Communications Authority of Kenya v Kenya Union of Journalists & 2 others (Civil Application E715 of 2024) [2025] KECA 670 (KLR) (11 April 2025) (Ruling)

Neutral citation: [2025] KECA 670 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E715 OF 2024

DK MUSINGA, M NGUGI & F TUIYOTT, JJA

APRIL 11, 2025

BETWEEN

COMMUNICATIONS AUTHORITY OF KENYA ..... APPLICANT

AND

KENYA UNION OF JOURNALISTS ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

MEDIA COUNCIL OF KENYA ..... 3RD RESPONDENT

(Being an application for stay of execution of the Judgment of the High Court of Kenya at Nairobi (L. N. Mugambi, J.) delivered on 7th November 2024 in Constitutional Petition No. 501 of 2019)

RULING

1. The applicant's application dated 18th December 2024 seeks, pending the hearing and determination of Civil Appeal No. E970 of 2024, stay of execution of the judgment of the High Court delivered on 7th November 2024 in Nairobi High Court Constitutional Petition No. 501 of 2019; Kenya Union of Journalists vs Communications Authority of Kenya and 2 Others, declaring both the broadcasting/ programming code prescribed by the applicant and sections 46 A (i) and (j), 46 H (i) of the *Kenya Information and Communications Act* (KICA) unconstitutional. The applicant also seeks an order of injunction to restrain the 3rd respondent from taking any measures or actions geared towards commencing, initiating the process of developing a broadcasting/programming code to replace the programming code developed by the applicant, or if already initiated or commenced, the 3rd respondent be restrained from proceeding or continuing with the process pending hearing and determination of the aforesaid appeal.

2. In an affidavit sworn by Lydia Sitienei, the Corporation Secretary and Director, Legal Services of the applicant, she states that on 7th November 2024 the High Court delivered a judgment in Nairobi High Court Constitutional Petition No. 501 of 2019, declaring both the broadcasting/programming code prescribed by the applicant and sections 46 A (i) and (j) and 46 H (i) of KICA unconstitutional; that the High Court suspended the declaration of unconstitutionality of the broadcasting/programming code for six

   (6) months to enable the 3rd respondent develop age-appropriate media standards for the protection of children and other vulnerable persons in place of the applicant's broadcasting/ programming code declared unconstitutional; that being aggrieved by the said judgment, the applicant filed a notice of appeal on 8th November 2024 and has since lodged a substantive appeal seeking to reverse the entire judgement.

3. The applicant contends that the appeal raises arguable points of law and facts including but not limited to the following:

   a. Whether the broadcasting/programming code developed and prescribed by the applicant is a media standard or a licensing standard/condition.

   b. Whether the regulation of broadcasts content is an ethical issue whose regulation is within the realm/mandate of the 3rd respondent.

   c. Which statutory body, between the 3rd respondent and the applicant is responsible for regulation of the broadcast content aired by broadcast licensees, including by prescribing a programming code.

4. The applicant further stated that unless the orders sought are granted, the applicant's appeal, if successful, will be rendered nugatory because:

   a. The six months suspending the declaration of the unconstitutionality of the applicant's broadcasting/programming code lapse on 7th May 2025 and it is unlikely that the appeal will have been heard and determined by then.

   b. After 7th May 2025, the High Court judgment shall take effect, thus rendering the appeal nugatory in the event it succeeds.

   c. In the absence of an operative broadcasting/programming code after 7th May 2025 the radio and television broadcast media will then operate in vacuo and unregulated.

   d. The applicant's appeal will also be rendered nugatory if the 3rd respondent is not restrained and proceeds to develop and implement standards or broadcasting/programming code in place of the applicant's programming code declared unconstitutional, in which event the radio and television broadcasts media regulatory landscape will be altered irreversibly and the appeal overtaken by events.

   e. If the applicant's appeal succeeds, the 3rd respondent will have wasted public resources in developing and implementing new standards or broadcasting/programming code.

5. The applicant further argued that no prejudice will be suffered by the respondents if the orders sought are granted; and that the order of stay of execution or injunction will have the effect of preserving the applicant's existing broadcasting/programming code, which contains appropriate standards for the protection of children and other vulnerable persons.

6. Lastly, the said deponent further deposed that the absence of an appropriate broadcasting/ programming code after 7th May 2025 poses a great danger of having an unregulated broadcast media space, and for those reasons urged this Court to grant the orders sought.

7. The application was opposed by the respondents. Eric Oduor, the Secretary General of the 1st respondent, states in his replying affidavit that the applicant's appeal is not arguable; that the applicant seeks to circumvent and violate the provisions of Article 34 (5) of *the Constitution* which clearly and unequivocally states that the 3rd respondent has the mandate to set standards, regulate and monitor compliance with such standards; that to give life to the said Article, Parliament enacted the Media Council of Kenya Act, 2013, which established the Media Council of Kenya under section 5, being an independent body that is well equipped and empowered to regulate and monitor media broadcasts in Kenya, and that the applicant's mandate under Article 34 (3) of *the Constitution* does not include the mandate of regulating media content and cannot as such be invoked to justify encroachment into the domain of the 3rd respondent.

8. The 1st applicant added that courts have consistently pronounced themselves on this matter and demarcated the roles of the applicant as well as the Media Council. The Supreme Court decision in Communications Commission of Kenya & 3 Others vs Royal Media Services Limited & 7 Others [2014] eKLR was cited, and this being a decision that is binding upon all lower courts, the 1st respondent contended that this Court has no wriggle room.

9. In response to the applicant's contention that there is a risk that television and media broadcast would operate in vacuo, the 1st respondent argued that the 3rd respondent already has in place a code of conduct for the practice of journalism provided as Schedule II of the *Media Council Act* which requires only a few modifications by incorporating age-appropriate standards for protection of children. The 1st respondent further argued that being the state organ with the professional competence to advice the Government on ethical standards in the media, whatever code generated by the 3rd respondent pursuant to the High Court judgment can be adopted by the 1st respondent for promulgation and enforcement, hence no public resources will have been wasted in the event the appeal is decided in favour of the applicant. To the contrary, the applicant would have been saved valuable time in coming up with a code that is compliant with *the Constitution*.

10. It was further argued by the 1st respondent that the appeal, if successful, would not be rendered nugatory. We were therefore urged to dismiss the application.

11. The 3rd respondent, in an affidavit sworn by Terence Bavon Minishi, the Manager, Regulatory Affairs, substantively replicates the arguments of the 1st respondent and we need not rehash the contents thereof, save to add his summation that the appeal is not arguable and would not be rendered nugatory, if successful, by refusal to grant the orders sought.

12. The 3rd respondent reiterated that it is actively developing the media standards as directed by the High Court, and the process would be completed within the six (6) month period granted by the court.

13. When this application came up for hearing on 4th March 2025, Mr. Wambua Kilonzo and Mr. Nicholas Malonza appeared for the applicant, while Mr. Ibrahim Oduor appeared for the 1st respondent, and Mr. Charles Kanjama, SC and Ms. Violet Obure appeared for the 3rd respondent. The 2nd respondent was not represented.

14. Counsel briefly highlighted their respective clients' submissions and we need not rehash them.

15. In an application of this nature, an applicant has to satisfy the Court that the appeal or intended appeal is arguable, and that the appeal, if successful, shall be rendered nugatory unless the orders sought are granted. See Stanley Kangethe Kinyanjui V Tony EKetter & 5 others [2013] KECA 378 (KLR)

16. Although the 1st and 3rd respondents contend that the appeal is not arguable, having perused the memorandum of appeal, noting the low threshold of an arguable appeal as has been stated by this Court in a plethora of decisions, we think that the appeal is arguable. We need not say much on this issue as that may embarrass the bench that will eventually hear the appeal.

17. On the nugatory aspect, we reiterate what this Court stated in Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others (supra), that whether an appeal will be rendered nugatory depends on whether what is sought to be stayed, if allowed to happen is reversible; or if it is not reversible, whether damages will reasonably compensate the aggrieved party.

18. In the impugned judgment, the High Court directed the 3rd respondent to execute its constitutional and statutory mandate by developing age-appropriate standards to protect children and other vulnerable persons from inappropriate media content in accordance with Article 34 (5) of *the Constitution* as read with section 6 of the *Media Council Act*. The 3rd respondent has embarked on that exercise, and told this Court the same shall be completed before the six (6) month period given by the High Court.

19. Section 46 H (ii) (a) of the Kenya Information Communication Act requires the applicant to review the programming code every two years. This implies that the broadcasting code being developed by the 3rd respondent may be revised or amended in the event that the appeal succeeds.

20. We agree with the 1st and 3rd respondents that no lacuna in the regulation of radio and television media shall arise after 7th May 2025 since by then, the 3rd respondent will have developed the media standards as directed by the High Court.

21. Lastly, we do not think that it would be in the public interest that we stay the impugned judgment of the High Court which was rendered in conformity with the provisions of *the Constitution* and declared section 46 A (i) and (j) and 46 H (i) of the Kenya Information Communications Act unconstitutional. In Attorney General & another v Coalition for Reform and Democracy & 7 others [2015] KECA 994 (KLR) this Court, in an application for stay of execution of a High Court judgment that had declared certain provisions of Security Laws Amendment Act (SLAA) unconstitutional rendered itself as follows:

> " While the court appreciates the contextual backdrop leading to the enactment of the SLAA, it must also be appreciated that it is not in the interest of justice to enact or implement a law that may violate *the Constitution* and in particular the Bill of Rights. Constitutional supremacy as articulated by Article 2 of *the Constitution* has a higher place than public interest. When weighty challenges against a Statute have been raised and placed before the High Court, if, upon exercise of its discretion the court is of the view that implementation of various sections of the impugned statute ought to be suspended pending final determination as to their constitutionality, a very strong case has to be made before this Court can lift the conservatory order. The State would have to demonstrate, for example, that suspension of the Statute or any part thereof, has occasioned lacuna in its operations or governance structure which, if left unfilled even for a short while, it is likely to cause very grave consequences to the general populace."

22. We are not satisfied that the above threshold has been met by the applicant in the application before us.

23. Since the applicant has only satisfied one limb of the twin principles under rule 5 (2) (b) of this Court's Rules, this application must fail. We hereby dismiss the application with costs to the 1st and 3rd respondents. Given the nature of the applicant's appeal, we direct that Civil Appeal No. E970 of 2024, Communication Authority of Kenya vs Kenya Union of* *Journalists and 2 Others be heard on priority basis.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF APRIL 2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.