



**Law Society of Kenya v Attorney General & another; Kenya Broadcasting Corporation (Interested Party) (Petition E182 of 2024) [2025] KEHC 3439 (KLR) (Constitutional and Human Rights) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3439 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E182 OF 2024  
LN MUGAMBI, J  
MARCH 20, 2025**

**BETWEEN**

**LAW SOCIETY OF KENYA ..... PETITIONER**

**AND**

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

**PRINCIPAL SECRETARY, MINISTRY OF ICT, INNOVATIONS & YOUTH AFFAIRS (STATE DEPARTMENT OF BROADCASTING & COMMUNICATIONS) ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**KENYA BROADCASTING CORPORATION ..... INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The petition dated 8<sup>th</sup> April 2024 is supported by an affidavit of even date sworn by the petitioner’s secretary and chief executive officer, Florence Muturi and a further affidavit sworn on 18<sup>th</sup> June 2024.
2. This petition challenges the 2<sup>nd</sup> respondent’s decision to restrict all of government’s advertisements to the interested party.
3. The petitioner complains this this is a direct violation of Articles 10, 27, 34, 35, 47, 201 and 227 of *the Constitution* as well as Section 103 and 104 of the *Public Procurement and Asset Disposal Act*.
4. The petitioner thus seeks the following reliefs against the respondent:



- a. A declaration that the decision contained in the Memorandum dated 7<sup>th</sup> March 2024 issued by the Principal Secretary Ministry of ICT, Innovations & Youth Affairs (State Department Of Broadcasting & Communications) to exclusively award the interested party the contract for advertising government services, thus making them the sole advertisers of government information contravened the provisions of Articles 10, 27, 47 and 201 of *the Constitution*, Section 103 and 104 of the *Public Procurement and Asset Disposal Act*, 2015 and is therefore illegal and void.
- b. An order of certiorari be issued to bring into this Court for purposes of quashing the Principal Secretary Ministry of ICT, Innovations & Youth Affairs (State Department Of Broadcasting & Communications) decision contained in the Memorandum dated 7<sup>th</sup> March 2024 to exclusively award the interested party the contract for broadcast advertising services by the government.
- c. An order awarding costs of the petition to the petitioner.
- d. Any other or further orders, writs and directions this court considers appropriate and just to grant.

### **Petitioner's Case**

5. On 7<sup>th</sup> March 2024, the 2<sup>nd</sup> respondent vide Memorandum Ref. MICDE/GAA/ ADM/3/Vol.VI (131) directed all principal secretaries, chief executive officers of State Corporations, semi-autonomous and autonomous government agencies, independent commissions and vice chancellors of public universities that, their advertising would be restricted to the interested party herein. It is averred that the impugned directive is currently being implemented by the interested party.
6. The petitioner asserts that the 2<sup>nd</sup> respondent's decision contravenes the constitutional and statutory provisions on procurement of public services. Further contrary to the industry standards which guarantee that vital government information is publicized, circulated and disseminated widely in compliance with Article 35 of *the Constitution*.
7. It is contended that by restricting the government's advertising information, the citizenry runs the risk of losing out on advertisements that may contain information which may be required for exercising or protecting their fundamental rights.
8. The petitioner also takes issue with the 1<sup>st</sup> respondent as it is claimed that it failed to advise the 2<sup>nd</sup> respondent on the legality and constitutionality of the impugned decision. Furthermore, it is argued that the 2<sup>nd</sup> respondent prior to making the decision, did not conduct public participation or engage the relevant stakeholders or interest groups such as the Advertising Practitioners Association, Media Owners Association, Kenya Union of Journalists, Media Council of Kenya, Marketing Society of Kenya, Public Relations Society of Kenya, the Consumer Federation of Kenya. Attempts by these groups to hold consultation with the 2<sup>nd</sup> respondent on the issue were unsuccessful.
9. It was thus contended that the unilateral decision by the 2<sup>nd</sup> respondent contained in the impugned memorandum and the subsequent implementation by the interested party is unconstitutional and a breach of the principle of separation of powers as it also extends to independent commissions.

### **1<sup>st</sup> Respondents' Case**

10. The 1<sup>st</sup> respondent relies on the 2<sup>nd</sup> respondent's response.



## 2<sup>nd</sup> Respondent's Case

11. In reply, the 2<sup>nd</sup> respondent filed the replying affidavit sworn on 20<sup>th</sup> May, 2024 on its behalf by Edward Waswa Kisiangani, the Principal Secretary, State Department for Broadcasting and Telecommunication under the Ministry of Information, Communications, and Digital Economy.
12. The 2<sup>nd</sup> Respondent asserted that Article 132(3) of *the Constitution* authorizes the President to direct the functions of the ministries and government departments through the Cabinet Secretary.
13. Further that Section 4 of the *State Corporations Act* provides that the President is to assign ministerial responsibility for any state corporation to the vice president and ministers as he may determine. Equally, that Section 12(1) of the *National Government Co-ordination Act* as read with Article 155 (2) of *the Constitution* that the 2<sup>nd</sup> respondent is responsible for the administration of a state department.
14. It was thus deponed that the impugned decision is not contrary to the law or made arbitrarily and was guided by several considerations which are articulated in the impugned letter summarized as follows: revival of ailing public sector entities; to ensure that public - private partnerships are not skewed against public sector institutions; leverage of the provisions within the Kenya Broadcasting Act which empower the interested party to undertake public sector electronic advertisements; the interested party has a nationwide footprint; government is focused on modernizing the interested party to be a premier broadcaster in Kenya and adoption of strategies that will ensure smooth flow of public sector advertising services while maintaining zero debt levels.
15. Accordingly, he avers that the main avenue for dissemination of government electronic information is the interested party which is a State Corporation and one of its objectives under the Kenya Broadcasting Act is to assume the government functions of producing and broadcasting programmes or parts of programmes by sound or television.
16. It is asserted that the interested party has an unmatched national broadcasting footprint in the country through the various services that it offers on its television and radio channels.
17. He contends as such that the impugned directive was not a change of policy but an internal administrative decision so as to implement the cited considerations. Considering this, he asserts that seeking to submit internal operational decisions to public participation is unreasonable.
18. He further argues that the impugned decision has no bearing upon Article 34 and 35 of *the Constitution*. This is because the 2<sup>nd</sup> respondent has not interfered with the operations of other media houses thus they remain uncompromised. Furthermore, he adds that the government has been keen on ensuring media freedom as seen in enactment of the Development of the Media Policy Guidelines 2009; *Media Council Act* 2013; establishment of the Communications and Multimedia Appeals Tribunal, Broadcasting Regulations and a Broadcasting Code under the *Kenya Information and Communications Act* and *Access to Information Act*, 2016 and Access to Information (General Regulations), 2024. Consequently, he contends that the petitioner has misconstrued the application of these two provisions in the circumstance of this case. Essentially, both relate to protection of media houses from the government's interference.
19. Additionally, he makes known that such policy directions are not novel within the government. He notes that similar policy directives were issued in relation to the government utilizing the services of Kenya Airways and National Oil Corporation of Kenya. Consequently, he opposes the insinuation that in directing the interested party as such, the same was geared towards creating a monopoly of the government's electronic advertisements.



20. Nonetheless, he avers that Section 4(2)(c) of the Public Procurement and Assets Disposal Act provides that acquiring services provided by a government department does not constitute a procurement or asset disposal as advanced by the petitioner. In sum the 2<sup>nd</sup> respondent avers that the petition lacks merit as is frivolous and vexatious.

### **Interested Party's case**

21. This party's pleadings and submissions are not in the Court file or Court Online Platform (CTS).

### **Petitioner's Submissions**

22. Japheth Kenvine Felix and Smith Advocates LLP for the petitioner filed submissions dated 18<sup>th</sup> June 2024 and supplementary submissions dated 18<sup>th</sup> September 2024.
23. Counsel sought to discuss the following issues in the set of submissions: whether the impugned directive, is reasonable, legal and constitutional; whether the exemption under Section 4(2)(c) of the *Public Procurement and Asset Disposal Act* is applicable to the exclusive allocation of government advertising contracts to the Kenya Broadcasting Corporation (KBC); whether the directive mandating exclusive advertising with KBC infringes on the constitutional rights to freedom of the media under Article 34 and access to information under Article 35 of *the Constitution*; and whether the issuance of the directive without public participation violated the constitutional principles of public participation and transparency under Articles 10 and 201 of *the Constitution*.
24. On the first issue, Counsel submitted that in order for a decision to be considered reasonable, the same ought to balance the intended benefits against the negative impacts on other media entities. Thus the decision should be proportional as discussed in *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR*.
25. In this matter, Counsel stressed that the impugned directive was unreasonable as disproportionately benefits one media entity being the interested party at the expense of all other media entities in the country. Accordingly, it was argued that the directive contravenes the principle of proportionality.
26. Additionally, Counsel submitted that the directive does not comply with the Article 227 of *the Constitution* and the Procurement and Asset Disposal Act which mandate a competitive procurement process that is fair, equitable transparent, competitive and cost effective. Reliance was placed in *Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR* where it was held that:

“An 'acceptable tender' must be construed against the background of the system envisaged by Article 227(1) of *the Constitution*, namely one which is; fair, equitable, transparent, competitive and cost-effective. In other words, whether 'the tender in all respects complies with the specifications and conditions set out in the bid documents' must be judged against these values. An 'acceptable tender' means any tender, which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. I find nothing convincing to suggest that the applicants could pass an Article 227 (1) analysis test and the above definition of an acceptable tender. Simply put, subjecting the entire procurement process to the values set out in Article 227 (1), I am not persuaded that the tender process cannot be read in a manner that is consistent with the said values and the dictates of the procurement laws and Regulations.”



27. Comparable reliance was placed in Republic vs. Public Procurement Administrative Review Board & another Ex parte SGS Kenya Limited [2017] eKLR, Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 others [2017] eKLR, Republic vs. Kenya National Highways Authority and 2 others, Ex Parte Amica Business Solutions Limited (2016) eKLR.
28. Turning to the second issue, Counsel submitted that the respondent's reliance on the exemption in Section 4(2) (c) of the *Public Procurement and Asset Disposal Act* was misplaced as does not justify overlooking of the principles set out under Article 227 of *the Constitution*. Counsel relied in Republic v Public Procurement Administrative Review Board Ex parte Kenya Power & Lighting Company Limited Energy Sectors Contractors Association & another (Interested Parties) [2020]eKLR where the Court held that:
- “*The Constitution* lays down minimum requirements for a valid tender process and contracts entered into following an award of a tender to a successful tenderer. Article 227 requires that the tender process, preceding the conclusion of contracts for the supply of goods and services must be fair, equitable, transparent, competitive and cost effective.”
29. Counsel as well stated that the impugned directive was in contravention of Article 34 of *the Constitution* as restricts media plurality by limiting the ability of other media houses to compete for government advertisements, thereby reducing their financial viability and ability to provide diverse viewpoints. Additionally it was contended that the government used this medium to curtail the rights of the other media houses.
30. Counsel likewise contended that the impugned directive solely vests the interested party with the function of disseminating government information which contravenes Article 35 of *the Constitution*. It was asserted that in doing so the interested party had granted the government undue control over the flow of public information and restricted access to government information to a single broadcaster.
31. To buttress this point reliance was placed in Nation Media Group Limited v Attorney General & 9 Others [2016] eKLR where it was held that:
- “We are of the view that there is nothing unconstitutional in granting the Cabinet Secretary in charge of information and communication the power to issue policy guidelines of a general nature in respect of matters that are within his Cabinet docket. We are also of the view that since such power is to be exercised, in the case of the *Media Council Act*, "in consultation with the Council", the issuance of guidelines that are likely to limit media freedom is to that extent limited.”
32. Like dependence was placed in Katiba Institute v President's Delivery Unit & 3 others [2017] eKLR.
33. Counsel further submitted that the impugned directive is in breach of Article 27 of *the Constitution* as discriminates against other media houses by denying them access to advertise or disseminate government related information, effectively giving the interested party a monopoly on government messaging. Reliance was placed in Royal Media Services Limited v Attorney General & 6 others [2015] eKLR where it was held that:
- “Good governance demanded of the regulator CCK to comply with the conditionalities set by both the substantive law and the regulations on disqualification for one to hold a BSD licence. This they did not as they disqualified the 1<sup>st</sup> and 2<sup>nd</sup> appellants from the tendering process on grounds placed in the tender document and yet to their knowledge these had



not been made as one of the disqualifying conditions in the tender notice. Secondly it was deeming and humiliating to degrade appellants by knocking them out of the industry as such a technicality. It gave the wrong impression that appellants were persons without integrity. This was contrary to the requirement of holding human dignity under Article 10. The move also did not respect the appellants' right to continue in the media industry as long as they complied with the law. No breaches of law in the conduct of their business in this industry were ever throughout the proceeding. It means appellants abided with the law in the discharge running of their business highlighted by the appellants were therefore genuinely aggrieved.”

34. In addition, Counsel submitted that the 2<sup>nd</sup> respondent prior to issuing the directive had failed to adhere to the principle of public participation as enshrined under Article 10(2)(a) and 201 (a) of *the Constitution*. As a consequence, Counsel submitted that the 2<sup>nd</sup> respondent’s directive fails the tests of reasonableness, legality, and constitutionality. Dependence was placed in Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR where it was held that:

“The principle of public participation ought to be real and not illusory; it must not be treated as a mere formality for the purposes of fulfilment of the constitutional dictates.”

35. Similarly, counsel relied in Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11 and Judicial Service Commission v Mosiria [2020] KECA 218 (KLR).

### **Respondents’ Submissions**

36. Principal State Counsel, Kaumba S.O. filed submissions dated 12<sup>th</sup> September 2024.
37. On the exclusive choice of the interested party, Counsel submitted that Section 4(2)(c) of the *Public Procurement and Asset Disposal Act* exempts the government-to-government acquisition and utilization of services and goods from the ambit of the Act.
38. Counsel further submitted that the Courts have also upheld the constitutionality of alternative procurement methods. Reliance was placed in Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others [2020] eKLR where the Court of Appeal upholding the High Court decision in Revival Health (EPZ) Limited vs Public Procurement Oversight Authority [2015] eKLR held that:

“

“94. Although the Act recognized alternative procurement methods, the default procurement procedure under Section 29 was open tendering. Section 29(1) of the Act provided that for each procurement, the procuring entity shall use open tendering. Other procurement procedures recognized under the Act that were subject to prescribed safeguards include restricted tendering; direct procurement; request for proposals; request for quotations; and procedure for low value procurements, among others. As regards restricted tendering or direct tendering, the safeguards under Section 29 (3) of the Act include obtaining the written approval of the procuring entity’s tendering committee and recording in writing the reasons for using the alternative procurement procedure.

95. It is not the appellants’ case, as we understand it, that the provision of alternative procurement procedures in the Act negates the requirements under



Article 227 of *the Constitution* to the effect that procurement by public entities should accord with a system “that is fair, equitable, transparent, competitive and cost effect.

In other words, the absence of “competition” in direct procurement in our view does not, in itself, render that procedure unconstitutional. We are therefore not persuaded, as contended by the appellants, that because the procurement of the SGR was not taken through a competitive bidding process, that in itself renders it unconstitutional.”

39. Furthermore, Counsel relying on paragraph 8 in the replying affidavit submitted that the impugned decision had been issued pursuant to a legitimate public purpose within the ambit allowable under this Section. To buttress this point reliance was placed in *Government of the Republic of South Africa v Grootboom* 2000(11) BCLR 1169, where the Court stated that:

“(42) A court considering reasonableness will not enquire whether more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognize that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirements of reasonableness. Once it is shown that the measures do so, this requirement is met.”

40. Counsel further asserted that the impugned decision was fair, reasonable and proportionate. It was argued that the Court cannot declare that certain acts of other organs of government are unconstitutional simply because they produce results which are in its opinion unjustified. Reliance was placed in *S v Makwanyane & another* 1995 (3) SA 391 (CC) where it was held that:

“Proportionality calls for the balancing of different interests. It held that in the balancing process, the relevant considerations will include the nature of the right that is being restricted and its importance to society. Regard should also be had to the purpose for which the right is restricted and the importance of that purpose to society. Further, a court entrusted with the interpretation of a right should look at the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, it should consider whether the desired ends could reasonably be achieved through other means less damaging to the right in question.”

41. In like fashion, Counsel submitted that the impugned decision does not violate the public’s right to access information. It was noted that beyond the broadcasting channels, a person is at liberty under Article 35 of *the Constitution* to obtain any information from the government.

42. On the right to media freedom, Counsel equally submitted that this right had not been compromised as alleged. Counsel stressed that Article 34(1) and (2) primarily concern protection of media houses from government interference. Considering this, it was noted that this provision does not preclude the government from advertising its content through the interested party.

43. In view of transparency and accountability, Counsel submitted that the interested party is governed by a Board as established under Section 4 of the *Kenya Broadcasting Corporation Act* and is directed under Section 8(1)(a) of the Act to be independent and impartial. This is further echoed under Section 10 and 43 of the Act which directs development of impartiality standards and audit of the interested party’s finances.



44. Reliance was placed in *Electoral Commission of Kenya V Attorney General & 2 Others* [2007] eKLR where it was held that:

“In our legal framework in Kenya three institutions have played major role in achieving a reasonable level of accountability in public institutions, namely the Courts through Constitutional enforcement and judicial review, Parliament through its committee systems including the Public Accounts Committee and the Executive itself by introducing the Rapid Results Initiative (RRI). It is not seriously contended in this matter that ECK notwithstanding its constitutional autonomy, is not subject to judicial review by the Court pursuant to S 123 of *the Constitution* or that it is immune from Parliamentary scrutiny in the conduct of its affairs or that it is immune from Controller and Auditor General’s audits. In addition the Minister could design in built procurement regulations which take into account the autonomy of the ECK and the need to undertake its constitutional mandate as set out S 41(9) and its obligation to account under the democratic provision, S 1A of *the Constitution*. All these forms or strategies of accountability are in my view adequate to ensure that the public funds channeled to the ECK are subjected to the principle of accountability.”

45. That being their case, Counsel stressed that the petition ought to be dismissed as is grounded on a miscomprehension of *the Constitution* and the law.

### **Analysis and Determination**

46. Taking into consideration the parties’ rival position, it is my opinion that the issues that arise for determination are as follows:

- i. Whether the 2<sup>nd</sup> respondent’s Memorandum, Ref. MICDE/GAA/ ADM/3/Vol.VI (131) dated 7<sup>th</sup> March 2024 is in violation of Articles 10, 27, 34, 35, 47, 201 and 227 of *the Constitution*.
- ii. Whether the petitioner is entitled to the relief sought.

### **Whether the 2<sup>nd</sup> respondent’s Memorandum, Ref. MICDE/GAA/ ADM/3/Vol.VI (131) dated 7<sup>th</sup> March 2024 is in violation of Articles 10, 27, 34, 35, 47, 201 and 227 of *the Constitution*.**

47. This Court has a constitutional duty under Article 165 (3) (d) (ii) to determine whether anything said to have been done under the authority of *the Constitution* or any law is inconsistent with *the Constitution* and under 165 (3) (b), whether any right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

48. The dispute before the Court was triggered by issuance of a memo reference number ref. no. MICDE/GAA/ADM/3/VOL. VI (131) dated 7<sup>th</sup> March, 2024 by the 2<sup>nd</sup> Respondent conveying the decision to restrict television and radio advertisements by government to the Kenya Broadcasting Corporation (the Interested Party). The petitioner’s contention being that the directive violates Articles 27, 34, 35, 47 and 227 of *the Constitution*.

49. The 2<sup>nd</sup> Respondent refuted the allegations and maintained the said directive complies with Article 227 (1) of *the Constitution*, Article 34 as well as Section 4(2)(c) of the Procurement and Asset Disposal Act.

50. This Court is called upon to interpret *the Constitution* and thus it is necessary to acknowledge the supremacy of *the Constitution* which under Article 2 (1) declares that it is the Supreme law of the Republic and binds all persons and State Organs at both levels of government while Article 2 (2) bars any person from claiming or exercising State authority except as authorized by *the Constitution*.



Further, Article 3 obliges every person to respect, uphold and defend the Constitution and Article 10 (1) requires all State Organs, State Officers, Public Officers and all persons to be guided by the national values and principles of governance whenever any of them applies or interprets the constitution, enacts, applies or interprets any law or when they make or implements public policy decisions. In addition, Article 21 (1) requires the State and every State Organ is to observe, respect, protect and fulfil the rights and fundamental freedoms in the Bill of Rights. If a law, public policy decision, act or omission is inconsistent with the Constitution, such law, act or omission is invalid by dint of Article 2 (4).

51. The task ahead therefore is to examine and determine the constitutionality of the 2<sup>nd</sup> Respondent's decision of the 7<sup>th</sup> March, 2024 that instructed all Principal Secretaries, Chief Executive Officers of State Corporations, Semi-Autonomous Government Agencies and Autonomous Government Agencies, Independent Commissions and Vice Chancellors of Public Universities to restrict their advertising to Kenya Broadcasting Corporation (the Interested party) with a view to ascertaining whether it violates any of the constitutional values and principles under Article 10, 227 (1) or violated the any of the rights and fundamental freedoms in the Bill of Rights.
52. In undertaking this assignment, the Court shall be guided principles of Constitutional interpretation encapsulated in Article 259 (1) as well as the principles of constitutional interpretation in the relevant case law. Article 259 (1) provides that Constitution shall be interpreted in a manner that-
  - a. promotes its purposes, values and principles;
  - b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights.
  - c) permits the development of the law and;
  - d) contributes to good governance.
53. The Supreme Court which In the matter of the Interim Independent Electoral Commission - Constitutional Application No. 2 of 2011 [2011] eKLR underscored the approach the Court should adopt when interpreting the Constitution stating as follows:

“The rules of constitutional interpretation do not favour formalistic or positivistic approach (Article 20(4) and 259(1)). The Constitution has incorporated non legal considerations which we must take into account in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human rights based and social justice oriented state and society. The values and principles articulated in the preamble, in article 10 in chapter 6 and in various provisions, reflect historical economic, social, cultural and political realities and aspirations that are critical in building a robust patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the court”.

54. This Court cannot therefore lose sight of the fact that the instruction given by the Constitution is interpreting it in a manner that promotes its values, purposes and principles. This means that when the constitutionality of an act, omission or policy is in question, the court has duty to evaluate the said act, omission or policy thoroughly to check its conformity with the constitutional values or principles. The Court must interrogate not only the purpose but also the effect of such an act, omission or policy on the Constitutional values and principles. In *Olum and another vs Attorney General* [2002] 2 EA; the Constitutional Court of Uganda stated:

“To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its



purpose does not infringe a right guaranteed by *the constitution*, the court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by *the constitution*, the impugned statute or section thereof shall be declared unconstitutional...”

55. I now turn to consider the constitutionality of the impugned memorandum. However, before that, it is necessary to set out the Constitutional and statutory provisions that are the subject of differing positions taken by petitioner and the respondents.
56. With reference to the procurement of public goods and services; Article 227 of *the Constitution* provides:
1. When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost- effective.”
  2. An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following-
    - a. categories of preference in the allocation of contracts;
    - b. the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;
    - c. sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and
    - d. sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.
57. Parliament enacted the *Public Procurement and Asset Disposal Act*, 2015 to give effect to Article 227. The preamble to the Act provides:
- An Act of Parliament to give effect to Article 227 of *the Constitution*; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes.
58. Section 3 of the Act sets out the guiding principles of the procurement process as follows:
- Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of *the Constitution* and relevant legislation—
- a. The national values and principles provided for under Article 10;
  - b. The equality and freedom from discrimination provided for under Article 27;
  - c. Affirmative action programmes provided for under Articles 55 and 56;
  - d. Principles of integrity under the *Leadership and Integrity Act* (Cap. 185C);
  - e. The principles of public finance under Article 201;
  - f. The values and principles of public service as provided for under Article 232;
  - g. Principles governing the procurement profession, international norms;
  - h. Maximization of value for money;



- i. Promotion of local industry, sustainable development and protection of the environment; and
- j. Promotion of citizen contractors.

59. Section 4 of the Act provides:

Application of the Act

1. This Act applies to all State organs and public entities with respect to—
  - (a) procurement planning;
  - (b) procurement processing;
  - (c) inventory and asset management;
  - (d) disposal of assets; and
  - (e) contract management.
- (2) For avoidance of doubt, the following are not procurements or asset disposals with respect to which this Act applies —
  - a. the retaining of the services of an individual for a limited term if, in providing those services, the individual works primarily as though he or she were an employee, but this shall not apply to persons who are under a contract of service;
  - b. the transfer of assets being disposed off by one state organ or public entity to another state organ or public entity without financial consideration;
  - c. acquiring of services provided by government or government department;
  - d. acquisition and sale of shares or securities, fiscal agency by a public entity, investments such as shares purchased by cooperative societies, state corporations or other public entities;
  - e. procurement and disposal of assets under *Public Private Partnerships Act* (Cap. 430); and
  - f. procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency unless as otherwise prescribed in the Regulations.
3. For greater certainty, all public procurement are procurements with respect to the application of this Act

60. The Court in *Okoti v Kenya Ports Authority & 5 others; Portside Freight Terminals Limited & 8 others (Interested Parties)* [2023] KEHC 20571 (KLR) observed as follows in regard to the procurement process:

“137. Article 227 of *the constitution*, in my view, provides the minimum threshold when it comes to public procurement and asset disposal. Being the minimum threshold, it is my view that in public procurement and asset disposal, the starting point must necessarily be *the constitution*. Any procurement must therefore, before considering the requirements in any legislation, rules and



regulations, meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness. In other words, any other stipulation whether in an enactment or in the tender document can only be secondary to the said constitutional dictates...”

61. In the same manner in *Republic v Public Procurement Administrative Review Board; Principles Styles Limited & another (Interested Parties) Ex Parte Accounting Officer, Kenya Water Towers Agency & another* [2020] KEHC 9278 (KLR) the Court observed as follows:

“...The starting point is that a decision to award a tender constitutes administrative action. An administrative decision is flawed if it is illegal. A decision is illegal if it: - (a) contravenes or exceeds the terms of the power which authorizes the making of the decision; (b) pursues an objective other than that for which the power to make the decision was conferred; (c) is not authorized by any power; (d) contravenes or fails to implement a public duty.

42. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations or in this case the Tender terms and conditions....

....  
48. The starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the State procurement process is Article 277 (1) of *the Constitution*. The Article provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

49. The national legislation prescribing the framework within which procurement policy must be implemented is the *Public Procurement and Asset Disposal Act* and The Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as the Regulations). A decision to award a tender constitutes administrative action so the provisions of Article 47 of *the Constitution* and the *Fair Administrative Action Act* (herein after referred to as the FAA Act), from which a cause of action for the Judicial Review of administrative action arises, apply to the process.

50. Section 3 of the Act provides that Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of *the Constitution* and relevant legislation—(a) the national values and principles provided for under Article 10; (b) the equality and freedom from discrimination provided for under Article 27;(c) affirmative action programmes provided for under for under Articles 55 and 56; (d) principles of integrity under the *Leadership and Integrity Act*, 2012; (d) the principles of public finance under Article 201; (e) the values and principles of public service as provided for under Article 232; (e) principles governing procurement profession, international norms; (f) maximization of value for money; (g) ...and ....”



62. Furthermore in Republic v Public Procurement Administrative Review Board Ex parte Kenya Power & Lighting Company Limited; Energy Sectors Contractors Association & another (supra) the Court discoursed as follows:
- “86... I find it convenient to state that public procurement in Kenya has been afforded a constitutional status. Article 227 of *the Constitution* establishes the primary and broad secondary procurement objectives. This Article is the cornerstone against which the requirements of public procurement is to be assessed... *The Constitution* is the supreme law of the land and all other law is subject to it. Thus, its interpretation cannot depend on the legislation enacted under it but on the language used in Article 227 which applies to a State organ or any other public entity...”
63. In the present dispute, the 2<sup>nd</sup> Respondent justified the memo directing that advertisement by all Government departments and agencies be done by the Kenya Broadcasting Commission by citing Article 132 (3) of *the Constitution* which provides that the President shall direct and coordinate the functions of Ministries and government departments; Section 4 of the *State Corporations Act*; Article 155 (2) of *the Constitution* that gives the responsibility of administration of Government Department to the Principal Secretary of State Department and Section 4 (2) of the Public Procurement and Assets Disposal Act, 2015 that provides that the acquiring of services by government to government department is not procurement or asset disposal to which the Procurement Act applies.
64. It needs to be pointed out that what is being questioned in this Petition is not the power of the President to direct or coordinate the functions of ministries or departments or those other powers *the constitution* broadly assigns to public officers but the constitutionality of the specific action, being the memo by the 2<sup>nd</sup> Respondent restricting government advertisement to the Kenya Broadcasting Corporation (the Interested Party) only.
65. The 2<sup>nd</sup> Respondent’s firmest defence regarding the said action was Section 4 (2) of the *Public Procurement and Asset Disposal Act* which the respondents insisted exempts the acquiring of services provided by government or government department from the application of the procurement Act.
66. In my humble view, the 2<sup>nd</sup> Respondent’s issuance of the memo directing all public bodies to procure their advertising services from the interested party contravenes the express provisions of the Procurement and Asset Disposal Act. Section 4 (2) (c) of the Public Procurement Act does not give the 2<sup>nd</sup> Respondent such authority. The 2<sup>nd</sup> Respondent has no powers to direct accounting officers of specific procuring entities on matters relating to procurement of goods and services in their respective dockets. Under Section 44 (1) of the *Public Procurement and Asset Disposal Act*, it is the primary responsibility of every accounting officer of a procurement entity making procurement or asset disposal to ensure that that the particular procurement entity complies with the Act. Section 4 (2) of the *Public Procurement and Asset Disposal Act* does not give the 2<sup>nd</sup> Respondent the power to direct other accounting officers on procurement decisions/matters. That is tantamount to usurping the statutory authority vested in accounting officers of respective procurement entities under Section 44 (1) of the *Public Procurement and Asset Disposal Act*.
67. In any case, even assuming that such a policy instruction could lawfully be issued as a government policy decision; the responsibility for issuance of such a policy direction under the *Public Procurement and Asset Disposal Act* does not fall within the scope of responsibility of the 2<sup>nd</sup> Respondent. Such a policy direction may only be lawfully issued by the Cabinet Secretary for the time being in-charge of finance. Under Section 2; ‘Cabinet Secretary’ means Cabinet Secretary for the time being responsible



for finance. In addition, the Act assigns the specific role of formulation of policies or issuance of guidelines under Act to the National Treasury. Section 7 provides thus:

Role of the National Treasury on public procurement and assets disposal

7.

(1) The National Treasury established under section 11 of the *Public Finance Management Act* (Cap. 412A), shall be responsible for public procurement and asset disposal policy formulation.

.....

.....

(2) In the performance of its role under subsection (1), the National Treasury shall—

.....

.....

(l) issue guidelines to public entities with respect to procurement matters;

68. It follows therefore that the 2<sup>nd</sup> Respondent unlawfully appropriated unto himself non-existent powers. Under the *Public Procurement and Asset Disposal Act*, the 2<sup>nd</sup> Respondent has no capacity to exercise such powers thus rendering his memo void ab initio.

69. Further, it is the considered opinion of this court that the memo perpetuates a policy of discriminative exclusion in procurement of public goods and services hence does not promote principle of transparency and competitiveness in procurement of public services as provided for under Article 227 (1) to ensure there is value for money.

70. Furthermore, for the State to make such stark departure in policy that directs all advertising services to a single government owned media entity that excludes all privately owned media houses, that is a major policy shift in government and cannot be mere internal matter. The consumers of the information being the public ought to have been consulted through public participation so that their views are taken into account. The importance of public participation was underscored by South African Constitutional Court in *Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 others*, CCT 86/08 [2010] ZACC 5 as follows: -

“Engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision”

71. The decision is also bound to have an impact on the other media players. The State does not act to advance its own interests but those of the people it serves and protects hence the decisions it makes can only gain legitimacy when there is consultation with the people. The Respondents had a constitutional duty to ensure that Kenyans in general as well as the stakeholders affected by this move were heard and their contributions considered before monopolizing and centralizing the dissemination of government advertisements through a single government owned media entity.

72. There also the danger that lurks from this approach that has been adopted by the State in terms of safeguarding media freedom. It is indisputable that the Government single handedly controls a huge budget on publicity.



73. Under Article 21 (1); the State has a Constitutional responsibility to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights of which the freedom of media under Article 34 is part of.
74. It is thus part of constitutional duty of the state to promote the independence of the media as well. It is thus inconceivable that the State can pursue a deliberate policy of exclusion that ensures that its massive resources are concentrated on one owned state entity giving it absolute economic advantage of gaining a firm control of the market at the risk of creating a monopoly since the rest of the media may not have the kind of resource base to match its traction in the market.
75. The long term effect of such a scheme by the State must thus be viewed from the standpoint of effect it might have. The effect of a decision or act matters when considering its constitutionality as was held in *Olum v Uganda* (supra). The objective to revitalize the Kenya Broadcasting Corporation through directing all government resources on advertisement to the Interested Party may be a good idea but the effect of the same may in the long run be calamitous. The policy by the State is detrimental to enabling the plurality of media as a cornerstone of a democratic society.
76. The State is nurturing the policy of economic exclusion that would weaken the private media while facilitating creation of a monopoly in media which is a potential threat to media freedom because of possibility of creating a gate-keeping media.
77. This policy being pursued by the State is constitutionally untenable considering that the State has a duty under Article 21 to promote all the rights in the Bill of Rights and this includes Article 34 on the freedom of the media. By excluding the private media from public advertisement, the State, through the policy is tacitly exacting the power of resources in order to gain control of the media through the policy of economic annihilation. Such a policy does not certainly align with the purposes, values and principles of *the Constitution* nor does it promote good governance of which the media plays a critical role.
78. Given the significance of the freedom of the media in a democracy, the discriminative policy of exclusion targeting private media by denying it government advertisement contracts is an affront to the freedom of the media under Article 34 of *the Constitution*.
79. The upshot is that this Petition succeeds. I thus grant the following orders:
  - a. A declaration that the decision contained in the Memorandum dated 7<sup>th</sup> March 2024 (Ref. MICDE/GAA/ADM/3/Vol. VI) (131) issued by the Principal Secretary Ministry of ICT, Innovations & Youth Affairs (State Department Of Broadcasting & Communications) to exclusively award the interested party the contract for advertising government services, thus making them the sole advertisers of government information contravened the provisions of Articles 10, 27, and 227 (1) of *the Constitution*, Section 7 (1) (l), 44 (1) of the *Public Procurement and Asset Disposal Act*, 2015 and is therefore unconstitutional, illegal and void.
  - b. An order of certiorari is hereby issued quashing the Principal Secretary Ministry of ICT, Innovations & Youth Affairs (State Department of Broadcasting & Communications) decision contained in the Memorandum MICDE/GAA/ADM/3/Vol. VI (131) dated 7<sup>th</sup> March 2024 to exclusively award the interested party the contract for broadcast advertising services by the government.
  - c. Each Party to bear its own costs.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> DAY OF MARCH, 2025.

.....

L N MUGAMBI

JUDGE

