IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS CIVIL APPLICATION NO. (JR) 51 OF 2010

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW AND FOR ORDERS OF CERTIORARI

IN THE MATTER OF: THE KENYA COMMUNICATIONS ACT (ACT NO. 2 OF 1998)

IN THE MATTER OF: THE LAW REFORM ACT (CHAPTER 26 OF THE LAWS OF KENYA)

IN THE MATTER OF: THE KENYA COMMUNICATIONS (BROADCASTING) REGULATIONS, 2009

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE MINISTER FOR INFORMATION AND COMMUNICATIONS.....1ST RESPONDENT

AND

THE COMMUNICATIONS COMMISSION OF KENYA.....2ND RESPONDENT

EX PARTE.....THE NATURE FOUNDATION LIMITED

JUDGMENT

The application dated 2/5/2010 was filed by **The Nature Foundation Limited** against the **Minister for Information and Communications (1st Respondent)** and the **Communications Commission of Kenya (2nd Respondent, CCK).** The Applicant seeks an order of certiorari to remove into this High Court and quash Regulations 46(1), (2) and (3) of Kenya Communications (Broadcasting) Regulations, purporting

to provide for ***"Transition of Permits to Licences"***. The main ground upon which the application is predicated is that the said Regulations are ultra vires the Act and specifically Sections 46(a) and (d) Section 46 (D) (2)(b) and (d); Section 46 K(a) and 46 (R) of the Kenya Communication Act 1998 and Paragraphs 2(a) and (b) of the Fifth Schedule to the Kenya Communications Act 1998. Further grounds are found in the verifying affidavit of **Alfrida Boinett** dated 22/4/2010 and a further affidavit sworn by the same deponent on 14/9/2010. Mr. Simani, the ex parte Applicant's counsel also filed submissions and authorities.

The application was opposed by both the 1st and 2nd Respondents. The 1st Respondent filed grounds of opposition on 16/9/2010 and submissions on the same date. Mr. Bitta, Senior Litigation counsel appeared on behalf of the 1st Respondent. **Mercy Wanjau**, the Principal Legal Officer of the 2nd Respondent swore an affidavit dated 19/7/2011. **Mr. Amoko**, counsel for the 2nd Respondent filed submissions and Authorities on 14/12/2011. The issues that seem to emerge are;

(1) whether the application offends Order 53 Rule 3(2) and 3(3) Civil Procedure Rules;

(2) whether the Applicant has the locus standi to bring his application;

(3) whether the Respondent is in contempt of the court order of 27th August 2009;

(4) whether the named Regulations are ultra vires the parent Act; and

(5) Whether the order sought can be granted; applicant's legitimate expectation has been breached.

Before considering the specific issues raised, I think it is important to set out the background to the case which was captured in very lengthy affidavits sworn by both sides. What can be gleaned from the affidavits and submissions is that for a long time, the broadcasting industry did not have any regulatory framework. There was a clamour for reform by various groups, and that culminated in the publication of the **Kenya Communications Amendment Act (KCAA)** which came into force on 1/1/2009 and later on 2//1/2010, the **Kenya Communications Broadcasting Regulations** were published. Work on these laws had commenced earlier but it is not until the **Statute Law (Miscellaneous Amendment) Bill** came into force on 22/7/2009 that the 1st and 2nd Respondents could finalise the draft Regulations. The 2nd Respondent claims to have posted the Regulations on its website on 18/9/2009 and the Daily Newspaper,s advising the public and interested parties to submit their views on the said Regulations and some stakeholders like **Multichoice** and **UN** asked for an extension of time and their comments were published in the Nation of 28/8/2009. There followed an open forum held at Kenya School of Monetary Studies where people were allowed to give their comments on the Regulations, all suggestions were collated and considered before the Regulations were finalized on 31/12/2009. According to the ex parte applicant, the Legislative intent was to cure the non-objective and politically motivated allocation of radio frequency spectrum and the 2nd Respondent was freed from political interference and was empowered to regulate the broadcasting industry without interference, buttressed by **Section 5B of the Kenya Communications Act**. The Applicant, submitted that the 2nd Respondent has abused its mandate by enacting the ultra vires Regulations and that is what has prompted this application.

In addition to the above, **Mr. Simani**, counsel for the Applicant submitted that Section 46 R, of the Kenya Communications (Amendment) Act introduced the Transitional Provisions on permits issued prior to the commencement of the Act, provided for in the Fifth Schedule. The Fifth Schedule, paragraph 2 provided that the Commission would respect and uphold the vested rights and interests of parties holding broadcasting permits issued by the Minister for Information prior to the commencement of the Act. At paragraph 2(a), those who held permits were allowed one year to continue to operate under the existing permits and at (b), before expiration of the one year, they would apply to the Commission to be licenced under the Act. Contrary to the above, the 2nd Respondent promulgated Regulation 46 which provided at paragraph 46(1)(c) that the persons who held permits before the commencement of the Act would retain the radio frequency resources already assigned under the same terms and conditions of issuance. He urged

that the said provision does not give effect to the intention of the Act.

Counsel also submitted that Regulations 46(1), (2), (3) tend to create further transitional provisions not envisaged by Section 46 R. He said that by the heading of **"Transition of Permits to Licences"**, the intention is to migrate permits to licences. He urged that the parliament never intended transition of permits to licences but that the express provisions of the Act gave a grace period of one year during which permit holders would apply to be licenced if they so-wished. It was submitted that part VI of the Act provides the procedure of licencing – Regulation 77 sets out how the application for a licence will be made; Regulation 78, the giving of notice in the Kenya gazette; Regulation 79, grant or refusal of licence. Counsel further submitted that by Regulation 46(1)(a) providing that all persons issued with broadcast permits prior to the commencement of the Act shall be required to apply for a broadcast licence, is ultra vires because the fifth Schedule provided that ***"all persons shall apply to the Commission".***

Counsel also submitted that the Act never intended what is provided in Regulation 46(1)(b) that all persons issued with permits prior to the commencement of the Act pay fees as prescribed but intended all persons to apply to the Commission and be licensed. Similarly, as regards Regulation 46(1)(c). Counsel observed that it created a totally new substantive provision not envisaged under the Act, by providing that all persons issued with permits prior to the commencement of the Act retain the radio frequency resources already assigned under the same terms and conditions, that was ultra vires because the parent Act provides that all such persons shall apply to the Commission to be licensed under the Act.

In respect to Regulation 46(3), counsel urged that it was Parliament's intention that after the grace period of one year, all broadcasters were required to apply to the Commission for licensing, and that is ultra vires because, the Regulation requires that one who holds a permit shall be required during the licence term, to surrender all additional broadcasting licences. He said all broadcasters were supposed to apply for consideration by the commission during the one year. Counsel submitted that Regulation 46(3) purports to postpone all the new requirements imposed by the new Act by an attempt to amend the parent Act. He quoted the proceedings of the Parliament's debate in the ***Hansard*** of 10/12/2008 and that provisions of the Act and the intention of Parliament was clear, that the vested rights and interests were to be respected for a year and no more.

1st Respondent's Case:

The grounds of Opposition raised by the 1st Respondent are as hereunder;

(1) That the ex-parte applicant is not a legal entity thus lacks the capacity to institute and proceed with the application;

(2) That the application will directly affect the rights of all persons with existing licenses yet the said persons have not been served with the application contrary to the mandatory provisions of Order LIII Rule 3(2) of the Civil Procedure Rules;

(3) That the ex-parte applicant's application is upported by the verifying affidavit of Alfrida Boinett which has unmarked annextures;

(4) That the entire application is allegedly being undertaken in the public's interest which interest the ex-parte applicant lacked the legal capacity to represent at the time of institution of the present application;

(5) That the ex-parte applicant's application is premised on the verifying affidavit of Alfrida Boinett which contains opinion evidence on issues touching on the interpretation of statutory provisions without the requisite foundation of her academic or empirical qualifications to give the same;

(6) That the ex-parte applicant has neither alleged having applied for **any broadcasting license**

nor having been denied one hence lacking the requisite sufficient interest to initiate the present application;

(7) That if the orders sought are granted, the entire country's broadcasting sector would be adversely affected and this Honourable Court ought to give greater currency to the larger public's interest while exercising its discretion in judicial review proceedings;

(8) That the regulations in issue are not ultra vires the provisions of the parent act;

(9) That the ex-parte applicant seeks to rely on a previous decision of the High Court in a purely commercial/civil matter whose ratio decidendi is not pertinent to the present application seeing as such that the present one is a public law action where the court's jurisdiction is circumscribed by the express provisions of the Law Reform Act;

(10) That the ex-parte applicant also seeks to rely on another decision of the High Court arrived at before the amendments were made to the parent act granting the 1st Respondent the powers to make the regulations in question under Section 46 K of the parent Act.

In addition, Mr. Bitta submitted that the main ground relied upon by the ex-parte applicant is that the regulations are ultra vires the parent Act. Counsel submitted that the Regulations are not ultra vires to the Parent Act and urged the court to read all the provisions in harmony in order to give effect to the intention of the Act. He urged the court not to examine the merits of the policy being effected through the Act as the applicant was trying to do. He urged that the regulations in relation to ***"transition of permits to licences"*** which is provided for under Section 46 R of the Kenya Communications Act envisaged the extension of the permits issued prior to the Act. In his view, the regulations to be in consonant with the Act. He urged this court to construe the regulations in harmony as was held in **Maharashtra State Board of Secondary and Higher Secondary Education Vs Kurmarshetia & Others 1985/LRC (Const) 1085 (b) C**.

Counsel submitted that in the event the court finds the Rules to be ultra vires, then the doctrine of severability be applied to quash only those Regulations that are ultra vires. (See *Bennion* in his article, **"Ultra Vires Delegated Legislation"**). Mr. Bitta also submitted that Judicial Review orders are discretionary and the court has to take into account the public interest. He relied on the decision in **Misc. Hcc No. 86 of 2009 KNCHR ex-parte Uhuru Kenyatta and Republic Vs JSC ex-parte Pareno (2004) KLR 203**. It was his view that if the regulations are quashed, it would result in chaos in the Broadcasting sector where most of the players are operating on permits issued before the commencement of the Act and they would be forced to close down contrary to public interest.

Mr. Bitta also raised issue with non-service of the application on all those parties affected by the orders that may be given by this court. It was his view that Rules of natural justice have been flouted as all the interested parties should have been joined to these proceedings. Lastly, counsel submitted that the applicants have not demonstrated that they have the necessary *locus standi* in this matter. He relied on **Canada Council of Churches Vs Republic (1992) CRC (Const)**, where the court considered the conditions that the plaintiff had to satisfy in public interest standing and that the applicant failed to meet the threshold. Mr. Bitta urged the court to disregard a previous case **Hc Misc. No. 490 of 2009 Wezn Radio Group Ltd** (Applicant) Vs The Communications Commission of Kenya (the 2nd Respondent) as the 1st Respondent was not a party to the said case.

2nd Respondent's submissions:

In her affidavit, **Mercy Wanjau** made reference to and adopted her depositions in her affidavit filed in **Nairobi Hcc No. 490 of 2009** in opposing the Judicial Review application. She said that Section 46 K of the Kenya Communications (Amendment) Act mandates the Minister, in consultation with the Commission to make regulations with respect to broadcasting. The work of preparing the rules started way back in 2009 when the President authorized the reviewing of the Kenya Communications (Amendment) Act, 2008 and it was not until the Statute Law (Miscellaneous Amendment) Bill came into

force on 23/7/2009 that the 1st and 2nd Respondents could finalise the draft regulations for promulgation under Section 46 K of the Kenya Communications (Amendment) Act. They were published on its website. On 23/9/2009, the public were notified on how to access the Regulations and the interested parties to give their comments; Requests were made by some interested parties like Multichoice for extension of the deadline. On 29/9/2009, a notice extending time for the submissions of comments was published and the period was extended to 16/10/2009; several representations were made to the 2nd Respondent but none came from the applicant. A stakeholder's forum was advertised for 18th and 19th November, 2009 at the School of Monetary Studies where all parties articulated their concerns on the Regulations. The applicant did not attend. All the suggestions were collated and collected in the final draft of the Regulations, they were finalized and published on 31/12/2009. She further deponed that though the draft Regulations had been approved and published by 2/1/2010, which was the date prescribed by Statute for the expiry of the transitional provisions for harmonizing of licences from permits, the licencing of the broadcasting could not begin.

In the meantime, the 2nd Respondent was trying to have the law amended by Parliament so as to extend the transitional period and allow for licensing of broadcasting until the regulations were ready but those amendments were not forthcoming by the time the Regulations were published. Ms Wanjau conceded that though the Regulations were promulgated to carry out the intentions of Parliament, there was a delay caused by amendments to the Kenya Communications (Amendment) Act and consultations with stakeholders so that by the time of publishing of the Regulations, the one year period provided by Section 46 R of Kenya Communications (Amendment) Act had lapsed before the Statutory regulations for licensing of broadcasting services could be operationalised. So as to ensure that Broadcasting did not ground to a halt, the permits previously used were not cancelled by the 2nd Respondent.

In his submissions, Mr. Amoko, the 2nd Respondent's counsel made a limited concession that regulation 46 and the 5th Schedule provided for transition from issuance of permits to application for licences. He recalled Mercy Wanjau had explained the delay and further submitted that Regulation 3 prescribes the manner of applying for licences and frequencies and they are only retained upon successful application for a licence. He denied that there is a retention or *status quo* as alleged by the Applicant. He also submitted that as per the Regulations if one has more than one frequency, they have to surrender it and that captures the broad purposes of the Act. Counsel also submitted that the plurality mandated by sections 46(A) (d) and 46(D)(2)(d) of the Act are given effect in Regulations 6 which covers obligations in relation to Broadcasting services; Rule 10 which restricts ownership and control; Rule 13 which covers obligations on community broadcasting and Rule 35 covering the local content. He urged the court not to grant orders as prayed as an order of certiorari is too wide and misleading and the Regulations on transitional provisions cannot deal with all aspects of the Act. He dismissed the reliance on Justice Sitati's ruling in **Hc Misc. No. 490 of 2009** because it was made at the leave stage and did not give final orders. Counsel agreed with submissions made by Mr. Bitta, counsel for 1st Respondent.

Analysis:

I have now considered the rival arguments, submissions filed by both sides of the controversy and Authorities relied upon. I will now consider each issue raised.

Whether the application offends Order 53R 3(2) and (3) Civil Procedure Rules; It was Mr. Bitta's submission that the application is incompetent because the applicant did not serve the application on persons whose rights may be affected by any orders that the court may make. Order 53 Rule 3(2) Civil Procedure Rules requires that the applicant do serve notice on all persons directly affected and under Rule 3(3), an affidavit giving the names and addresses of those persons who have been served must be filed. The rules are couched in mandatory terms.

In the instant case, the Regulations that have been challenged are those made by the 2nd Respondent on behalf of the 1st Respondent. The licence holders who would be interested parties herein only benefit from the decision of the Respondents and in my view it is not mandatory that all the licence holders be served. Although the resultant decision would affect them, they cannot come into this matter as

individuals because they are not party to the promulgation of the impugned Regulations.

Locus Standi:

Both Respondents have contended that the applicant has not demonstrated that it has an interest sufficient enough to sustain these proceedings. The applicant is a limited liability company registered with Registrar of Companies. A Certificate of Incorporation was exhibited and dated 6/11/2001. Only page 1 of the Memorandum of Association was exhibited and states only three objects not relevant to Broadcasting. The applicant claims to derive interest in this matter on the basis that it is involved in public awareness, environmental conservation, community development and empowering through various mediums, fundraising for construction of electric fence around Lake Nakuru and Mau and Lembus Forests; conserving habitat around Lake Bogoria, Baringo and Lake Turkana. Apart from what is deponed to by Ms. Boinett, there is not a shred of evidence of involvement in the said activities. The applicant claims to have been interested in applying for a broadcasting licence but has not demonstrated that it made any application for licencing which has been denied. It is not denied that the applicant never bothered to respond to an invitation by the Respondent to the public forum held at Kenya School of Monetary Studies to give its views and contributions before the Rules were promulgated.

Mr. Amoko also argued that the applicant being a Private Limited Liability Company, it can only do that which it is authorized by its Constitution or Memorandum. The applicant did not exhibit the complete memorandum and this court can not tell what activities the applicant is mandated to involve itself in. I do agree that the applicant has to demonstrate that it has some interest in the matter and not just a mere busy body. In the Canadian Case of **Canada Council of Churches Vs Republic & Another [1992] LRC [Const] page 610**, the court had this to say of *locus standi*;

"the conditions that a plaintiff must satisfy in order to be granted public interest standing to challenge legislation or the exercise of administrative authority were whether;

(a) there was a serious issue as to invalidity of legislation;

(b) he or she was directly affected or had a genuine interest as a citizen in the validity of the legislation and;

(c) there was no other reasonable and effective manner in which the issue might be brought before the court.

Accordingly, a person would not have standing where on a balance of probabilities a directly affected individual might be expected to initiate legislation. Although the principles should be interpreted in a liberal and generous manner, the decision to grant status was nonetheless discretionary and an undeserving applications could be refused".

Halsbury's Laws of England, 4th Edition at paragraph 66 states that over the years, the question of what is sufficient interest has been relaxed and the key issue is whether the applicant can identify some substantial default or abuse and not whether his personal rights or interests are involved. The author also observes that cases brought by pressure groups, they do have standing to challenge decisions which concern their areas of interest or expertise. The applicant seems to be a pressure Group because it does not seem to have any specific interest in broadcasting, but it has not demonstrated that Broadcasting is its area of interest or expertise. Ms Boinett only depones that the applicant intended to apply for a licence. There is no evidence of an application having been made. That is not sufficient interest in the impugned Regulations.

Mr. Amoko also urged that the applicant being a private limited liability company, it could only transact that which it was authorized to do by its Constitution or Memorandum. The whole Memorandum of the Applicant was not exhibited and the applicants did not avail any evidence to support their allegations that they are involved in conservation and public fundraising for the public benefit or that they have an interest in broadcasting. Even given the wide definition of sufficient interest that *Lord Diplock* considered

in **Republic Vs Inland Revenue Commissioners ex-parte National Federation of Self Employed & Small Businesses Limited [1952] Page 617**, that sufficient interest depends on the circumstances of each case, the applicants did not pay much attention nor did counsel respond to the objection raised by the Respondents. That is despite the fact that it is a very important issue that goes to determine whether or not this court has jurisdiction to hear the Judicial Review application, and grant the orders sought. I will agree with the Respondents that the Applicant has totally failed to demonstrate that it has any interest in the issue at hand.

Whether the Respondents were in contempt of the order of 27/8/2009; The applicants allege that the Respondents are in contempt of a court's order issued by Justice Sitati in **Nairobi Misc. Application No. 490 of 2009 Wezn Radio Group Limited Vs The CCK**. The Ruling of the Judge was exhibited and it is evident that it was a ruling made ex parte when the applicant sought leave of the court to commence Judicial Review proceedings. Stay was granted for 60 days whereby the Respondents were barred from publishing the Regulations. The Notice of Motion arising from the leave granted has however not been determined and there is no evidence that the applicants in that case ever moved the court in that matter to cite the Respondents for contempt of court. There is due process under the law **(Section 5 of the Judicature Act)** for determining whether a party is guilty of contempt. That process should have been pursued by the party affected in the said case. Since the Respondent has not been found to have been contemptuous of the court's order, this court cannot reach the conclusion that the Respondent disobeyed the court's order of 27/9/2009 and the court's order of stay in that case does not have direct relevance to this case. Besides, the order of stay seemed to apply to the decision of the Communications Commission of Kenya contained in the Daily Nation Newspaper of 21/7/2009 and it is denied that any permits were issued under the amendments of the Act No. 1 of 2009. At least, there is no evidence to that effect. If the said order was disobeyed, it can be challenged in that suit.

Whether the Regulations are ultra vires; There was dire need for regulation of the Broadcasting industry, due to the many competing interests and limited resources. The need for regulation of the Broadcasting Industry was underscored by **Daniel J. Gifford** in his book, **Administrative Law Cases and Materials**, where he says;

"Radio and television regulation is justified on a market theory rationale: without regulation, the dynamics of the marketplace would encourage more stations to broadcast in population centres than the radio frequency spectrum could tolerate without interferences."

It is admitted by all parties that after a lot of protracted discussions by stakeholders in the broadcasting industry, the Kenya Communications (Amendment) Act (KCAA) came into force on 1/1/2009. The preamble to the Act reads that it was meant to amend the Kenya Communication Act 1998, to make minor amendments to other statute law and for connected purposes. **Section 5 of the Principal Act** was amended to include the objects of the Commission to be ***"…licence and regulate postal information and communication services"*** in accordance with the provisions of the Act. Section 46A which falls under part IVA of the Act, spells out the functions of the Commission in relation to Broadcasting services to be as follows;

(a) promote and facilitate the development in, keeping with the public interest, of a diverse range of broadcasting services in Kenya;

(b) facilitate and encourage the development of Kenyan programmes;

(c) promote the observance at all times, of public interest obligations in all broadcasting categories;

(d) promote diversity and plurality of views for a competitive marketplace of ideas;

(e) ensure the provision by broadcasters of appropriate internal mechanisms for disposing of complaints in relation to broadcasting services;

(f) protect the right to privacy of all persons; and

(g) carry out such other functions as are necessary or expedient for the discharge of all or any of the functions conferred upon it under this Act.

Under Section 46K of the Kenya Communication (Amendment) Act, the Minister was mandated to make Regulations on Broadcasting. It provides *inter alia*;

"The Minister may, in consultation with the Commission, make regulations generally with respect to all broadcasting services and without prejudice to the generality of the foregoing, with respect to –

(a) the facilitation, promotion and maintenance of diversity and plurality of views for a competitive marketplace of ideas;

The Regulations were drafted and published on 31/12/2009. According to the Respondents, they were approved and published by 2/1/2010 which was the date prescribed by statute, for expiry of the Transitional Provisions. The Applicant contends that Regulations 46(1), (2) and (3) are ultra vires the Act and in violation of the various sections that have been cited. I will consider each of the said Regulations in turn. But before I do that, the question is what is the scope of the court in determining whether or not delegated legislation is in conformity with the parent Act. *Bennion***,** on **Statutory interpretation, 2nd Edition**; considered what should be taken into account when interpreting all statutes. The author says at page 717;

"That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of common law) four things are to be discerned and considered;

(1) what was the common law before the making of the Act?

(2) What was the mischief and defect for which the common law did not provide?

(3) What remedy the Parliament later resolved and appointed to cure the disease of the commonwealth; and "the true reason of the remedy and then the office of all the Judges is always to make such construction as shall;

(a) suppress the mischief and advance the remedy,

(b) suppress subtle interventions and evasions for the continuance of the mischief *pro private commodo* (for private benefit), and

(c) add force and life to the cure and remedy according to the true intent of the makers of the Act pro bono publico (for the public good)"

Again, the same author in the book 5th Edition, Lexis Lexis at page 247, says as follows of Judicial Control over delegated legislation;

"The courts have long maintained a right to superintend delegated legislations, though the process are necessarily limited by the terms of the relevant enabling Act. All that the court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that the powers are exercised in good faith. Apart from that, the courts have no power at all to enquire into the reasonableness, the policy, the sense or any other aspect of the transaction."

The above stated views were echoed in the case of **Maharashtra State Board of Secondary & Higher**

Secondary Education Vs Kurmarsheth & Others 1985 LRC (Const) page 1084 – 1106. The court said;

"The validity of regulation is to be determined by reference to specific provisions of the statute conferring the power of delegated legislation and to its objects and purposes. Provided the regulations have a rational nexus with the object and purpose of the statute, the client should not concern itself with the wisdom and effectiveness… The court should not concern itself with the merits or demerits of a policy pursued by means of delegated legislation, but only with the question whether the delegated legislation falls within the scope of power conferred by statute and is consistent with the Act and the Constitution."

One of the milestones achieved by the Act was to create an independent Commission so that it could carry out its mandate without interference. Section 5B provides that;

"Except as provided under this Act or any other law, the Commission shall exercise its functions independent of any person or body."

The other objects and intentions of the legislatures are captured in Section 46A which is already set out earlier in this Judgment on the functions of the Commission and in Section 46D, as regards what the Commission should take into account when considering applications for licensing which are *inter alia*; The public interest, diversity and plurality of views in market place of ideas and efficiency and economy, in the provision of broadcasting services.

Section 46R provides that transitional provisions in respect to broadcasting permits issued prior to the commencement of the Act shall be found in the Fifth Schedule of the Act. Paragraph 2 of the Fifth Schedule reads as follows;

"The Commission shall respect and uphold the vested rights and interests of parties holding broadcasting permits issued by the Minister prior to the commencement of this Act, provided that;

(a) Such parties shall be granted a period not exceeding one year during which they may continue to operate in accordance with their existing permits; and

(b) Before the expiry of the one year period, such parties shall apply to the Commission to be licensed under this Act."

The purposes to be served by the transitional provisions was aptly captured by the Minister for Information and Communications when on 10/12/2008, he said in the *Hansard* that the proposal to extend time to one year was to respect and uphold vested rights and interests of parties holding broadcasting permits before the new regime came into force so that nobody becomes a victim of time limit. The Transitional Provisions were meant to ensure that broadcasting continued during the period of the transition to the new statutory regime otherwise, there would have been chaos in the sector.

Before I proceed to consider each of the alleged impugned Rules, it is worth remembering that the 2nd Respondent made a limited concession that the 2nd Respondent did not fully comply with the transitional provisions due to amendments introduced to the Act in July, 2009 which was more than 6 months into the transitional period. Further, due to the consultations with stakeholders, the Regulations were not published till 31/12/2009.

The impugned Regulations are Regulation 46 (1)(2) and (3). For purposes of comparison, with the Fifth Schedule and Section 46R, I will consider each subsection of Regulations 46. Regulation 46(1) (a) reads as follows;

"46 (1) Pursuant to section 46R of the Act, all persons issued with broadcast permits prior to the commencement of the Kenya Communications (Amendment) Act, 2009 shall-

(a) be required to apply for broadcast licence(s) in such a manner as may be prescribed by the Commission."

In respect of Regulation 46 1(a); it was submitted by the applicant that despite the fact that paragraph 2 of the Fifth Schedule provides that those holding permits will have a grace period of 12 months within which to apply to the licensed; Regulation 46 1(a) provides for migration of the permit to a licence. The transitional provisions provide that the permit will expire within a year and that parties **SHALL** apply to be licensed. The Applicants submitted that the intention of Section 46 R and paragraph 2 of the Transitional Provisions was not meant to migrate the permits to licences.

Regulations 46 (1)(b), provides;

"Pursuant to section 46R of the Act, all persons issued with broadcast permits prior to the commencement of the Kenya Communications (Amendment) Act, 2009 shall-

(b) pay such fees as may be prescribed by the Commission for the issuance of the broadcasting licences) to replace the permits and frequency licence and usage fees"

It was submitted that under the above Regulation, those holding permits pay fees for payment of licences contrary to the transitional provisions which provide that the permits expire within 12 months and all the parties apply to be licensed.

Regulation 46 (1)(c) –

"Pursuant to section 46R of the Act, all persons issued with broadcast permit prior to the commencement of the Kenya Communications (Amendment Act, 2009 shall-

(c) retain such radio frequency resources already assigned under the same terms and conditions of issuance"

It was urged by the Applicant that though the Transitional provisions state that all permits will expire within 12 months, contrary to that intention, the rule provides that those with the broadcast permits should retain the radio frequency resources already assigned under the same terms and conditions of issuance provided that they comply with the new terms. It was submitted that the intention of the legislature was that the permits expire within one year and applications be made for licences but not a migration from permit to a licence.

Regulation 46 (2);

"In addition to the requirements specified under section 46D (2), the Commission shall, when considering an application for a licence to replace a permit, consider-

(a) the past compliance record of the applicant relating to adherence to the conditions of the broadcasting frequency licence; and

(b) the status of frequency fee payments.

It was submitted that the Respondent purported to add to the requirements of Section 46D(2) when the Commission is considering an application for a licence and that the Respondent could not purport to amend that section through the Regulations. Regulation 46(3) provides as follows;

"Any person who holds a broadcasting permit and who has been assigned more than one broadcast frequency for either radio or television broadcasting services in the same broadcast coverage area, shall be required within a period not exceeding the licence term, to surrender all additional broadcasting frequencies to the Commission."

It was argued that a party which had been assigned more than one broadcast frequency should surrender it within the licence period. It was urged that this is contrary to the provisions of the Fifth Schedule which provides that the permit expire within a year and a fresh applications for licences be made. It was argued that the Regulation is postponing the expiry of the permit date after the licence term. The Act envisages a situation where the permits will be invalidated and parties are required to apply and be considered for licensing afresh. Counsel argued that if Parliament wanted there to be a migration from permits to licences, there was nothing to stop it from enacting such law as it had done in earlier legislation, Kenya Communications Act, Third Schedule paragraph 2 stated thus;

"2 Licences granted by former Corporation

"Notwithstanding the repeal of the Kenya Posts and Telecommunications Act, all licences granted by the former Corporation shall be deemed to be granted by the Commission under the corresponding provisions of this Act and shall remain in force until they are revoked in accordance with any terms in that regard set out in the licence and replaced by licences granted under the Act."

Contrary to the Applicant's submissions on Regulation 46, Mr. Amoko and Mr. Bitta submitted that the Regulations fully recognize the requirements of diversity and plurality as mandated by Sections 46(A)(d) and 46D (2),(b) and (d) as they have been given effect by Regulations 6, 10, 13 and 35. Regulation 6 deals with broadcasting services which provides *inter alia*;

"(b) The Commission shall;

(a) ensure that broadcasting services reflect the National Identity, needs and aspirations of Kenyans;

(b) ensure that broadcasting services are delivered using the most efficient and effective available technology (c) and (d)…"

Regulation 10 provides for restriction on ownership and control;

"10(1) No persons rather than the public broadcaster shall be directly or indirectly entitled to more than one broadcast frequency or channel for radio or television broadcasting in the same coverage area;

Provided the Commissioner shall prescribe a timeframe for existing stations to comply with this requirement, 2-8.."

Regulation 13 provides for obligations imposed on community broadcasting. It reads in part;

"13(1) A community Broadcaster shall;
Reflects the needs of the people in the community including cultural, religious, language and demographic needs;

(c) deal specifically with community issues which are not normally dealt with by other broadcasting services covering the same area and (a)(d) – (5).

Regulation 35, makes provision for Local Content;

"The Commission may require a licensee to commit the minimum amount of time, as maybe specified in the licence, to broadcast of local content or as may be prescribed from time to time by the Commission by notice in the gazette:

Provided that where a broadcaster is, unable to comply with the foregoing, the Commission shall require such broadcaster to pay such an amount of money, as may be prescribed by the Commission into the Fund.

(2) The Commission shall from time to time prescribe a minimum local content quota for foreign broadcasting stations that broadcast in Kenya."

The impugned regulations cannot be read in isolation but should be read in harmony with the rest of the Regulations. The court in **Kurmarsheth case (supra)** observed that it is a well established doctrine of statutory interpretation that enacted provisions should be construed in harmony with each other. In this case, Regulation 46 cannot be construed in isolation of other Regulations but has to be read together with the rest. It seems that the Regulations 6, 10, 13 and 35 do provide for diversity and plurality which the applicant contends have not been taken into account by the Regulation 46.

Regulations 6, 10, 13 and 35 are evidence of these objects having been taken into account. I find that the impugned regulations 46(1) and (2) have been made within the scope of the Act. However, I find that Regulation 46 (3) allowing those who were assigned more than one frequency, to last the term of the licence, does not conform with paragraph 2 of the Fifth Schedule: The permits were to expire within one year, and applications for licences were to be made afresh. Regulation 46(3) tends to extend the period within which the permits issued in the old regime would remain valid. For example, if one was issued with a permit for a frequency for 10 years, in January 2007, then it means the permit will be in use till 2017. That in effect will be maintaining the status quo for a long time. It means that those who had a monopoly of the frequencies will continue to hold onto them denying other interested players from entering the market. In my view, Rule 46(3) was made contrary to the 2nd Respondent's mandate, the intent and objects of the Act and therefore made outside the scope of the 2nd Respondent's jurisdiction. Though the 2nd Respondent had the jurisdiction to make by laws, it could only make them within the four walls of the Act. Of course, it is appreciated that the Act only creates the skeletal framework while the Rules provide the substance. But the rules have to conform to the provisions of the Act. *Lord Reid*in **Anisminic Vs Foreign Compensation Board [1969] All Er 208 (213)** had this to say of ultra vires decisions.

"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly. I understand that some confusion has been caused by my having said in *Armah Vs Government of Ghana (6)* that, if a tribunal has jurisdiction to go right, it has jurisdiction to go wrong. So it has if one uses "jurisdiction" in the narrow original sense. If it is entitled to enter on the enquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or

wrong subject only to the power of the court in certain circumstances to correct an error of law."

Going by the reasoning in the above cited case, had the applicant established its interest or standing in this matter, this court would have quashed Regulation 46(3) for being ultra vires to the 2nd Respondent's mandate. However, for all the reasons given in this Judgment, I decline to grant an order of certiorari as prayed. The application is hereby dismissed. The Applicant to bear the costs.

DATED and **DELIVERED** this 2nd day of June, 2011.

R. P. V. WENDOH
JUDGE

PRESENT:
Mr. Mwangambo for Applicant
Ms Naija for Respondents
Kennedy – Court Clerk