



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 557 OF 2013**

**BETWEEN**

**ROYAL MEDIA SERVICES LTD.....1<sup>ST</sup> PETITIONER**

**NATION MEDIA GROUP LIMITED .....2<sup>ND</sup> PETITIONER**

**STANDARD GROUP LIMITED .....3<sup>RD</sup> PETITIONER**

**AND**

**ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE MINISTRY OF INFORMATION**

**COMMUNICATIONS AND TECHNOLOGY.....2<sup>ND</sup> RESPONDENT**

**COMMUNICATIONS COMMISSION OF KENYA.....3<sup>RD</sup> RESPONDENT**

**SIGNET KENYA LTD.....4<sup>TH</sup> RESPONDENT**

**STAR TIMES MEDIA LTD.....5<sup>TH</sup> RESPONDENT**

**PAN AFRICAN NETWORK GROUP KENYA LTD.....6<sup>TH</sup> RESPONDENT**

**GO TV KENYA LTD.....7<sup>TH</sup> RESPONDENT**

**AND**

**CONSUMER FEDERATION OF**

**KENYA (COFEK).....1<sup>ST</sup> INTERESTED PARTY**

**WEST MEDIA LTD .....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. The petitioners are broadcasting companies who have moved this Court by a petition seeking

- enforcement of their rights as broadcasters under **Articles 33 and 34** of the Constitution. They allege that the respondents, by limiting the broadcast signal distribution licence to certain licencees have violated their freedom and will affect the rights of the public and in effect disenfranchise them. The issue of violation of fundamental rights and freedoms is founded on the proposed migration from analogue to digital television broadcasting and the manner in which it is being implemented and whether such implementation violates Constitutional provisions.
2. Through a Notice of Motion dated 5<sup>th</sup> December 2013, the petitioners have moved the court to certify that the petition raises substantial questions of law on the fundamental rights and freedoms of broadcasters, which are matters of public interest. **Article 165(4)** of the Constitution provides that, *“Any matter certified by the court as raising a substantial question of law under clause 3(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.”*
  3. The parties before me have made oral and written submissions which I have considered. Several cases have been cited to illustrate some of the principles applicable in consideration of whether the court should certify the matter under **Article 165(4)**. These cases include; *Judicial Service Commission v Speaker of the National Assembly and Five Others*, Nairobi Petition No. 518 of 2013[2013]eKLR, *Bidco Oil Refineries Limited v The Attorney General and Three Others*, Nairobi Petition No. 177 of 2012[1013]eKLR, *Intoil Limited and Another v The PS, Ministry of Energy and Others*, Nairobi Petition No. 156 of 2006 [2012]eKLR, *Community Advocacy and Awareness Trust & Others v The Attorney General*, Nairobi Petition No. 243 of 2011 (Unreported), *J. Harrison Kinyanjui v The Attorney General and Another*, Nairobi Petition 74 of 2011[2012]eKLR and *Gilbert Mwangi Njuguna v The Attorney General*, Nairobi Petition No. 267 of 2009 [2012]eKLR.
  4. The cases I have cited set out some of the principles which govern the exercise of discretion in an application such as the one before the court. They can be distilled as follows;
    - a. The grant of a certificate under **Article 165(4)** is an exception than the rule.
    - b. The substantial question of law is a question to be determined in the circumstances of the case. Substantial issue of law is not necessarily a weighty one or one that raises a novel issue of law of fact or even on that is complex.
    - c. Public interest may be considered but is not necessarily a decisive factor.
    - d. The court ought to take into account other provisions of the Constitution, the need to dispense justice without delay having regard to the subject matter and the opportunity afforded to the parties to litigate the matter upto the Supreme Court.
  5. It cannot be gainsaid that this case raises issues of enforcement of fundamental rights and interpretation of the Constitution particularly the form, content and extent of media freedom guaranteed by **Article 34** of the Constitution. Like many matters concerning the Constitution, such issues will arise for the first time and judges will be called upon to make a determination. As I stated in the case of *Community Advocacy and Awareness Trust v The Attorney General (Supra)*, *“These questions posed are the bread and butter of judges of this division. They are the kind of questions that the judges of the High Court will be required to deal with when discharging their judicial duties..”*
  6. In my view the petition does not raise matters which cannot be adequately dealt with by a judge of the High Court. I conclude that the issues of **Article 34** and its interpretation and application to the facts of this case do not meet the threshold of a *“substantial question”* under **Article 165(4)**.
  7. The petitioner’s Notice of Motion dated 5<sup>th</sup> December 2013 is dismissed with costs in the petition.

**DATED and DELIVERED at NAIROBI this 10<sup>th</sup> day of December 2013**

**D.S. MAJANJA**

**JUDGE**