REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 257 OF 2010

REPUBLIC

VERSUS

THE COMMUNICATIONS APPEALS TRIBUNAL……..…1ST RESPONDENT
THE MINISTER FOR INFORMATION & COMMUNICATIONS…2ND RESPONDENT
AND
COMMUNICATIONS COMMISSION OF KENYA...…….……INTERESTED PARTY

EX PARTE:

SAFARICOM LIMITED

RULING

Safaricom Limited, the ex parte applicant, hereinafter referred to as **"the applicant"** filed an application by way of Notice of Motion dated 3rd August, 2010 seeking the following orders:

"1. An order of certiorari do issue bringing into this honourable court for the purpose of its being quashed the judgment of the Communications Appeals Tribunal of Kenya dated and delivered on 22nd February, 2010 in Appeal No. 3 of 2009 between the applicant and the Communications Commission of Kenya (the interested party).

2. An order of mandamus directed at the Minister for Information and Communications do issue requiring him to appoint and convene a proper and lawful Communications Appeals Tribunal in accordance with the powers vested in him under the provisions of the Kenya Information and Communications Act, 1998.

3. An order of mandamus do issue directing that a lawfully constituted Communications Appeals Tribunal do hear, re-consider and determine the applicant's complaint as set out in Appeal No. 3 of 2009 in accordance with the provisions of the Kenya Information and Communications Act, 1998, and the regulations made thereunder.

4. the costs of this application be provided for."

The application was made on the grounds that the Communications Appeals Tribunal, hereinafter referred to as **"the tribunal",** lacked jurisdiction to make its impugned judgment since the term of its three

members had expired as at 22nd February, 2010 when the tribunal rendered its decision. It was also the applicant's contention that the tribunal failed to take into account relevant considerations and instead took into account irrelevant factors. The applicant further argued that the decision of the tribunal failed to recognize that the Communications Commission of Kenya (the interested party) has a statutory duty to protect the interests of telecommunications services with respect to prices charged and the quality and variety of serves offered. The tribunal thus failed to consider public interest in its determination. Further, the applicant stated that the 1st respondent acted irrationally and discriminatively against her in making the impugned decision.

The application was supported by an affidavit sworn by **Nzioka Waita,** the Head of the Legal Regulatory Affairs Department. The deponent stated that the applicant holds a third generation **(3G)** Mobile Communications Licence Number TL/3G/00001 issued on 17th October, 2007 ("the effective date") for the construction, installation and operation of 3Gmobile communications systems and the provision of 3G mobile communications and telecommunications services in the Republic of Kenya. The licence has been renewed from time to time upon, *inter alia,* payment of the frequency renewal fees. In terms of the 3G licence, the applicant has been permitted to offer wireless voice telephony, narrow and broadband wireless date, multimedia services and other related services (the 3G services) which are to be provided within an assigned frequency. In consideration of the grant of the licence the Communications Commission of Kenya required the applicant to pay an initial fees of US$25,000,000 and any other fees related to the use of the frequency spectrum resource.

The applicant further stated that the terns upon which the 3G licence was issued had been notified to the applicant but the interested party's letter dated 1st February, 2007 which *included, inter alia,* the condition that the annual spectrum utilization fee will be based on the number of transmitters within the network calculated in the normal manner once returns were submitted to the interested party. The interested party did not then or at any time thereafter specify a formula for computation of the annual spectrum utilization fee. By this letter dated 4th November, 2008 the interested party required the applicant to submit its 3G network returns which the applicant did vide its letter of 11th November, 2008.

Subsequently, the interested party required the applicant to pay a sum of Kshs.135,450,000/- as frequency utilization fee for the period 1st July, 2008 to 30th June, 2009 in respect of the 3G services. Upon enquiry by the applicant as to the methodology applied in computing the said fees, the interested party indicated that this was based on the actual usage of the spectrum based on the number of transmitters or transreceiver links used by the applicant in accordance with the formula set out in the said letter.

Thereafter the applicant exchanged numerous correspondences with the interested party attempting to explain that the formula used in arriving at the aforesaid fees was incorrect and pointing out that the formula was being incorrectly and pointing out that the formula was being incorrectly used for 3G services. Subsequently, the year 2009 -2010 the interested party agreed to adopt a new formula for charging for 3G spectrum usage as previously proposed by the new formula to the fees applicable in the 2008-2009 year, the applicant stated.

Being aggrieved by the decision of the interested party, the applicant filed an appeal against that decision to tribunal being Appeal No. 3 of 2009. The dispute was heard and on 22nd February, 2010 the tribunal delivered its decision dismissing the appeal and directing the applicant to pay the 3G licence fees as charged.

The applicant stated that the members of the tribunal are appointed by the Minister of Information and Communications by virtue of powers granted to him under **Section 102** of the **Kenya Information and Communications Act, 1998,** to sit for a tem of 3 years renewable once. The said members were appointed vide **Gazette Notice No. 1403 of 2007** to sit for a period of 3 years with effect from **1st February, 2007 to 31st January, 2010.** However, at the time when the tribunal delivered its ruling on 22nd February, 2010 the term of the members had expired and the same had not been renewed by the Minister. The applicant further contended that the tribunal was not properly constituted at the time it

delivered its decision and therefore the decision was rendered a nullity.

The applicant further stated that if the tribunal's decision is allowed to stand it would result in perpetuation of an illegality and would occasion manifest injustice to the applicant. The applicant added that the interested party, having reviewed the methodology it applies for the frequency utilization fees in respect of 3G services, will result in charging other telecommunications services providers a manifestly lower fee for 3G services that would be demanded from the applicant.

The applicant stated that in arriving at its decision, the tribunal failed to take account relevant considerations including the fact that the review of the methodology used to charge for utilization of 3G services by the interested party was a concession on the interested party's part that the methodology that had been used to charge the applicant for 3G services for 2008-2009 was not only inaccurate but also inconsistent with international methodology used to charge for such services. Subsequently, the interested party has further lowered the initial licence fees charged to other telecommunications services providers, the applicant averred.

The tribunal filed a replying affidavit that was sworn by **Mrs. Rose Simba**, its Chairperson. She stated that the other members of the tribunal are **Engineer Arthur Ogwayo and Mr. Richard Mutiso**. Mrs. Simba stated that the current chairperson and members of the tribunal were first appointed on 26th February, 2008 as per letters of appointment addressed to them by the **Honourable Mutahi Kagwe,** then Minister for Information and Communications. The appointment was for a term of 3 years. The tribunal rendered its decision in Appeal No. 3 of 2009 on 22nd February, 2010. She therefore stated that at the time of rendering the decision the tribunal Chairman and its members were legally in office. She added that the terms of the Chairperson and members were renewed for a further term of 3 years with effect from 1st February, 2010. She annexed to her affidavit copies of letter dated 1st February, 2010 addressed to the Chairperson and the said members by **Honourable Samuel Poghisio,** Minister for Information and Communications.

Dr. Bitange Ndemo. The **Permanent Secretary** in the **Ministry of Information and Communications,** swore a replying affidavit for and on behalf of the 2nd respondent. He stated that the Minister for Information and Communications vide **Kenya Gazette Notice No. 10897 of 2010** published on 17th September, 2010 duly appointed Mrs. Rose Simba (Chairperson), Arthur Ogwayo and Richard Mutiso as members of the tribunal for the period of 3 years with effect from 1st February, 2010. He further stated that the members of the tribunal had individually received letters of appointment on 1st February, 2010 which is within the period they made the decision now being challenged. The tribunal was therefore properly constituted at the time it rendered its decision, he stated. He added that the applicant had not raised the issue of jurisdiction at the time of delivery of the judgment.

Dr. Ndemo defended the decision of the tribunal saying that it was based on merit and had addressed the submissions made by the parties. He added that the mere fact that the appointment of the members of the tribunal was not gazette immediately does not in any way validate the appointments.

Mr. John Omo filed a replying affidavit for and on behalf of the interested party. He reiterated the depositions made by Dr. Bitange Ndemo with respect to appointment and gazettement of the members of the tribunal as well as renewal of their term of service. He stated that the **Kenya Information and Communications Act** grants the Minister power to make the appointment of the members of the tribunal but the Act does not specifically require the Minister to make the said appointments by gazette notice. In his view, gazettement of the members of the tribunal is an administrative act and failure to gazette the appointments did not in any way invalidate the functions of the tribunal including its decision at the material time.

With regard to the issue of 3G licence and fees, Mr. Omo stated that it is the interested party, Communications Commission of Kenya, hereinafter referred to as "**the Commission**" which exclusively determines and settles the fees chargeable for various licence categories that the Commission issues. The commission issued the 3G licence to the applicant on 17th October, 2007. The licence was issued on the

express condition that **"it shall form part of and to be read together with"** the original mobile service provision licence that had been granted to the applicant on 1st July, 1999. Clause 11 of the licence states as follows:

"Clause 11: In addition to the fees associated with licence number ML-99-0001 granted on 1st July 1999, the licensee shall pay the following fees as relates to the 3G licence:

11.1 An initial fee of USD$425 Million before the issuance of the licence.
11.2 Any other fees related to the use of frequency spectrum resource."

When the applicant submitted its 3G returns in November 2008, the Commission calculated the Annual Spectrum Utilization Fees payable and it amounted to Kshs.135,450,000/= for the financial year 2008-2009 and the applicant was invoiced accordingly. The commission's methodology of calculation was based on the actual number of transmitters within the applicant's network as submitted in the applicant's returns, Mr. Omo Stated.

It was not therefore correct for the applicant to imply that the tribunal failed to consider the fact that the methodology used by the Commission in arriving at the invoiced fees did not conform to international standards, Mr. Omo added. He stated that the tribunal took into account all the relevant considerations in arriving at its decision. In particular, the tribunal was alive to the fact that the function of determining the fees payable by an industry player for a licence was an executive decision placed by the Act in the hands of the Commission as the industry regulator.

Mr. Omo further defended the Commission against the applicant's averment that it had failed to apply the appropriate policy guidelines in charging the 3G Spectrum Utilization Fees as set out in **Section 23** of the **Act**. He also denied that there was nay discrimination by the Commission against the applicant. He added that the issue of lowering the initial licence fee for subsequent industry players in the 3G market was not part of the dispute submitted to an d adjudicated upon by the tribunal and as such this court lacks jurisdiction to make any finding thereon.

The applicant filed a supplementary affidavit sworn by **Mr. Stephen Chege**, the Head of Public Policy and Market Regulation Section. He set out the chronological sequence of events leading to the judgment of the tribunal. In particular, he stated that the hearing of the appeal commenced on 3rd February and was adjourned to 24th February 2010. But on 5th February, 2010 the tribunal wrote to the advocates for the parties requiring them to appear before the Chairman on 9th February, 2010 for purpose of taking fresh dates. On that day, Mr. John Ohaga, the applicant's advocate, attended the office of the chairman who informed him that 24th February, 2010 was not convenient to the tribunal as one of its members would not be available. The matter was fixed for hearing on 1st and 2nd March, 2010. However, on 10th February the said advocate received a telephone call from the tribunal's clerk requiring him to appear before the tribunal on 12th February, 2010 to take fresh dates. The reason for that was that the tribunal's term was believed to be ending on 28th February, 2010 and unless all the members were to be re-appointed they would not be able to conclude the hearing.

Mr. John Ohaga advocate and the Commission's advocate attended the tribunal on 12th February, 2010. The matter proceeded to hearing on 15th and 16th February, 2010 and the tribunal rendered its decision on 22nd February, 2010.

In paragraphs 16 and 17 of his affidavit, Mr. Chege stated:

"16. The purpose of setting out the chronological sequence of events above is to demonstrate, firstly that the ex parte applicant's attention was drawn to doubts as to the tribunal's jurisdiction by the tribunal itself; and secondly to demonstrate if the members of the tribunal were labouring under the misconception that their term was due to expire on 28th February 2010, then it cannot be possible that the term of the members of the tribunal had been extended by the letters dated 1st

February 2010.

17. I verily believe that it must follow that the letters dated 1st February 2010 annexed to the replying affidavit of Mrs. Rose Simba and marked as "RS-2" are a fraud upon the court as it cannot possibly be true that the Minister extended the term of the members of the tribunal on 1st February 2010 otherwise the tribunal would not have gone out of its way to bring the hearing dates for the appeal forward from 1st and 2nd March 2010 to 15th and 16th March 2010 in the mistaken belief that its term would expire on 28th February 2010."

The deponent stated that the Minister was only prompted to publish the renewal of the term of the members of the tribunal in response to matters that were raised by Mr. John Ohaga advocate in the certificate of urgency that was filed herein.

This application was largely disposed of by way of written submissions though counsel highlighted them briefly. I have carefully considered the submissions. I will proceed to determine this application on the basis of the grounds that were advanced by the applicant to challenge the decision of the 1st respondent.

A. JURISDICTION OF THE 1ST RESPONDENT

The applicant submitted that the 1st respondent did not have jurisdiction to hear and determine the appeal since its mandate expired on 31st January, 2010. The tribunal was first appointed in February 2007 pursuant to the provisions of **Section 102** of the Kenya **Information Communications Act, 1998.** The Section as amended states as hereunder:

"**102.(1) There shall be established an Appeals Tribunal for the purpose of arbitrating the cases where disputes arise between the parties under this Act and such matters as may be referred to it by the Minister which shall consist of_**

(a) A chairman who shall be a person who holds or has held a judicial office in Kenya or who is an advocate or not less than seven years standing and entitled to practice before any of the courts of Kenya; and

(b) Four other members who are persons possessing, in the opinion of the Minister, expert knowledge of the matters likely to come before the Tribunal and who are not in the employment of the Government or the Corporation.

(2) The chairman and other members of the Tribunal shall be appointed by the Minister in consultation with the Attorney-General and the provisions set out in the second Schedule shall have effect in relation to the membership, procedure and sittings of the Tribunal.

(3) The Minister may from time to time publish in the gazette amend the schedule as he deems fit.

(4) The members of the Tribunal shall hold office for a period of three years but shall be eligible for reappointment for one further term of a period not exceeding three years."

There is no dispute that the initial term of the office of the members of the tribunal is 3 years. The initial appointment was published in Gazette Notice No. 1403 of 23rd February, 2007. The effective date was 1st February 2007. However, vide letters dated 26th February, 2007 the Minister had also informed each of the three members that their appointment was with immediate effect. The applicant argued that the term of the members expired on 31st January, 2010 and therefore when the tribunal rendered its decision it has no jurisdiction to do so as its term had come to an end.

In response, the respondents argued that their term of office was renewed on 1st February 2010 vide letters of appointment signed by the Minister, although their re-appointment was not published in the

Kenya Gazette until 17th September, 2010. They contended that **Section 102** of the **Kenya Information Act** does not specifically require the Minister to make the said appointment by Gazette Notice and that such gazettement is but an administrative act that is meant to notify the general public of the appointments.

The interested party submitted that if it was a legal requirement that the appointments be effected by way of publication in the Gazette, the Act would have specifically so stated. They cited as an example appointment of an Appeals Tribunal under the **Value Added Tax Act, Section 32** which states:

"32 (1) The Minister shall, by order published in the Gazette, establish an Appeals Tribunal for any are any area specified in the order for the purpose of hearing appeals under this part."

On the other hand, **Section 102(1)** of the **Kenya Communications and Information Act, 1998** states:

"102(1) There shall be established Appeals Tribunal for the purpose of arbitrating in cases where disputes arise between the parties under this Act and such matters as may be referred to it by the Minister which shall consist of ...."

The minister's letters of appointment dated 26th February, 2007 informed the members of the tribunal of their appointment thereto **"with immediate effect for a term of 3 years".** But the Gazette Notice of 23rd February, 2007 had stated that the effective date as 1st February, 2007. Between the date indicated on the said letters and that in the Gazette Notice, the latter took precedence. It follows therefore that the initial term of 3 years had to expire on 31st January, 2010. Although the letters bore 26th February, 2007 as the date of appointment, that date was not of any legal significance in light of the date in the Gazette Notice.

When an Act of Parliament requires a Minister to appoint a person to a public office, such appointment has to be effected and actualized by publication in the Kenya Gazette on its due date. The appointment cannot be done by merely writing to the person so appointed without notification in the Kenya Gazette. Courtesy and good order demands that the Minister notifies the appointee about the appointment through a letter but the letter cannot substitute the requirement for publication of the appointment in the Kenya Gazette.

I agree with the applicant's counsel that the tribunal is a creature of statute, created for the purpose of resolving disputes in terms of the mandate spelt out in the **Kenya Information and Communication Act, 1998**. The appointment of members of the tribunal cannot therefore be a private matter between the Minister and the tribunal members restricted only to notification of appointment by correspondence addressed to the members only. Such appointment must be made public by publication in the Kenya Gazette. The publication must be done as soon as possible after the appointment. It is improper in law for the persons appointed to start performing their public duties in terms of their appointment or re-appointment before such publication in the Kenya Gazette.

Kenya Information and Communications Act, 1998 does not prescribe the time within which notification of the public appointments has to be done. However, **Section 58** of the **Interpretation and General Provisions Act** requires that to be done without unreasonable delay. The section provides:

"Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises."

The initial term of service of the members of the tribunal came to an end on 31st January, 2010. The Minister did not publish their re-appointment until 17th September, 2010, nearly eight months after expiry of the term of office and that was done following the filing of these proceedings. I believe it was intended to seal a gapping loop hole that had been pointed out by the applicant regarding the re-appointment. It was however too late.

There is another issue which the Minister failed to address himself to when he was re-constituting the

tribunal in 2010. The **Kenya Communications (Amendment) Act, 2008, Section 102** of the **Principle Act** was amended to the effect that the tribunal was required to have a Chairman and four members. **Subsection (2)** thereof states that:

"(2) The Chairman and other members of the Tribunal shall be appointed by the Minister in consultation with the Attorney-General and the provisions set out in the Second Schedule shall have effect in relation to the membership, procedure and sittings of the Tribunal".

The commencement date of the **Kenya Communications (Amendment) Act, 2008,** was 2nd January, 2009. That means that by the time the Minister was re-appointing the Chairman and the two members for a further term of three years with effect from 1st February, 2010, he ought to have appointed two more members. Failure to appoint the required number of members meant that the tribunal was not properly constituted after 31st January, 2010.
The Minister further failed to act on a further amendment to the said **Section 102** that was brought about vide **Statute Law (Miscellaneous Amendments) Act, 2009** to the effect that, of the four members of the tribunal, two should be nominated by the Medical Council established under the **Media Act, 2007** and appointed by the Minister.

All the appointments are supposed to be done by the Minister in consultation with the Attorney-General. It is doubtful whether the Minister consulted with the Attorney-General when he was making the re-appointments in 2010 because the Attorney-General would have advised him of the new requirements regarding composition of the members of the tribunal.

Was the tribunal properly constituted after 31st January, 2010 when it had only a Chairman and two members as opposed to a Chairman and four members? I do not think so.

From 2nd January, 2009 when the **Kenya Communications (Amendment) Act, 2008** came into operation the composition of the tribunal was supposed to be a Chairman and four members, a total of five. The **Statute Law (Miscellaneous Amendments) Act, 2009,** brought further requirements regarding the four members. Two of them had to be nominated by the Media Council. Can the default in its composition be cured by the provisions of **Section 53** of the **Interpretation and General Provisions Act?** The section provides as follows:

"Where by or under a written law a board, commission, committee or similar body, whether corporate or unincorporate, is established, then, unless a contrary intention appears, the powers of the board, commission, committee or similar body shall not be affected by –

(a) a vacancy in the membership thereof; or
(b) a defect afterwards discovered in the appointment or qualification of a person purporting to be a member thereof."

A proper construction of the law is that a board, committee or tribunal should be established with the numbers and qualifications as required by the relevant law for it to perform its statutory duties. Once it is so established, in the event that a vacancy occurs for any reason or a defect is afterward discovered regarding the appointment or qualification of any of its members, its functions shall not be affected by such reason.

But where the Minister is by law required to appoint five members of a tribunal following a given criteria and he appoints only three, it cannot be argued that the provisions of Section 53 of the **Interpretation and General Provisions Act** can justify non-compliance with the provisions of **Section 102** of the **Kenya Information and Communications Act**, **1998**. The Minister did not advance any reason for failure to appoint the other two members of the tribunal. To the extent that the tribunal is lacking two members, it is not properly constituted.

In view of the foregoing, I find and hold that:

(a) At the date of the rendering its decision (22nd February, 2010) the term of the three members of the tribunal had expired and in the absence of a Gazette Notice regarding the member's re-appointment, the Minister's letter dated 1st February, 2010 cannot suffice. The tribunal seemed to wrongly believe that its term was to end on 28th February, 2010 or thereabout. The Minister cannot blame the Government Printer for publication before expiry of the term of the members of the tribunal.

(b) The tribunal was not properly constituted when it heard and determined the appeal. The purported proceedings were null and void and of no legal consequence.

In **MCFOY v UNITED AFRICA CO. LTD [1967] 3 ALL ER 1169**, Lord Denning stated:

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse"

When a tribunal acts without jurisdiction, its decision is amenable to an order of certiorari to quash the same.

Jurisdiction is a creature of statute and cannot be conferred on a tribunal by consent of parties and waiver on their part cannot make up of lack or defect of jurisdiction. It matters not that none of the advocates who appeared before the tribunal during the hearing and on the date of delivery of the decision raised the issue of jurisdiction. Jurisdiction is everything and without it a tribunal cannot function in law.

B. WHETHER THE TRIBUNAL FAILED TO TAKE INTO ACCOUNT RELEVANT CONSIDERATIONS AND TOOK INTO ACCOUNT IRRELEVANT CONSIDERATIONS

The application submitted that the judgment of the tribunal was informed by irrelevant considerations and that the tribunal failed to take into account relevant considerations and therefore arrived at the wrong decision. The application alleged that the tribunal did not take into account provisions of **Section 23** of the **Act**.

I carefully perused the replying affidavit sworn by Mr. John Omo the Commission Secretary, which explains in great detail how the 3G licence was issued and how the licence fees was arrived. It is clear from his explanation that it is the Commission that is mandated to impose fees and not the tribunal. The Commission in granting the 3G licence to the applicant imposed certain conditions which were agreed upon by the applicant in particular, clause 11 of the license stipulated the fees hat was to be charged. The fee was an initial sum of US$25 Million before the issuance of the licence and any other fees related to the use of Frequency Spectrum Resource.

The tribunal considered, inter alia, the aforesaid issues. In my view therefore, I do not think that the tribunal can be accused of having considered irrelevant issues and disregarding relevant ones.

It is trite law that the remedy of judicial review is concerned not with the merits of a decision but the decision making process. See **REPUBLIC vs JUDICIAL SERVIE COMMISSION ex parte PARENO [2004] 1 KLR 203**. The court cannot substitute its decision for that of the tribunal and neither can it act as an appellate court.

C. WHETHER THE DECISION OF THE TRIBUNAL WAS IRRATIONAL, ILLOGIALCA AND OR UNREASONABLE.

In discussing the principle of irrationality as a ground for judicial review, in the case of **COUNCIL OF CIVIL SERVICE UNIIONS vs MINISTER FOR THE CIVIL SERVICE [1984] 3 ALL ER 935**, Lord Diplock stated as follows at page 950

"By 'irrationality" I mean what can be now be succinctly referred to as "wednesbury unreasonableness" (See ASSOCIATED PROVINICAL PICTURE LTD vs WEDNESBURY CORP [1947] 2 All ER 680. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system."

Having perused the decision of the tribunal I do not think that it fits the above description of irrationality. I do not think that it is correct to say that the tribunal failed to appreciate that the methodology used by the Commission to price the Spectrum usage in respect of the 3G telecommunication services was inimical to the objectives set out at Section 23 of the **Act**. Mr. Omo explained that the methodology of calculation was based on the actual number of transmitters within the applicant's network as submitted by the applicant in its returns. He further stated that there is no single or unified international standard for calculating Spectrum Utilization Fees. These issues did not escape the tribunal attention.

D. WAS THE METHODOLOGY USED BY THE COMMISSION DISCRIMINATIVE AGAINST THE APPLICANT?

The applicant argued that the methodology used in pricing the asage of 3G Spectrum for the 2008-2009 financial year was discriminative. It submitted that the tribunal failed to take cognizance of the entry of new players and therefore competitors into the market, the result of which wold be that the position of the old formula on itself would occasion significant competitive disadvantage. Further, the the commission had revised the methodology and would be charging lower licencing fees for the same services to the applicant's competitors.

In discounting that allegation, Mr. Omo stated that in the years 2007-2008, 2008-2009, only the applicant had a 3G licence and as such there could not be any discrimination of the applicant was a monopoly operator. Secondly, the reviewed methodology is being applied across the board for all industry players in the 3G market. Thirdly, the issue of lowering the initial licence fees for subsequent industry players in the 3G market was not part of the dispute submitted to and adjudicated upon the tribunal.

I would agree with the arguments advanced by the Commission and find that the issue of discrimination was not established.

In conclusion, other than the fact that the tribunal rendered its decision when its term had expired and when it was not properly constituted thus affecting its jurisdiction, I do not find any other ground upon which the tribunal's decision can be faulted. But in view of the earlier finding that the tribunal had no jurisdiction, its decision delivered on 22nd February, 2010 in Appeal no. 3 of 2009 between the applicant and the Commission must be quashed by an order of certiorari as prayed by the applicant, which I hereby do.

An order of mandamus is also issued directed at the Minister for Information and Communications requiring him to appoint and convene a proper and lawful Communications Appeals Tribunal in accordance with the powers vested in him under the provisions of **Section 102** of the **Kenya Information and Communications Act, 1998.**

A further order of mandamus is also issued directing that upon constitution of a lawful Communications Appeals Tribunal, the same do hear, re-consider and determine the applicant's aforesaid appeal.

The 2nd respondent shall bear the costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY, 2011.

D. MUSINGA
JUDGE

<u>In the presence of:</u>

Nazi – Court Clerk

Miss Masaka for Mr. Kipkogei for the 1st and 2nd Respondents

Mr. Echesa Werima for Mr. Ohaga for the Ex Parte Applicant

Mr. Wambua Kilonzo for the Interested party