein on 18th January 2013.*

1.	Enchoro Hill	8 8. 8 M H z	E g e s a F
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			<i>M</i>
		9 8.5 <i>M</i> <i>H</i> <i>z</i>	<i>C</i> <i>h</i> <i>a</i> <i>m</i> <i>g</i> <i>e</i> <i>F</i> <i>M</i>
		9 0.2 <i>M</i> <i>H</i> <i>z</i>	<i>R</i> <i>a</i> <i>d</i> <i>i</i> <i>o</i> <i>C</i> <i>i</i> <i>t</i> <i>i</i> <i>z</i> <i>e</i> <i>n</i>
2.	<i>Migori</i>	9 5.4 <i>M</i> <i>H</i> <i>z</i>	<i>R</i> <i>a</i> <i>m</i> <i>o</i> <i>g</i> <i>i</i> <i>F</i> <i>M</i>
		9 3.2 <i>M</i> <i>H</i> <i>z</i>	<i>R</i> <i>a</i> <i>d</i> <i>i</i> <i>o</i> <i>C</i> <i>i</i> <i>t</i> <i>i</i> <i>z</i> <i>e</i> <i>n</i>
3.	<i>RIAT</i> <i>Kiboswa</i>	9 6.8 <i>M</i> <i>H</i>	<i>C</i> <i>h</i> <i>a</i> <i>m</i> <i>g</i>

		<i>z</i>	<i>e</i> <i>F</i> <i>M</i>
		<i>1</i> <i>0</i> <i>0.</i> <i>4</i> <i>M</i> <i>H</i> <i>z</i>	<i>M</i> <i>u</i> <i>l</i> <i>e</i> <i>m</i> <i>b</i> <i>e</i> <i>F</i> <i>M</i>
4.	<i>Siaya</i>	<i>9</i> <i>9.</i> <i>6</i> <i>M</i> <i>H</i> <i>z</i>	<i>R</i> <i>a</i> <i>d</i> <i>i</i> <i>o</i> <i>C</i> <i>i</i> <i>t</i> <i>i</i> <i>z</i> <i>e</i> <i>n</i>
		<i>1</i> <i>0</i> <i>1.</i> <i>0</i> <i>M</i> <i>H</i> <i>z</i>	<i>R</i> <i>a</i> <i>m</i> <i>o</i> <i>g</i> <i>i</i> <i>F</i> <i>M</i>
5.	<i>Webuye</i>	<i>9</i> <i>9.</i> <i>0</i> <i>M</i> <i>H</i> <i>z</i>	<i>R</i> <i>a</i> <i>d</i> <i>i</i> <i>o</i> <i>C</i> <i>i</i> <i>t</i> <i>i</i> <i>z</i> <i>e</i> <i>n</i>
6.	<i>Nyahurur</i>	<i>9</i>	<i>R</i>

	<i>u (Maili Nne)</i>	5. 3 <i>MHz</i>	<i>a d i o C i t i z e n</i>
		1 0 3. 2 <i>MHz</i>	<i>I n o o r o F M</i>
7.	<i>Nyadundo</i>	9 8. 6 <i>MHz</i>	<i>C h a m g e F M</i>
8.	<i>Mazeras</i>	9 4. 2 <i>MHz</i>	<i>B a h a r i F M</i>
		9 8. 9 <i>MHz</i>	<i>I n o o r o F M</i>
9.	<i>Msamwe</i>	9 6.	<i>B a</i>

		2 M H z	h r a i F M
	ni	1 0 1. 1 M H z	R a d i o C i t i z e n
10.	Kilifi	9 4. 5 M H z	R a d i o C i t i z e n
		1 0 2. 2 M H z	B a h a r i F M
11.	Malindi	T V C h a n n e l 3	C i t i z e n T

		9	V
12.	Meru	104.7 MHz	Muga FM
13.	Vuria Hill	97.1 MHz	Bahari FM
14.	Narok	92.6 MHz	Inooro FM
15.	Kisumu	104.4 MHz	Mulembé FM

4. That the 3rd respondent be restrained by itself, its servants and or agents from interfering, pending lodging and determination of the petitioners' intended appeal from the judgment delivered on 18th January 2013, with the petitioner's broadcasting using the following frequencies described in the public notice contained in the issue of the daily nation of 17th May 2012;

	Location	Station	Frequency
1.	Kapenguria	Radio Citizen	96.1 MHz
2.	Webuye	Sulwe FM	100.5

			MHz
3.	Webuye	Radio Citizen	94.5 MHz
4.	Webuye	Mulembe FM	89.6 MHz
5.	Webuye	Citizen TV	TV CH 50
6.	Limuru	Radio Citizen	106.7 MHz
7.	Limuru	Inooro FM	98.9 MHz
8.	Limuru	Ramogi FM	107.1 MHz
9.	Limuru	Change FM	90.4 MHz
10.	Limuru	Egesa FM	103.2 MHz
11.	Limuru	Mulembe FM	97.9 MHz
12.	Limuru	Hot 96	96/0 MHz
13.	Limuru	Citizen TV	TV CH 39
14.	Kisekini	Muuga FM	94.2 MHz
15.	Kisekini	Musyi FM	102.2 MHz
16.	Londiani Hill	Radio Citizen	100.5 MHz
17.	Londiani Hill	Change	95.0 MHz
18.	Londiani Hill	Inooro FM	89.8 MHz
19.	Londiani Hill	Hot 96	102.5 MHz
20.	Londiani Hill	Citizen TV	TC CH 12
21.	Eldoret	Mulembe FM	94.2 MHz
22.	Eldoret	Change FM	97.5 MHz
23.	Eldoret	Hot 96	87.7 MHz
24.	Eldoret	Inooro FM	107.0

25.	Eldoret	Radio Citizen	90.4 MHz
26.	Eldoret	Citizen TV	TV CH 31

5. *That the 3rd respondent be restrained by itself, its servants and or agents from interfering, pending lodging and determination of the petitioners' intended appeal from the judgment delivered on 18th January 2013, with the petitioner's broadcasting using the following frequencies described in the public notice contained in the issue of the daily nation of 17th May 2012;*
2. The application is supported by the affidavit of S. K. Macharia sworn on 22nd January 2013 wherein he states that he fears that unless conservatory orders sought are issued, its business will suffer substantial loss and its right of appeal will be rendered nugatory. Its case was supported by submissions made by Dr Kuria S.C., and relied on several cases; ***Emma Muthoni Wambaa and Another v Joseph Kariuki Kibaara and Others Mombasa HCCC No. 274 of 2009 (Unreported)***, ***Africa Safari Club v Safe Rentals CA Civil Application No. NAI 53 of 2010 (Unreported)***, ***S. K. Macharia and Purity Githae Milimani HC BC Nos. 25 and 26 of 2009 (Unreported)***. Counsel submitted that the orders sought are intended to preserve the subject matter of the petition pending appeal from the judgment.
3. The application was opposed by the respondents. Mr Kaumba, for the 1st and 2nd respondent noted that although, no order was sought against them, the application could not be granted as the effect of the orders would be to restrain a statutory corporation, the Communication Commission of Kenya ("CCK") from enforcing legal process. Furthermore, as the suit was dismissed, there is nothing to stay the pending appeal.
4. Mr Kilonzo, counsel for the 3rd respondent also opposed the application on the grounds submitted by Mr Kaumba. Counsel submitted that in granting any orders, the court must balance the right of the petitioner and the responsibility of the CCK to regulate the airwaves. Counsel also adverted to the fact that once the petition was dismissed, there was no order capable of execution and consequently nothing to stay. Counsel referred to several authorities to support this proposition; ***Dennis Mogambi Mong'are v Attorney General and Others Civil Application No. 265 of 2011 (Unreported)***, ***Haither Haji Abdi and Another v Southdown Developers Limited and Others Nairobi High Court Petition No. 218 of 2012 (Unreported)***.
5. It is not in doubt that the petitioner has now evinced its intention to pursue an appeal and the issue is whether I should grant the orders in the motion. At the outset, the application before the Court seeks injunctive relief rather than specific prayers of stay. Although the application is grounded on the provision of the ***Civil Procedure Rules***, it is considered must be considered within the rubric of the **Article 22 and 23** as the petition before the Court is one for enforcement of fundamental rights and freedoms. As I stated in my ruling of 18th January 2013, ***"[I]t constitutes an application under Article 22 and therefore, the Court has powers to frame appropriate orders to preserve the petitioner's right of appeal and to see to it that the appeal is not diminished thereby undermining the specific purpose of Article 22."***
6. I also reiterate what I stated in ***Joseph Ihugo Mwaura and 82 others v Attorney General & Others. Nairobi Petition No. 498 of 2009 (Unreported)*** in relation to the jurisdiction of the High Court to grant relief after it has heard and dismissed an application under **Article 22**. I observed as follows, ***"[35]The question as to whether this court has jurisdiction to grant orders of stay or injunction pending appeal must be seen in light of the provisions of Article 22 and 23 of the Constitution. [36]The provisions of Articles 22 and 23 are the gateway to the Bill of Rights in the sense that without them, the rights and fundamental freedoms guaranteed remain non-justiciable. It is the fact that the court can be moved to grant relief in case of infringement,***

violation or threat that gives the Bill of Rights teeth. Commenting on the effect on the equivalent provision of the former Constitution, Justice Shields stated in the case of Felix Njagi Marete v Attorney General (1987) KLR 690 “The Constitution is not a toothless bulldog nor is it a collection of pious platitudes. It has teeth and those teeth and in particular are to be found in Section 84”. [37] Article 23(3) entitles the High Court to grant appropriate relief in respect of matters brought under Article 22. Apart from the specific relief in the nature of an injunction set out in Article 23(2) the Court can frame any relief that is appropriate in the circumstances. It follows therefore such relief must also include such as is necessary to secure the applicant’s right to appeal and ensure that the appeal is not rendered nugatory and the right thereby protected is watered down. [38] To argue that the relief secured by Article 23 is diminished merely because there is lack of a specific provision in the Constitution or under the Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 is to undermine the Bill of Rights and its efficacy. I do not read rule 23 to prohibit the court from granting further relief after hearing and determining a matter. [39] I reject the respondent’s argument that this court lacks jurisdiction to grant interim relief pending appeal. I find and hold that this court’s exercise of its power under Article 23(3) is entitled to give orders that give effect to the Bill of Rights including such orders as are necessary to preserve the subject matter pending appeal. [40] In my view, it does not matter that the application to enforce fundamental rights has been dismissed. The applicant has an undoubted right of appeal and the appellate court may take a different view of the matter. It is the obligation of the trial court to consider the facts before it and decide whether interim relief pending appeal is warranted. To decline jurisdiction would be to undermine the very essence of the Bill of Rights. [41] Finally, I refer to the principle stated in the well-known case of Erinford Properties Ltd v Cheshire County Council (1974) 2 All E R. 488. The principle is that a judge who has dismissed an interlocutory application for injunction is entitled to grant the unsuccessful applicant an injunction pending appeal against the dismissal. This principle is well established in our jurisdiction and there is no reason why such a principle should not apply to these proceedings.”

7. The petitioner’s case was that by taking regulatory action, the CCK had infringed fundamental rights and freedoms. In my judgment, I took a contrary view and dismissed the petition. If a conservatory order is not granted, it is likely that the regulatory action will proceed rendering the intended appeal nugatory in the sense that such action will deprive the petitioner of the opportunity to challenge the judgment in the appellate Court. If on the other hand the appeal fails, CCK will still be entitled to proceed with regulatory action.
8. In order to ensure that the petitioner takes steps to expedite the appeal, I will grant orders limited in time and limited to the letters and notices that were the subject of the regulatory action taken by the CCK. I therefore grant orders as follows;
 1. The 3rd respondent be and is hereby restrained from taking any further steps or enforcing demands and notices in the letters dated 6th March 2012 (in respect of 94.2 MHz in Mazeras), 3rd August 2012 (in respect of 100.4 MHz Kiboswa (Kisumu)), the Notice of Violation issued on 3rd August 2012 and the Notice issued on 17th May 2012 published in the Daily Nation pending the hearing and determination of the intended appeal from the judgment delivered on 18th January 2013 for a period of 30 days only from today to enable it lodge its appeal. Thereafter the petitioner shall be at liberty to move the Court of Appeal for further orders.
 2. Costs of the application shall be in the appeal.

DATED and DELIVERED in NAIROBI this 30th day of January 2013.

D.S. MAJANJA

JUDGE

Dr Kamau Kuria, S.C., instructed by Kamau Kuria and Kiraitu Advocates for the petitioner/applicant.

Mr Kaumba, Litigation Counsel, instructed by the State Law Office for the 1st and 2nd respondents.

Mr Kilonzo with him Miss Thanji instructed by Sisule Munyi Kilonzo and Associates for the 3rd respondent.