



**Cradle – Children Foundation (suing through the Trustee Geoffrey Maganya)
v Nation Media Group Limited ex parte Cradle – Children Foundation (suing
through Geoffrey Maganya) (Judicial Review Miscellaneous Application 217 of 2011)
[2012] KEHC 3 (KLR) (Judicial Review) (21 December 2012) (Judgment)**

*Cradle – Children Foundation (suing through the Trustee Geoffrey Maganya) v Nation Media Group
Limited ex parte Cradle – Children Foundation (suing through Geoffrey Maganya) [2012] eKLR*

Neutral citation: [2012] KEHC 3 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 217 OF 2011
CW GITHUA, J
DECEMBER 21, 2012**

**IN THE MATTER OF: AN APPLICATION BY CRADLE – THE CHILDREN
FOUNDATION THROUGH GEOFFREY MAGANYA FOR JUDICIAL REVIEW
ORDERS SOUGHT AGAINST THE NATION MEDIA GROUP LIMITED**

AND

**IN THE MATTER OF: ALLEGED BREACHES OF SECTION 39
OF THE PERSONS WITH DISABILITIES ACT NO 14 OF 2003.**

BETWEEN

REPUBLIC APPLICANT

AND

NATION MEDIA GROUP LIMITED RESPONDENT

AND

**CRADLE – THE CHILDREN FOUNDATION (SUING THROUGH GEOFFREY
MAGANYA) EXPARTE**

**Failure by television stations to provide sign language amounts to discrimination against persons
with hearing disabilities**

*The application sought an order of mandamus to compel the respondent (Nation Television) to comply with section
39 of the Persons with Disabilities Act which provided that all television stations shall provide a sign language
inset or subtitles in all newscasts and educational programmes, and in all programmes covering events of national*



significance. The court held that failure by television stations to provide sign language amounts to discrimination against persons with hearing disabilities.

Reported by Halonyere Andrew & Nowamani Sandrah

Constitutional Law – *fundamental rights and freedoms - enforcement of fundamental rights and freedoms - rights of persons with disabilities - claim that there was failure to provide sign language inset or subtitles in newscasts, educational programmes and all programmes covering events of national importance – whether such omission violated the rights of persons with hearing disabilities to equality, equal protection and benefit of the law – Persons with Disabilities Act, section 39 - Constitution of Kenya, 2010, article 27.*

Constitutional Law – *locus standi – parties to the petition to prosecute fundamental rights and freedom - whether the applicant being a charitable trust that enhanced the rights of children had the locus standi to prosecute the application to enhance the rights of persons with disabilities.*

Civil Practice and Procedure - *Judicial review - application for an order of mandamus - whether judicial review proceedings could be instituted against a private body.*

Brief facts

The applicant a charitable, non-profit making trust whose mandate was to protect, promote and enhance the rights of the child through court representation, advocacy and law reform, brought an application seeking an order of *mandamus* to compel the respondent (Nation Television) to comply with the provisions of section 39 of the Persons with Disabilities Act which provided that all television stations shall provide a sign language inset or subtitles in all newscasts and educational programmes, and in all programmes covering events of national significance.

The application was *inter-alia* based on the grounds that the respondent's television station had without any plausible explanation failed to ensure that all its newscasts, educational programmes and coverage of events of national significance complied with the provisions of section 39.

The respondent on its part submitted that the applicant had *no locus standi* in the matter, arguing that the applicant was only mandated by its trust deed to protect the rights of children and not the rights of all persons with disability. The respondent also contended that the applicant had not demonstrated by way of an affidavit or other document that it was actually acting in the interest of another person, group or class of persons.

Issues

- i. Whether the applicant being a charitable trust that enhanced the rights of children had the *locus standi* to prosecute the application to enhance the rights of persons with disability.
- ii. Whether private companies which did not execute any public function could be amenable to the High Court's supervisory jurisdiction.
- iii. Whether there was some interplay between administrative law on which the remedy of judicial review was anchored and constitutional law.
- iv. Whether by failing to comply with section 39 of the Persons with Disabilities Act, the respondent has violated and continued to violate the rights of children with hearing disabilities to equality, equal protection and benefit of the law.
- v. Whether the respondent's failure to provide sign language inset or subtitles in its newscasts, educational programmes and all programmes covering events of national importance as provided for in section 39 of the Persons with Disabilities Act, violated the rights of persons with hearing disabilities to equality, equal protection and benefit of the law.
- vi. Whether the fact that there could be other broadcasters who were in breach of their statutory and constitutional obligations of not providing sign language inset could vindicate the respondent from complying with its own obligations under the law.
- vii. Whether the duty to provide for the needs of the vulnerable and marginalized groups which include persons with disability solely was the duty of the state and not on private citizens.



Relevant provisions of the Law

Constitution of Kenya, 2010

Article 20 - Application of Bill of Rights

(1) The Bill of Rights applies to all law and binds all State organs and all persons.

Article 27 - Equality and freedom from discrimination

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

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

Article 33 - Freedom of expression

(1) Every person has the right to freedom of expression, which includes—

(a) freedom to seek, receive or impart information or ideas;

Article 260 - Interpretation

“A person” includes a company, association or other body of persons whether incorporated or unincorporated.

Persons with Disabilities Act, Cap 133

Section 39 - Television programmes

All television stations shall provide a sign language inset or subtitles in all newscasts and educational programmes, and in all programmes covering events of national significance.

Held

1. In judicial review proceedings, an applicant was not required to demonstrate that he was personally aggrieved by the decision or action which was under challenge. All that an applicant needed was to demonstrate *locus standi*- that he had sufficient interest or stake in the matter to which the application relates.
2. A person who commenced an action to challenge an administrative decision or to enforce constitutional rights was not required to demonstrate by way of affidavits or other documentation that he was representing the public interest. Therefore the applicant had *locus standi* to institute and maintain the proceedings before court.
3. It was not disputed that the respondent was a limited liability company incorporated under the Companies Act. It is also common ground that though the respondent was licenced under the provisions of the Kenya Information and Communication Act, it derived its mandate to carry out its broadcasting function not from any statutory authority but from its memorandum and Articles of Association. There could not therefore be any doubt that the respondent was not a public or statutory body which would automatically fall within the court's judicial review jurisdiction.
4. The mere fact that a body or entity was engaged in the business of rendering services to members of the public did not by itself mean that it was performing a public function. Public functions were those functions which were meant for public benefit and not for private gain. Such functions had to be characterized by some public element.
5. The respondent was incorporated as a private company and did not enjoy any direct or indirect support from the Government or any of its Agencies. It did not also have a duty to act judicially like the panel of take overs and mergers had in its role in the regulation of the United Kingdom's financial markets. In the circumstances, the respondent was a private company which did not execute any public function and it was not therefore subject to the courts supervisory jurisdiction. It was therefore not amenable to judicial review.
6. Although the applicant sought the enforcement of its constituent's constitutional rights through a judicial review application, there was some interplay between administrative law on which the remedy of judicial review was anchored and constitutional law. In the interest of administering substantive justice as envisaged in the existing constitutional dispensation, the court should not be overly



- concerned with the way or manner in which litigants' grievances were presented to the court provided that they were clear and justiciable. The court would in the interest of justice proceed to consider and determine the application as a constitutional petition for the enforcement of constitutional rights under article 22 of the Constitution.
7. Since the respondent was within the definition of a person under article 260 and was therefore bound by the provisions of the Constitution generally as well as the Bill of Rights. That meant that it had a constitutional duty and obligation to respect and obey all the provisions of the Constitution. If a violation of the rights of an individual by the respondent was demonstrated, then the court would have power under article 23 to grant appropriate relief.
 8. Article 54 (1) (c) of the Constitution guaranteed to persons with disability the right to reasonable access to all places, public transport and information. When read together with article 2, 20 and 260, article 54 (1) (c) imposed an obligation on all persons, not just the State, to ensure access by persons with disabilities to all places, public transport and information.
 9. Though the state should bear the greatest responsibility in providing for the needs of vulnerable groups in society, private citizens also had a role to play in that regard, that was informed by the fact that the Constitution expressly made it clear that there was both vertical-state to citizen, and horizontal-citizen to citizen application of the Bill of Rights.
 10. The respondent being a corporate citizen Kenya was duty bound to fulfill its own obligations under the Constitution. The respondent could not argue that it could not provide ramps on its building to enable persons with physical disabilities to access its facilities because it was not the state or a public entity. Similarly, the respondent could not be heard to argue that it could not provide sign language broadcasting for the benefit of children or persons with hearing disabilities because it was not part of the State.
 11. The provisions of the Constitution, coupled with the express provisions of Section 39 of the Persons with Disabilities Act, imposed an express obligation on all persons in the position of the respondent to provide access to persons with hearing disability access to the information that they impart to the general public in their television programmes. Failure to provide such information to persons with hearing disabilities by not availing sign language interpreters amounted to indirectly affording them less favourable treatment than the respondent afforded those who were not hearing impaired.
 12. A reading of article 34 (2) (a) clearly showed that there was nothing in the requirement contained in section 39 of the Act that amounted to a limitation of the respondent's freedom to produce or circulate any publication or to disseminate information by any medium. All that it required was that the respondent extends the information it chose to broadcast to a vulnerable group in Kenya's society to which it entitled just like everybody else in order to keep abreast with current affairs and events of national significance.
 13. The State did not require the respondent to exclusively use sign language in its programmes. If this had been the import of section 39 of the Act, it would have been a clear violation of the respondent's rights under article 44. However, that was not the position in the case. What section 39 required of the respondent was that in addition to its normal broadcasts in any spoken language of its choice, it should avail an interpreter for those who have hearing disability and were not able to understand spoken language. The respondent's failure to comply with section 39 of the Act amounted to indirect discrimination of the applicant's constituents on the basis of their hearing disability.
 14. This matter required a balancing of the interests of persons with hearing disabilities to access information and the private interest of the respondent to maximise on profits. While the court appreciated the cost that would go with compliance with the requirement of the law, such cost should not be an inhibition or restriction on the court to play its rightful role in the advancement and protection of the rights of marginalized communities within Kenya's society. Money could not be a



- substitute to the enjoyment of the rights bestowed constitutionally and statutorily to persons with hearing disabilities.
15. It was incumbent upon the respondent to provide to the applicant's constituents what the Constitution and law gave them, that was a constitutional and statutory obligation and the respondent and all other television broadcasters had no option but to comply.
 16. The court took judicial notice that as a matter of Government policy, all television broadcasters were being required to migrate from analogue to digital signal in fulfilment of Kenya's obligations as a member of the International Telecommunication Union (ITU). In the circumstances, the respondent's argument of double investment in sign language equipment could not hold.
 17. The court could only deal with the parties before it. The fact that there might have been other broadcasters who were in breach of their statutory and constitutional obligations did not mean that the respondent could be excused from complying with its own obligations under the law.
 18. The claim that the order sought if granted would be discriminatory could not be used to deny the applicant its right to enforce its constituent's constitutional rights against the respondent. The application was a wakeup call to the regulator in the communication and media industry, namely the Communication Commission of Kenya to take its regulatory role seriously and ensure that all television stations in the country comply with the provisions of the Persons with Disabilities Act particularly section 39 in the interest of the public.
 19. Article 23 revealed that a court was empowered to grant appropriate relief which might include but was not limited to the reliefs stated. An appropriate relief would be an order directing the respondent to comply with its statutory obligations under section 39 of the Persons with Disabilities Act.

Application allowed.

Orders

Respondent's ordered to provide a sign language inset or sub-titles in all its newscasts, educational and all programmes of national importance within a period of ninety (90) days from the date of judgment. Each party to bear its own cost.

Citations

Cases

Kenya

1. *Githunguri v Githunguri* Civil Appeal 30 of 1978; [1979] KECA 2 (KLR) - (Explained)
2. *Republic v Kenya Cricket Association & 2 others* Civil Miscellaneous Application 1723 of 2004; [2006] KEHC 2028 (KLR) - (Explained)
3. *Republic v Kenya National Examination Council Executive Officer & 2 others ex parte LMB & 319 others* Civil Appeal No 266 of 2006; [2006] eKLR - (Explained)

United Kingdom

Panel on Takeovers and Mergers ex parte Datafin plc and another [1987] QB 815; [1987] WLR 699; [1987] 1 All ER 564 - (Followed)

Texts

1. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn
2. Kaluma, P., (Ed) (2009), *Judicial Review Law Procedure and Practice* Nairobi: Law Africa, 2nd Edn p 32
3. Mackay, JPH., (Lord of Clashfern) et al (Eds) (1995), *Halsbury's Laws England* London: Butterworths 4th Edn p 91

Statutes

Kenya

1. Companies Act (cap 486) In general - (Cited)



2. Constitution of Kenya, 2010 articles 2, 7(3); 20; 21(3); 22(2); 27(1)(5); 33(1)(a); 34(2)(b); 44(1); 54(1)(c); 258(2); 260- (Interpreted)
3. Kenya Information and Communication Act (cap 411A) In general- (Cited)
4. Persons with Disabilities Act, 2003 (Act No 14 of 2003) section 39 - (Interpreted)
5. Registration of Documents Act (cap 285) In general - (Cited)

Instruments

1. Convention on the Rights of Persons with Disabilities (CRPD), 2006
2. International Covenant on Civil and Political Rights (ICCPR), 1966
3. Universal Declaration of Human Rights (UDHR), 1948

JUDGMENT

1. The *ex parte* applicant (hereinafter referred to as the applicant) is the Cradle, a charitable, non-profit making trust constituted by a declaration of deed which is duly registered with the Registrar of Documents in accordance with the *Registration of Documents Act*, chapter 286 of the Laws of Kenya. The mandate of the applicant is to protect, promote and enhance the rights of the child through court representation, advocacy and law reform.
2. The judicial review proceedings in this case were instituted on behalf of the applicant by one Geoffrey Maganya, an Advocate of the High Court who also prosecuted the application on behalf of the applicant.
3. The respondent is a limited liability company incorporated under the provisions of the *Companies Act*, chapter 486 of the Laws of Kenya. The respondent operates a television station currently trading under the name and style of Nation Television.
4. Through the notice of motion dated September 27, 2011, the applicant approached this court seeking an order of *mandamus* to compel the respondent to comply with the provisions of section 39 of the *Persons with Disabilities Act* ((hereinafter referred to as the Act).
5. The application is based on the grounds stated on its face chief among them being that:
 - a. The Persons with Disabilities Act was enacted in 2003 and subsequently received presidential assent on December 31, 2003.

On January 1, 2010, the Minister for Gender, Children and Social Services vide Legal Notice Number 182 of 2009 operationalized the provisions of section 39 of the Act which requires all television stations to provide a sign language inset or subtitles in all newscasts, educational programmes and all programmes covering events of national significance;
 - b. The applicant has noted that the respondent's television station, Nation Television, has without any plausible explanation failed to ensure that all its newscasts, educational programmes and coverage of events of national significance comply with the provisions of section 39 of the Act;
 - c. That the respondent's failure to comply with the provisions of section 39 of the Act has deprived persons with hearing disabilities of the benefits that are otherwise enjoyed by persons without disabilities;



- d. The respondent's failure to comply with the provisions of section 39 of the Act has also resulted in the violation of rights of persons with hearing disabilities not to be discriminated against on account of their disability, which rights are enshrined in a host of international instruments which have been ratified by Kenya to the extent that they are unjustifiably deprived of the benefits that are otherwise enjoyed by persons without disabilities;
 - e. The applicant deems it fit to seek redress on behalf of all persons with disabilities whose rights have been infringed and continue to be infringed by the respondent's failure to comply with the provisions of section 39 of the Act;
 - f. It is imperative that this honourable court do compel the respondent to comply with the provisions of section 39 of the Act so as to stem violation of the rights of persons with hearing disability that have been highlighted above.
6. The application is supported by the Statutory Statement dated September 27, 2011 and the verifying affidavit sworn by Geoffrey Maganya on September 27, 2011.
 7. The application is opposed Mr Sekou Owino, a legal officer in the employ of the respondent swore a replying affidavit on behalf of the respondent which was filed on 1st December 2011.
 8. Before the filing of the replying affidavit, the respondent had filed a notice of preliminary objection dated 8th November 2011. Ms. Wanjiru Ngige, learned counsel for the respondent agreed with the court's proposal that the preliminary objection be argued within the main application.
 9. In support of their respective cases, counsel on record for the parties filed written submissions which they briefly highlighted before me on 23rd of July 2012
 10. Before analysing the issues raised in this case, I think it is important to give a brief outline of the applicant's case in order to appreciate the context within which the application was filed.
 11. It is the applicant's case that the Persons with Disabilities Act and particularly section 39 thereof was intended to enable persons with hearing disabilities including children (hereinafter referred to as the applicant's constituents) to keep abreast of current affairs by receiving information through educational programmes and newscasts aired in both public and private television stations. The applicant asserted that such information would broaden its constituent's knowledge and help them achieve their full potential.
 12. The applicant claimed that though it had by letter dated October 30, 2010 requested the respondent to comply with the provisions of section 39 of the Act, the respondent had blatantly neglected, failed or refused to do so necessitating the filing of the current application.
 13. The respondent in its opposition to the applicant's motion filed a notice of preliminary objection dated November 8, 2011 in which it objected to the applicant's motion on the following two grounds:
 1. That the respondent is not a public body to be amenable to the judicial review jurisdiction of this court.
 2. That the application is fatally defective having been brought through the wrong procedure and in the wrong forum.
 14. These two points were also repeated in the respondent's replying affidavit in which the respondent urged the court to dismiss the applicant's motion on the following main grounds.



- a. That it is the duty of the state, not the respondent, under article 21(3) of the Constitution to address the needs of vulnerable groups within the society. The respondent is therefore wrongly sued and the applicant ought to direct its suit to the State or the State Broadcaster.
 - b. That protection of the rights of persons with disabilities does not fall within the objects of the applicant. The trust deed limits the applicant's mandate to the rights of children, not the rights of the persons with disabilities. The applicant therefore has no locus standi to prosecute the application.
 - c. Section 39 of the Persons with Disabilities Act is unconstitutional because it seeks to compel broadcasters to conduct their broadcasts in a particular fashion contrary to the express provisions of article 34 (2)(a) of the Constitution
 - d. Implementing sign language insets would require a redesign of the studio facilities of the respondent's Television Station and purchase of broadcast equipment compatible with the analogue format currently in use, which will be costly and would subject the respondent to heavy losses given that more equipment will have to be bought to comply with the new digital regime expected to be operationalized within 7 months.
 - e. The application seeks discriminatory orders as it is only directed against the respondent whereas there are more than 10 television stations broadcasting in the country. If the order sought is issued, it will unfairly distort competition and will amount to a breach of article 34(2) (b) of the Constitution
15. Having carefully considered the pleadings herein, the submissions made by counsel on record both written and oral alongside all the authorities cited, I find that three issues arise for determination by this court which are as follows;
 1. Whether the applicant has *locus standi* to institute the current proceedings
 2. Whether the respondent is amenable to judicial review.
 3. Whether the applicant is entitled to the relief sought.
 16. Starting with the first issue, the respondent maintained the position that the applicant has no *locus standi* in this matter. The respondent claimed that the applicant is only mandated by its trust deed to protect the right of children and not the rights of all persons with disability. The respondent also contended that the applicant had not demonstrated by way of an affidavit or other document that it was actually acting in the interest of another person, group or class of persons.
 17. The applicant on its part asserted that it had locus standi in this matter since it was an organization whose main objective was to safeguard the rights of children who include children with disabilities. In addition, Mr Maganya submitted that the proceedings had been instituted not only for the benefit of children with hearing impairment but also in the public interest.
 18. The term locus standi denotes the legal capacity of a person to institute and maintain court action before a court of law.
 19. In the Black's Law Dictionary 9th Edition, *locus standi* is defined as;

“The right to bring an action or to be heard in a given forum”.
 20. In judicial review proceedings, an applicant does not need to demonstrate that he is personally aggrieved by the decision or action which is under challenge. All that an applicant needs to establish to



- demonstrate locus standi is that he has sufficient interest or stake in the matter to which the application relates.
21. Having considered the affidavits on record and the arguments made by both counsel on this issue, I find that it is not disputed that the applicant is an organization that champions the promotion, enhancement and protection of rights of children. The application before the court was filed to enforce the constitutional rights of persons with hearing disability who includes children.
 22. The constitution of Kenya has widely enlarged the scope of legal standing in actions meant to enforce constitutional rights.
 23. Article 22(2) read together with article 258(2) gives standing to not only a person acting in his own interest but also a person acting in the interest of a group or class of persons or in the public interest. My view is that a person who commences action to challenge an administrative decision or to enforce constitutional rights is not required to demonstrate by way of affidavits or other documentation that he is representing the public interest.
 24. In view of the foregoing, i am satisfied that the applicant had locus standi to institute and maintain the current proceedings.
 25. Turning to the second issue framed for determination, the respondent contended that the respondent is a limited liability company and that as the courts judicial review jurisdiction applies only to public bodies, the respondent was not amenable to judicial review.
 26. Relying on several authorities including the case of *Panel on Takeovers and Mergers exparte Datafin plc and another* [1957] All ER Mr Maganya learned counsel for the applicant invited the court to find that the respondent was performing a public function in that it was rendering broadcasting services driven by the needs and dictates of the public. Counsel submitted that since the respondent was airing television programmes meant solely for public consumption, it was performing a public function and it was for that reason subject to the courts judicial review jurisdiction.
 27. Having addressed my mind to the submissions made by the parties on this point, I wish to state at the outset that this courts judicial review jurisdiction is quite limited in scope.
 28. Judicial review is the process by which the court exercises its supervisory jurisdiction over the proceedings and decision of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties – see: *Halsbury's Laws of England*, 4th Edition at Page 91.
 29. This means that the remedy of judicial review is only available against subordinate courts, inferior tribunals, public bodies or persons who perform public duties. This exposition of the scope of judicial review has been confirmed by a number of decisions made by both the High Court and the Court of Appeal.
 30. To give just a few examples, in *Republic v Kenya Cricket Association & 2 others, exparte Maurice Omondi Odumbe* (2006) eKLR this court (Wendoh J) held that judicial review remedies are only available against public bodies or persons performing public functions .The Court of Appeal confirmed in the celebrated case of *Kenya National Examination Council v Republic, Exparte Geoffrey Gathenji & 9 others*, C/Appeal No 266 of 2006 that only public bodies are amendable to judicial review.
 31. This limitation on the scope of judicial review is premised on the fact that the primary purpose of judicial review is to keep the Government and its various agencies within their legal bounds in order to ensure that they do not exceed or abuse their powers to the detriment of citizens.



32. It is not disputed that the respondent is a limited liability company incorporated under the Companies Act cap.486 Laws of Kenya. It is also common ground that though the respondent is licenced under the provisions of the *Kenya Information and Communication Act*, it derives its mandate to carry out its broadcasting function not from any statutory authority but from its memorandum and articles of Association. There cannot therefore be any doubt that the respondent is not a public or statutory body which would automatically fall within the courts judicial review jurisdiction.
33. I have considered the applicant's claim that as the respondent airs its television programmes for the public consumption, it was performing a public function. I take the position that the mere fact that a body or entity is engaged in the business of rendering services to members of the public does not by itself mean that it is performing a public function.
34. In my view, public functions are those functions which are meant for the public benefit and not for private gain. Such functions must be characterised by some public element.
35. According to Peter Kaluma in his legal text *Judicial Review, Law Procedure and Practice* 2nd Edition at page 250 a public element
- “signifies ‘governmental’ or ‘quasi-governmental’ element. A public or governmental element exists in the functions of a body where, if the body did not exist, the government would intervene to create a body to carry out the function. Other factors which may indicate public element in functions of a body include whether the body, even though not statutory, is supported indirectly by a periphery of statutory powers or penalties and whether the body is under a duty in exercising its powers to act judicially”.
36. Unlike the *Panel on Takeovers and Mergers in the ex-parte Datafin PLC case (supra)* which did not have any form of legal existence and enjoyed indirect support from United Kingdom's State Agencies like the Bank of England and the Department of Trade and Industry , the Respondent herein is incorporated as a private company and does not enjoy any direct or indirect support from the government or any of its agencies. It does not also have a duty to act judicially like the panel of take overs and mergers had in its role in the regulation of the United Kingdom's financial markets.
37. In the circumstances, i find that the respondent in this case is a private company which does not execute any public function and it is not therefore subject to this courts supervisory jurisdiction. It is consequently not amenable to judicial review.
38. Having made that finding, the question that begs an answer at this juncture is - what is the remedy of a person seeking to enforce a constitutional or statutory obligation against a private company?
39. Here is a situation where parliament has enacted legislation with the objective of equalising opportunities for persons with disabilities with the aim of improving their welfare and integrating them into mainstream society. In enacting the Persons with Disabilities Act, Parliament in its wisdom specifically provided a mechanism to enable persons with hearing disabilities to receive information from television broadcasts. This was done through section 39 of the Act which provides as follows:
- ”All television stations shall provide a sign language inset or sub-titles in all newscasts and educational programmes, and in all programmes covering events of national significance”.
40. The requirement of this statutory provision is what the applicant is seeking to enforce in this proceedings. As noted earlier, it is the applicants case that failure of the respondent to comply with section 39 of the Act has violated its constituent's constitutional rights to equality and freedom from discrimination.



41. Although the applicant sought the enforcement of its constituents constitutional rights through a judicial review application, it is my view that there is some interplay between administrative law on which the remedy of judicial review is anchored and constitutional law. In the interest of administering substantive justice as envisaged in the new constitutional dispensation, I am of the firm view that the court should not be overly concerned with the way or manner in which litigants grievances are presented to the court provided that they are clear and justiciable .
42. In this case, the applicants complaints were clearly set out and they relate to the alleged violation of constitutional rights and freedoms under the Bill of Rights. I think that the court has power under its unlimited jurisdiction to investigate the applicant’s grievances and make a final determination thereon irrespective of the inappropriate mode used to present the said grievances to the court. In making this finding, the court is guided by the precedent set by this court in *Githunguri v Republic* (1986) eKLR where the court converted a judicial review application for an order of prohibition into a constitutional application which it proceeded to consider and determine.

In that case, the court stated at page 12 as follows;

“it seems to us that the application in these proceedings comes more appropriately as a fundamental right application under section 77(1) of the Constitution as referred to in section 84(1) above In the interest of justice we will treat the application before us as having been made, and to deem it amended and to have been brought under section 84(1).....”

43. Similarly, this court will in the interest of justice proceed to consider and determine the application filed herein as a constitutional petition for the enforcement of constitutional rights under article 22 of the Constitution.
44. Before embarking on an examination of the constitutional issues raised by the parties herein, I wish to start by pointing out that under article 2(1) and 20(1) of the *Constitution*, all persons and all state organs are bound by the constitution and the Bill of Rights.

Article 2(1) states:

“This constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government”.

Article 20(1) states

“The Bill of rights apply to all law and binds all state organs and all persons”

45. At article 260, the *Constitution* defines a person in the following terms;

“a person” includes a company, association or other body of persons whether incorporated or unincorporated”

46. In view of these express provisions of the constitution, can the respondent be heard to say that since it is a private company, it cannot comply with statutory obligations which have a direct bearing on obligations imposed on private entities under the constitution?
47. My answer to this question is in the negative since the respondent falls within the definition of a person under article 260 and is therefore bound by the provisions of the constitution generally as well as the Bill of rights.



48. This means that it has a constitutional duty and obligation to respect and obey all the provisions of the Constitution. If therefore a violation of the rights of an individual by the respondent is demonstrated, then I find that the court would have power under article 23 to grant appropriate relief.
49. Turning now to the applicant's case, the applicant's main complaint is that in failing to comply with section 39 of the Act, the respondent has violated and continues to violate the rights of children with hearing disabilities to equality, equal protection and benefit of the law under article 27(1) and (5) of the *Constitution* which rights are also enshrined in a host of international instruments ratified by Kenya including the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *United Nations Convention on the Rights of Persons with Disabilities* among others.
50. It is the applicant's contention that the respondent's failure to provide a sign language inset or subtitles in its newscasts, educational programmes and all programmes covering events of national importance deprives persons with hearing disabilities benefits which are otherwise enjoyed by people without hearing impairment and this amounts to discrimination on the basis of disability.
51. Article 27 generally guarantees the right to equality and freedom from discrimination on any ground. The relevant provisions of this article in so far as the applicant's complaints are concerned are 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 27(4) - "The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth".
- Article 27(5) - "A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4)".
52. The applicant also claims that the respondent's failure to comply with section 39 of the Act amounted to a violation of the rights of its constituents to seek and to receive information and ideas as enshrined in article 33(1)(a) of the *Constitution*.
- Article 33(1) provides for freedom of expression. It states :
- "Every person has the right to freedom of expression, which includes –
- a. freedom to seek, receive or impart information or ideas;
53. The respondent in support of its case submitted that its failure to comply with section 39 of the Act does not amount to a violation of the applicant's right to equality and freedom from discrimination as alleged.
54. The respondent justified its position on grounds that it was also guaranteed rights and fundamental freedoms by the Constitution which made its non-compliance with section 39 of the Act reasonable and justifiable in an open and democratic society.
55. According to the respondent, it enjoys a right under article 44(1) of the *Constitution* which gives every person the right to use the language of one's choice including sign language which is recognized under article 7(3). The respondent argued that it was entitled to broadcast its programmes in any language it chooses and it cannot be bound by the state to broadcast in any particular language.



56. The respondent also alleged that it was protected under section 34(2)(a) of the Constitution which provides that

“The State shall not –

- a. exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium”.

57. In this regard, the respondent submitted that the orders sought by the applicant would act as a “control” or “interference” with its broadcasting function which is prohibited by article 34.

58. Lastly, the respondent argued that the duty of addressing the needs of vulnerable groups is vested in the state under article 21(3) of the Constitution and the same cannot be delegated to private entities.

59. After carefully considering the rival submissions made on behalf of the parties herein and having read through the relevant provisions of the Constitution, I find that article 54(1)(c) of the Constitution guarantees to persons with disability the right to reasonable access to all places, public transport and information. (Emphasis added)

60. When read together with article 2, 20 and 260, article 54(1)(c) imposes an obligation on all persons, not just the State, to ensure access by persons with disabilities to all places, public transport and information.

61. The respondent has argued that the duty to provide for the needs of the vulnerable and marginalized groups which include persons with disability lies on the state and not on private citizens. Though it is true that the state should bear the greatest responsibility in providing for the needs of vulnerable groups in society, it is my view that private citizens also have a role to play in that regard.

62. My view on this point is informed by the fact that the Constitution expressly makes it clear that there is both vertical-state to citizen, and horizontal-citizen to citizen application of the Bill of Rights.

63. The respondent being a corporate citizen in this country is duty bound to fulfil its own obligations under the Constitution. Can the respondent for example argue that it cannot provide ramps on its building to enable persons with physical disabilities to access its facilities because it is not the state or a public entity. I think not. Similarly, it is my view that the respondent cannot be heard to argue that it cannot provide sign language broadcasting for the benefit of children or persons with hearing disabilities because it is not part of the state.

64. In my considered view, the provisions of the Constitution, coupled with the express provisions of section 39 of the Persons with Disabilities Act, imposes an express obligation on all persons in the position of the respondent to provide access to persons with hearing disability access to the information that they impart to the general public in their television programmes.

65. Failure to provide such information to persons with hearing disabilities by not availing sign language interpreters amounts to indirectly affording them less favourable treatment than the Respondent affords those who are not hearing impaired.

66. Article 27(5) prohibits direct or indirect discrimination by any person on the basis of any of the grounds set out in article 27(4). It applies the rights against discrimination horizontally against private citizens



67. The respondent has contended that to require it to provide sign language interpretation is to violate its rights under article 44(1) and 34(2). Article 34 relates to freedom of the media.

Article 34(2) states

“The state shall not

- a. “Exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium.

68. A reading of article 34(2)(a) clearly shows that there is nothing in the requirement contained in section 39 of the Act that amounts to a limitation of the respondent’s freedom to produce or circulate any publication or to disseminate information by any medium. All that it requires is that the respondent extends the information it chooses to broadcast to a vulnerable group in our society to which it entitled just like everybody else in order to keep abreast of current affairs and events of national significance.

69. The state does not require that the respondent exclusively uses sign language in its programmes. If this had been the import of s 39 of the Act, it would have been a clear violation of the respondent’s rights under article 44. However, this is not the position in this case. In my view, what s 39 requires of the respondent is that in addition to its ‘normal’ broadcasts in any spoken language of its choice, it should avail an interpreter for those who have hearing disability and are not able to understand spoken language.

70. In view of the foregoing, I find that the respondent’s failure to comply with s 39 of the Act amounts to indirect discrimination of the applicant’s constituents on the basis of their hearing disability.

71. It is important to note that this matter requires a balancing of interests namely the interests of persons with hearing disabilities to access information and the private interest of the respondent to maximise on profits. The respondent argues that if the application succeeds, it will incur expenses by acquiring and installing the sign language equipment on its analogue system and still spend again when it adopts the digital broadcasting platform.

72. While the court appreciates the cost that will go with compliance with the requirement of the law, it is my humble view that such cost should not be an inhibition or restriction on the court to play its rightful role in the advancement and protection of the rights of marginalized communities within our society. The point I am making is that money cannot be a substitute to the enjoyment of the rights bestowed constitutionally and statutorily to persons with hearing disability.

73. It is incumbent upon the respondent to provide to the applicant’s constituents what the Constitution and law gives them. This is a constitutional and statutory obligation and the respondent and indeed all other television broadcasters have no option but to comply.

74. The court takes judicial notice that in any event, as a matter of Government policy, all television broadcasters will soon be required to migrate from analogue to digital signal in fulfilment of Kenya’s obligations as a member of the International Telecommunication Union (ITU). In the circumstances, the respondent’s argument of double investment in sign language equipment cannot hold much water.

75. Finally, the respondent has argued that the order sought is discriminatory against it as there are about ten other broadcasting stations which are yet to comply with the provisions of section 39 of the Act. My simple response to this is that the court can only deal with the parties before it. The fact that there may be other broadcasters who are in breach of their statutory and constitutional obligations does not mean that the respondent can be excused from complying with its own obligations under the law.



76. The claim that the order sought if granted would be discriminatory cannot be used to deny the applicant its right to enforce its constituents constitutional rights against the respondent. Perhaps this application is a wakeup call to the regulator in the communication and media industry namely The Communication Commission of Kenya to take its regulatory role seriously and ensure that all television stations in the country comply with the provisions of the Persons with Disabilities Act particularly s 39 thereof in the public interest.
77. Article 23(3) of the Constitution empowers the court, in any proceedings brought before it under article 22, to grant appropriate relief, including the following;
- a. a declaration of rights;
 - b. an injunction;
 - c. a conservatory order;
 - d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24;
 - e. an order for compensation; and
 - f. an order of judicial review
80. A close scrutiny of article 23 reveals in my view that a court is empowered to grant appropriate relief which may include but is not limited to the reliefs stated above.
81. In this case, I take the view that an “appropriate relief” would be an order directing the respondent to comply with its statutory obligations under section 39 of the Persons with Disabilities Act.
82. I am however aware that complying with that statutory requirement will have some financial implications on the respondent and taking this into account, I hereby issue an order directing the respondent to provide a sign language inset or sub-titles in all its newscasts, educational and all programmes of national importance within a period of ninety (90) days from the date of this judgement.
83. On the issue of costs, as this was an application for the enforcement of constitutional rights which was filed in the public interest, I find that it would be just and fair if each party was ordered to bear its own costs. It is so ordered.

DATED, DELIVERED AND SIGNED BY ME THIS 21ST DAY OF DECEMBER 2012

C.W. GITHUA

JUDGE

