



REPUBLIC OF KENYA
HIGH OF KENYA AT NAIROBI
CRIMINAL MISCELLANEOUS APPLICATION 43 OF 2013

IN THE MATTER OF AN APPLICATION UNDER SECTION 362 OF THE CRIMINAL
PROCEDURE CODE CAP. 75 OF THE LAWS OF KENYA AND UNDER ARTICLE 165(6) AND (7)
OF THE CONSTITUTION

AND

IN THE MATTER OF EXERCISING REVISION/SUPERVISORY JURISDICTION OVER
CRIMINAL PROCEEDINGS IN THE CHIEF MAGISTRATES COURT AT NAIROBI IN (1)
MISCELLANEOUS APPLICATION NO. 152 OF 2013: CID-COMMISSION vs. ROYAL MEDIA
SERVICES (2) MISCELLANEOUS APPLICATION NO. 153 OF 2013: CID-COMMISSION vs.
ROYAL MEDIA SERVICES (3) MISCELLANEOUS APPLICATION NO. 154 OF 2013: CID-
COMMISSION vs. ROYAL MEDIA SERVICES and (4) MISCELLANEOUS APPLICATION NO. 155
OF 2013: CID-COMMISSION vs. ROYAL MEDIA SERVICES

BETWEEN

ROYAL MEDIA SERVICES LTD.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

AND

COMMUNICATIONS COMMISSION OF KENYA.....INTERESTED PARTY

RULING

1. The Application before me is an Originating Notice of Motion dated 6th February 2013. Filed simultaneously with the Notice of Motion application was an application for conservatory orders filed by way of a Chamber Summons.

2. The Applicant seeks the following orders:

1. Call for the record of the proceedings in Chief Magistrate’s Court in **Miscellaneous Application No. 152 of 2013, CID-Commission v Royal Media Services, Miscellaneous Application No. 153 of 2013, CID-Commission v Royal Media Services, Miscellaneous Application No. 154 of 2013, CID-Commission v Royal Media Services, and Miscellaneous Application No. 155 of 2013, CID-Commission v Royal Media Services** to determine the legality of the said criminal proceedings and

make such orders or give such directions as it considers appropriate to ensure the fair administration of justice

2. A declaration that the Criminal Investigation Department (the CID) and the Communications Commission of Kenya (the Commission) exercise their respective powers under the **Information and Communications Act** and the **Criminal Procedure Code** under the delegation of the Respondent under **Article 157(9)** of the **Constitution**.

3. A declaration that the power delegated to the CID and the Commission under **Article 157(9)** of the **Constitution** does not include the power to shut down or disable broadcasting stations without observance of due process of the law.

4. A declaration that a prosecutor to whom prosecutorial power is delegated under **Article 157(9)** of the Constitution is disqualified from instituting criminal proceedings against a Petitioner who has instituted against him/it proceedings to enforce rights under the **Bill of Rights** in **Chapter IV** of the **Constitution**.

5. A declaration that the CID and the Commission prosecutors exercising powers under **Article 157(9)** of the **Constitution** are obliged to be impartial.

6. A declaration that the Respondent exercises under **Article 157(6)** of the **Constitution** a *quasi-judicial* function in determining whether or not criminal proceedings shall be instituted against a person like the Applicant.

7. A declaration that the Respondent breached his *quasi-judicial* duties in instituting in the Chief Magistrate's Court on 30th January 2013 the **Miscellaneous Applications No. 152 of 2013, 153 of 2013, 154 of 2013 and 155 of 2013**.

8. A permanent stay of the criminal proceedings in Nairobi Chief Magistrate's Court: **Miscellaneous Applications No. 152 of 2013, No. 153 of 2013, No. 154 of 2013 and No. 155 of 2013**

9. A declaration that the criminal proceedings in Nairobi Chief Magistrate's Court **Miscellaneous Applications No. 152 of 2013, No. 153 of 2013, No. 154 of 2013 and No. 155 of 2013** are null and void

10. Quashing of the proceedings in the said Nairobi Chief Magistrates Court in **Miscellaneous Applications No. 152 of 2013, No. 153 of 2013, No. 154 of 2013 and No. 155 of 2013**.

11. A declaration that the Applicant's broadcasting equipment seized and taken possession of on 2nd and 3rd February 2013 pursuant to warrants issued on 30th January 2013 in Nairobi Chief Magistrate's Court **Miscellaneous Applications No. 152 of 2013, No. 153 of 2013, No. 154 of 2013 and No. 155 of 2013** constitute evidence obtained in contravention of the Applicant's rights under **Articles 27, 40, 48, and 50(4)** of the **Constitution** and is inadmissible in criminal proceedings.

12. Orders for return to the Applicant by the Respondent all the broadcasting equipment seized and taken possession of by his delegate, the Commission from its 17 broadcasting sites pursuant to warrants issued by the lower Court.

13. Restraining of the Respondent and all his delegates under **Article 157(9)** of the **Constitution** from charging any officer of the Applicant on matters touching on the Applicant's litigation taking the forms of

1. High Court Petition No. 244 of 2011, Media Owners Association v Attorney General, Minister of Information and Communication, and Communications Commission of Kenya;

2. High Court Petition No. 346 of 2012, Royal Media Services Ltd. v Attorney General, Minister of Information and Communication, and Communications Commission of Kenya;

3. High Court of Kenya Petition No. 59 of 2013 Royal Media Services Ltd. v Attorney General,

Minister of Information and Communication, and Communications Commission of Kenya

14. Costs of the Application.

3. The Application is supported by the Affidavit sworn by Samuel Kamau Macharia, Chairman of the Board of Directors of the Applicant, sworn on 6th February 2013. It is premised on the following grounds:

1. That the Respondent through the CID and the Commission abused the process of the Court on 30th January 2013 in the proceedings under the lower court in applying for a search warrant in respect of broadcasting frequencies and equipments which are the subject matter of **High Court Petition No. 244 of 2011, Media Owners Association v Attorney General**.

2. The Resident Magistrate in Nairobi Chief Magistrates Court in **Miscellaneous Applications No. 152 of 2013, No. 153 of 2013, No. 154 of 2013 and No. 155 of 2013** committed contempt of court taking the form of assuming jurisdiction over matters already before Honourable Justices Lenaola, Achode and Majanja in **High Court Petitions No. 244 of 2011, and No. 346 of 2012**.

3. The Resident Magistrate in Nairobi Chief Magistrates Court in **Miscellaneous Applications No. 152 of 2013, No. 153 of 2013, No. 154 of 2013 and No. 155 of 2013** ignored the hierarchy of courts set out in Chapter 10 of the Constitution and undermined the authority of the High Court.

4. This Court has power to prevent an abuse of the criminal process by the Chief Magistrates Court.

5. The 1st Respondent exercises *quasi judicial* authority in deciding whether or not a person is to be charged with an offence and should not act capriciously or arbitrarily and discriminatively.

6. **Article 157 of the Constitution** mandates the Respondent and those to whom he delegates his powers to act impartially in the discharge of duties

7. The Commission, to which the Respondent has delegated his powers under **Article 157 of the Constitution** has been a Respondent in **High Court Petitions No 244 of 2011, and No. 346 of 2012** and during the pendency of the two suits it abused prosecutorial powers and instituted the above mentioned applications to oppress the Applicant and defeat its right of access to justice under **Article 48 of the Constitution**.

8. The Respondent has prejudiced the Applicant's rights under **Article 48 of the Constitution** of access to justice by taking a prejudicial action during the pendency of the above-mentioned petitions.

9. In all the applications, the Commission, to which the Respondent has delegated its powers, is the Applicant for search warrants.

10. The search warrants are illegal in that the Respondent exceeds authority conferred on it as the search warrants permit contravention of the Applicant's property rights protected under **Article 40 of the Constitution**.

11. The High Court has power to supervise subordinate Courts under **Article 165(6) and (7) of the Constitution** and make any orders or give directions it considers appropriate to ensure fair administration of justice.

12. Fair administration of justice demands that the proceedings pending before the Chief Magistrates' Court in **Miscellaneous Applications No. 152 of 2013, No. 153 of 2013, No. 154 of 2013 and No. 155 of 2013** be stayed pending the hearing and determination of this Application, and thereafter the same be stayed permanently and the Applicant be awarded exemplary damages as compensation for the contraventions by the State of its rights under **Article 48 of the Constitution**.

13. The Court has jurisdiction to grant the relief sought under **Section 362 of the Criminal Procedure**

Code and Article 165(6) of the Constitution.

4. The Commission opposed the Application through the Replying Affidavit of John Omo, the Secretary of the Commission sworn on 6th March 2013. It is the Commission's case that the Commission is mandated under the **Kenya Information and Communications Act**, with regulating and licensing broadcasting, e-transactions, radio communications, telecommunications and postal services in Kenya. This mandate entails among others assigning frequencies to applicants including strategic national institutions, subject to terms and conditions attached to the assigned licences. Such conditions include frequency, location of the transmitter, geographical transmitter site coordinates and maximum effective radiated power. As such, users who have been licensed are required to use transmitters that are approved by the Commission and which should be installed with band pass filters to eliminate emissions outside the assigned broadcast bands.

5. The Commission deposed that routine inspection by the Commission's monitoring and inspection unit revealed the existence of unauthorized FM and TV broadcast transmitters at various sites in the country, all belonging to the Applicant. The Commission explains that some of the issues regarding the operation of unauthorized transmitters by the Applicant have been the subject in other litigation; namely, **High Court Petition No. 346 of 2012, Royal Media Services Ltd. v Attorney General & 2 Others**. Mr. Omo deposed that the Applicant continued with the violations which were not the subject matter of the said Petition. Mr. Omo further explained that the Commission did not take any action against the Applicant with regard to frequencies that were the subject matter in the said Petition pending its conclusion. The Commission further avers that after the Petition was concluded, the Applicant continued using the unauthorized frequencies that were the subject of the proceedings in the lower Court.

6. According to the Commission, the Applicant was given notice through a Public Notice published in the Daily Nation on 30th November 2012 and a letter dated 3rd December 2012, and requested to take corrective measures within a specified period and inform the Commission of such compliance. The Commission proceeded to seek search and seizure warrants from the lower Court with a view to seizing the offending transmitters and taking up criminal action against the owners, which were issued by the lower court on 30th January 2013 through **Miscellaneous Applications No. 152 of 2013, No. 153 of 2013, No. 154 of 2013 and No. 155 of 2013**.

7. The Commission further deposed that following the ruling by the Hon. Justice Majanja in **Petition No. 59 of 2013**, the Applicant amended and filed the **amended Petition No. 59 of 2013**, which is substantially the same as the initial Petition which was filed prior to the present proceedings and as such, these proceedings are caught by the doctrine of *res sub judice*

8. Further, the Commission added that the existence of the two proceedings creates a risk of reaching variant decisions on the same subject and set of facts, in that the two proceedings are not distinct from each other despite the difference in the manner applied by the Applicant in approaching the Court, one as a Petition and the other as a Revision Application

9. Regarding the interim orders issued by the respective Courts in the said Petitions, the Commission stated that the said orders ought to be cited in the context of the said proceedings and were any contempt of those orders to arise, the contempt proceedings ought to be brought before the same proceedings and not through instituting independent proceedings or through the present Application.

10. The Commission further contended that this Application is wrongly premised on the basis that the Commission in seeking for the search warrants was acting under powers delegated by the Respondent herein under **Article 157(9) of the Constitution** whereas the Commission in so acting exercised its powers under **Sections 89 and 90 of the Kenya Information and Communications Act** with a view to presenting the seized equipments to the lower Court and using the same in a criminal action that would be instituted against the owners of the equipments.

11. The Commission asserted that the Applicant did not demonstrate any illegality or impropriety in the proceedings of the subordinate Court leading to the issuance of the warrants while the Commission on its

part established a *prima facie* case by availing to the subordinate Court all the necessary and relevant information to justify the issuance of the said warrants..

12. In a further Affidavit sworn by Mr. Samuel K. Macharia on 8th March 2013, the Applicant stated that the Commission erred by filing submissions in the guise of a Replying Affidavit thus the same was not a valid Affidavit. The Applicant while denying the contents of the Commission's Replying Affidavit clarified that **Petition 59 of 2013** was withdrawn as evidenced by the Notice of Withdrawal.

13. During the hearing of the Application, Dr. Kamau Kuria, SC, for the Applicant stated that the Applicant was seeking orders from the court in the nature of quashing orders (prayer 9 and 10), consequential orders (prayers 11 and 12) and declaration of rights and attendant orders. On the quashing orders, the learned Senior Counsel urged this Court to consider the jurisdiction of the lower Court to make the orders being challenged in light of the hierarchy of courts. He also urged the Court to consider the factors to take into consideration as stated in **Regina v Central Criminal Court ex parte the Guardian, the Observer & Martin Bright [2000] EWHC 60 QB**. On this line of argument, learned Senior Counsel submitted that the Magistrate lacked jurisdiction to issue orders without due regard to subsisting orders that were issued by me and Honourable Justice Lenaola.

14. On the consequential orders, learned Senior Counsel opined that the search warrants ought not to be granted until a condition precedent as required by the law is fulfilled; namely, a demand for access to the premises and if the same is denied, to have recourse to the Court. It was also submitted for the Applicant that the Commission did not need the search warrants, rather a remedial action by the Applicant in light of the alleged violations of the law. In support of this position, learned Senior Counsel cited the contents of the Notice published in the Daily Nation on 30th November 2012 and a letter dated 3rd December 2012 by the Commission to the Chairman of Royal Media Services.

15. Learned Counsel for the Applicant also submitted that the intention of seeking the search and seizure warrants by the Commission was for other purposes other than the purpose envisaged under relevant provisions of the law that is, the securing of evidence to be used in criminal proceedings. He contended that the Commission undertook this process for an ulterior motive, thereby abusing the process of the court. The Applicant was therefore praying for a permanent stay of proceedings since the orders of the lower Court give an intimation of further action after the search and seizure of equipment. Learned Counsel advanced the position that the Court can sanction stay of proceedings to prevent further abuse of criminal proceedings and therefore as in this case, where court quashes the orders, it can order the return of any goods that might have been seized through such a process. He supported this position with several cases, namely, **Francis Mbugua Mukundi & 4 Others v Republic, [2012] eKLR; Kirpal Singh & Another v Republic [2006] eKLR; David Muigai Macheru v Kenya Forest Service & Another [2012] eKLR** and **Ivanov v North West Gambling Board (312/201) [2012] ZASCA] 92**. Counsel submitted that since the equipment was seized invalidly the Court ought to declare the orders of the lower court null and void and order for the return of all equipments that were seized to the Applicant.

16. Dr. Kamau Kuria also submitted that the Commission acted as a prosecutor in that a reading of the Notice and Letter referred to earlier on shows that a decision had already been made that an offence had been committed and the Commission intended to use the seized equipment as evidence.

17. Further, according to Counsel for the Applicant, the application for the search warrants was made by a person who lacked capacity to make such an application. In support of this argument, Counsel directed me to the South African decision of **Democratic Alliance v the President of Republic of South Africa [2011] ZASCA** to emphasize that an appointee to act as a prosecutor must be a person and not an institution. Learned Senior Counsel thus summed on the proceedings in the lower Court: that the application for warrants was made by a person who lacked capacity, before a judicial authority who lacked power to question the authority of a superior court and for an illegal purpose. He urged the Court to so declare.

18. Mr. Issa, supporting Counsel for the Applicant addressed me on the issue of jurisdiction; that the Court in exercising revisionary powers ought not to limit itself to the restricted provisions of **Section 362**

of the **Criminal Procedure Code** in that the Application is also anchored on the wider powers of the Court under **Articles 165 and 167 of the Constitution**. He reiterated the position that the application before the lower court was made by a prosecutor for an unlawful purpose to circumvent the orders of the High Court granted in a constitutional Petition. He further emphasized that a Magistrate's Court could not circumvent or overturn or reverse the orders of the High Court which were still in force when the warrants were granted. Learned Counsel also urged that the Magistrate may, while granting the orders, have lacked insight into the existing orders and thus could not have known the mind of the applicant seeking the warrants.

19. Mr. Issa also urged the Court to take into account the Press Statement that was issued by the Commission following the grant of orders to the effect that the Commission was shutting down broadcasting by the Applicant in which it confirmed the shutting down of 6 transmitters and the intended shutting down of 11 more transmitters. Accordingly, learned Counsel, citing the case of **Githunguri v Republic [1984] KLR 1**, inferred that the orders were intended to achieve a collateral purpose, that is, to shut down the operations of Royal Media Services, and not to collect evidence. Counsel therefore urged that the Court is duty-bound to preserve the integrity of the criminal justice process by setting aside the orders obtained for improper purpose and thereby order for return of equipments seized and restoration of the frequencies. Mr. Issa also referred the Court to the issue pending before another Court in **Petition 244 of 2011** where the mandate of the Commission is being challenged.

20. Mr. Issa submitted that while the grant of search and seizure is legally provided for, some guarantees ought to be taken into account where the media is concerned. He relied on the reasoning in **Regina v Central Criminal Court [2000] EWHC 560 QB** and **Ivanov v North West Gambling Board (312/2011) [2012] ASCA 92** on factors to take into consideration including the wider public interest, the purpose and implications of the orders and the power to order the return of the equipment and material seized.

21. Mr. Muteti, learned State Counsel for the Respondent opposed the Application. He submitted that the Court in exercising its revisionary jurisdiction should restrict itself to considering the propriety, correctness and legality of the orders of the lower court, and by doing so, examine the material before the Magistrate and most importantly the averments made by the person seeking the search and seizure warrants. Mr. Muteti stated that from the Affidavit sworn by Inspector Francis Baraza, it was clear that the lower Court was notified of the subsistence of **Petition No. 244 of 2011** where it was deposed that the application being sought had no bearing to the pending matter. He urged the Court in this regard to examine the record in the two matters and make a distinction between the frequencies covered and protected under the orders issued by the High Court in the said Petition and the ones that are the subject of the Revision Application before me.

22. Mr. Muteti added that while the Respondent is aware that there are pending criminal investigations into this matter, a prosecutorial decision had not been made but underlined that the decision of this Court on the Revision Application would have a bearing on the ongoing investigations. He also added that since there was disclosure of existence of the said orders, only the investigators could submit to the issue as to whether or not the application for search and seizure warrants was made for a collateral purpose.

23. On the submission by learned Counsels for the Applicant that the Commission acted as a prosecutor, the learned State Counsel referred to my earlier ruling in this matter to reiterate that a prosecutorial decision had not been made. He added that if the warrants were sought for the purpose of criminal investigation and not any other purpose, the court should be hesitant to quash them as part of its duty to check any abuse of the court process.

24. Mr. Kilonzo, learned Counsel for the Interested Party, opposed the Application and relied on the Affidavit by John Omo, the Commission Secretary, sworn on 6th March 2013 pursuant to leave granted by this Court. On the Court's duty in exercising its revisionary jurisdiction, Counsel pointed to the case of **Manfred Walter Schmidt & Another v Republic Misc. Cr. Application 569 of 2012** that the court's duty is limited to examining the evidence before it and determine whether there were reasonable grounds to entitle the grant of those orders. He urged that, in doing so, the Court is required to exercise its

discretion judiciously, as it is emphasized in **ABC Metallurgiac Limited v Republic, Criminal Revision 29 of 2009.**

25. Mr. Kilonzo further submitted that in considering a revision application, the Court ought to consider the material before the lower Court at the time when the application for search warrants was made. Accordingly, he submitted, the court ought to analyze the appropriate legal principles to determine whether the order issued by the lower Court meets the correctness or legality required by the law by considering the following: firstly, the nature of proceedings before the lower court; secondly, the power that the Commission and the CID were exercising at the time of applying for the warrants, (whether it was investigative or prosecutorial power); thirdly whether the Director of Public Prosecutions (the DPP) had any role to play at the stage of the application for the warrants for any orders to be directed against him and fourthly, the status of the lower Court's proceedings upon the issuance of the search warrants and execution of the same the latter being important in determining whether or not an order for stay of proceedings can be granted.

26. On the first issue, Counsel submitted that the question had already been determined by this Court in an earlier ruling and the same position was reiterated in the case of **ABC Metallurgiac Limited v Republic.** On the second question, Mr. Kilonzo opined that **Section 118** of the **Criminal Procedure Code** was intended by legislature to afford an opportunity for the judicial arm of government to have some measure of control in the investigative process. Thus, it was clear that this was not a prosecutorial process as further shown in the Affidavit by Barasa that the Commission and the C.I.D. were acting as investigators and not as prosecutors. Learned Counsel further emphasized that the determination as to whether a person is a prosecutor or not is not a matter of conjecture, but a statutory expression on the basis of which the DPP can delegate prosecutorial powers. Thus, the Court has no power to declare that a person was acting as a prosecutor.

27. On the third issue, Mr. Kilonzo reiterated the position that no prosecution was involved in invoking **Section 118** of the **Criminal Procedure Code** and further that the DPP is not a party during such proceedings, thus no orders could be granted against him. On the fourth question, Mr. Kilonzo was of the view that once warrants are issued and executed, the proceedings in the subordinate court are concluded, save for the executing party to make a return to that court on execution of the warrant thus, there were no proceedings capable of being stayed. He further stressed that an order of stay as prayed would result in an absurdity in that it would frustrate the very purpose for which the warrants were sought since once the warrants were executed, the investigators would not be able to proceed with investigations and any intended prosecution would be similarly affected.

28. On the prayers sought, Mr. Kilonzo submitted that all necessary information was placed before the Magistrates Court thus the allegation of non-disclosure could not stand. Learned Counsel submitted that as already expressed the applicants were exercising an investigating power. He added that no evidence was introduced to show breach of any quasi-judicial authority by any person thus the prayer on the same could not stand. Similarly, the prayer for stay of proceedings could not be granted since the warrants had already been executed. On the prayer for nullification of the lower Court's proceedings, learned Counsel cited the decision of Honourable Justice Majanja in **Petition No. 346 of 2012** where he reasoned that the matters in question were different and did not refer to the same frequencies and licenses. Mr. Kilonzo also noted that while the Applicant referred to the Commission and CID in the Application as prosecutors, that reference was abandoned, an indication that the Applicant's reasoning lacked any ground. He urged the court to dismiss the Application with costs.

29. In reply to Mr. Kilonzo's submission, learned Senior Counsel for the Applicant noted that Mr. Kilonzo has introduced a new legal person, an investigator who can get audience from the court. He opined that this was a misinterpretation of my ruling that allowed joinder of an interested party. Learned Senior Counsel submitted that the position that the proceedings in the lower Court were investigations and not prosecution was fallacious in that: Firstly, there is no legal basis for the said legal person – 'the investigator' and as such, any person who applies for a search warrant under the cited provisions is subject to the jurisdiction of the subordinate court and the revisionary jurisdiction of the High Court. Secondly, it is clear from the act of the Commission as also expressed in the letter and the notice by the

Commission that a decision had already been made to prosecute the Applicant without the requisite prosecutorial authority.

30. Thus, arguments by Mr. Kilonzo to the contrary were purely academic in that the object of the action by the Commission was not to acquire evidence but an order to shut down the operations of the Applicant. He contended, therefore, that the authorities relied upon by the Interested Party in this regard, had no application to this Application. Thirdly, there is no other person who can come before the Court in representing the State other than the Attorney General in civil proceedings and the DPP in criminal proceedings. To augment this position, learned Senior Counsel cited the decision of the Court of Appeal in **Elirema v. Republic Criminal Appeal No. 67 of 2002 [2003] KLR 537**

31. Having considered all the parties' case and considered the submissions and authorities presented before me, I now set out the issues for my determination. I must first determine the following preliminary issues before I consider the substantive aspects of the Application:

- a) Whether the Replying Affidavit by the Interested Party is valid and therefore whether the same ought to be admitted to Court
- b) Whether the proceedings before me are *res sub judice* in light of the proceedings in **High Court Petition No. 59 of 2013**
- c) What is the scope of the Court's jurisdiction when exercising revisionary jurisdiction?

On whether the Replying Affidavit by the Interested Party is valid and therefore whether the same ought to be admitted to Court,

32. The Applicant stated that the Commission erred by filing submissions in the guise of a Replying Affidavit thus the same was not a valid Affidavit. This issue was raised by the Applicant at a very advanced stage of the proceedings before me, subsequent to the filing of a Replying Affidavit by the Interested Party. Nevertheless, I must make a determination on the same. An Affidavit as defined by the **Black's Law Dictionary, 9th Edition** on page 66 is,

"a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths. A great deal of evidence is submitted by way of affidavit."

33. In light of the above, the key elements that must be satisfied in the form and content of an affidavit are therefore: (a) A commencement statement where the affiant is identified and described (b) Averments or affirmations, being the claims that are made by the affiant (c) A statement of truth of facts stated in the affidavit by the affiant and (d) an attestation clause which is the certification of the affidavit and (e) signatures of the deponent and the person witnessing the affidavit. Therefore, in form and substance I find that the Replying Affidavit meets the statutory requirements and is in compliance of the standard prescribed under the **Oaths and Statutory Declarations Act**. I also find that in certain few respects, the Affidavit by Mr. John Omo touched on arguments in support of the case before me. However, this does not render the same invalid and I admit the said Affidavit for consideration of this matter.

On whether the proceedings before me are *res sub judice* the proceedings in **High Court Petition No. 59 of 2013**

34. Mr. John Omo in the Replying Affidavit sworn for the Commission deposed that the present proceedings before me are substantially similar to the proceedings in **Petition 59 of 2013** in that the Applicant herein impugns the warrants issued by the lower Court; both proceedings are premised on the argument that the lower court in issuing warrants acted in excess of its jurisdiction or in contempt of court in light of existing orders issued by the High Court in **Petition No. 244 of 2011** and **Petition No. 346 of 2011**; both proceedings seek to bar the Commission from interfering with the broadcasting sites that were shut down in pursuance of the warrants; prayer No. 13 of the present Application shows the nexus between the present proceedings and **Petition No. 59 of 2013** and thus the Court should allow the said

Petition to be concluded first.

35. I have had the opportunity to peruse the file in **High Court Petition 59 of 2013**, and noted the following specific particulars:

a) The Petition is premised on the lower Court's orders issued in **Miscellaneous Applications No. 152 of 2013, No. 153 of 2013, No. 154 of 2013 and No. 155 of 2013**.

b) The Petition is challenging the said lower Court's orders as null and void in that (a) the applications were intended to vary the orders of the High Court in **Petitions No. 244 of 2011 and No. 346 of 2012** (b) the Magistrate did not take into account her lack of jurisdiction to make the orders and to entertain an application touching on petitions of which the High Court was seized (c) the third respondent in that Petition, and the Interested Party herein lacked capacity to make the applications (d) the applications in the lower Court were invalid as they were in breach of the Constitutional provisions on determination of whether or not to institute charges against any officer of Royal Media Services (e) the Chief Magistrate committed the contempt of court in removing the subject matter of the said High Court Petitions and placing it in the custody of the Commission, (f) the warrants were final orders for shutting down the Applicant's transmitters (g) the object of the Commission was to circumvent the orders of the High Court in the said Petitions.

c) The prayers sought include (a) a declaration that the action by the Commission violated the Applicant's rights under the Constitution as specified in the petition, (b) an injunction requiring the Commission to return the confiscated equipments and (c) a permanent injunction restraining the Commission from interfering with the Applicant's licences, frequencies, spectrums and broadcasting services

36. Mr. Kilonzo for the Commission relied on the case of **Dr. Kiama Wangai v John Mugambi & Republic, [2012] eKLR** which restated the *res sub judice* principle as provided for in **Section 6** of the **Civil Procedure Act** that,

"A court shall not proceed with any proceedings in which the matter in issue is also directly and substantially in issue in previously instituted proceedings between the same parties where such proceedings are pending before the same or any other Court having jurisdiction to grant the same relief claimed."

37. I find that indeed, some of the above-highlighted issues in the Petition are indicative of the substantial similarity between the said Petition and the Revision Application before me. The amended Petition was filed on 13th February 2013 while the initial Petition was dated 4th February 2013. The Revision Application before me is dated 6th February 2013 and filed on the same date. The Petition having been filed did not go to full hearing besides the certificate of Urgency that was heard before Hon. Justice Majanja. Thus on the face of the facts as deposed on behalf of the Commission that indeed a matter of *res sub judice* arises, but, in light of the date of the Amended Petition, the proceedings before the Court that would entertain the amended Petition having been filed subsequently, would have violated the *res sub judice* principle. However, as it was correctly deposed in the Further Affidavit on behalf of the Applicant, the said proceedings were withdrawn by the Petitioner as evidenced by a copy of a Notice of Withdrawal dated 8th March 2013. A perusal of the said Petition file also confirms the said withdrawal by a letter written on behalf of the Commission dated 11th March 2013 acknowledging receipt of that Notice and making a request for an order as to costs in light of this withdrawal. Thus, these proceedings can safely proceed without going against the *res sub judice* principle.

On the scope of the Court's exercising the revisionary jurisdiction

38. Mr. Issa, urged me not to limit myself to the limited provisions of **Section 362** of the **Criminal Procedure Code** in determining the Application since the Application is also anchored on **Articles 165 (6) and (7)** of the **Constitution** which affords wider powers.

39. **Articles 165 (6) and (7) of the Constitution** provide that,

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration”

40. The question is whether by virtue of the Constitutional provision the scope of the Court’s revisionary jurisdiction is expanded beyond the specificity prescribed under **Section 362 of the Criminal Procedure Code**. I find, having regard to the above cited provisions, the power of revision is to be exercised as so specifically as prescribed and the Constitutional provisions do not expand the power than is beyond what is statutorily provided for. I associate myself with the position by Honourable Justice Majanja in a preliminary Ruling No. 2 in **Royal Media Services v The Attorney General & 2 Others, High Court Petition No. 59 of 2013** that,

*“The High Court power of revision under the Code is merely a statutory codification of the Court’s jurisdiction under **Article 165(6) and (7)** and unless there is a good reason to bypass the subordinate court or the High Court procedure established by law, the Court should resist such a temptation”*

41. That statutory demarcation of revisionary jurisdiction is very clear in that in exercising power under **Section 362 CPC** the scope is limited to determining

“...the correctness, legality or propriety of any finding, sentence or order recorded or passed, and ...the regularity of any proceedings of any such subordinate court.”

42. That is not to say that constitutional considerations take a back seat when the Court is applying statutory provisions of the law. Rather, the values and principles enunciated in the Constitution including those concerning fundamental rights and freedoms, remain the bedrock in the exercise of judicial authority at all times. As the Court in **Manfred Walter Schmidt & Another v Republic & Another Criminal Revision No. 569 o 2012** observed,

*“**Articles 18, 19 and 20** as read with **Article 10** demand that the Bill of Rights and national values and principles of governance must now permeate every decision made by every person exercising authority under any law”*

Thus, while the scope of the revisionary jurisdiction of the Court is clear, the guiding principles of the Constitution are not departed from, rather, form the roadmap of all decisions made by any authority, not less the Courts of law.

43. A position was also advanced on behalf of the Applicant that touches on the scope of the Court’s revisionary jurisdiction, that and specific to this case, the Court does make additional considerations in determining this matter where the media is concerned. Mr. Issa directed the court to additional factors such as public interest as established in the case of **Regina v Central Criminal Court**. He also urged the Court to take into account the letter and press statement by the Commission that followed after the orders granting the search warrants were issued.

44. On the matters to take into consideration when exercising the revisionary jurisdiction, the Court ought to take into account the material that was before the Court at the time the application for warrants was made. In this case, the Applicant urged the Court to take into account the actions of the Commission post-issuance of the warrants to look into the issue of ulterior purpose. I am of the view that the Court can as pleaded take into consideration of the matters urged. However, this does not depart from the principle on the matters to consider, rather, any additional considerations are to be made within the context of

determining the correctness, legality and propriety of the lower Court's orders and in this case, whether or not the proceedings were an abuse of the court process.

45. On the matters considered in the case of **Regina v Criminal Court**, I find that while this case provides insightful considerations, the same was also anchored on the particular provisions of the law of that jurisdiction that enumerated the factors that must be taken into account in exercising review. Furthermore, while public interest plays a part, it is not an absolute aspect and one-sided consideration in that this Court must exercise the delicate balance of upholding the rights of all and compliance with the law. As the Court in this case, at paragraph 99,

“...The Judge, alert to the need to safeguard basic freedoms, must simultaneously acknowledge the public interest which underpins the relevant legislation and section 9 in particular, that crime should be discouraged and those responsible for crime should be detected and brought to justice. Balancing these interests where they appear to be in conflict is a decision to be made in each individual case where apparent conflict arises.”

46. Furthermore, in the above cited case, the additional considerations to be taken into account including public interest are expressly provided for in the law. The **Police and Criminal Evidence Act, 1984 of UK in Section 8** empowers the Court to issue warrants authorizing a constable to enter and search premises if satisfied that there are reasonable grounds. This law also provides for special provisions relating to certain items subject to legal professional privilege, otherwise referred to 'special procedure material' to which certain access conditions apply including public interest. In the instant case the material in question was information held by a journalist whose content was alleged to be in breach of the Official Secrets Act, 1989. In the matter before me, the subject matter is in relation to compliance with the applicable regulatory laws. While public interest may be a consideration, it is not a one-sided factor. The circumstances in this case are different and I do not find reason to call for special considerations.

47. On the substantive aspects of the Application, I have narrowed down the following issues for my consideration and determination:

- a) Whether the Applicants had capacity to make the application for search and seizure warrants before the lower court
- b) Whether the application for the warrants was made for an ulterior purpose and thus was an abuse of the Court process
- c) Whether the grant of the orders by the Magistrates' Court satisfied the conditions precedent prescribed under **Sections 118 and 121** of the **Criminal Procedure Code** and **Section 89** of the **Kenya Information and Communications Act**.
- d) Whether the Magistrates Court in entertaining the application for search and seizure warrants and issuing the orders acted in excess of jurisdiction
- e) Whether the constitutional rights of the Applicant were violated

On whether the Applicants had capacity to make the application for search and seizure warrants before the lower court

48. It was submitted for the Applicant that the Commission and the CID in seeking for the search and seizure warrants were exercising prosecutorial powers. Dr. Kamau Kuria, SC contended that 'the investigator' as referred to by Counsel for the Interested Party was a person not known in law. Further, that the intention of the Commission was clear in that the Commission while lacking capacity had already made a decision to prosecute the Applicant. He therefore urged the Court to find that the applicants in the lower Court's proceedings acted as prosecutors while they lacked capacity to exercise prosecutorial powers, and thus, the proceedings and their effect were in effect null and void.

49. To determine this issue, I must make reference to the nature of the proceedings contemplated in **Sections 118 and 121 of the Criminal Procedure Code** and **Sections 89 and 90 of the Kenya Information and Communications Act**. The relevant sections of the cited provisions are,

Section 118 Criminal Procedure Code:

“Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law

Section 89 Kenya Information and Communications Act:

(1) If a court is satisfied by information on oath that there is reasonable ground for suspecting that an offence under the provisions of this Act has been or is being committed, and that the evidence of the commission of the offence is to be found on any premises specified in the information, or in any vehicle, vessel or aircraft so specified, it may grant a search warrant, authorising any person or persons authorised in that behalf by the Commission and named in the warrant, with any police officer, to enter, at any time within one month from the date of the warrant, the premises specified in the information or, as the case may be, the vehicle, vessel or aircraft so specified and to search such premises, vehicle, vessel or aircraft, and to examine and test any station or apparatus or obtain any article or thing found in such premises, vessel, vehicle or aircraft.”

50. There is no doubt that the above provisions contemplate the taking of an action where an offence is committed or for the purpose of facilitating investigation into the commission of an offence; this is an investigative function. The section further defines who may be granted the warrant – a person representing the Commission together with a police officer or other person named in the search warrant. And the issuance of the warrants is the power of a magistrate. Thus, the assertion that no other person has audience with Court lacks ground.

51. On the nature of proceedings in an application for search and seizure warrants, the court before which the application is made, does not sit as an adjudicator into the determination of the innocence or guilt of a person, (which is a prosecution process), rather as an authority over a quasi-judicial process. The proceedings are not prosecution proceedings and therefore the role of the applicants for search warrants is not as prosecutors, but as investigators whose authority is under the check by the courts granting the search and seizure warrants.

52. The fact that the police officer or other person named in the search warrant appears before the Court does not alter the prosecutorial roles defined in the Constitution and by statute. This is because the role of a prosecutor (which only begins once criminal proceedings are initiated,) has not commenced at this stage. It does not suffice to say therefore, as submitted by Counsel for the Applicant, that ‘the investigator’ is not known in the law. The proceedings at this stage are *quasi-judicial* in nature, whose purpose was enunciated by Basdeo, V. in ***The Constitutional Validity of Search and Seizure Warrants in South African Criminal Procedure***, as follows:

“The safeguards against an unjustified interference with the right to privacy and other fundamental rights include prior judicial authorization and an objective standard that is whether there are reasonable grounds to believe based on information obtained under oath that an offence has been or is likely to be committed....”

53. **Article 157(4) of the Constitution** is also indicative of demarcations between prosecutorial function of the DPP and investigative roles of the police. It provides that

(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

54. Furthermore, the **Criminal Procedure Code at Section 89** gives certainty on the process of institution of criminal proceedings, as follows:

a) Proceedings begin by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.” (**Section 89(1)**)

b) The drawing up of a charge which contains a statement of the offence with which the accused is charged and this may be done by a magistrate or a police officer, (**Section 89(4)**)

c) The magistrate, can, if of the opinion that a complaint or formal charge made or presented does not disclose an offence, make an order refusing to admit the complaint or formal charge and record reasons for the order. (**Section 89(5)**)

55. From the above and the facts before me, it is clear that even if there is a clear intention to prosecute; the stage contemplated in **Section 89** of the Criminal Procedure Code has not been arrived at. The decision and action to prosecute is the sole purview of the DPP and the action by the Commission and CID in seeking warrants was not in exercise of prosecutorial authority. The role of the prosecutor does not commence until criminal proceedings have begun. Therefore, the submission by the Applicant to the effect that the Commission undertook a prosecutorial function while lacking the mandate therefore fails.

On whether the grant of the orders by the Magistrates’ Court satisfied the conditions precedent prescribed under **Sections 118** and **121** of the **CPC** and **Section 89** of the **Kenya Information and Communications Act**

56. The Applicant submitted that the Commission ought to have first demanded permission to access the premises before seeking the option of search warrants. The Application in the lower Court was brought under the provisions of **Section 89(1)** of the **Kenya Information and Communications Act** and **Sections 118** of the **Criminal Procedure Code**. The condition precedent referred to by the Applicant is not requisite under the said provisions.

57. **Section 89(1)** requires satisfaction to the court that *there is reasonable ground for suspecting that an offence has been or is being committed*. Only **Section 89(2)** of the **Kenya Information and Communications Act** renders the condition precedent of demand for entry into the premises. This although not for the strict determination of this court, nevertheless calls for comment. The existence of two separate provisions in the **Kenya Information and Communications Act** that can be invoked independent of each other, and especially in light of the provisions of the **Sections 118** of the **Criminal Procedure Code** creates confusion in implementation and further on what purpose would be served in having the additional requirement for demand for entry. Further in view of the nature of an application for search warrants, there is always the real possibility that prior demand for entry would be defeated by the person against whom they are sought. The mandate of the Commission, intrinsically envisages a situation where the Commission would ordinarily have access to premises in the process of undertaking routine inspection as it was deposed to by Mr. John Omo. That said, on this issue, the statutory provisions relied on were satisfied before the lower Court.

On whether the Magistrates Court in entertaining the application for the search warrants and issuing the search and seizure warrants acted in excess of jurisdiction

58. The Applicant extensively submitted that the Magistrate’s Court acted in contempt of the orders of the High Court and acted in disregard of the hierarchy of Courts thereby undermining the authority of the High Court. From the record before the lower Court there was information to the effect that there were existing orders of the High Court, and an averment that, while those proceedings were between the same parties, the matters in the said Petitions were not the same subject matter. Mr. Kilonzo for the

Commission had urged that those orders ought to be read in the context of the proceedings in which they were issued.

59. It is not for this Court to determine any issue of the alleged contempt of the High Court orders. For emphasis, contempt of court orders cannot be brought against a judicial officer as a result of exercising judicial function. As **Section 6** of the **Judicature Act** provides,

“No judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of;...”

60. The submission by the Applicant that the Magistrate acted in contempt of High Court orders is in my view, a misapprehension of contempt proceedings. Secondly, the matter of contempt cannot be addressed in this forum, rather, before the Court the orders of which the contempt allegations are the subject. To this effect, the Applicant submitted that notice to institute contempt proceedings against the Commission had been filed. Thirdly, contempt proceedings are only instituted against the person to whom the orders were directed. The said orders were not directed at the Magistrate. Thus, in dealing with the issues raised on this matter, I shall confine myself to considering whether the Magistrate acted in excess of jurisdiction.

61. Courts are at liberty in the process of adjudicating matters before them to issue temporary court orders. This is the nature of the orders being relied upon by the Applicant as being binding upon the Commission. Such orders serve the purpose of preserving the matter which is the subject of the proceedings and they cease to have effect once the matter is determined. I however, need to make a distinction on the nature of the proceedings before me and the ones before the various courts in which those orders were issued:

a) **High Court Petition No 244 of 2011** – is a matter that was initiated by the Media Owners Association in a representative capacity to challenge the intended enforcement by the Commission of a new regulatory framework as contained in a notice entitled, ‘*Licensing of Existing Broadcasters under the New Regulatory Framework*’ published in the Daily Nation on 11th November. In this matter, Hon. Justice Lenaola issued conservatory injunctive orders on 14th November 2012 which read in part as follows

An order for certiorari do issue and remove into the HC and quash the decision of the CCK contained in the Public Notice appearing in the DN newspaper dated 11th November 2011.

An order of prohibition do issue prohibiting the CCK from inviting applications for licenses for broadcasting services and/or issuing licensing for broadcasting services on the basis that such applicants must have permits issued by the Minister for Information and Broadcasting either s it has purported to do by the said public notice or at all.”

b) **High Court Petition No. 346 of 2012** , which was instituted by Royal Media Services challenging among others the powers of the Commission to regulate the licensing of broadcasters. The matter arose as a result of a publication of a notice by the Commission on 17th May 2012, on unauthorized use of broadcasting frequencies listed as follows:

No.	Site	Frequency	Broadcaster
		88.8 Mhz	Egesa FM
1.	Enchore Hill	98.5 Mhz	Change FM
		90.2 Mhz	Radio Citizen
2.	Migori	95.4 Mhz	Ramogi FM

		93.2 Mhz	Radio Citizen
3.	Riat Kiboswa	96.8 Mhz	Change FM
		100.4 Mhz	Mulembe FM
4.	Siaya	98.6 Mhz	Radio Citizen
		101.0 Mhz	Ramogi FM
5.	Webuye	98.0 Mhz	Radio Citizen
6.	Nyahururu Maili Nane	95.3 Mhz	Radio Citizen
		103.2 Mhz	Inooro FM
7.	Nyadundo	98.6 Mhz	Change FM
8.	Mazeras	94.2 Mhz	Bahari FM
		98.9 Mhz	Inooro FM
9.	Msambweni	96.2 Mhz	Bahari FM
		101.1 Mhz	Radio Citizen
10.	Kilifi	94.5 Mhz	Radio Citizen
		102.2 Mhz	Bahari FM
11.	Malindi	TV Channel 39	Citizen TV
12.	Meru	104.7 Mhz	Muuga FM
13.	Vuria Hill	97.1 Mhz	Bahari FM
14.	Narok	92.6 Mhz	Inooro
15.	Kisumu	104.4 Mhz	Mulembe FM

The temporary orders issued by me on 15th August 2012 read in part as follows:

“That pending the determination of this application a conservatory injunctive order be and is hereby ordered for 14 days restraining the 2nd and 3rd respondents or any of them from restricting or in any way howsoever interfering with the Petitioners private broadcasting with the under-mentioned or any other frequencies or broadcasting spectrums issued by the 3rd Respondent”

That pending the determination of this application a conservatory injunctive orders be and is hereby ordered for 14 days restraining the 2nd and 3rd respondents or any of them from restricting or in any way howsoever interfering with the Petitioners private broadcasting with the under-mentioned or any

other frequencies or broadcasting spectrums issued by the 3rd Respondent”

No.	Site	Frequency	Broadcaster
1.	Kapenguria	96.1 Mhz	Radio Citizen
2.	Webuye	100.5 Mhz	Radio Citizen
3.	Webuye	94.5 Mhz	Radio Citizen
4.	Webuye	89.6 Mhz	Milembe FM
5.	Webuye	TV Channel 50	Citizen TV
6.	Limuru	106.7Mhz	Radio Citizen
7.	Limuru	106.7 Mhz	Inooro FM
8.	Limuru	107.1 Mhz	Ramogi FM
9.	Limuru	90.4 Mhz	Chmage FM
10.	Limuru	103.2 Mhz	Egesa FM
11.	Limuru	7.9 Mhz	Mulembe FM
12.	Limuru	96.0 Mhz	Hot 96
13.	Limuru	TV Channel 39	Citizen TV
14.	Kisekini	94.2 Mhz	Muuga FM
15.	Kisekini	102.2 Mhz	Musyi FM
16.	Londiani Hill	100.5 Mhz	Radio Citizen
17.	Londiani Hill	95.0 Mhz	Change
18.	Londiani Hill	89.8 Mhz	Inooro FM
19.	Londiani Hill	102.5 Mhz	Hot 96
20.	Londiani	TV Ch. 12	Citizen TV
21.	Eldoret	94.2 Mhz	Mulembe FM
22.	Eldoret	97.5 Mhz	Change FM
23.	Eldoret	87.7 Mhz	Hot 96
24.	Eldoret	107.0 Mhz	Inooro FM
25.	Eldoret	90.4 Mhz	Radio Citizen
26.	Eldoret	TV Ch. 31	Citizen TV

62. Since the orders are made for an interim function and in the context of the language of such orders, ‘*pending the determination of this application*’ it therefore follows that their application cannot be stretched beyond the matter in issue, the status of which ought to be preserved for the purposes of those proceedings. Furthermore, **Petition 346 of 2012** went to full hearing and a judgment delivered on 18th January 2013 in which the Petitioner’s case was dismissed. Thus, the orders granted as above have since ceased to have effect and in this instance, it would be absurd to expect such orders to impact on other matters beyond the issues in those proceedings. Secondly, from the highlights above, it is clear that the subject matters are different; thus, the conservatory orders do not afford a blanket application for the benefit of the Applicant. This position was adopted in the case of ***Royal Media v Telkom Kenya EALR [2001] 1 EA 201***. In view of the above, I find that the lower Court did not act in excess of jurisdiction.

On whether the application for the warrants was made for an ulterior purpose and thus was an abuse of the Court process

63. It was submitted for the Applicant that the intention of seeking the search and seizure warrants by the Commission was for other purposes other than the purpose envisaged under the relevant provisions of the law that is, the securing of evidence to be used in criminal proceedings. And thus were an abuse of the process of the court.

64. Proceedings amount to an abuse of the process of the Court if, as expressed by **I.H. Jacob, The Inherent Jurisdiction of the Court in Current Legal Problems, 1970, University College London, Volume 23, at Pp 42-43**, they “...*fall within one or more of the following categories of proceedings:*

- a) *Proceedings which involve a deception of the court or are fictitious or constitute a mere claim;*
- b) *Proceedings where the process of the court is not being fairly or honestly used but its employed for some ulterior or improper purpose or in an improper way;*
- c) *Proceedings which are manifestly groundless or without foundation or which serve no useful purpose;*
- d) *Multiple or successive proceedings which cause or are likely to cause improper vexation or oppression”*

65. The above listed are not exhaustive and are to be determined in the circumstances of each case. It has not been demonstrated as submitted by Mr. Issa that the orders were sought for an unlawful purpose to circumvent the orders of the High Court granted before the constitutional division. I have already found hereinbefore the orders made in the Petitions referred to do not apply to the proceedings herein.

66. Mr. Issa also urged the Court to take into account the Press Statement that was issued by the Commission following the grant of orders to the effect that the Commission was shutting down broadcasting by the Applicant in which it confirmed the shutting down of 6 transmitters and intended to shut down 11 more transmitters. The processes leading to the issuance and execution of the warrants were as follows:

- a) Surveillance conducted on various dates to establish the status of FM and TV bands in various areas. Mr. John Omo also deposed that the Commission had undertaken routine inspection.
- b) Public Notice published in the Daily Nation on 30th November 2012 on *Unauthorized Use of Broadcast Frequencies* giving 30 days notice to cease using the offending frequencies failure to which the Commission would take necessary action.
- c) Letter by the Commission dated 3rd December 2012 addressed to the Managing Director of the Applicant company requiring the Applicant to dismantle the offending transmitters pursuant to **Section 35**

an **41** of the **KICA** within 30 days failure to which appropriate action would be taken

d) Application for search and seizure warrants by the Commission which was granted on 30th January 2013

e) Press statement by the Commission dated 2nd February 2013 confirming the shutdown of illegal broadcast transmitters being used by the Applicant

67.The action by the Commission above was anchored on the provisions of **Section 35** and **Section 41** of the **Kenya Information and Communications Act**

Section 35 provides, “(1) Subject to subsection (2), no person shall, establish or use any radio communication station or apparatus except in accordance with the terms of a licence granted under section 36.

(2) A person who contravenes the provisions of subsection (1) commits an offence and shall be liable on conviction to a fine not exceeding five million shillings, or to imprisonment for a term not exceeding three years, or to both.”

Section 41 provides that,

“(1) If the Commission is of the opinion—

(a) that any apparatus does not comply with the requirements applicable to it under regulations made for the purpose under subsection (1) of section 40; or

(b) that either:—

(i) the use of the apparatus is likely to cause undue interference with any radio communication used for the purpose of any safety of life service or for any purpose on which the safety of any person or of any vessel, aircraft or vehicle may depend; or

(ii) the use of the apparatus has caused or is causing undue interference with any other radio communication apparatus in circumstances where all reasonable steps to minimise interference have been taken in relation to the situation or apparatus receiving such radio-communication,

it may serve on the person in whose possession the apparatus is, a notice in writing requiring that, after a date fixed by the notice, not being less than thirty days from the date of service thereof, the apparatus shall not be used, whether by the person to whom the notice is given or otherwise, or shall only be used in such manner, at such times and in such circumstances as may be specified in the notice:

Provided that if the Commission is satisfied that the use of the apparatus in question is likely to cause undue interference with any radio communication used for the purpose of any safety-of-life service or for any purpose on which the safety of any person or of any vessel, aircraft or vehicle may depend, the date to be fixed by the notice may be the date of the service thereof.

(5) Any person who, knowing that a notice of the Commission under this section is in force with respect to any apparatus, uses such apparatus, or causes or permits it to be used in contravention of the notice, commits an offence and shall be liable on conviction to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years, or to both.”

68. From the above, it is clear that the Commission acted in line with the procedure as enumerated by the law. On the contrary, there is no indication as to any action that the Applicant might have taken following receipt of notice despite there being an elaborate procedure through which the targeted licensee may consult with the Commission with regard to issues raised on the unauthorized use of transmitters.

69. Furthermore, the assertion that the Commission had made up its mind to seek warrants in order to respond to the Applicant's non-compliance on the offending frequencies does not hold ground since the process for seeking search warrants is meant to safeguard the interests of the Applicants. Secondly, the Commission is still under the authority of the law and cannot take such action when it has not been authorized. Thirdly, the effect of executing the warrants as issued was to seize the offending equipment thus the collateral effect of executing the warrants, when legally granted would be to shut down. This does not point to the conclusion that there was an ulterior purpose in so doing.

On whether the constitutional rights of the Applicant were violated

70. It is the contention of the Applicant that the action by the Respondent and the Commission of seizing the Applicant's equipment was evidence obtained in contravention of the Applicant's rights under **Articles 27, 40, 48 and 50(4)** of the **Constitution** thus inadmissible in any criminal proceedings. The cited provisions provide as follows:

Article 27: (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law...

Article 40: (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—...

Article 48: The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

Article 50(4): Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice."

71. On the right to equality and non discrimination under Article 27, there was no submission or demonstration by the Applicant how these have been violated. The procedure through which the property of the Applicant was acquired is legally provided for under the law, and is in effect, a rare instance, where the law makes provisions for actions that may in effect encroach on the rights and freedoms of citizens. It is for this reason that I have in the foregoing reasoning examined the impugned actions with a view to assessing whether the same have been done in contravention of the governing provisions of the law. The rights that the Applicant has alleged were violated do not fall under the category of the non-derogable rights under **Article 25** of the **Constitution**.

72. Furthermore, the **Constitution** in **Article 34 (3)** recognizes that the media has the freedom to exercise their functions independently but is subject to licensing procedures. The provision thus reads,

"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."

73. Having carefully considered all the raised herein I find that the Application lacks merit and I hereby dismiss the same

SIGNED DATED and DELIVERED in open court this 18th day of April 2013.

L. A. ACHODE

JUDGE