



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 89 OF 2020

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COMMUNICATIONS AUTHORITY OF KENYA.....RESPONDENT

EX PARTE:

SAUTI COMMUNICATIONS LIMITED

JUDGMENT

The Application

1. Sauti Communications Limited (hereinafter referred to as “the *ex parte* Applicant”) states that it is a limited liability media company. The *ex parte* Applicant has sued the Communications Commission of Kenya (hereinafter referred to as “the Respondent”), in relation to a decision made in a letter dated 12th April 2020, by which the Respondent revoked and repossessed the *ex parte* Applicant’s radio broadcasting frequency spectrum licence designated as 91.0Mhz.

2. The *ex parte* Applicant thereby filed an application by way a Notice of Motion dated 8th May, 2020, is seeking the following orders:

a) THAT an order of certiorari do issue removing to this Honorable Court for the purposes of being quashed the decision of the Respondent made on the 12th April 2020 by virtue of a letter under Ref. CA/FSM/BC/60 Vol. I revoking and or repossessing the Applicant a radio broadcasting frequency spectrum license designated 91.0 MHz.

b) THAT an order of prohibition do issue to prohibit and restrain the Respondent either by itself, agents, employees or whatsoever from taking any steps, actions and measures to enforce its decision contained in the letter dated 12th April,2020 under Ref. CA/FSM/BC/60 Vol. I repossessing the Applicant a radio broadcasting frequency spectrum license designated 91.0 MHz.

c) THAT an order of prohibition do issue to prohibit and restrain the Respondent either by itself, agents, employees or whatsoever from acting upon the decision made on the 12th April,2020 and/or assigning the radio broadcasting frequency spectrum license in question to any persons or entity other than the ex-parte Applicant.

d) THAT an order of mandamus do issue to compel the Respondent to assign the ex-parte Applicant the radio broadcasting frequency spectrum license in question.

e) THAT the costs of this application be provided for.

3. The said application is supported by the *ex parte* Applicant’s statutory statements dated 5th April 2020 and 5th May, 2020, verifying affidavits sworn on the said dates, and a further affidavit sworn on 20th July, 2020 by Musili Nzambu, the *ex parte* Applicant’s director. The Respondent in turn filed a Replying Affidavit dated 7th July 2020 and a Supplementary Affidavit sworn on 31st August, 2020 sworn by Ngige Peter Njoroge, the Acting Assistant Director for Frequency Planning in the Frequency Spectrum Management Department of the Respondent. The summary of the respective parties’ cases are set in the following sections.

The *ex parte* Applicant’s Case

4. The *ex parte* Applicant case is that the reasons for revocation of the licence as stated in the Respondent's letter dated 12th April, 2020 are patently false, misleading and plainly non-sustainable, as the Applicant is and has been an established broadcaster since the year 2004 to-date well to the full knowledge of the Respondent. Further, that no hearing and or adequate time was granted to the Applicant to address itself on matters raised by the Respondent in breach of the rules of natural justice.

5. The *ex parte* Applicant explained that sometime in year 2004 it successfully applied for a broadcasting license and or a radio frequency spectrum license to enable it broadcast its radio services first from Machakos then subsequently, in major towns such as Nairobi, Mombasa, Kisumu, Nakuru, Nyeri and Eldoret. The *ex parte* Applicant contended that it is and has been an existing broadcaster since 2004 and has kept the Respondent abreast with all its dealings appertaining to use of the licence and has continued from time to time to comply with the regulatory requirements including the conditions necessary to continue utilizing the allocated frequency and the licenses thereto.

6. Therefore, that there is no justification for revocation of the Radio broadcasting frequency spectrum license granted to the *ex parte* Applicant by the Respondent. Further, that the decision revoking the Radio broadcasting frequency spectrum license by the Respondent was made arbitrary, without any basis and or for ulterior motives and purposes especially considering the fact that the *ex parte* Applicant has complied with all necessary regulatory requirements, and has been making use of the licence in question. The *ex parte* Applicant stated that the Respondent's conduct exhibits bias and partiality incompatible with its roles and duties, and which conduct reveals that the Respondent is bent to assign the Radio broadcasting frequency spectrum license in question to a third party or to some other entity to detriment of the Applicant.

7. According to the *ex parte* Applicant, the decision by the Respondent was made against the principles of public interest and legitimate expectation that due process and the law will be followed, and that upon compliance with all statutory and regulatory requirements, the Applicant would be let to utilize the radio frequency spectrum license without hindrance for the duration granted. In addition, that the matters raised herein are outside the purview of the Tribunal established under the Act, and in any event, the Respondent can never be a judge in its own cause and or be in a position of unjustifiably influencing a process to its advantage.

8. The *ex parte* Applicant further averred that it wrote a letter to the Respondent letter dated 27th April, 2020 lamenting the decision of the Respondent to revoke the license in question and in which letter it forwarded all relevant correspondence to confirm that it is duly registered and compliant, but which letter had not elicited any response from the Respondent

9. In rebuttal to the Respondent's averments, the *ex parte* Applicant stated that on the 23rd November 2004, it made a request to the Respondent for a change of the transmission site from Mbwa to Mua Hills and which request was duly approved by the Respondent on 8th July, 2005. Further, that before it could officially be allowed to go on air for broadcasting purposes, the Respondent on the 29th November, 2005 sought to change the broadcasting frequency assigned to the *ex parte* Applicant from 90.5 MHz to 90.3 MHz thus temporarily affecting the use of the license under circumstances that were beyond the control of the *ex parte* Applicant. The *ex parte* Applicant also averred that on the 30th January, 2006, the Respondent again wrote to it halting any plans to migrate to the new FM frequency until further communication from the Respondent on the same, and which resulted into delays and confusion as the *ex parte* Applicant was mistakenly regarded as not to have utilized the license granted within 12 months.

10. The *ex parte* Applicant's case therefore is that there were a number of issues that required to be resolved before it could be allowed to commence the broadcasting services at the initial stage, and which issues the Respondent had failed to take into consideration by unfairly labelling it as a non-compliant broadcaster. Further, that contrary to the deposition by the Respondent, the *ex parte* Applicant had made good all the outstanding frequency utilization fees since the year 2004 to date, and had not illegally provided the broadcasting services as portrayed. The *ex parte* Applicant added that it went off air temporarily sometime in February, 2020 due to persistent power failure which was rectified.

11. It was also contended that whereas it had been deposed that the *ex parte* Applicant was allegedly using transmission equipment not approved by the Respondent, on the other hand the Respondent has alleged that the equipment belonged to another company by the name Around the Globe Services (ATG) without supplying any cogent proof. He deposed that the Respondent is out to paint the *ex parte* Applicant as a non-compliant broadcaster by alleging that the Applicant had leased the frequency to ATG without approval but had not bothered to supply any evidence of lease as alleged otherwise.

12. The *ex parte* Applicant annexed a copy of the Respondent's impugned letter dated 12th April, 2020; copies of its application for a broadcasting licence dated 24th June 2004 ; the authority given to it to operate a TV station and FM Radio station by the Ministry of Information and Communications dated 16th August 2004; the requests and application for frequency allocation to the Respondent; and the assignment of a frequency by the Respondent dated 22nd October 2004. The Applicant also provided copies of various correspondence between it and the Respondent.

The Respondent's Case

13. The Respondent averred that it is responsible for licensing all broadcasters in the radio communications industry and managing the country's frequency spectrum resources, including frequency assignment. Further, that in this regard, the Respondent is the successor in title and function to the Communications Commission of Kenya by virtue of Article 34 of the Constitution and the Kenya Information and Communications (Amendment) Act, 2013. The Respondent confirmed that the Ministry of Information and Communications vide a letter dated 16th August, 2004 approved the issuance of a licence to the *ex parte* Applicant to operate a radio station within Machakos and surrounding areas with a 5-Kilowatt transmitter broadcasting in Kamba and Kiswahili, and annexed a copy of the said letter.

14. However, that the licence was subject to the National Government reserving the right to prescribe such conditions as deemed necessary; the regulations imposed by relevant statutes; the *ex parte* Applicant liaising with the Respondent with regard to the allocation of the frequency and subject to availability of such frequencies; and the licence not being transferrable. Furthermore, that the letter did not approve the operations of a radio station other than in Machakos and its environs in the Kamba and Kiswahili languages. The Respondent averred that with a view to complying with the directions contained in the said letter, the *ex parte* Applicant sought the allocation of a frequency, and the

90.5 MHz frequency was assigned to it on 22nd October 2004 upon payment of the frequency fees.

15. According to the Respondent, the assignment of the 90.5 MHz frequency was conditional on :

- a) The FM Sound broadcasting transmitter operating under an annual licence and which was to be kept in force at all times by making the payment of the requisite licence fees;
- b) The frequency assigned being put into use 12 months from the date of assignment;
- c) The frequency assignment being valid only when the frequency licence and broadcasting permits are jointly in force;
- d) The broadcaster seeking approval from the Respondent of the equipment intended to be used, prior to its installation and use; and
- e) The transmitters in use conforming to the technical parameters specified by the Respondent.

16. The Respondent annexed a copy of the Conditions of Assignment dated 20th September 2004, and stated that in total disregard of the said conditions, the *ex parte* Applicant failed to utilize the frequency assigned within 12 months of the assignment, and that this breach provoked the exercise of the right reserved under the conditions for the Respondent to repossess and reassign the frequency so assigned to another broadcaster. Accordingly, that the Respondent by a letter dated 3rd July, 2006 issued the *ex parte* Applicant with a notice requiring it to within 14 days of the date thereof to bring the frequency into use failing of which the same would automatically revert to the Respondent and thereafter assigned to deserving third parties.

17. However, that instead of complying with the Respondent's directive, the *ex parte* Applicant sought an extension of the time within which it could utilize the frequency and was granted an extension to 31st December, 2006. The Respondent stated that it approved the request for change of frequency from 90.5 MHz to 91.1 MHz on 8th November 2006, and granted *ex parte* Applicant a further extension of time within which to commence broadcasting to 30th April, 2007. Subsequently, that the regulatory framework changed with the enactment of the Kenya Communications (Amendment) Act Number 1 of 2009 which made it mandatory for every person providing broadcasting services to operate in accordance with a licence issued under Part IVA of the Act the Kenya Information and Communications Act, 1998 .

18. The Respondent contended that by a letter dated 10th August, 2011, it notified the *ex parte* Applicant on the new regulatory framework, and that all existing broadcasters were required to apply for broadcasting licenses as provided for under clause 46 of the Kenya Information and Communications Act, 1998 and of the procedure to be followed. However, that the *ex parte* Applicant did not comply with the directions set out in the said the letter and with the mandatory provisions of the Act, and the effect of the said non-compliance meant that it is not a licensed broadcaster in terms of Part IVA of the Act. As such, that any services the *ex parte* Applicant offers under the 91.0 MHz frequency is unlawful and in breach of section 46Q of the Act and cannot be the subject of judicial review proceedings. In addition, that the *ex parte* Applicant is not eligible for grant of a broadcasting license, as it had failed to pay the outstanding frequency utilization fees since the year 2017.

19. According to the Respondent, the *ex parte* Applicant not only illegally provide broadcasting services, but also breached the conditions that were imposed on the assignment of frequency 91.0 MHz, which breach was unearthed by the Respondent's inspection team which visited the transmission site on 13th March, 2018, 17th September 2018, and August, 2019, and found that the *ex parte* Applicant was using transmission equipment which it had not sought and obtained an approval from the Respondent; had returned the frequency from 91 MHz to 91.0 MHz; was transmitting on an unauthorized studio to transmitter link (STL) frequency being 377.8 MHz instead of the assigned 374.0 MHz; and its broadcasting signal unexpectedly went off air in August, 2019. The Respondent annexed a copy of the Inspection Report dated 5th April 2018 as well as the Notices of Violations.

20. It was further contended that these violations had not as at 6th August 2019 been remedied by the *ex parte* Applicant, and that by a letter dated 8th August, 2019, it misrepresented to the Respondent that their frequency went off air due to the blowing up of their transmitter. However, that an inspection undertaken by the Respondent on 15th August, 2019 established that the *ex parte* Applicant did not in fact have any transmitters on the said site as the transmitters on site belonged to a company by the name Around the Globe Services Limited (ATG); and it had without the Respondent's approval leased the frequency to ATG who had since acquired another frequency and re-tuned its transmitter.

21. The Respondent averred that the *ex parte* Applicant's actions provoked the issuance of a notice to show cause on 16th August, 2019, in which the *ex parte* Applicant was given 7 days to show cause why the frequency should not be revoked. A copy of the said letter was annexed by the Respondent, who further averred that the *ex parte* Applicant has not shown good cause as to why the orders sought in the Notice of Motion should be granted, as the decision it made on 12th April 2020 was lawful and in accordance with the regulatory framework under Kenya Information and Communications Act, and was neither unprocedural, illegal nor unconstitutional.

22. The Respondent further averred that the effect of granting the reliefs sought would be to exempt the *ex parte* Applicant who continues to hold itself as a provider of broadcasting services, from the regulatory framework under Kenya Information and Communications Act. The Respondent stated that the assignment of the frequency had since been revoked and that the frequency 91.0 MHz was subsequently assigned to another entity by the name Telemain Company Limited, and the issuing of any orders with respect to the frequency shall affect accrued rights and business operations of the said company.

23. The Respondent reiterated that the *ex parte* Applicant does not have a broadcasting license and thus should not be allowed to conduct regulated business as so doing would amount to sanitizing an illegality. The Respondent explained the statutory requirements for a frequency assignment to be compliant, and contended that there was no broadcasting licence issued to the *ex parte* Applicant in 2011 as alleged, and that the decision communicated vide its letter dated 12th April 2020 was only repossessing an FM frequency being 91.0 MHz, that was being used in contravention of the conditions contained in the letter dated 20th September 2004 from the Communications Commission of

Kenya, and by a company which did not have a broadcasting licence. Consequently, that the *ex parte* Applicant was neither licensed under the Act to offer broadcasting services nor did it pay the annual broadcasting operating fees, and its decision did not revoke a broadcasting license as there was no licence capable of being revoked.

24. Lastly, the Respondent averred that it acted in accordance with the Kenya Information and Communications Act, and pointed out that the Act provides for a self-executing appeal process to a Tribunal in the event a licensed broadcaster is aggrieved with the decision of the Respondent, and that the Court cannot be called upon to usurp the powers and functions of the Respondent and the Tribunal. Further, that the Court cannot be asked to issue orders whose effect are to validate criminal acts by the *ex parte* Applicant and/or exempt it from the regulatory framework obtaining under the Kenya Information and Communications Act, 1998.

The Determination

25. The parties canvassed the instant application by way of written submissions. The advocates on record for the *ex parte* Applicant, Masika & Koross Advocates, filed two sets of written submissions dated 7th August, 2020 and 16th September 2020; while Majanja Luseno & Company Advocates for the Respondent filed submissions dated 31st August 2020. I have considered the pleadings and submissions filed by the parties herein, and find that a preliminary issue has been raised by the Respondent that needs to be addressed first, as it affects the propriety of the *ex parte* Applicant's application before this Court. This preliminary issue is whether the *ex parte* Applicant has exhausted the statutory remedies available to it before approaching this Court.

26. If the *ex parte* Applicant's application is found to be properly before this Court, three substantive issues will proceed to determination. These are firstly, whether the Respondent acted fairly in reaching the decision dated 12th April 2020; secondly whether the said decision dated 12th April 2020 was reasonable; and lastly, whether the *ex parte* Applicant merits the remedies sought.

On the Exhaustion of Statutory Remedies

27. The Respondent submitted that the *ex parte* Applicant's application offends the doctrine of exhaustion, and that while the High Court is clothed with the power to review decisions made by administrative bodies, section 9 (2) and (3) of the Fair Administrative Action Act provides that it shall not review an administrative action or decision unless internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Further, that section 102 of the Kenya Information and Communications Act establishes the Communications and Multimedia Appeals Tribunal, which has the power to hear and determine appeals against decisions made by the Respondent under section 102F thereof. Therefore, that the said Act provides for internal mechanisms for appeal against the decisions of the Respondent.

28. According to the Respondent, the *ex parte* Applicant is inviting the court to consider the merits of the decisions by the Respondent and determine whether there were sufficient grounds to repossess the assigned frequency and it seeks to quash the decision. Further, that the Communications and Multimedia Appeals Tribunal is composed of persons possessing specialised knowledge and experience in media, telecommunication, postal, courier systems, radio communications, information technology or business practice, and is therefore the best forum to address the grievances of the *ex parte* Applicant, and would be in a position to review the merits of the decision and has the authority to set the same aside.

29. The Respondent contended that judicial review should be a matter of last resort, and that where the statute provides for mechanisms of dispute resolution, the same must first be explored by the aggrieved party. In addition, that judicial review is not a means of appeal.

30. Reliance was placed on the decision by the Court of Appeal in **Speaker of the National Assembly vs James Njenga Karume [1992] eKLR** for this proposition, and the Respondent further submitted that an aggrieved party must apply for exemption from the internal mechanisms and must demonstrate exceptional circumstances under section 9(3) of the Fair Administrative Action Act, and as held in **Republic vs Kenya Revenue Authority, Commissioner ex parte Keycorp Real advisory Limited, (2019) eKLR** and **Republic vs JP. Maiwo & 2 others sued as the Executive Director, Treasurer and Secretary respectively of Central Kenya Conference (CKC); Moses Nyankuru & 23 others (Interested Parties) Ex parte Humphrey Nguma Macharia & another [2019] eKLR** .

31. The Respondent concluded its submissions on the issue at hand by averring that the impugned decision constitutes an administrative action as defined in section 2 of the Fair Administrative Action Act, and that the *ex parte* Applicant neither applied for exemption from the obligation to exhaust internal remedies nor have they demonstrated exceptional circumstances for exemption. Therefore, that the application before this court offends section 9(2) of the Fair Administrative Action Act and should be dismissed.

32. The *ex parte* Applicant on its part submitted that it is wrong and misleading for the Respondent to suggest that an appeal should have been preferred against the Respondent's decision to the Communications and Multimedia Appeals Tribunal under Section 102 of the Kenya Information and Communication Act No. 18 of 2018. This is because the instant application under consideration is a judicial review application and not an appeal as suggested by the Respondent. Further, that it is only this Court that has the requisite special jurisdiction to grant the prerogative orders sought in the interests of justice and fairness, and that the Communications and Multimedia Appeals Tribunal does have such powers. Indeed, that the *ex-parte* Applicant moved this Court to consider the process employed in arriving at the impugned decision as opposed to the merits of the same, thus there exists an apparent distinction between judicial review and an appeal.

33. The *ex parte* Applicant relied on the provisions of Article 47 of the Constitution and sections 2, 3, 4 and 7 of the Fair Administrative Action Act, on the definition and scope of the provisions on the right to a fair administrative action, and the right of any person who is aggrieved by an administrative action or decision to apply for review of the administrative action or decision to a court. The *ex parte* Applicant also relied on the decisions in **Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi, (2012) eKLR** and **Republic v National Police Service Commission Ex-parte Daniel Chacha Chacha (2016) eKLR**, wherein it was held that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself.

34. The *ex parte* Applicant's submission therefore, is that it is only this Court that has jurisdiction to entertain and grant the prayers and or the orders it seeks, as its application is not an appeal but for judicial review. Further, that the powers of the tribunal established pursuant to section 102 of the Kenya Information and Communications Act are to hear and determine appeals against decisions made by the Respondent, and that appeals and judicial reviews are not the same. In addition, that the provisions of section 102F of the Kenya Information and Communications Act presume an action or decision that has been handled procedurally from which an appeal can be sustained or proffered, whereas the *ex-parte* Applicant is not questioning the merits of the decision, but rather the procedure in which the Respondent arrived at the impugned decision.

35. Lastly, that the subject Tribunal sits to hear the merits of the case and not to determine the procedure employed by the Respondent, and therefore that in the circumstances of this case, the merits and the facts as pleaded are exceptional such that only this Court has power to address and make a determination thereon, and which justify bypassing the said Tribunal.

The Disposition

36. It is notable that in the present proceedings, this Court is being asked in exercise its supervisory jurisdiction, to review the lawfulness of the Respondent's decision. The Respondent is a statutory body established under the Kenya Information and Communication Act, and is therefore amenable to this Court's supervisory jurisdiction. It is necessary to restate the parameters of judicial review jurisdiction in this regard, as stated in the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** thus:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala*, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

37. Judicial review is now entrenched as a constitutional principle pursuant to the provisions of Article 47 of the Constitution, which provides for the right to fair administrative action, and section 7 of the Fair Administrative Action Act in this regard provides that any person who is aggrieved by an administrative action or decision may apply for review of the said action or decision. In addition, it was noted by the Court of Appeal in ***Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) eKLR that Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator.***

38. **Lastly**, Article 165(6) of the Constitution also provides that this Court has supervisory jurisdiction over any person, body or authority that exercises a quasi-judicial function or a function that is likely to affect a person's rights.

39. It needs to be emphasised at this point that the availability of an adequate alternative remedy does not affect the Court's jurisdiction to entertain a claim for judicial review. However, an available adequate alternative remedy is a material consideration in the exercise of the Court's discretion to grant the relief sought, for the reasons that judicial review is a remedy of last resort, and Courts require other avenues of redress to be first utilised in relation to the actions or decisions of a public body.

40. In addition, the exhaustion of alternative remedies is now both a constitutional and legal imperative under Article 159 (2)(c) of the Constitution and section 9(2) and (3) of the Fair Administrative Action Act, and as exemplified by emerging jurisprudence on the subject. Article 159(2)(c) of the Constitution in this regard obliges this Court to observe the principle of alternative dispute resolution. Specifically, with respect to the exercise of the judicial review jurisdiction of this Court, sections 9(2) (3) and (4) of the Fair Administrative Action Act state as follows:

“(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such

exemption to be in the interest of justice.”

41. The Court of Appeal first embodied the doctrine of exhaustion in Speaker of National Assembly vs Karume (1992) KLR 21, and further clarified the doctrine under the current constitutional dispensation in Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (2015) eKLR as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

42. Under section 9 (4) of the Act, the Court may, in exceptional circumstances, find that the exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. While the exceptions to the exhaustion requirement are not clearly delineated, the Court of Appeal gave guidelines when they would apply in Republic vs. National Environment Management Authority, Civil Appeal No. 84 of 2010, as follows:

“...where there was an alternative remedy and especially where Parliament had provided a statutory appeal process it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the real issue is to be determined and whether the statutory appeal procedure was suitable to determine it...The learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect we agree with the judge.”

43. Likewise, it was held by the High Court In the Matter of the Mui Coal Basin Local Community (2013) e KLR, R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance (NASA) Kenya and Mohamed Ali Baadi and others vs The Attorney General & 11 others [2018] eKLR that in reaching a decision as to whether an exception applies, courts will undertake an analysis of the facts, regulatory scheme involved, the nature of the interests involved including the level of public interest involved, and the polycentricity of the issues and the ability of a statutory forum to determine them.

44. In the present case, it is not controverted that a decision was made by the Respondent by a letter dated 12th April 2020 repossessing the *ex parte* Applicant’s radio broadcasting frequency spectrum license, in exercise of its statutory mandate and powers under the Kenya Information and Communications Act. It is also not in dispute that section 102(1) of the said Act establishes the Communications and Multimedia Appeals Tribunal, and section 102F in this regard provides as follows as regards the said Tribunal’s jurisdiction and powers:

(1) Unless otherwise expressly provided in this Act, the Media Council Act or any other law, where this Act or the Media Council Act, empowers the Media Council or the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.

(2) Any person who is aggrieved by an action or decision of the Media Council, the Authority or a person licensed under this Act, may within sixty days after the occurrence of the event or the making of the decision, against which he is dissatisfied, make a claim or appeal to the Tribunal.

(3) Upon any appeal, the Tribunal may—

(a) confirm, set aside or vary the order or decision in question;

(b) exercise any of the powers which could have been exercised by the Media Council or the Authority in the proceedings in connection with which the appeal is brought; or

(c) make such other order, including an order for costs, as it may consider necessary.

45. The Authority referred to in the section is the Communications Authority of Kenya, the Respondent herein. The *ex parte* Applicant has argued that it has brought a judicial review application and not an appeal, and therefore the said provisions are inapplicable to the instant application. However, the issue raised by the Respondent and for determination herein is not whether the *ex parte* Applicant has lodged proceedings in the nature of an appeal or judicial review, but whether there is a remedy available to the *ex parte* Applicant that is an adequate alternative to judicial review, which makes this Court an inappropriate forum to hear its grievance in the first instance.

46. In this respect section 102F of the Kenya Information and Communication Act provides for an alternative remedy by way of an appeal to a different forum, being the Communications and Multimedia Appeals Tribunal Section 102G further provides that it is only when and if the *ex parte* Applicant is dissatisfied with the Tribunal’s decision, that it can appeal to the High Court. To this extent, the *ex parte* Applicant’s application herein is premature, and it cannot approach the Court in the first instance whether by way of judicial review or appeal.

47. The second argument put forward by the *ex parte* Applicant, is that even if the proper forum to hear its grievance is the Communications and Multimedia Appeals Tribunal, it is only this Court as a judicial review court that can grant it an effective remedy. In considering whether an alternative remedy is effective, and ought to have been exhausted by an applicant, the Court considers the adequacy of the

alternative remedy as a matter of substance. In this respect the alternative remedy should be convenient, expeditious and effective in practical terms, and the procedure employed should provide the claimant with the outcome sought as a matter of substance.

1. Thus, in the case of Dawda K. Jawara vs Gambia ACmHPR 147/95-149/96, the African Commission of People and Human Rights held that:

"A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

48. The *ex parte* Applicant has in this respect urged that its contestation in the instant application is the process employed by the Respondent in arriving at its decision of 12th April 2020, and this is an aspect of its grievance that the Communications and Multimedia Appeals Tribunal has no powers to decide upon.

49. It is notable in this regard that the powers of review granted under the Fair Administrative Action are not limited to this Court alone, but also to tribunals. Section 1(b) of the Act provides that the Act applies to all state and non-state agencies, including any person performing a judicial or quasi-judicial function under the Constitution or any written law. Section 7 specifically provides that Courts and Tribunals can review proceedings brought before them on various grounds, including whether the process employed and whether there was procedural fairness as follows:

(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-

(a) a court in accordance with section 8; or

(b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

(2) A court or tribunal under subsection (1) may review an administrative action or decision, if-

(a) the person who made the decision-

(i) was not authorized to do so by the empowering provision;

(ii) acted in excess of jurisdiction or power conferred under any written law;

(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) was biased or may reasonably be suspected of bias; or

(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

50. The jurisdiction of the Communications and Multimedia Appeals Tribunal under section 102(F) of the Kenya Information and Communication Act is also not limited as regards the grounds on which it can confirm, set aside or vary a decision made by the Respondent, and it is expressly mandated in this regard to exercise all the powers of the Respondent in providing an appropriate remedy. For these reasons, it is my finding that the alternative remedy of an appeal to the Communications and Multimedia Appeals Tribunal was therefore not only available, but also adequate to address the *ex parte* Applicant grievance at the time of filing the application herein. It is also notable that the *ex parte* Applicant still has recourse to the High Court in the event it is not satisfied with the Tribunal's decision.

51. The Court will therefore defer to the constitutional and statutory prescriptions on the exercise of its judicial review jurisdiction, arising from the circumstances of the instant application. The only impediment that this Court needs to deal with in this case, is the one presented by the requirement in section 102(F) of the Kenya Information and Communication Act that an appeal should be lodged with the Communications and Multimedia Appeals Tribunal within sixty days of the decision of the Respondent that is being appealed. The sixty days have since lapsed, as the decision that is being impugned was made by the Respondent on 12th April 2020.

52. The Fair Administrative Action Act provides a remedy for such a situation. Section 9(3) of the Act provides that this Court can direct an applicant to first exhaust the alternative remedy, while section 11 provides that a court may grant any order that is just and equitable, including an order directing any of the parties to do any act or thing the doing of which the court or considers necessary to do justice between the parties. This Court therefore has the power to place this matter before the appropriate forum for determination irrespective of the lapse of time, in the interests of substantive justice.

The Orders

53. Arising from the foregoing reasons, this Court orders as follows:

I. The *ex parte* Applicant's Notice of Motion application dated 8th May 2020 is not properly before this Court and is accordingly struck out, and the stay orders granted herein are hereby vacated,

II. The *ex parte* Applicant shall comply with the provisions of section 102(F) of the Kenya Information and Communication Act, and exhaust the remedy provided therein, and shall be at liberty to lodge an appeal with the Communications and Multimedia Appeals Tribunal within sixty days of the date of this judgment.

III. There shall be no order as to the costs of the Notice of Motion application dated 8th May 2020.

54. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF MARCH 2021

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT

Pursuant to the Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from Risks Associated with the Global Corona Virus Pandemic dated 17th March 2020 and published 17th April 2020 in Kenya Gazette Notice No. 3137 by the Honourable Chief Justice, this judgment was delivered electronically by transmission to the email addresses of the *ex parte* Applicant's and Respondent's Advocates on record.

P. NYAMWEYA

JUDGE