



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 59 OF 2013

BETWEEN

ROYAL MEDIA SERVICES LTD.....PETITIONER

AND

THE HON ATTORNEY GENERAL.....1ST RESPONDENT

THE MINISTER OF INFORMATION AND BROADCASTING.....2ND RESPONDENT

THE COMMUNICATION COMMISSION OF KENYA.....3RD RESPONDENT

RULING

1. The Chambers Summons dated 2nd February 2013 has been brought to me today, 3rd February 2013. It is a Sunday when the Court does not ordinarily sit and I was requested by the Chief Justice to hear the matter having been in chambers today, finalising judgments in the recently concluded matters arising from the Independent Electoral and Boundaries Commission nomination cases. Moreover, I had dealt with a recent case concerning the taking of regulatory action by the Communication Commission of Kenya (“CCK”) between the petitioner and the respondents being *Nairobi Petition No 346 of 2012* where I rendered a judgment on 18th January 2013. Thereafter, I granted interim injunctive relief on the same date pending the filing of a formal application. I heard the application for conservatory orders pending appeal inter-parties and on 30th January 2013, I granted conservatory orders pending appeal from the judgment.

2. Although the Courts do not ordinarily conduct business on Sundays and weekends, there is no rule of law or procedure that prohibits them from doing so and in an appropriate case when moved, the court will seek to do justice. Such a power was recognised by Kneller JA in the case of *Geoffrey Ndung’u Theuri v The Law Society of Kenya Nairobi CA Civil Application No. NAI 33 of 1984 (Unreported)* (see also *Halsbury’s Laws of England, 4th Ed. Vol. 24* at para 1050). I would state that such power is properly located in the Constitution particularly **Article 48** which protects the right of access to justice for all Kenyans and requires the State to ensure access to justice for all persons. Perhaps it is time for the Chief Justice to issue Practice Direction for the hearing of urgent matters on weekends and public holidays where necessary. My finding on jurisdiction is also fortified by the fact that the case before the Court is

one for the enforcement of fundamental rights and freedoms.

3. The Chamber Summons dated 2nd February 2013 seeks the following main reliefs;

[2] THAT the 3rd respondent do open the applicant's transmitter houses at Narok, Nakuru, Mukuyuni and Maburui forthwith.

[3] THAT the 3rd respondent do handover to/return forthwith the applicant's transmitters confiscated from its transmitter sites at Narok, Nakuru, Mukuyuni and Maburui.

[4] THAT the 1st and 2nd respondents do remove forthwith armed police officers placed at the applicant's broadcasting sites at Narok, Nakuru, Mukuyuni and Maburui.

[5] THAT a conservatory injunctive order be issued restraining the 3rd respondent, its servants and agents from interfering or restricting or in any way howsoever with the applicant's private broadcasting at Narok, Nakuru, Mukuyuni and Maburui until further orders of this court.

[6] THAT the 3rd respondent be restrained by itself, its servants or agents from interfering or restricting or in any way whatsoever with the applicant's private broadcasting sites in the Republic of Kenya without observance of the due process of law until further orders of the court.

[7] THAT the 3rd respondent be restrained by itself, its servant or agents from interfering or restricting or in any way howsoever with the applicants' private broadcasting from its broadcast sites in the Republic of Kenya without observance of the due process of law pending the hearing and determination of the petition.

4. The application was precipitated by a statement delivered on 2nd February 2012 by the Director General of the CCK. The press statement was titled, ***"Press Statement by CCK Director General, Mr Francis W. Wangusi, on the Shut Down of Illegal Broadcast Transmitters."*** In the statement the Director General notified the public on Saturday morning that CCK had shut down the petitioner's broadcast transmitters in four different sites or locations in the country that were being operated illegally and/or in breach of the law and more particularly **section 35 of the *Kenya Information and Communication Act, 1998.***

5. As regards the petitioner and its case, the Press Statement noted that, ***"The six transmitter stations that have now been put off-air were located in Narok, Nakuru, Mukuyuni (in Ukambani) and Mambrui (Malindi) and were being operated by the Royal Media Services. The Stations are part of 17 unauthorised transmitter stations that the Commission issued a 30-day notice about on 3rd December 2012. The notice directed the offending broadcaster (i.e. Royal Media Group) to cease operating the unauthorised frequencies or face the full force of the law. In spite of the notice, Royal Media Services has continued to transmit broadcast signals from the 17 transmitter stations in total disregard of the law. The Commission shall in the next few days shut down the remaining 11 illegal stations located in various parts of the country***"

6. The petitioner avers that pursuant to its stated intention contained in the Press Statement, CCK has continued to shut down broadcasting stations and will continue to do so unless restrained. According to the depositions sworn by Mr S. K. Macharia, the Chairman of the petitioner's Board of Directors, the petitioner has invested over Kshs. 1.4 billion in its business. It has over 1,300 members of staff and serves Kenyans through radio and television broadcasting and therefore shutting down the station will adversely affect its business and also the rights of Kenyans to receive information through the media particularly at this time of the general elections.

7. I have considered the arguments and material placed before the court and I think the petitioner is entitled to have its case heard before drastic action is taken against it by the CCK. I am aware that this is an *ex-parte* application and the other side ought to be given an opportunity to present its case. In my view,

the orders that would take into account the circumstances of the case are orders that would preserve the status quo. I am unable to grant mandatory orders at this stage.

8. I therefore make the following orders;

- (1) An order be and is hereby issued restraining the Communication Commission of Kenya, its servants and or agents and the 2nd respondent from interfering or restricting in any manner whatsoever the applicants private broadcasting from its broadcasting sites within the Republic of Kenya and more particularly, it is hereby restrained from shutting down any further broadcasting sites stated in the Press Release dated 2nd February 2013 until further orders of the Court.**
- (2) The petition shall be sent via-email to the respondents particularly the 3rd respondent forthwith directly and through its advocates forthwith.**
- (3) The petition shall be filed on Monday morning and served on all the parties thereafter.**
- (4) The petitioner shall be at liberty to serve the handwritten ruling on the respondent forthwith.**
- (5) This matter shall be listed before me at 12.00 noon on 4th February 2013 for hearing, further orders and/or directions.**

DATED and DELIVERED in NAIROBI this 3rd day of February 2013.

D.S. MAJANJA

JUDGE

FURTHER ORDER:

- (1) Ruling read in the presence of the advocates.
- (2) Ruling is subject to editorial changes and corrections as it is delivered *ex-tempore*.

D.S. MAJANJA

JUDGE

Dr Kamau Kuria, S.C., instructed by Kamau Kuria and Kiraitu Advocates for the petitioner/applicant with him Mr Issa.