REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.59 OF 2015

BETWEEN

OKIYA OMTATAH OKOITI……PETITIONER

AND

COMMUNICATIONS AUTHORITY OF KENYA……1ST RESPONDENT

FRED MATIANG'I……2ND RESPONDENT

BEN NGENE GITUKU……3RD RESPONDENT

FRANCIS WANGUSI……4TH RESPONDENT

PETER MUTIE……5TH RESPONDENT

KENNEDY NYAUNDI……6TH RESPONDENT

WILBERT CHOGE……7TH RESPONDENT

GRACE MUNJURI……8TH RESPONDENT

HELLEN KINOTI……9TH RESPONDENT

BEATRICE OPEE……10TH RESPONDENT

MONICA JUMA……11TH RESPONDENT

KAMAU THUGGE……12TH RESPONDENT

LEVI OBONYO……13TH RESPONDENT

JOSEPH TIAMPATI ole MUSUNI……14TH RESPONDENT

ATTORNEY GENERAL……15TH RESPONDENT

RULING ON A PRELIMINARY OBJECTION

Introduction

1. The Petitioner's Notice of Motion application dated 18th February 2014, seeks the following substantive orders;

> ***"(1) ….***
>
> ***(2) That pending the hearing and determination of this Application and/or the Petition herein the Honourable Court be pleased to issue temporary orders ordering the 1st – 14th Respondents to restore free-to-air TV services across the Country.***
>
> ***(3) That the Honourable Court be pleased to order that the matter herein being of weighty national importance should be heard and disposed of within 14 days.***
>
> ***(4) That this Honourable Court be pleased to join other parties relevant to this Application/Petition as and when it deems fit.***
>
> ***(5) That consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice."***

2. The Application is premised on many grounds including the complaints that Supreme Court in **Petition No.14 of 2014** never ordered the 1st to 14th Respondents to terminate free to air TV services;that by implementing the orders of the Supreme Court selectively, the Respondents have violated the Constitution and specifically the provisions of the Bill of Rights and that the administrative actions of the Respondents that have resulted in free to air TV services across the Country being suspended are unconstitutional, null and void for being in contravention of **Article 47** of the **Constitution**.

3. To put matters into perspective, the Petitioner, Okiya Omtatah Okoiti, a resident of Nairobi City County filed the Petition dated 27th February 2015, claiming to be a consumer of free-to-air television (TV) services provided by four TV Stations, namely, KTN, NTV, QTV and Citizen TV. He filed his Petition alleging further that the 1st to 14th Respondents,by switching off analogue broadcasting, have inconvenienced him and over 80% of Kenyan viewers who depend on free- to- air analogue TV. He also alleged that it is reckless, unreasonable and inconsiderate of the 1st to 14th Respondents to shut down the free to air analogue platform which serves the masses, especially the poor, who cannot afford subscriptions to pay TV while the Nation Media Group, Royal Media Services and the Standard Group, through their African Digital Network Consortium (ADN), have indicated that they require three months to provide free to air digital TV by 30th May 2015 well ahead of 17th June, 2015, the international switch off date for the analogue platform.

4. It is the Petitioner's further position that all Kenyans have a right to enjoy to access information including through television, irrespective of their economic status, and also have a right to choose between free-to-air TV and pay TV.

5. He has therefore asked the Court to determine the following questions posed in the Petition;

> ***"(a) Whether the 1st – 14th Respondents violated the Constitution and the National Information & Communications Technology (ICT) Policy in the digital migration.***
>
> ***(aa) Whether the 2nd – 14th Respondents are incompetent and/or unfit to hold***

public office.

(ab) Whether the Board of Directors of the 1st Respondent is constituted according to the Constitution and is free of Government, political or commercial control.

(b) Whether by dint of Article 47 of the Constitution there is a constitutional obligation on the Respondent to ensure a smooth and seamless migration from analogue to digital TV broadcasting.

(c) Whether by dint of Articles 33(1)(a) and 35 the Petitioner and other Kenyans, especially the poor who can't afford to subscribe to pay TV have a constitutional right to free-to-air digital TV broadcasting.

(d) Whether the Respondents' decision to frustrate the setting up by the ADN of a free-to-air digital TV broadcasting platform violates the media rights in Article 34.

(e) Whether by dint of Articles 4(2) and 10 the Respondent was under obligation to consider the needs of the poor who are dependent on free-to-air TV and avoid forcing everybody to migrate to pay TV.

(f) Whether digital migration means the migration to pay TV.

(g) Whether the decision by the Respondents to switch off the digital analogue system in circumstances where there was no infrastructure for free-to-air TV is unconstitutional and, therefore, null and void.

(h) Whether the Respondents ought to allow the ADN Group the three months they require to establish a free-to-air digital TV broadcasting infrastructure.

(i) Whether the Respondents should bear the costs of this Petition for being the party directly responsible, through their actions and/or omissions, for the violation of the Constitution and the law which necessitated the Petitioner to seek remedy in the Honourable Court."

6. Having answered the above mentioned questions, the Petitioner has sought the following declarations and orders;

"(a) A declaration be and is hereby issued that the 1st – 14th Respondents violated the Constitution and the National Information & Communications Technology (ICT) Policy in the digital migration.

(aa) A declaration be and is hereby issued that the 2nd – 14th Respondents are incompetent and unfit to hold public office.

(ab) A declaration be and is hereby issued that the Board of Directors of the 1st Respondent is NOT constituted according to the Constitution.

(b) A declaration be and is hereby issued that by dint of Article 47 of the Constitution there is a constitutional obligation on the Respondents to ensure a smooth and seamless migration from analogue to digital TV broadcasting.

(c) A declaration be and is hereby issued that by dint of Article 33(1)(a) and

35 the Petitioner's and other Kenyans,especially the poor who can't afford to subscribe to pay TV, have a constitutional right to free-to-air digital TV broadcasting .

(d) A declaration be and is hereby issued that the Respondent's decision to frustrate the setting up by the ADN of a free-to-air digital TV broadcasting platform violates the media rights in Article 34.

(e) A declaration be and is hereby issued that by dint of Articles 4(2) and 10 the Respondent was under obligation to consider the needs of the poor who are dependent on free-to-air TV and avoid forcing everybody to migrate to pay TV.

(f) A declaration be and is hereby issued that the digital migration DOES NOT mean migration to pay TV.

(g) a declaration be and is hereby issued that the decisions by the Respondent to switch off digital analogue system in circumstances where there was no infrastructure for free-to-air TV is unconstitutional and, therefore, null and void.

(ga) the Honourable Court do issue and hereby issues a mandatory order dismissing the Board of the 1st Respondent for NOT being constituted according to the Constitution, and ordering the 15th Respondent to commence the process of constituting the board according to the law.

(h) The Honorable Court do issue and hereby issues a mandatory order quashing the Respondents' decision to switch off the analogue signal.

(i) The Honourable Court do issue and hereby issues a mandatory order ordering the Respondent to allow the ADN the three months they require to set up a free-to-air digital TV broadcasting infrastructure.

(j) The Honourable Court be pleased to issue an order ordering the Respondents to bear the costs of this Petition for being the party directly responsible, through actions and/or omissions, for the violations of the Constitution and the law which necessitated the petitioner to seek remedy in the Honourable Court."

Submissions on the Preliminary Objections

7. The above issues therefore form the substratum of the Petition but before any directions with regard to either the Notice of Motion or Petition could be made, the 1st and 3rd to 14thRespondents filed a Notice of Preliminary Objection dated 24th February 2015, objecting to the hearing of the Petitioner's Notice of Motion Application, as well as the Petition, on the grounds that;

"(1) The issues and facts raised in the present application have already been litigated substantively and determined by the Supreme Court of Kenya in Supreme Court Petition No.14 of 2014 CCK & 3 Others vs Royal Media Services & 9 Others vide judgment delivered on 29th September 2014 and the subsequent final orders of the Supreme Court of 13th February, 2015 and as such, the matters raised in the present application are *res judicata.*

(2) Further, this Honourable Court has no jurisdiction to overrule the Orders/findings of the Supreme Court as the Supreme Court and its judgments or orders cannot be subjected to review and/or questioned by this Honourable

court.

(3) Under Article 163 (7), this Honourable Court is bound by the decisions of the Supreme Court therefore, orders sought in the present application do not lie.

(4) For the aforesaid reasons, this Honourable Court lacks the requisite jurisdiction to entertain the present Application and should down its tools."

8. Similarly, the Attorney General, the 15th Respondent, filed a Notice of Preliminary Objection dated 20th February 2015 on the grounds that;

"(1) That the Supreme Court has made a judgment on the claims of the parties in this case by issuing the following orders;

(a) The orders of the Court of Appeal made on the 28th of March 2014 are hereby set aside.

(b) The declaration of the appellate Court of 28th March 2014 annulling the issuance of a BSD license by the 1st Appellant herein (CCK as it then was) to the 5th Appellant herein (Pan African Network Group Kenya Limited), Is hereby Set Aside.

(c) The order by the Court of Appeal directing the independent regulator to issue a BSD license to the 1st 2nd and 3rd Respondents herein (National Signal Networks) is hereby set aside.

(d) The 1st Appellant shall, in exercise of its statutory powers, and within 90 days of the date hereof, consider the merits of applications for a BSD licence by the 1st, 2nd and 3rd Respondent and of any other local private sector actors in the broadcast industry, whether singularly of jointly.

(e) The 1st Appellant (CAK) shall, in exercise of its statutory powers, ensure that the BSD licence issued to the 5th Appellant herein, is duly aligned to constitutional and statutory imperatives.

(f) That 1st Appellant (CAK), in exercise of its statutory authority shall, in consultation with all the parties to this suit, set the time lines for the digital migration, pending the international Analogue Switch-off Date of 17th June, 2015.

(g) Upon the course of action directed in the foregoing orders (d & e) being concluded, the 1st Appellant (CAK) shall notify the Court through the Registry; and the Registrar shall schedule this matter for mention on the basis of priority, before a full Bench.

(2) That on the 13th February 2015 the Supreme Court ruled that the general switch off dates from the analogue to digital platform shall remain as scheduled by the 1st Appellant(who is now the 1st Respondent in these proceedings).

(3) That the Supreme Court having issued a final judgment on the merits in the Appeal No.14 of 2014, all the Courts in the judicial hierarchy in Kenya, through which the dispute relating to the issues in question in the current Petition were processed, stand functus officio with regard to all the matters in this Petition and that all the matters brought up in the Notice of Motion are res judicata.

(4) That the parties to the Appeal were issued with guidelines by the Court on how to proceed with regard to the fixing of a new analogue switch off date and that there is evidence of the Court record to the effect that the 31st December 2014 analogue switch-off date was fixed after stakeholder consultations and with the unqualified consent of all the interested parties to the appeal, all other persons who could have voluntarily enjoined themselves to that litigation while it was still pending are barred by law from re-litigating the same issues elsewhere or particularly, are barred from contesting the analogue switch off date at this or any other forum.

(5) That no orders provided that the analogue switch off date had to await the putting into place of any infrastructure by any person.

(6) That is it not in the public interest for the Court to substantively entertain any further proceedings on the issue of the analogue switch off date or indeed any other matter specifically dealt with in the Supreme Court appeals herein above referred to.

(7) That the operation of Government Agencies charged with policy and Regulation in the Information and Telecommunications Sector, who have been ready for many years to comply with Kenya's international obligations under the auspices of the International Communications Union and specifically the 2006 Geneva conference (RRC-06) will be severely affected in all their future operations by any unpredictably that may be bred by any precedent set by the Court herein if the prayers of the applicants are even entertained leave alone granted.

(8) That Policy making and implementation process on the part of the Government generally will function lamely forever in this County as the doctrine of separation of powers will have been breached."

9. Both Preliminary Objections were argued before me on 2nd March 2015. Mr. Njoroge presented the Attorney General's case and submitted that the issues arising from the Petition have already been determined within the judgments delivered in **High Court Constitutional Petition No.557 of 2013, Royal Media Service Ltd & 2 Others vs Attorney General & 6 Others,** at the Court of Appeal in **Civil Appeal No.4 of 2014 Royal Media Service Ltd & 2 Others vs Attorney General& 6 Others** and at the Supreme Courtin **Petition No.14 of 2014, Communications Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others.**He thus submitted that the Petition is *res judicata* and he relied on the cases of **Julia Odhiambo Ogina vs Andrew Horace Omondi ELC No.515 of 2013 , Kenya Scientific Research International Technical and Institution Workers Union vs Black & Beauty Products Ltd Cause No.1579 of 2014**and**Abok James Odera vs John Patrick Macharia Civil Application No. 49 of 2001** in which the Court set out the principles applicable where *res judicata* has been pleaded.

10. It was his further submission that the Parties in this Petition are the same as they were in **Petition No.557 of 2013** and that consumers of TV services, allegedly represented by the Petitioner, were in that Petition represented by the Consumer Federation of Kenya (COFEK). He thus concluded that the Petitioner is reintroducing the same matters in this Petition in a different way, language and expression while the issues remain the same. He thus urged the Court to remain vigilant and guard against litigants who, ingeniously, try to avoid the application of the doctrine of *res judicata*. For that submission he relied on the caseof **E.T vs Attorney General & Another (2012) e KLR**and further sought that the Petition be dismissed with costs.

11. On his part, Mr. Kilonzo for the 1st and 3rd to 14th Respondents associated himself with the submissions by Mr. Njoroge and added that the Supreme Court in **Petition No. 14 of 2014** made a final decision in all issues in respect of the present Petition and that being the case, litigation must come to an end. In any event, he claimed that the Supreme Court's decisions are binding on the High Court and this Court has no jurisdiction to reopen the case and further that the doctrine of *res judicata* was applicable in constitutional matters such as the one before the Court and prayed that for the above reasons,the

Petitionought to be struck out with costs.

12. In response, the Petitioner submitted that the doctrine of *res judicata* does not apply in the instant Petition because: firstly, the parties in this Petition are different;secondly, the issues raised herein are also different; the previous suits concerned migrating broadcasters from analogue to digital broadcasting including licensing and copyrights while the current Petition concerns migrating viewers from analogue to digital platforms including alleged violations of the Bill of Rights and other provisions of the Constitution and also involves the suitability and competence of the 2nd to 14th Respondents to hold public office. Lastly, that the orders sought are also different. To support his case, he relied on the case of **Kiprono Arap Biegon vs John Arap Bii and Anor (2005) e KLR .**

13. It was his further submission that to find that the Petition herein is *res judicata* would amount to a violation of the Petitioner's right to access justice and this Court should not allow the Respondents to benefit from such a situation.

14. While urging the Court to consider the merits of his Petition, Mr. Okoiti submitted that this Court should be slow on dismissing claims without hearing them on their merits and on that submission he relied on the case of **Chokolingo vs The Attorney General of Trinidad and Tobago (1981) 1 WLR 106**.

15. Mr. Issa for the ADN Consortium took the middle ground and argued that while some issues were indeed settled by the Supreme Court, matters relating to the rights of viewers were never addressed and are therefore live for determination in the present Petition.

Determination

16. Having considered the Parties' submissions as above, the only issue arising for determination is whether the Petition and the Application before me should be terminated at this stage on the basis of *res judicata.* All other issues raises are peripheral and are related to that one issue.

In that context, the law on res judicata in civil law is found at Section 7 of the Civil Procedure Act which provides as follows;

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

17. For *res judicata* to be invoked in a civil matter therefore, the issue in a current suit must have been previously decided by a competent Court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in a subsequent suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title. (See the case of **Karia and Another vs the Attorney General and Others (2005) 1EA 83).**

18. The rationale behind the provisions of **Section 7** above entrenching the doctrine of *res judicata* is that if the controversy in issue is finally settled, determined or decided by a competent Court, it cannot be re-opened. The doctrine is therefore based on two principles; that there must be an end to litigation and that a party should not be vexed twice over the same cause. This was what was held with approval in **Omondi vs National Bank of Kenya Ltd and Others (2001) EA 177.**

19. Applying the above principles to the instant Petition and in so far as the first and second issues are concerned, it is clear to my mind that the substratum of the dispute before is digital migration. I say so because the litigation history of digital migration in Kenya can be traced to **High Court Petition No.557 of 2013** in which the Petitioners (**Royal Media Services Ltd & Others**) sought for orders to compel the

then Communications Commission of Kenya (CCK) to issue them with Broadcast Signal Distribution (BSD) licences as well as frequencies and an order to compel CCK from switching off the analogue frequencies, broadcasting spectrums and broadcasting services pending issuance of the BSD licences. Majanja J in a judgment delivered on 23rd December, 2013 dismissed the Petition in its entirety and in his judgment, the Learned judge held that the Petitioners were not entitled to be issued with BSD licenses on the basis of their established status or legitimate expectation and further that digital migration could not be a violation of the Petitioners' fundamental rights and freedoms.

20. Being aggrieved by the decision of the judge, the Petitioners filed **Nairobi Civil Appeal No.4 of 2014** and in a judgment delivered on 28thMarch, 2014, the Court of Appeal set aside the High Court judgment and held *inter alia* that CCK was not the appropriate body contemplated under **Article 34(3)(b)** and **34(5)** of the **Constitution** and could therefore not grant BSD licenses. Being dissatisfied with the Court of Appeal's decision, CCK appealed to the Supreme Court in **Petition No.14 of 2014**. The Supreme Court framed the following five issues as issues arising for determination;

> ***"(a) whether the Communications Commission of Kenya was the body contemplated under Article 34 of the Constitution.***
>
> ***(b) whether the 1st, 2nd and 3rd Respondents had a legitimate expectation to be issued with Broadcast Signal Distribution(BSD) licenses.***
>
> ***(c) whether the 1st, 2nd and 3rd Respondents' intellectual property rights were infringed by the Appellants.***
>
> ***(d) whether the Petition filed at the High Court was barred by "issue estoppel", and amounted to an abuse of the Court process, for being a collateral attack against the decision by the Public Procurement Administrative Review Board (Tribunal).***
>
> ***(e) whether the final orders of the Court of Appeal were in excess of the powers and jurisdiction conferred by the Constitution."***

21. Having determined all the above issues, the Court in its judgment delivered on 29th September 2014, made the following final orders;

> ***"(a) On account of requisite adaptions to the supporting infrastructure accompanying the imminent shift from Analogue Terrestrial Broadcasting to Digital Terrestrial Broadcasting, the Kenya Parliament should consider the content of the Kenya Communications Act, 1998 for appropriate review.***
>
> ***(b) Alongside the foregoing indication, parliament should consider such appropriate environmental measures as should guide signal distributors, in complying with the terms of Articles 10(2) (d) and 42 of the Constitution.***
>
> ***(c) In that same context, Parliament should consider an appropriate course of legislation to govern the disposal of waste-material resulting from the transition from analogue television transmission to digital television transmission.***
>
> ***(d) On the question of Set Top Boxes (STBs), we would urge CAK to ensure that their sale is open to competition to avoid creating a monopoly or duopoly. At the centre of the sale of these STBs, should be the interest of the consumer, i.e. the Kenyan public. Towards this end, CAK could consider incorporating into the licensing conditions, the requirement on the part of signal distribution licensees to subsidize the cost of STBs. We make this suggestion in the belief***

that it reflects good corporate social responsibility.

(e) Most importantly, CAK must re-align its operations and licensing procedures so as to be in tune with Articles 10, 34 and 227 of the Constitution."

22. I have reproduced the litigation history above to demonstrate that the subject of the Petition before me has largely been the same as in the three Petitions mentioned above. However, I heard Mr. Okoiti to submit that the prior litigation concerned migrating broadcasters from analogue to digital broadcasting including issues of licensing and copyrights while the current Petition concerns migrating viewers from analogue to digital broadcasting and includes alleged violations of the Bill of Rights and other provisions of the Constitution. However, looking at the Supreme Court judgment again, I note at paragraph 388 that the Court addressed the place of the people of Kenya in the controversy and stated as follows;

'In resolving the dispute, account must be taken of the nature of the resource (Spectrum) being contested, the economic fundamentals underguarding its capitalization, the country's obligations under international law, and the values decreed in our Constitution. At the end of the day the people of Kenya, local investors, international investors all have a stake. Of course care must be taken so as not to leave this resource to 'the tragedy of the commons.'

The Court, in that context made the following orders;

"(a) The first Appellant shall, in exercise of its statutory powers, and within 90 days of the date hereof, consider that the merits of applications for a BSD licence issued to the 5th Appellant herein, is duly aligned to constitutional and statutory imperatives.

(b) The 1st appellant (CAK), in exercise of its statutory authority, shall, in consultation with all the parties to this suit, set the time-lines for the digital migration, pending the International Analogue Switch-off Date of 17th June 2015.

(c) Upon the course of action directed in the foregoing orders being concluded, the 1st appellant (CAK) shall notify the Court through the Registry, and the Registrar shall schedule this matter for mention, on the basis of priority, before a full Bench."

Juxtaposing the issues settled by the Supreme Court and the issues raised in this Petition, it is obvious to me (subject to what i shall say later on some issues) that while some issues were indeed disposed of and cannot be re-opened, the following issues were never the subject of direct and stand alone litigation, either in the High Court, Court of Appeal or Supreme Court;

(i) Prayer (aa) of the Petition, on whether the 1st – 14th Respondents are incompetent and unfit to hold public office.

(ii) Prayer (ab) on whether the Board of Directors of the Communication Authority of Kenya is properly constituted and is free of political and other interferences.

(iii) Prayer (g) of the Petition on whether the entire Board of CAK should be dismissed for not being constituted in accordance with the Constitution and whether the 15th Respondent should be ordered to commence the process of constituting the Board afresh and in accordance with the Law.

On the other hand, the following issues were determined with a measure of finality i.e Prayers (a), (c), (d), (e), (f), (g), (h) and (i) all which rotate around the singular issue whether the migration from analogue to digital was done unlawfully and/or in breach of the Constitution. In that regard, it matters not that the Petitioner has introduced the ingenious argument that the needs of the poor may not have been addressed in prior litigation. I say so because the issue of migration to digital TV in all its faces was settled by the Supreme Court and once that was done, it was not open to the Petitioner or anyone else to re-open them by fresh litigation and it is of no consequence how he has reframed those issues to suit his circumstances. Once they have been determined, they come to an end and that is why in E.T vs Attorney General (supra) the Court stated as follows;

> ***"The Courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the Court in another way and in the form of a new cause of action which has been resolved by a court of competent jurisdiction."***

I agree with the reasoning of the Court and adopt the same in the instant Petition. I also have no doubt in my mind that the issues the Petitioner intends to canvass in this Petition, if looked at properly, are really all about digital migration,and in essence, to purport to determine them would be akin to re-opening **Petition No.14 of 2015,** an act that would be frowned upon by the doctrine of *res judicata*. The words of Kuloba J in **Njangu vs Wambugu and Another Nrb HCC No. 2340 of 1991** therefore ring true in that regard. The learned Judge stated as follows as regards the importance of having a closure to litigation;

> ***"If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his aces some cosmetic face lift on every occasion he comes to Court, then I do not see the use of the doctrine of res judicata."***

23. I agree with the learned judge and as I have stated above, it matters not that the Petitioner has framed different questions for determination or has sought slightly different orders from those in **Petition No.14 of 2014**. To my mind, the core and crux forming the subject matterof the Petitioner's case is largely the issue of digital migration save the additional issue as regards the Board of the CAK. I am clear that the Petitioner is therefore trying to bring to this Court, in another way and in the form of a new cause of action, a suit that has already been placed before a competent court in earlier proceedings and which was adjudicated upon and judgment delivered. In that regard **Richard Kuloba** in his book, **Judicial Hints on Civil Procedure, 2nd Ed** writes as follows;

> ***"The plea of res judicata applies not only to points upon which the first Court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply: Law Ag V-P in Kamunye and others vs Pioneer General Assurance Society Ltd [1971] EA 263 at 265, (20 October 1970), on appeal from High Court of Uganda but relying on JadvaKarsan vs Hamam Singh Bhogal (1953 20 EACA 74 (10 March 1953), an appeal from the Supreme Court of Kenya, and has also been followed by the Court of Appeal in Kenya in the case of Hawkesworth vs Attorney-General [1974] EA 406, (7 October 1974)."***

24. I am in agreement would only add that it is not proper for parties to have piecemeal litigation. A party ought to litigate in one suit all matters that belong to that subject in controversy and it is not sufficient therefore for the Petitioner to allege now that the issues he has raised for interpretation were not covered by the previous suit more so when he, Mr. Okoiti, admitted that he was in the Court of Appeal during the proceedings before that Court and knew what issues were in contest. In so finding I am also guided by the decision of the Court of Appeal in **Pop In (Kenya) Ltd & 3 Others vs Habib Bank AG Zurich (1990) KLR 609** where the Court held that:

> ***"But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The* locus classicus *of that aspect of res judicata is the judgment of Wigram VC in Henderson v Henderson (1843) Hare 00, 115, where the judge sys:***
>
> > ***Where given matter becomes the subject of litigation in, and of adjudication by, court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies, except in special cases, not only to points which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time".***

Simply, put therefore, in the circumstances, the present complaints,excluding the suitability and competence of the and 2nd -14th Respondents to hold office, could have been made and should have been raised in the earlier petitions in the High Court, Court of Appeal and Supreme Court.

25. Having expressed myself on the main arguments made on *res judicata*, there is still one last issue to address i.e whether the Parties in this Petition are the same as those in the previous Petitions. In the present Petition, the parties are as listed above and in the previous cases, the parties were the CCK, the Attorney General, the Ministry of Information, Communications and Technology, SIGNET Kenya Ltd, Pan African Network Group Kenya Ltd, Startimes Media Ltd, Royal Media Services Ltd, Nation Media Services Ltd, Standard Media Group Ltd, COFEK and West Media Ltd. Looking at the parties in this Petition again, the 2nd to the 14th Respondents are officials of the 1st Respondent, the CAK the successor to CCK, a party to the previous Petition. The Attorney General is also a party in both petitions. In the present Petition, African Digital Network (AND) has been enjoined as the 16th Respondent. ADN has been described as a consortium of Royal Media Services (Citizen TV), The Standard Group (KTN) and the Nation Media Group (NTV and QTV). All these media houses were parties to the previous Petition. The only new party is therefore the Petitioner himself.

26. In my view, he sued the officials of the 1st Respondent and ADN so as to disguise the proper parties who were in the first Petition and that attempt cannot affect my conclusions above and help him evade the doctrine of *res judicata* on the main issue of digital migration which is the common thread running through all the Petitions as can be seen above. I shall repeat for emphasis that the said issue cannot be re-opened merely by re-introducing the rights of viewers to migrate and re-packaging it differently as a violation of the provisions of the Constitution and that of the Bill of Rights so as to prevaricate the principle of *res judicata*.

27. Before ending on this aspect of the Preliminary Objections, I recall that the Petitioner also urged the Court to find that res *judicata* does not apply in constitutional matters in the same manner as it would apply in civil claims. In that regard, am aware of the general rule that *res judicata* is applied sparingly in constitutional matters and in stating so, I will do no better than reiterate my sentiments in **Okiya Omtatah Okoiti and Another vs Attorney General & 2 Others Petitions No. 593 of 2013** where I opined as follows;

> ***"Whereas these principles {of** res judicata**} have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of** res judicata **can and should only be invoked in constitutional matters in the clearest of cases and where a party is re-litigating the same matter before the Constitutional Court and where the Court is called upon to re-determine an issue between the same***

parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious."

28. Given my reasoning elsewhere above and in the circumstances obtaining in the matter before me, it is obvious that this is one of those clear cases where the doctrine of *res judicata* can be properly invoked although it is otherwise a matter premised on the constitution.

29. In that regard, I reiterate that the Petitioner's claim on the issue of digital migration is an attempt to circumvent the judgment of the Supreme Court in **Petition No.14 of 2014 ,** is also a collateral attack on that judgment and constitutes an abuse of the Court process. If the Petitioner has issues he deems ought to have been determined in that Petition but were not (and in any event I have not been persuaded that there are any), the law has provided other avenues through which he can re-open the case and attack the judgment but coming to this Court to re-litigate the same is not one of those avenues.

30. As regards the Prayers relating to the legality of the CAK Board and suitability of the 2nd – 14th Respondents to sit on it, the issue was raised in the context of the manner in which they acted with regard to digital migration and not any other matter. Once I have found that the said issue cannot be re-opened in this Court, the corollary issue of the suitability of the Board cannot stand and although not barred by *res judicata*, it would be an exercise in futility for this Court to pursue those matters. The Petitioner, as I have said earlier, is at liberty to file separate proceedings on that matter but not with digital migration as the substantive cause of action. I have made these findings suo *motu* and to protect the court process from abuse and it follows therefore that even prayers (aa), (ab) and (ga) of the Petition cannot stand for the above reasons.

31. As regards costs, Mr. Kilonzo urged the court to award the same to the 1st to 14th Respondents upon the objections being upheld while the Petitioner argued that the Petition was filed in the public interest and so he should not be penalized with costs even if the objections were to be upheld. In my view, this Court has a duty to protect the noble motive of public interest litigation from those who file claims out of mischief and less than genuine interest in the guise of protecting a public interest. The filing of false and frivolous public interest litigation which risk diverting the court's attention from genuine cases will not be entertained. In that regard, in **Truth Justice and Reconciliation Commission vs Chief Justice of the Republic of Kenya & Another (2012) e KLR,** Warsame J (as he then was) stated as follows;

"Though as courts we spare no efforts in fostering and developing liberal and broadened litigation, yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to matters which are dear to them must be addressed, the meddlesome interlopers having absolutely no grievances but who file claims for personal gain or as a proxy of others or for extraneous motivation break the queue by wearing a mask of public interest litigation and get into the court corridors filing vexatious and frivolous cases. This criminally wastes the valuable time of the court and as a result of which genuine litigants standing outside the court in a queue that never moves thereby creating and fomenting public anger, resentment and frustration towards the courts resulting in loss of faith in the administration of justice."

32. I am in agreement with the learned judge. I have elsewhere above shown that I am not convinced that the Petitioner had any serious case to pursue and more likely than not he was pursuing publicity for self in the name of unnamed poor people. I am also aware that all the TV stations under the ADN umbrella have since resumed broadcasting and much of what was complained above is no longer a live issue, even if it had any seriousness in the beginning, and I doubt that it did. Without saying more, I am satisfied that the Petition herein was filed with mischief and will order that the Petitioner bears the costs of the 1st to 14th Respondents only and since Mr. Njoroge for the Attorney General did not pursue an order for costs, the 15th Respondent shall bear his own costs.

33. From what I have stated above, it follows that the Petition as well as the Notice of Motion dated

18th February 2015 are struck off with costs to the 1st to 14th Respondents only.

34. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MARCH, 2015

ISAAC LENAOLA

JUDGE

In the presence of :

Kariuki – Court clerk

Petitioner - present in person

Mr. Kilonzo for 1st – 14th Respondents

Mr. Njoroge for 15th Respondents

No appearance for 16th Respondents

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE

Further Order

Proceedings to be supplied.

Copies to be supplied to Parties.

ISAAC LENAOLA

JUDGE

10/3/2015