Sauti Communications Limited v Communication Authority of Kenya (Civil Appeal E891 of 2024) [2026] KEHC 1210 (KLR) (Civ) (6 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1210 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E891 OF 2024

JM CHIGITI, J

FEBRUARY 6, 2026

BETWEEN

SAUTI COMMUNICATIONS LIMITED ..... APPELLANT

AND

COMMUNICATION AUTHORITY OF KENYA ..... RESPONDENT

JUDGMENT

Background;

1. In 2020, the Appellant instituted Judicial Review Miscellaneous Civil Application No. 89 of 2020 seeking to quash the decision by the Respondent made on the 12th of April 2020 to repossess the frequency assignment from the Appellant on account of the non-compliance by the Appellant with the conditions of assignment and the broadcasting regulations.

2. On 12th March 2021, Justice Nyamweya in dismissing the proceedings, held that the proper forum for redress was the Communication and Multimedia Appeals Tribunal, and granted the Appellant leave to file an Appeal before the Tribunal.

3. Thereafter in dismissing the resultant Application, the Tribunal held as follows:

    a. It has the discretion to allow the amendment of pleadings;

    b. It did not have the power to order the Respondent to allocate a radio broadcast spectrum frequency to the Appellant.

    c. It did not have the jurisdiction to award special damages as sought by the Appellant.

4. That triggered the filing of the Memorandum of Appeal against the Ruling of the Communication and Multimedia Appeals Tribunal delivered on 5th July 2024 on the Appellant's Application dated 10th May 2024.

5. The Appeal is predicated on the Memorandum of Appeal dated 3rd August 2024 wherein the Applicant is seeking orders: -

    a. That the Appeal be allowed with costs.

    b. That this Honourable Court be pleased to review and/or set aside the ruling and orders of the Communication and Multi-Media Appeals Tribunal delivered on the 5th July 2024 and instead direct that the Appellant's Application for amendments be allowed.

    c. That the Appellant be allowed both the costs of the Appeal and of the Tribunal.

    d. That this Honourable Court be pleased to give such orders or reliefs as may deem just and fit to grant.

6. The Appellant raises the following grounds; -

    1. That the Honourable Tribunal erred in law and fact in misapprehending the nature of the Appellant's Application dated 10th May 2024 and dismissing the same.

    2. That the Honourable Tribunal erred in law and fact in failing to appreciate that amendment of the Appellant's pleadings was necessary for the just, proportionate and effectual adjudication of the dispute in the circumstances of the case and in light of the decision given by this Honourable Court in Civil Appeal NO.E379 of 2022 concerning the then proposed joinder of Telemain Company Limited as an interested party.

    3. That the Honourable Tribunal erred in law and fact in recognizing that it had powers to allow amendments BUT refusing the permit the amendments sought by the Appellant.

    4. That the Honourable Tribunal erred in law and fact by dismissing the Appellant's Application based on the merits of the whole case and not the importance of the amendments sought in bringing before the Tribunal the real matters in controversy.

    5. That the Honourable Tribunal nevertheless erred in law and fact in finding that it cannot direct the Respondent to issue the Appellant a radio broadcast spectrum frequency license and further award the Appellant damages.

    6. That the Honourable Tribunal erred in law and fact in failing to recognize and find that the Respondent violated the Appellant's fundamental freedoms and rights guaranteed in *the Constitution* by dismissing amendments meant to cure the said violation.

    7. That the Honourable Tribunal erred in law and fact by allowing the Appellant to suffer a wrong without a remedy by dismissing Appellant's Application for amendment of the Memorandum of Claim thereby enabling the Respondent to run away with an illegality.

    8. That the Honourable Tribunal erred by applying the wrong principles of law thereby arriving at a wrong decision.

    9. that the Honourable Tribunal erred in Law and fact and misdirected itself in taking into account irrelevant consideration and failed to take into account relevant consideration.

10. That in all Circumstances of the case, the findings of the Honourable Tribunal is insupportable in law or on the basis of the evidence adduced and the circumstances of the case.

The Appellant's Case

7. It is its case that The Respondent repossessed its radio broadcasting frequency spectrum license on the 12th April, 2020 by virtue of a letter under Ref. CA/FSM/BC/60 Vol. 1.

8. The Applicant being aggrieved by the said decision was alive to the fact that it had to move fast to have the said decision quashed, the Respondent to be compelled to restore back the signal license hence it moved and filed for Judicial Review in the High Court at Nairobi, Judicial Review Number 89 of 2020, in good faith that the Court was the only one at that moment clothed with jurisdiction to grant the prayers sought.

9. The Court delivered its judgment on the 12th March, 2021 in which it exalted the doctrine of exhaustion of administrative remedies which arises when a litigant, like the Appellant herein is aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies. On this basis the High Court held that the matters were not ripe for determination by it until the ex-parte Applicant who is the Appellant herein has exhausted available local remedies. To this end the High Court determined that the Applicant still had an opportunity to have its Appeal entertained before the Tribunal in the first instance and ordered accordingly under paragraph 53 of the said Judgment allowing it sixty days of the date of the judgment.

10. Fully guided by the High Court, and in accordance with the ORDERS in the said Judgment as read together with the relevant provisions of the KICA and the subsidiary rules thereunder the Applicant lodged an Appeal no. 2 of 2021 before the Honourable Tribunal, to which the Respondent filed a Preliminary Objection solely contesting the Jurisdiction of the Honourable Tribunal to entertain the Appeal. The Tribunal Ruled that it had jurisdiction to entertain the Appeal.

11. In the course of the proceedings and before the hearing of it learnt that the license the Respondent had repossessed from the Appellant on the 12th April, 2020 by virtue of a letter under Ref. CA/FSM/BC/60 Vol. 1, had been assigned to a third party namely, Telemain Company Limited on 29th April,2020.

12. This revelation led the Appellant to file an Application dated 18th February, 2022 in the Tribunal seeking to include Telemain Company Limited as an Interested Party or Respondent.

13. The Respondent has NOT contested that it repossessed the Appellant's broadcasting frequency license and assigned it to a third party named Telamain Company Ltd. Therefore, the decision by the Respondent to repossess the said license from the Appellant and assigning it to a third party is germane to this Appeal for the following reasons;

    a. The radio frequency license repossessed by the Respondent is subject of the suit because the manner in which it was repossessed is contested;

    b. That the Respondent having decided on 12th April, 2020 to reposes the license from the Appellant disposed it immediately on 29th April,2020 to a third party in a span of 16 days;

c. Under the law, Section 102 (F)(2) of *Kenya Information and Communications Act* (KICA) allows the Appellant a period of sixty (60) days after the making of a decision by the Respondent to Appeal the said decision to the Tribunal in the following manner:

> 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.

14. Section 102 (F)(3) of KICA, empowers the Tribunal to grant remedies to an Appeal in the following manner;

(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.

15. The instant Appeal arises from the Ruling of the Honourable Tribunal dated 15th July,2024 dismissing the Appellant's Application dated 10th May, 2024 which Application sought for Orders that;

a. That the Applicant be allowed to amend its Memorandum of Appeal dated 5th May,2021 and filed in the Honourable Tribunal on the 11th May,2021 as per the draft annexed thereto;

b. That the amended Memorandum of Appeal annexed thereto be treated as the Appellant's Amended Memorandum of Appeal and that the same be deemed as having been duly filed upon payment of the requisite fees;

c. That the Respondent be at liberty to amend its respective Memorandum of Response within seven (7) days thereafter if it so wishes;

d. That costs of the Application be costs in the Appeal.

16. The Tribunal in its Ruling, reduced the matters into S issues being;

a. Whether it has power to allow the Appellant to amend the Memorandum of Appeal;

b. Whether it has Jurisdiction to grant the Remedies sought in the draft Memorandum of Appeal?

c. Whether to allow or dismiss the Appellant's Application

d. What orders should be made as to costs

17. According to the Appellant, the main crux of the instant Appeal is the interpretation of Section 102F (3) of KICA, on whether or NOT the Honourable Tribunal has power to grant the remedies sought in the amended draft Memorandum of Appeal and if NOT, whether the Superior Court can assume jurisdiction and do justice.

18. Every person has a right to pursue a remedy under common law, for a wrong or injury suffered. Under common law, there cannot be a wrong without a remedy - or in other words, "Equity will not suffer a wrong to be without a remedy" (ubi jus ibi remedium).

19. The Appellant suffered a wrong; he went to the Court and the Tribunal seeking relief and the Tribunal has intimated that first even if it found that the license was illegally repossessed by the Respondent, it cannot recall the license which has been assigned to a third party and neither can it grant the Appellant any relief in damages because it does not have that jurisdiction, which means that the Appellant's Appeal before the Tribunal is an academic exercise.

20. There are legal issues arising out of the entire Appeal as filed before the Honourable Tribunal, which involve; the interpretation of Section 102F(3) of KICA, and also whether or not the Respondent having made a decision against the Appellant, it can go ahead to remove the substance from the jurisdiction of the Tribunal before the lapse of sixty (60) days in light of Section 102 (F)(2) of *Kenya Information and Communications Act*.

21. We seek that this Honourable Court shall be pleased to find and declare that Tribunals and especially CANTAT has quasi-judicial powers and authority to grant equitable remedies. This Court when determining the Jurisdiction of the Public Procurement Board and the Tribunal established under the *Energy Act* in Omondi v Kenya Power & Lighting Co. Ltd & 6 others (Constitutional Petition E324 of 2020) (2022) KEHC 13215 (KLR), under similar circumstances found that they had jurisdiction to grant equitable remedies thus;

    Turning back to the case at hand, it comes to the fore that most of the matters raised by the Petitioner fall within the jurisdiction of the Tribunal. I say so since the Tribunal has original civil jurisdiction on any dispute between a licensee and a third party_ or between licensees.

    The Tribunal also has powers to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.

22. In the instant Appeal, CAMAT has narrowly interpreted Section 102 (F)(3) of KICA, which empowers it to do justice to the parties by stating alternative remedies the Tribunal can grant to the Appellant upon the Appeal being successful. The Tribunal wrongly believes that its powers and jurisdiction is only as limited as established under KICA, erroneously failing to consider that it also has power and authority under Article 3(1) of *the Constitution* 2010 which the High Court in Omondi v Kenya Power & Lighting Co. Ltd & 6 others (Constitutional Petition E$24 of 2020) (20223 KEHC 13215 (KLR) interpreted, when asserting the power and authority of the Public Procurement Administrative Review Board and the Energy Tribunal established under Section 25 of the *Energy Act*, to interpret and apply both *the Constitution* and the law as follows;

    > " This Court, therefore, takes great exception to the position that Tribunals, quasi-judicial bodies, State organs or any person, except Courts of law, cannot determine whether *the Constitution* and the law is infringed. That cannot, by any shred of imagination, be correct. The reason is simple. Article 3 of *the Constitution* and in mandatory terms, obligates every person, as defined in Article 260 of *the Constitution*, to respect, uphold and defend *the Constitution*.
    >
    > In discharging the said constitutional-calling, the persons, which include Tribunals and quasi-judicial bodies, must apply_ *the Constitution* and the law. A body which applies *the Constitution* and the law definitely has the capacity to understand and ascertain whether the very Constitution and law it is supposed to uphold is infringed. That can be the only reasonable rationale since the converse is to suggest that the persons do not understand and cannot therefore respect, uphold and defend *the Constitution* and the law. Such a finding will be in itself unconstitutional."

23. It is its case that While the Tribunal found correctly that it has the jurisdiction and the discretion to allow amendments of the pleadings, it erred in law and fact when it delved into the merits and demerits of the prayers the Appellant sought to include in the amended pleadings which required trial to arrive at the determination. The Tribunal preempted the orders the Appellant sought in the proposed Draft Amendment without having them subjected to trial and dismissed the Application and held that it has no jurisdiction to grant the remedies sought in the amended draft Memorandum of Appeal.

24. The reading of Section 102 (F)(3) of KICA, in its entirety grants the Tribunal Judicial review powers over the decisions of the Respondent. As such, the correct interpretation of the law would be that in the event the tribunal sets aside the decision of the Respondent, it will return the parties to status quo ante order. As such, it will be as though the Respondent had not made the decision contested and therefore the license by law is required to be back in the hands of the Appellant. This would mean there was no license available to be assigned to any third parties whose remedy would lie in damages.

25. The subordinate Courts are described in *the Constitution* 2010, at Article 169(1) of *the Constitution*, as the Magistracy, the Kadhis Courts, Courts Martial, and other courts or tribunals established by Acts of Parliament. We submit that the Honourable Tribunal, Communications and Multimedia Appeals Tribunal (CAMAT) is one of those Tribunals this Honourable Court exercises supervisory powers over including via Application or suo moto to call for the record of any proceedings before it and make any order or give any direction it considers appropriate to ensure the fair administration of justice.

26. Whereas it might be true that indeed the Tribunal is not clothed with powers to grant the remedies sought or even to entertain the amended Draft Memorandum of Appeal, which we submit is an error in the Application of the law for the part of the Tribunal, we hasten to add that fortunately, this Honourable Court has supervisory power over the Tribunal including power to recall the file from the Tribunal and determine issues that are beyond the Tribunal.

27. Reliance is placed in Stephen S Nteere Inoti V Mtwaruchiu Nthunguri Ikwinga Another 201 IKEHCI 865(KLR) where this Honourable Court held that;

> " The Land Dispute Tribunal Act does not provide for the extension of the 60 days period provided in that section. But I dare say the hands of the court are not tied by lack of such a provision. In this regard, I will refer to a case of this court decision which is relevant to this case."

28. The case is Mukiri M'Mbui vs. Ringera Mukiira & Ano. High Court Civil Appeal No. 100 of 2002 where it was stated: -

> " Both the old and the present constitution provide that the High Court has supervisory jurisdiction over the subordinate courts which include Tribunals. Article 165 (6) of the present constitution provides as follows: -
>
> "165 (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court." "Article 165 (7) of the present constitution provides the purpose for which sub article (6) was provided. Sub article 7 provides as follows: "165 (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."
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> "As it can be seen, the purpose of sub Article (6) is to ensure fair administration of justice."

The Respondents Case;

29. On 10th May 2024, the Appellant filed an Application of even date seeking to amend its Memorandum of Appeal to introduce distinct and/or totally different reliefs including prayers for special damages.

30. The Application, was on 5th July 2024, dismissed by the Honourable Tribunal.

31. The Appellant has called upon this Honourable Court to set aside the Ruling and allow its Application.

32. In addressing the issue whether the Tribunal has the jurisdiction to grant the prayers in the draft Amended Memorandum of Appeal?

33. It relies in The Supreme Court in SC Application 2 of 2011 Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 others while discussing the issue of jurisdiction rendered itself as follows:

> "A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings...Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

34. It submits that Section 102F of the Kenya Information & Communications Act (hereinafter referred to as "KICA") provides that upon Appeal, the Tribunal has the power to:

    i. confirm, set aside or vary the order or decision in question;

    ii. exercise any of the powers which could have been exercised by the Media Council or the

    iii. Authority in the proceedings in connection with which the Appeal is brought; or

    iv. make such other order, including an order for costs, as it may consider necessary.

35. The Appellant sought to introduce the following reliefs in its Amended Memorandum of Appeal;

    i. A mandatory injunction compelling the Respondent to assign the Appellant an equivalent Radio Broadcasting Frequency Spectrum in Machakos region;

    ii. Or in the alternative Damages for:

        a. Loss of investment in communications equipment of USD.675,064.

        b. Loss of annual income of Kshs. 25,000,000 from the date of repossession till payment in full.

36. The Tribunal held that it does not have the power to order the Respondent to allocate a radio broadcast spectrum frequency to the Appellant. Frequencies are allocated to parties by the Respondent in line with the KICA. The Respondent must identify available frequencies where after the same are then advertised publicly (in whole or in batches) for interested parties to apply for the licence(s).

37. Broadcasters must also have broadcasting licenses which, too, are allocated by the Authority. Under section 77 of KICA, the process of issuance of a licence is provoked by an Application being made in a prescribed form accompanied by prescribed fees.

38. The process then is subjected to public participation in accordance with section 78 of KICA. The Act contemplates that the licence so applied for has to be identified and can easily be described. It is its case that granting a mandatory injunction would amount to usurping the powers of the Authority as reserved under Part VI of KICA.

39. The Act does not envisage an instance where the Tribunal allocates or participates in frequency allocation decisions. Secondly, the Appellant sought to introduce the alternative claim of special damages of USD. 675,064 and Kshs. 25,000,000. It is its case that the Tribunal was right in its finding that it does not have the jurisdiction to award special damages.

40. Section 102F of KICA does not clothe the Tribunal with the power to award damages, let alone specific damages. It argues that unlike other Tribunals like the Business Premises Tribunal which under Section 12 of the Landlord and Tenant (Shops, Hotel and Catering Establishments) Act is expressly clothed with powers to award compensation, the Communication and Multimedia Appeals Tribunal is not clothed with such powers under Section 102F (3) of KICA.

41. As such, it lacks the pecuniary jurisdiction to hear and determine claims whose value exceeds Kshs. 20,000,000.00. The proposed amendment introduces a claim for USD 675,064 (approximately Kshs. 87,083,256) and a further claim of Kshs. 25,000,000.00.

42. These amounts are clearly beyond the pecuniary jurisdiction limit of the Tribunal. It submits that the amendments sought, if allowed, would have the effect of inviting the Tribunal to make a determination of the propriety of the Respondent's decision of 12th April 2020, being bereft of jurisdiction to grant the remedies sought.

43. Such a course would render the proceedings purely academic and result in a significant waste of judicial time and resources. This is frowned upon by the Court as seen in the decision of the Republic v Kenya Maritime Authority & another; Zam Zam Shipping Limited (Interested Party) (Judicial Review 10 of 2020) where the Court held as follows:

> "No court of law would knowingly act in vain. The general attitude of courts of law was that they were loathe in making pronouncements on academic or hypothetical issues as it did not have any useful purpose. A suit was academic where it was merely theoretical, made an empty sound and of no practical utilitarian value to the Plaintiff even if judgment was given in his favour. A suit was academic if it was not related to practical situations of human nature and humanity."

44. It submits that thirdly, paragraph 8 of the draft Amended Memorandum of Appeal, where the Appellant pleads "... the Appellant contends that as result of the Respondent's illegal acts of commission and omissions including the repossession and assignment of the radio frequency spectrum license to a Third party aforesaid, the Appellant has suffered loss and damages..." which losses it then particularizes.

45. In HCCA E379 of 2022 (Sauti Communications limited -vs- Communications Authority of Kenya), this Court upheld the decision by the Tribunal which held that the Appellant was out of time to Appeal against the decision of the Respondent made on 29th April 2020 in which it assigned the frequency to Telemain. We refer the Court to the decision at pages 179 to 204 of the Record of Appeal.

46. Permitting the proposed amendment would, in effect, invite the Tribunal to reopen and interrogate the Respondent's decision of 29th April 2020, characterized by the Appellant as "illegal acts of commission and omission in assigning the frequency", despite the matter having already been conclusively determined.

47. The Respondent submits that the proposed amendment is a calculated attempt by the Appellant to circumvent the binding decision this Court in HCCA E379 of 2022 (Sauti Communications limited -vs- Communications Authority of Kenya), and indirectly pursue an Appeal out of time against the Respondent's decision dated 29th April 2020 under the guise of leave to amend.

48. Having established that the Tribunal did not have the jurisdiction to grant the prayers in the proposed amended Memorandum of Appeal, we submit that the Tribunal was right in finding that allowing the amendments would be in vain.

49. The Appellant has submitted that the Tribunal pre-empted the orders without subjecting the matter to trial. However, we respectfully submit that Jurisdiction goes to the root of everything. Allowing an amendment which seeks to introduce prayers that fall outside the Tribunal's jurisdiction would serve no useful purpose. Such an amendment would be futile and contrary to the principle that courts and tribunals should not entertain claims over which they lack jurisdiction.

50. In Land Case Appeal E046 of 2023 (Raas Residence Limited v M Dalamr Trading Company Limited & another), the Court held as follows:

> " Firstly, there is no gainsaying that jurisdiction goes to the root of the matter. In this regard, before a court of law can engage with and/or undertake proceedings in a particular matter, it behooves the court to discern/ascertain whether same [court] is indeed seized of the requisite jurisdiction to entertain and adjudicate upon the matter..... For good measure the question of jurisdiction cannot be tossed around and/or postponed."

51. The Appellant has further submitted that the High Court can invoke its supervisory jurisdiction to "recall the file from the Tribunal and determine issues that are beyond the Tribunal" should it confirm that the Tribunal is divested with jurisdiction. Justice Nyamweya did, in a ruling delivered on 12th March 2021, find that the proper forum for challenging the Authority's decision is the Tribunal established under the Act.

52. The supervisory jurisdiction of the Court should be exercised sparingly and only in exceptional circumstances, particularly where no alternative avenue of redress exists. In the present case, such jurisdiction is unwarranted, as Section 102G of the *Kenya Information and Communications Act* (KICA) provides for a right of Appeal to the High Court from the decisions of the Tribunal.

53. The Respondent argues that the Appellant cannot seek to invoke the supervisory jurisdiction of the High Court to interfere with the independence of the Tribunal, which is duly empowered under Section 102F of the Act to hear Appeals and grant appropriate reliefs within its jurisdiction.

54. In so submitting, reliance is placed on Miscellaneous Civil Application 379 of 2013 (Mbui -v- Nyiha & 2 others) were the Court held as follows:

> " It is true that the High Court has supervisory powers and jurisdiction over the lower court. This power is exercisable with caution and only where the inferior court has exceeded its jurisdiction or where a party's constitutional rights are being or about to be abrogated through the process in that inferior court.
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> 10. However, there is no power granted to this court to transfer a matter from an inferior court to this court simply because the Applicant is unhappy with the decisions made by the inferior court. In such circumstances the option for the Applicant is to Appeal to this court through the normal appellate procedure. This Application, if granted, would amount to this court giving appellate reliefs to party through the back door."

55. In Miscellaneous Civil Application E104 of 2023 (Tanui v Kenei & another) the High Court affirmed this position and stated:

> " I fully embrace the above reasoning and reiterate that the powers donated under Articles 165 (6) & (7) of *the Constitution* should only be invoked where sufficient material is presented and well argued. The powers should be exercised sparingly and only in the clearest of cases. The proper avenues available to challenge grievances against decisions of the subordinate Courts should not be circumvented in the manner suggested by the Applicant. Articles 165 (6) & (7) do not mean that a Judge of the High Court should interfere with the decision-making independence of Magistrates. The High Court is well equipped to provide guidance to the subordinate Courts in its judgments on Appeals filed against the decisions of the Magistrate Courts by aggrieved parties."

56. It submits that the Tribunal did not err in dismissing the Appellant's Application. It is a settled principle that courts and tribunals should not issue orders in vain.

57. The Tribunal rightly found that it lacked jurisdiction to grant the proposed reliefs for damages. Allowing the proposed amendments would have compelled the Tribunal to engage in an academic exercise, deliberating on issues over which it lacks jurisdiction to grant effective remedies.

Analysis and determination;

Following are the issues for determination;

1. Whether the Appeal has merit.
2. Who shall bear the costs.

Whether the Appeal or the cross Appeal has merit.

58. In the case of Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA The court held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

59. This principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An Appeal to this court ... is by way of retrial and the principles upon which this court acts in such an Appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

60. The court agrees with the Appellant that subordinate Courts are described in *the Constitution* 2010, at Article 169(1) of *the Constitution*, as the Magistracy, the Kadhis Courts, Courts Martial, and other courts or tribunals established by Acts of Parliament.

61. The Tribunal, Communications and Multimedia Appeals Tribunal (CAMAT) is one of those Tribunals and this Honourable Court exercises supervisory powers over it.

62. This Honourable Court has supervisory power over the Tribunal including power to recall the file from the Tribunal and determine issues that are beyond the Tribunal.

63. Article 165 (6) of the present constitution provides as follows: -

> " 165 (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court." "Article 165 (7) of the present constitution provides the purpose for which sub article (6) was provided. Sub article 7 provides as follows: "165 (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

64. On 10th May 2024, the Appellant filed an Application of even date seeking to amend its Memorandum of Appeal to introduce the following reliefs in its Amended Memorandum of Appeal;

    i. A mandatory injunction compelling the Respondent to assign the Appellant an equivalent Radio Broadcasting Frequency Spectrum in Machakos region;

    ii. Or in the alternative Damages for:

        a. Loss of investment in communications equipment of USD.675,064.

        b. Loss of annual income of Kshs. 25,000,000 from the date of repossession till payment in full.

65. The Application was dismissed on 5th July 2024. Section 102F of the Kenya Information & Communications Act provides that 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.

66. The Tribunal in its finding held as follows:

    a. It has the discretion to allow the amendment of pleadings;

b. It did not have the power to order the Respondent to allocate a radio broadcast spectrum frequency to the Appellant.

c. It did not have the jurisdiction to award special damages as sought by the Appellant.

67. This court is in agreement with the Tribunal's finding that it has the jurisdiction and the discretion to allow amendments of the pleadings.

68. In order to exercise its discretion judiciously in arriving at the decision whether or not to allow the amendment as sought, the Tribunal had to look at the nature of the proposed amended pleadings so as to ensure it does not to grant orders blindly.

69. The court also finds that the tribunal did not fall into an error in law and fact when it delved into the prayers the Appellant sought to be included in the proposed amended pleadings.

70. In order to determine whether it had the jurisdiction to grant the remedies sought in the amended draft Memorandum of Appeal the Tribunal had to make a glimpse of the nature of the reliefs sought at the early stage lest it allows amendments that would ouster its jurisdiction or that would yield no outcomes ultimately.

71. Courts do not issue orders in futility. Clearly what the Appellant sought to introduce were going to exceed the Authorities powers. The Tribunal must not act in vain.

72. The court has noted that the Appellant filed an Application dated 18th February 2022 seeking to enjoin Telemain, the third party who had been assigned Frequency 91.0 MHz.

73. By its Ruling delivered on 6th May 2022, the Tribunal dismissed the Appellant's Application and declined to enjoin Telemain, holding that the Appeal before it was limited to the decision to repossess the frequency; which ruling was upheld by this Court on Appeal by Justice J.N. Njagi.

74. The court is in agreement with the Tribunal's finding that it does not have the power to order the Respondent to allocate a radio broadcast spectrum frequency to the Appellant. The Tribunal lacks the power to allocate or participate in frequency allocation or licensing decisions.

75. Granting a mandatory injunction if at all in a future date after the amendment was allowed would amount to usurping the powers of the Authority as reserved under Part VI of KICA. There was not going to be any value in allowing an Application that was clearly going to lead into a process before a Tribunal that was bereft of Jurisdiction. That would have created false hopes and an illegitimate expectation.

76. In the same vein the court finds that the Tribunal was right in its finding that it does not have the jurisdiction to award special damages under Section 102F of KICA.

77. The Appellant's intended prayer for special damages of USD. 675,064 and Kshs. 25,000,000 would have not have led to the grant of the order given that the Act does not donate such power to the Tribunal. Granting such an order would have been an exercise in futility. Just like courts, Tribunals must not act in vain given that they operate on public resources.

78. The court has looked at the power of other Tribunals. It is clear that the legislator was very categorical when it came to providing for the power of the various Tribunals.

79. For instance, unlike other Tribunals like the Business Premises Tribunal which under Section 12 of the Landlord and Tenant (Shops, Hotel and Catering Establishments) Act is expressly clothed with

powers to award compensation, the Communication and Multimedia Appeals Tribunal is not clothed with such powers under Section 102F (3) of KICA.

80. Nothing would have stopped the legislator from expressly providing that the Tribunal had the jurisdiction to award injunctions, compensation, special damages or related reliefs had the legislator intended it like in the other Statutes.

81. I am satisfied that the Tribunal lacks the pecuniary jurisdiction to hear and determine claims whose value exceeds Kshs. 20,000,000.00 which the Appellant was pursuing. Allowing an amendment which seeks to introduce prayers that fall outside the Tribunal's jurisdiction would have no Practical significance.

82. Black's Law Dictionary Tenth Edition defines the term "moot" as having "no practical significance; hypothetical or academic "and a "moot case" as a "matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights".

83. A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic.

84. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact.

85. A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner or Applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review. Nothing would have been achieved ultimately had the tribunal allowed the Application.

86. In HCCA E379 of 2022 (Sauti Communications limited -vs- Communications Authority of Kenya), this Court upheld the decision by the Tribunal which held that the Appellant was out of time to Appeal against the decision of the Respondent made on 29th April 2020 in which it assigned the frequency to Telemain.

87. Permitting the proposed amendment would, in effect, invite the Tribunal to reopen and interrogate the Respondent's decision of 29th April 2020, characterized by the Appellant as "illegal acts of commission and omission in assigning the frequency", despite the matter having already been conclusively determined.

88. The proposed amendment was clearly a calculated attempt by the Appellant to circumvent the binding decision this Court in HCCA E379 of 2022 (Sauti Communications limited -vs- Communications Authority of Kenya).

89. That would in effect amount to allowing the Appellant pursue an Appeal out of time against the Respondent's decision dated 29th April 2020 and I find that the Respondent did the right thing in declining to allow the amendment.

90. In Court in Eastern Bakery vs. Castelino [1958] 1 EA 461 (CA) stated: -

> " The court will not refuse to allow an amendment, simply because it introduced a new case ... But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit ... The court will refuse to amend where the amendment would change the action into one of a substantially different character ... or where the amendment, would prejudice the rights of the opposite party existing".

91. As was stated in Evans vs. CIG Mon Cymru Ltd [2008] 1 WLR 2675, [24]-[26]:

> " Amending a claim... to specify a cause of action not previously mentioned therein does not raise a new cause of action if the amendment is made simply to resolve an obvious inconsistency between the claim ... and the particulars of claim served with it. In deciding whether the amendment raises a new cause of action the court should consider the proposed amendment in the context of the statements of case as a whole, not just the claim form by itself." (Emphasis added).

92. In determining the Application before it, the Tribunal was right in considering the proposed amendments in arriving at the impugned decision.

93. The Appellant cannot seek to invoke the supervisory jurisdiction of the High Court to interfere with the independence of the Tribunal, which is duly empowered under Section 102F of the Act to hear Appeals and grant appropriate reliefs within its jurisdiction which it did.

Determination ;

94. The Appeal lacks merit.

Costs ;

95. In Joseph Oduor Anode v. Kenya Red Cross Society, Nairobi High Court Civil Suit No. 66 of 2009; [2012] Eklr Odunga, J. thus observed:

> " ...whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute [the *Civil Procedure Act*] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so. In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion ..." [emphasis supplied].

96. The Respondent is entitled to costs.

Orders ;

The Appeal is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6 TH DAY OF FEBRUARY, 2026.

....

J. CHIGITI (SC)

JUDGE