IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. KARANJA, SICHALE & J. MOHAMMED, JJ. A)

CIVIL APPEAL NO. 43 OF 2013

BETWEEN

ROYAL MEDIA SERVICES LTD.....APPELLANT

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

MINISTER OF INFORMATION

AND COMMUNICATION.....2ND RESPONDENT

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

(An appeal from the judgment and decree of the High Court at Nairobi (Majanja, J) dated 18th January 2013

in

Petition No. 346 of 2012)

****

JUDGMENT OF THE COURT

Introduction

[1] This is an appeal by **Royal Media Services Limited** (the appellant) from the judgment and decree of the High Court at Nairobi (**Majanja J.**) in **Petition No. 346 of 2012** in which the learned Judge dismissed the appellant's petition dated 13th August, 2012. This appeal brings to the fore the nature and extent of **Article 34** of the **Constitution** which guarantees the freedom of the media.

Background

[2] A brief statement of the facts and background will put the appeal in perspective. The appellant is a private limited liability company incorporated under the Companies Act. At all material times, it was carrying on broadcasting business using broadcasting licences issued to it by the 2nd respondent and frequencies allocated both by it and its predecessor, **Kenya Posts and Telecommunications Corporation.**

[3] The Attorney General (the 1st respondent) was sued on behalf of the State of Kenya and the Ministry of Information and Broadcasting. **The Minister of Information and Communication** (the 2nd respondent) was the Minister who was in charge of the formulation and implementation of policy on public information and who issued licences to broadcasters. The **Communications Commission of Kenya** (the 3rd respondent) was established by the **Kenya Communications Act, 1998** with the initial mandate to licence and regulate telecommunication, radio communication and postal services. The 3rd respondent's mandate was expanded by the **Kenya Communications (Amendment) Act, 2009 (the 2009 Act)** to facilitate the development of the information and communications sector (including broadcasting, multimedia, telecommunications and postal services) and electronic commerce. Pursuant to **Section 5(1)** of the **2009 Act**, the object and purpose for which the 3rd respondent was established was expanded to be to: licence and regulate postal, information and communication services in accordance with the provisions of the **2009 Act.**

[4] A brief background of the appeal as can be gleaned from the Petition filed by the appellant on 13th August, 2012 is that on **17th May, 2012,** the 3rd respondent published a notice in the *Daily Nation* newspaper (the Notice) in the following terms*:*

> ***"PUBLIC NOTICE UNAUTHORISED USE OF BROADCAST FREQUENCIES.***
>
> ***The Communications Commissions of Kenya (CCK) is the regulatory authority for the communications sector in Kenya with responsibilities in telecommunications, broadcasting, electronic transactions, and postal services, CCK is also charged with the responsibility of managing the country's numbering and frequency spectrum resources.***
>
> ***CCK wishes to remind the licensed frequency users that all radio frequency transmitters must be operated under a valid licence whose conditions must be adhered to. In accordance with the Kenya Information and Communications Act, Cap 411A, operation of radio services without a licence is an offence that attracts a fine of Kshs.5 million and imprisonment for a term not exceeding three years or both.***
>
> ***It has come to the attention of the Commission that the following frequencies are being operated without a licence and therefore, in contravention of the law. The current users of these resources are hereby served with a 30 day notice to surrender the frequencies, failing which CCK shall take the necessary action at its disposal."***

The appellant's claim in the Petition

[5] On 13th August, 2012, the appellant filed **Petition No. 346 of 2012** before the High Court on grounds *inter alia*: that the Notice contravened its broadcasting freedom, its right to property and its right to fair administrative action under **Articles 34, 40 and 47** of the **Constitution** respectively; that by issuing the Notice, the 3rd respondent acted beyond its powers as it was not the licensing body established under **Article 34(5)** of the **Constitution**; and that the Notice was issued in contempt of an order issued by Lenaola, J. (as he then was) on 14th November, 2011 in **Media Owners Association and another v Attorney General, and 2 others [2014] eKLR (the Media Owners' Case).** The Petition was supported by the affidavits sworn by **Mr. S.K. Macharia** a shareholder and the Chairman of the appellant's Board of Directors dated 13th August, 2012 and 14th September, 2012.

[6] In the Petition, the appellant assailed *inter alia* the letter addressed to it from the 3rd respondent dated **3rd August, 2012** titled ***"Notice of Violation"***. In the impugned letter, the 3rd respondent stated that several frequencies in use by the appellant were in contravention of the frequency assignment conditions. The impugned letter further required the appellant to take corrective measures within thirty (30) days of the date of the letter, install bandpass filters, obtain Type Approval for transmitters, shut down unauthorized stations and relocate to designated broadcast sites.

[7] It was the appellant's contention that the impugned letter lacked any basis as the 3rd respondent had inspected the appellant's radio and TV sites and broadcasting equipment in 2003 and had confirmed compliance on the part of the appellant. The appellant maintained that since the inspection it had not altered its broadcasting equipment.

[8] It was the appellant's further claim that the 3rd respondent sought to damage its broadcasting interests by allocating frequencies operated by it to other broadcasters resulting in interference with its broadcasting stations. In this respect, the appellant cited the letters dated **6th March, 2012** and **3rd August, 2012** issued by the 3rd respondent requiring it to cease broadcasts on certain frequencies as they were interfering with other broadcasters who had been assigned frequencies by the 3rd respondent.

[9] The appellant filed an amended Petition dated **12th October, 2012**, supported by the affidavit of **Mr. Samuel Kamau Macharia** dated **1st November, 2012.** In the amended Petition, the appellant claimed that the 3rd respondent engaged in selective and discriminatory enforcement of the **Kenya Information and Communications Act** in breach of **Article 27** of the **Constitution**. The appellant further contended that through discriminating against it, the 3rd respondent contravened its constitutional obligation under **Article 4** of the **Constitution** to uphold at all times the multi-party democratic culture of Kenya founded on the national values and principles of governance referred to in **Article 10** of the **Constitution.**

[10] The appellant particularized what it termed as discriminatory treatment against it by the 3rd respondent to include: setting in motion the process of enforcing the **Kenya Information and Communications Act** against the appellant for allegedly using non type approved transmitters but took no action against other broadcasters; referring matters relating to the appellant's business to the National Assembly for debate whilst no other broadcaster's matters were referred through the same; purporting to apply the **Kenya Information and Communications Act** against the appellant for allegedly using frequencies not allegedly allocated to it whilst not taking action against other parties it claimed were using frequencies allegedly not allocated to them; applying for warrants of search to be issued for the intended search of the appellant's premises while no search warrants were issued against other broadcasters; and publishing on **17th May, 2012** a list of alleged unauthorized frequencies used by the appellant while no similar notice was published of other broadcasters. The appellant asserted that the discriminatory treatment denied it full and equal enjoyment of all rights and fundamental freedoms.

The orders sought by the appellant in the Amended Petition dated 29th October, 2012.

[11] The appellant sought the following orders in the amended Petition:

> **"a) A declaration that the respondents have not complied with the mandatory requirements of Article 34 of the Constitution to establish licensing procedures to regulate the airwaves and other forms of signal distribution which procedures are independent of control by Government, political interests or commercial interests;**

b) A declaration that the respondents have contravened the petitioner's rights under Articles 34, 40 and 47 of the

Constitution;

bb) It be declared that actions embodied in the letters dated 6th March, 2012, 3rd August, 2012, 6th August, 2012 and the Public Notice published in the issue of Daily Nation of 17th May, 2012 are null and void because of the rule in Kenya Tourist Development Corporation v Kenya National Capital Corporation Nairobi HCCC No 6776 of 1992; bbb) It be declared that the 3rd respondent has forfeited the right to be heard on the petition herein for disobeying the order made on 14th November, 2011 in favour of the Petitioner in High Court Petition No. 244 of 2011; bbbb) It be declared that the 3rd respondent has contravened the petitioner's rights under Articles 27 and 48 of the Constitution; bbbbb) It be declared that the Commissioners who constitute the 3rd respondent have demeaned their offices; bbbbbb) It be declared that the 3rd respondent has contravened the petitioner's rights to impart information under Article 33(b) of the Constitution. bbbbbbb) An order that the commissioners of the 3rd respondent be removed from office forthwith.

c) A permanent injunction restraining the 3rd respondent from usurping the licensing and regulatory powers and functions of the body to be established by the parliament under Article 34(3) of the Constitution;

d) A permanent injunction restraining the 3rd respondent acting on its letter dated 3rd March, 2012 addressed to the petitioner, its notice published in the issue of the Daily Nation of 17th May, 2012 and its letters addressed to the petitioner dated 3rd August, 2012 respectively;

e) An order that the 3rd respondent's letter dated 3rd March, 2012 addressed to the petitioner, its notice published in the issue of the Daily Nation of 17th May, 2012 and its letters addressed to the petitioner dated 3rd August, 2012 respectively be brought to this Court and quashed;

f) A permanent injunction to restrain the 2nd and 3rd respondents from interfering with the petitioner's exercise of its broadcasting freedom enjoyed through the frequencies pleaded in paragraphs 10, 12 and 16 above;

g) A permanent injunction restraining the 2nd and 3rd respondent's or any of them from cancelling, stopping, suspending, restricting or in any way whatsoever interfering with the petitioner's licences, frequencies, broadcasting spectrums and broadcasting services.

h) General damages;

i) Exemplary damages; and

j) An order that the costs of this Petition be provided for."

The 1st and 2nd respondents' response to the amended Petition

[12] In response, the 1st, 2nd and 3rd respondents opposed the amended Petition and filed written submissions. The 1st and 2nd respondents submitted *inter alia* that the **Constitution** under **Article 34** guarantees the freedom and independence of the electronic, print and all other types of media; that the right is however subject to limitation which limitation terms are stipulated under **Article 34(3)** of the **Constitution** whose import is that the independence of the media is subject to licensing regulation including regulation of frequencies by an independent and impartial entity to be established through legislation contemplated under **Article 34(5)** of the **Constitution;** that by dint of **Article 261(1)** of the **Constitution,** Parliament was required to enact the legislation contemplated under **Article 34** of the **Constitution** within 3 years which effectively lapsed on 27th August, 2013; that in recognition of the time frame and transitional requirement, the framers of the **Constitution** provided by dint of **Section 7(1)** of the **Sixth Schedule** to the **Constitution** for the transitional and consequential provisions which states that **"all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations; qualifications and exceptions necessary to bring it into conformity with this Constitution."**

[13] It was the 1st and 2nd respondent's further submission that this provision has two limbs which are: the recognition of the old law to govern media regulation; and that the old laws are deemed modified to be in conformity with the **Constitution**; that the broadcasting licensing regime in place prior to the promulgation of the new **Constitution** compromised the **Kenya Communications Act, 1998** and the **Kenya Communications (Amendment) Act, 2009** which empowered the 3rd respondent to licence and regulate postal, information and communication services; and that the 3rd respondent's actions of sending the impugned letters to the appellant and issuing the Notice were in conformity with the **Constitution** and the law.

The 3rd respondent's submissions to the amended Petition.

[14] The 3rd respondent opposed the amended petition and filed written submissions and a replying affidavit sworn by **Mr. John Omo**, the 3rd respondent's Commission Secretary. The gist of **Mr. Omo's** submissions was that frequency spectrum is a scarce public resource allocated to nations in accordance with complex international agreements; that in Kenya, the 3rd respondent was mandated to ensure utilization of the frequency spectrum in a coordinated manner to avoid interference of frequency users with each other; that the 3rd respondent was empowered to regulate radio communication under **The Kenya Communications (Amendment) Act, 2009** and the **Kenya Information (Radio Communications and Frequency Spectrum) Regulations, 2010;** that in 2006, the 3rd respondent received several complaints from broadcasters and strategic national institutions concerning interference with the frequencies assigned to them; that following

these complaints the 3rd respondent carried out inspection exercises to determine the cause of the interferences complained about; and that the 3rd respondent established that several broadcasters were causing harmful interference with the frequencies allocated to other broadcasters including aeronautical services.

[15] It was **Mr. Omo's** further averment that upon establishing that some broadcasters were operating contrary to the authorized frequencies, the 3rd respondent issued the requisite notices to the offending broadcasters notifying them of their breaches and directing them to remedy the breaches; that on this basis, the 3rd respondent issued the Notice dated **6th April, 2010** in the *Daily Nation*; and that upon notification of the breaches, the concerned broadcasters put in place remedial measures.

[16] Mr. Omo further averred that the 3rd respondent sent notices of violation of various breaches to the appellant; that the 3rd respondent wrote to the appellant on **3rd August, 2012** directing it to put in place appropriate remedial measures; that the appellant continued to be in violation of its licence conditions for the various frequencies assigned to it; that upon inspection and surveillance visits, the 3rd respondent established that the appellant had made transmissions without due assignment by the 3rd respondent and was therefore in contravention of the law; that the 3rd respondent wrote several letters to the appellant to remedy the breach and to cease making unauthorized transmissions; that despite demand, the appellant continued to operate on unlicensed frequencies thereby causing harmful interference to aeronautical services and other broadcasters; and that the appellant did not provide any evidence that it was authorized to use the impugned frequencies.

[17] It was **Mr. Omo's** further averment that the question whether the 3rd respondent is the body envisaged under **Article 34** of the **Constitution** to regulate broadcasting was the subject of other proceedings before the Court in the **Media Owners' Case** as consolidated with the **Magic Radio Limited V The Communications Commission of Kenya JR. Misc. No. 284 of 2011** (**the Magic Radio Case)** which were then still pending determination; and that the 3rd respondent denied all the allegations of contempt which should be addressed within the context of the proceedings and before the court which the contempt is denied.

The impugned judgment of the High Court

[18] Upon hearing the matter, the learned Judge found two (2) main issues for determination: whether the 3rd respondent was entitled to continue the role of regulation of airwaves and other forms of signal distribution in light of the fact that Parliament had not passed legislation contemplated under **Article 34**; and whether the letters and Notice issued by the 3rd respondent to the appellant contravened or violated the appellant's fundamental rights and freedoms under **Articles 34, 40 and 47** of the **Constitution.**

[19] The learned Judge concluded as follows:

> ***"62. In summary, I find and hold that the CCK is entitled to exercise regulatory authority over broadcasting and other electronic media pursuant to the Kenya Information and Communications Act until such time as Parliament establishes the body contemplated under Article 34(5) of the Constitution. Thus prayers (a), (b) and (c) of the amended petition are dismissed.***
>
> ***63. I find and hold that the letters dated 6th March 2012, 3rd August 2012, the Notice of Violation dated 3 rd August 2012 and the notice issued in the Daily Nation of 17th May 2012 are not in contravention of the petitioners rights protected by Articles 34, 40 and 47 of the Constitution as they are in the nature of notices that afford RMS to show cause why regulatory action should not be taken against it. As a consequence, I reject prayers (d), and (e) of the amended petition.***
>
> ***64. The grant of prayers (f) and (g) of the amended petition would have the effect of excluding RMS from statutory regulations. As I have held, I do not think regulatory action, which entitles the RMS to due process is a violation of the Constitution nor does such action interfere with its fundamental rights and freedoms of the petitioner.***
>
> ***65. In view of the findings I have made, the petition is dismissed. As this is a matter for the enforcement of fundamental rights and freedoms I decline to make an award for costs."***

The Appellant's Grounds of Appeal

[20] Aggrieved by that decision, the appellant filed this appeal essentially on grounds *inter alia* that the learned Judge erred: in wholly ignoring the nature of broadcasting and other electronic media whose establishment has been conferred by **Article 34** of the **Constitution**; in failing to hold that the broadcasting freedom in a democracy is secured through the composition of the independent regulatory authority envisaged by **Article 34(3)** and **34(5)** of the **Constitution;** in holding that the 3rd respondent could regulate the airwaves and other forms of signal distribution after 27th August, 2010; in holding that the respondents acted in compliance with the Constitution in addressing to the appellant the orders contained in the letters dated **6th March, 2012**, **3rd August, 2012** and the Notice published in the *Daily Nation* on **17th May, 2012**; in failing to hold that the conservatory orders issued on 14th November, 2011 in **the Media Owners' Case** were so issued in the protection of the members of the Media Owners' Association which include the appellant, and consequently the said orders contained in the letters dated **6th March, 2012, 3rd August, 2012** and the Notice published in the *Daily Nation* on **17th May, 2012** were issued in contempt of the said order; in hearing the 3rd respondent which had disobeyed the orders made in favour of the applicant in **the Media Owners' case;** and in failing to hold that the members of the 3rd respondent had contravened **Article 75** of the **Constitution** and consequently were disqualified from serving as such.

[21] The appellant prayed that the appeal be allowed; and that the judgment of the High Court delivered on 18th January, 2013 be set aside and be substituted with an order allowing the petitioner's petition dated 13th August, 2012 with costs.

Submissions for the Appellant

[22] At the plenary hearing of the appeal, learned Senior Counsel, **Dr. Kamau Kuria** represented the appellant and relied on the appellant's

written submissions and bundle of authorities. **Dr. Kuria** submitted that the appellant has a right to freedom of expression which includes the freedom to seek, receive or impart information or ideas under **Article 33(1)(a)** of the **Constitution**; that the 3rd respondent is the previous regulator of the broadcasting industry, following the promulgation of the **Constitution of Kenya, 2010,** it failed to meet the standards of an independent regulator within the meaning of **Article 34(5)** of the **Constitution**; that the 3rd respondent purported to serve as a purported regulator under the **Kenya Information and Communications Act**; that the appeal deals primarily with six (6) constitutional rights namely, right to equality and freedom from discrimination under **Article 27** of the **Constitution**; freedom of expression and the right to media under **Articles 33** and **34** of the **Constitution;** the right to property which is protected by **Article 40** of the **Constitution;** the right to an administrative action which is fair, efficient, expeditious, lawful, reasonable and procedurally fair under **Article 47** and the right to a remedy when any of those rights are contravened under **Article 23** of the **Constitution**.

[23] Dr Kuria urged that the 3rd respondent was in contempt of court for interfering with the appellant's use of frequencies which it had previously used; that the 3rd respondent's interference of the frequencies was done without compliance with **Article 47** of the **Constitution**; and that the transformative nature of the **Constitution** required that if adverse action was to be taken against the appellant, due process was to be observed. In support of this proposition, **Dr. Kuria** relied on the case of the **Speaker of the Senate and Another v Attorney General and 4 Others [2013] eKLR.**

[24] It was **Dr. Kuria's** further contention that **Article 34** of the **Constitution** required, *inter alia*, the reorganization of certain state organs to protect the freedom of the media; and that **Article 34** of the **Constitution** suspended all licensing functions of the 3rd respondent under the **Kenya Information and Communications Act** until a licensing body was established under **Article 34(5)** of the **Constitution**.

[25] Dr. Kuria further argued that the issuance of a frequency is comparable to the issuance of a licence under the law and a licence is a species of property protected under **Article 40** of the **Constitution**.

Finally, **Dr. Kamau** contended that there was breach of **Article 27** of the **Constitution** as the 3rd respondent had engaged in selective and discriminatory enforcement of the **Kenya Information and Communications Act**.

Submissions for the 1st and 2nd Respondents

[26] Learned counsel, **Ms. Mitchelle Omuom** represented the 1st and 2nd respondents. **Ms. Omuom** opposed the appeal and relied on the 1st and 2nd respondents' written submissions. Counsel submitted that based on **Article 259** of the **Constitution** on the interpretation of the Constitution, the 3rd respondent was entitled to continue regulation of airwaves as the body envisaged under **Article 34(5)** of the **Constitution** was yet to be formed. Counsel relied on the case of **Communications Commission of Kenya and 5 others v Royal Media Services Limited and 5 others, [2014] eKLR (Digital Migration case).** Counsel submitted that the Supreme Court of Kenya found that the 3rd respondent was entitled to continue regulation until the contemplated body under **Article 34 (5)** of the **Constitution** is established.

[27] On the question whether the letters and notices issued by the 3rd respondent to the appellant contravened or violated is fundamental rights and freedoms under **Articles 34, 40 and 47** of the **Constitution**, **Ms. Omuom** submitted that while **Article 34** of the **Constitution** guarantees the freedom and independence of electronic, print and all other types of media, it does not exclude regulation which complies with the **Constitution**; and that since the appellant had been operating frequencies without a licence and contravened the laid down conditions, it did not have the right to property per **Article 40(6)** of the **Constitution**. It was counsel's further submission that the 3rd respondent's actions did not violate the appellant's right to fair administrative action under **Article 47** of the **Constitution** as the 3rd respondent gave the appellant thirty (30) days to surrender illegally acquired frequencies; and that the 3rd respondent was given a further 30 days to rectify some non-conformities with its frequency assigned conditions; that the 3rd respondent had given the appellant reasons for the intended action and a time frame within which to comply; that the 3 rd respondent did not therefore breach **Article 47** of the **Constitution**.

It was counsel's further submission that there was no evidence adduced by the appellant to support its claim that the 3rd respondent discriminated against it in contravention of **Article 27** of the **Constitution**. Counsel urged us to dismiss the appeal with costs.

Submissions for the 3rd respondent.

[28] Learned counsel **Mr. Wambua Kilonzo** represented the 3rd respondent and relied on the 3rd respondent's written submissions. Counsel opposed the appeal and submitted that in the ***Digital Migration case,*** the Supreme Court of Kenya found that the 3rd respondent was within its legal mandate in regulating the airwaves until the establishment of its current successor, the **Communications Authority of Kenya**; that this Court is bound by all decisions of the Supreme Court as stipulated in **Article 163 (7)** of the **Constitution**. Counsel further highlighted the guidelines for interpretation of constitutional provisions set out by the Supreme Court in the **Digital Migration Case**. For these reasons, counsel asserted that the 3rd respondent did not breach **Article 34** of the **Constitution** in exercising its mandate of regulating the airwaves during the intervening period before the establishment of the body envisaged by **Article 34 (5)** of the **Constitution**.

[29] It was **Mr. Wambua's** further submission that frequency spectrum is not an owned asset or vested private property interest to be subjected to either mortgage, lien, pledge, attachment, seizure or similar property right by the appellant. Counsel referred to **Clause 5 (2) of the Radio Communications and Frequency Spectrum Regulations, 2010** and relied on the US case of **Nextwave Personal Communications Inc. Et Al., Petitioners v Federal Communications Commission, Inc. US 293 (2003)** in support of this proposition.

[30] Mr. Wambua further contended that under **Article 40(6)** of the **Constitution**, the right to property does not extend to any property found to have been unlawfully acquired. On this point, counsel cited the High Court case of **Vekariya Investments Limited v Kenya Airports Authority & 2 Others [2014] eKLR** where the case of **Joseph Ihugo Mwaura and 82 Others v The Attorney General and 2 Others [2012] eKLR. Section 75** of the former **Constitution** which is the equivalent of **Article 40** of the **Constitution** observed that:

> ***"[46] Section 75 of the Constitution contemplates that the person whose property is the subject of compulsory acquisition has a proprietary interest as defined by law. The Constitution and more specifically section 75 does not create proprietary interests nor***

does it allow the court to create such rights by constitutional fiat. It protects proprietary rights acquired through the existing legal framework."

[31] Mr. Wambua further submitted that the 3rd respondent gave the appellant notice to remedy any breach and allowed the appellant to respond and address any issues through the letters dated **6th March, 2012** and **3rd August, 2012**. Counsel argued that in the circumstances, there was no breach of **Article 47** of the **Constitution** by the 3rd respondent.

[32] Finally, **Mr. Wambua** submitted that the appellant based its case on legitimate expectation. Counsel relied on the **Digital Migration Case** where the Supreme Court set out the principles that must be considered when an issue of legitimate expectation is raised, the most important of which, in counsel's view, is that legitimate expectation cannot be against the law. Counsel urged that in the circumstances, the appellant cannot argue that despite being in contravention of the terms of its licence agreement and in possession of unlicensed frequencies, it did not legitimately expect regulatory actions against it.

[33] Counsel decried the appellant's contention that the learned Judge erred in law and in fact in finding that the orders made in the **Media Owners' Case** were limited to the four corners of the said suit and the matters in issue in that suit and did not afford the appellant a *carte blanche* to operate without the law. Counsel also took issue with the appellant's contention that by issuing the impugned letters and Notice, the 3rd respondent was in contempt of the orders issued in the **Media Owner's case.** Counsel submitted that the Notice impugned in the instant appeal is the Public Notice in the Daily Nation of 17th May, 2012 which was not the Public Notice that was in issue in the **Media Owners' Case**; that the conservatory orders while subsisting were not a blanket cover for the appellant or any other licensee to escape regulatory action; that it is trite law that where there is an allegation of contempt of Court orders, the appropriate forum to discuss the said allegations is the Court that issued the orders alleged to be breached. Counsel urged us to dismiss the appeal with costs to the 3rd respondent.

Determination.

[34] We have considered the grounds of appeal, the rival submissions, the authorities cited and the law. As this is a first appeal, the guidelines succinctly set out by this Court in **Selle v Associated Motor Boat Company Ltd [1968] EA 123** by **Sir Clement De Lestang** are pertinent. They are that:

"An appeal to this court from a trial by the High 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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholan, (1955), 22 E.A.C.A. 270)."

[35] We discern the following three (3) issues for determination:

i) Whether the learned Judge erred in law and fact in finding that the 3rd respondent is properly constituted and empowered to carry out its statutory responsibilities including regulation contemplated under **Article 34** of the **Constitution** until such time as the entity contemplated under **Article 34(5)** of the **Constitution** is established?

ii) Whether the learned Judge erred in law and fact in finding that the orders of the **Media Owners' Case** were limited to the four corners of the said suit and the matters in issue in that suit and did not afford the appellant a *carte blanche* to operate outside the ambit of the law?

iii) Whether the demands and orders issued by the 3rd respondent vide the letters dated **6th March, 2012** and **3rd August, 2012** and the Notice in the *Daily Nation* dated **17th May, 2012** breached the appellant's constitutional rights?

[36] The nature and extent of **Article 34** of the **Constitution** which guarantees the freedom of the media is pertinent in the determination of this appeal. To put the issue in perspective, **Article 34** of the **Constitution** provides as follows:

"Freedom of the media.

34. (1) Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33

(2).) The State shall not—

(a) exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or

(b) penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.

(3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that—

(a) are necessary to regulate the airwaves and other forms of signal distribution; and

(b) are independent of control by government, political interests or commercial interests.

(4) All State-owned media shall—

(a) be free to determine independently the editorial content of their broadcasts or other communications;

(b) be impartial; and

(c) afford fair opportunity for the presentation of divergent views and dissenting opinions.

(5) Parliament shall enact legislation that provides for the establishment of a body, which shall—

(a) be independent of control by government, political interests or commercial interests;

(b) reflect the interests of all sections of the society; and

(c) set media standards and regulate and monitor compliance with those standards." [Emphasis supplied].

[37] Article 20(3)(b) of the Constitution provides that in applying a provision of the Bill of Rights, a court shall adopt the interpretation that most favours the enforcement of the rule of law. The **Constitution** and legislation should be interpreted holistically and purposively. The provisions of the **Constitution** should be read as a whole to delineate the intention of the framers of the **Constitution**.

[38] In the **Digital Migration case** the Supreme Court laid down the principles that should guide the interpretation of constitutional provisions as follows:

(i) **The Constitution of 2010** came into operation being cognizant of existing legislation. Flowing from the Constitution's supremacy clause, it was imperative to provide a formula by which old legislation would transit into the new constitutional dispensation, without creating a vacuum. **Section 7(1)** of the **Sixth Schedule**, therefore, is vital as a medium for ensuring harmonious transition.

(ii) The Fifth Schedule gives a time-frame within which Parliament ought to act by amending or repealing old legislation, or enacting new law, so as to give effect to particular articles of the **Constitution**.

(iii) All laws in force immediately before the promulgation of the **Constitution** remain in force, but subject of **Section 7(1)** of the **Sixth Schedule.**

(iv) In construing any pre-Constitution legislation, a Court of law must do so taking into account necessary alterations, adaptations, qualifications and exceptions, to bring it into conformity with the **Constitution**.

(v) Where it is not possible to construe an existing law in accordance with (iv) above, so as to bring it into conformity with the **Constitution**, that is to say, where a law cannot be conditioned through judicial intervention without usurping the role of Parliament, such a law is invalid for all purposes.

[39] In the Matter of Kenya National Commission on Human Rights [2014] eKLR the Supreme Court of Kenya stated as follows regarding the meaning of a holistic interpretation of the **Constitution**:

"…It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."

Further, **Article 259** of the **Constitution** enjoins us to interpret the **Constitution** in a manner that promotes its purpose, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill or Rights; permits the development of the law; and contributes to good governance.

[40] In **Centre for Rights Education and Awareness and another v John Harun Mwau and 6 others [2012] eKLR** this Court outlined the principles of Constitutional interpretation in the following terms:

"a) It should be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance as provided by Article 259.

b) The spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.

c) The Constitution must be interpreted broadly, liberally and purposively so as to avoid "the austerity of tabulated legalism.

d)The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).”

[41] In the above stated case, **Justice E.M. Githinji, JA** stated as follows:

“These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statues which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise… The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution.”

[42] These are the principles that will guide us in the determination of this appeal. Our starting point is the question whether the 3rd respondent could regulate the airwaves and other forms of signal distribution under **Article 34** of the **Constitution** until the body contemplated under **Article 34(5)** of the **Constitution** was established. We are guided by the decision of the Supreme Court in the **Digital Migration Case** which involved the appellant and the 3rd respondent among other parties. The main question for determination in the **Digital Migration Case** was whether the 3rd respondent herein was the body contemplated under **Article 34** of the **Constitution**.

[43] In the **Digital Migration Case** the Supreme Court stated as follows:

“[205] In such context, can it be concluded that the promulgation of the Constitution, on the 27th of August, 2010 *immediately* ***rendered CCK and all its actions thereafter unconstitutional? Such is the conclusion the Appellate Court arrived at, and which occasioned the nullification of the licence that had already been issued to the 5thappellant herein. It is clear to us that this conclusion was based on the assumption that Article 34(3) and (5) had somehow envisaged the reconstitution of CCK. However, this assumption, although not devoid of logic, is not supported by the tentative cast of the two sub-Articles. The three-year time-frame within which legislation was required to be enacted, pursuant to the Fifth Schedule as read with Section 7(1) of the Sixth Schedule, should be understood to mean that the Constitution*** *did not contemplate a vacuum* ***in the licensing of airwaves.***

[206] CCK had been established and mandated to, inter alia, license and regulate the airwaves and signal distribution, before the promulgation of the new Constitution (by the Kenya Information and Communications Act, 1998). Hence, having been in existence before the date of promulgation, CCK had a **lawful existence,** ***and its actions were not unconstitutional. The transition Chapter and clauses in the Constitution are meant not only to ensure harmonious flow from the old to the new order, but also to preserve the Constitution itself, by ensuring that the rule of law does not collapse owing to disruptions arising from a vacuum in the juridical order. Unless it is demonstrated that the legislation establishing CCK was*** **incapable of being construed with the necessary alterations and exceptions,** ***so as to bring it into conformity with the Constitution, pending the three-year legislative intervention, it would be*** **improper in law and in principle,** ***to declare CCK unconstitutional.***

[207] Such a perception is aptly foreshadowed at the trial stage, in the following passage in the Judgment of **Majanja, J** ***[at paragraph 84]:***

“The circumstances of CCK have not changed and until the transition is completed by implementation of the Kenya Information and Communications (Amendment) Bill, 2013, CCK as currently established remains the body entitled under the Constitution and the law to continue to regulate the media and airways in accordance with the Constitution and existing law.”

[208] It was not in vain that the time-lines within which Parliament was to enact the various statutes were set out in the Fifth Schedule to the Constitution. To this day, Parliament is **still enacting legislation** ***to operationalize the Constitution a fact that merits judicial notice.***

[209] Hence it is our conclusion that, CCK was not only legally mandated to regulate airwaves and licensing under the 1998 and 2009 Acts, but also, the promulgation of the Constitution of 2010 did not render its actions immediately unconstitutional.”[Emphasis supplied].

[44] The Supreme Court in the **Digital Migration Case** unequivocally confirmed that the 3rd respondent was within its legal mandate to regulate the airwaves until the establishment of the body envisaged by **Article 34(5)** of the **Constitution**. In the circumstances, we find that the 3rd respondent did not violate the appellant’s rights under **Article 34** of the **Constitution**. The High Court did not therefore err in finding that the 3rd respondent continued to perform regulatory function pending the formation of the body contemplated by **Article 34(5)** of the **Constitution**.

[45] It is notable that in **Royal Media Services Ltd and 2 others v Attorney General and 8 others, [2013] eKLR** the High Court (**(Majanja, J.)** adopted an interpretation that favoured the 3rd respondent as the entity to undertake regulatory function in the absence of the contemplated entity and stated as follows:

“In considering applications for broadcasting licences, the CCK is mandated under Part IV A of KICA to take into consideration various factors among them availability of radio frequency spectrum including the availability of such spectrum for future use:

efficiency and economy in the provision of broadcasting services and expected technical quality of the proposed service, having regard to developments in broadcasting technology. Under Section 460, the CCK is the body charged with granting licences to person(s) to provide signal distribution services. The signal distribution licence may carry with it certain conditions as set out under subsection (2) of the section. Section 46N makes it an offence for any person to provide signal distribution services within Kenya to or from Kenya to other countries except in accordance with a licence issued under Part IV of the KIA. Indeed, the CCK is empowered to revoke the licences where the licensee flouts the conditions attached to the licence or acts contrary to the Act or its regulations. Under Part VII of the KICA, the CCK is the body charged with licensing and enforcement function under the Act. I did not hear the petitioners challenge the constitutionality of these or any of the KICA provisions. The Constitution provides the general framework of principles and values within which the broadcasting and media operations are to operate. These are given effect through the various laws which regulate the information and communication sector in the country including KICA. The petitioner's contention that CCK cannot manage the digital migration process including issuing of BSD or other licences lack merit and is dismissed."

[46] In **Republic v. Returning Officer Kamukunji Constituency & another [2008] eKLR,** the High Court (**J. G. Nyamu, J. (as he then was) and R. Wendoh, J**.) succinctly stated as follows:

"Just as nature abhors a vacuum, even the enforcement of the rule of law abhors a vacuum or a gap in its enforcement and we refuse to accept jurisprudence which accepts or suggests that a gap exists in our law… The jurisprudence which we uphold is the one that will help the courts at all times to 'illuminate the dark spots and shadows in all circumstances, so that justice as a beacon of light and democratic ideals are practiced and hailed at all times over the hills, valleys, towns, and homes in this beautiful land of Kenya. The mantle of justice and the rule of law must cover all corners of Kenya in all situations. Courts have a continuing obligation to be the foremost protectors of the rule of law."

[47] It was the appellant's contention that by issuing the letters dated **6th March, 2012, 3rd August, 2012** and the Notice of **17th May, 2012** to the appellant, the 3rd respondent contravened the appellant's rights and fundamental freedoms protected under **Articles 27, 34, 40 and 47** of the **Constitution**.

[48] The appellant further contended that by issuing the said impugned letters and Notice, the 3rd respondent infringed its right to equality and freedom from discrimination under **Article 27** of the **Constitution**. In this regard, the appellant claimed that the 3rd respondent was selective by only taking action against the appellant but not taking the same action against other broadcasters. The appellant cited the following instances of discrimination against it: referring the appellant's broadcasting business to the National Assembly; not acting upon the appellant's complaints of interference of its frequencies; applying for search warrants against the appellant; and issuing the Notice of **17th May, 2012.**

[49] The learned Judge found that the claim of discrimination was a new cause of action which was not covered by the leave granted to the appellant to amend the petition. The learned Judge also found that there was insufficient evidence to support any finding on discrimination and that as regards the nature of the alleged infractions by other broadcasters, there was insufficient evidence to support any evidence of discrimination and that it would be improper for the Court to make a finding that would affect them adversely without giving them an opportunity to be heard. We have, as required of us, examined the evidence on record in this regard. From the record, we find that the learned Judge did not err in finding that there was no evidence regarding the alleged non-compliance by other broadcasters.

[50] It was the appellant's further contention that the 3rd respondent breached its right under **Article 34** of the **Constitution** which guarantees freedom and independence of electronic, print and all other types of media. In the **Digital Migration Case** the Supreme Court stated as follows:

"The freedom of the media, while guaranteed by the Constitution, is subject to certain professional and ethical standards. This is in keeping with criteria of integrity, also found in other professions, such as medicine, law, engineering or architecture. In many jurisdictions, the standardization and monitoring of media practice, takes the form of either a self-regulating or a governmental-regulating mechanism. Self-regulation can be statutory or non-statutory. Governmental regulation is rarely the preferred option, given the intrusive nature of government-interest in media activities."

[51] We are therefore guided by the findings of the Supreme Court in the **Digital Migration case** that the 3rd respondent was legally mandated to regulate airwaves and licensing under the **1998** and **2009 Acts** and that the promulgation of the Constitution did not render its actions immediately unconstitutional. Accordingly, we find that the 3rd respondent did not breach **Article 34** of the **Constitution** in sending the impugned letters to the appellant and issuing the Notice.

[52] The appellant further contended that the 3rd respondent violated its right to property under **Article 40** of the **Constitution.** The appellant contended that the issuance of a frequency is comparable to the issuance of a licence under the law and that a licence is a species of property protected under **Article 40** of the **Constitution**.

[53] On this issue, the learned Judge observed as follows:-

"49. I agree with the CCK proposition that frequency spectrum is a scarce public resource allocated by the CCK in order to ensure utilization in a co-ordinated manner so as to benefit the public as a whole. In Observer Publications Limited v Campbell "Mickey" Mathew et. al (Supra), the Privy Council noted, at p. 49, "The airwaves are public property whose use has to be regulated and rationed in the general interest." The basis for regulation of airwaves was clearly enunciated in Red Lion Broadcasting Co. v FCC 395 US 367 (1969) where the Supreme Court stated, "Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalised only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably be heard.

Consequently, the Federal Radio Commission was established to allocate frequencies among competing applicants in a manner responsive to public 'convenience, interest and necessity. "

[54] It was the 3rd respondent's contention that the frequency spectrum broadcast licence as distinguished from the station's plant or physical assets (broadcasting equipment) is not an owned asset or vested private property interest so as to be subjected to either mortgage, lien, pledge, attachment, seizure or similar property right by the appellant. It was the 3rd respondent's further contention that this is in keeping with **Clause 5 (2)** of **The Kenya Information and Communications (Radio Communications and Frequency Spectrum) Regulations, 2010** which provides that **"A radio communication licence shall not confer any ownership rights of the frequency on the licensee."**

[55] The 3rd respondent relied on the persuasive authority of the United States Case of **Nextwave Personal Communications Inc., Et Al.,**

Petitioners v Federal Communications Commission, Inc. 537 US 293 (2003) where it was stated that:

"…Besides, spectrum licenses are not property-much less property of the estate-vis-à-vis the FCC's exercise of regulatory authority, and petitioner cites no appellate decision holding otherwise…The statute "provide[s] for the use of [radio] channels, but not the ownership thereof," and states expressly that "no [radio license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. In short, "[l]icenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them…"

[56] It was the respondents' claim that nothing was placed before the High Court to demonstrate that the appellant had acquired or owns property capable of protection under **Article 40** of the **Constitution**. It was the respondents' further contention that the protection conferred by **Article 40** of the **Constitution** does not extend to property whose acquisition is found to be unlawfully acquired as provided by **Article 40(6)** of the **Constitution**. In support of this proposition, the 1st and 2nd respondents relied on the persuasive authority of the High Court of **James Ngochi Ngugi v National Land Commission and another (2017) eKLR** while the 3rd respondent relied on the persuasive authority of **Morris Ngundo v Lucy Joan Nyaki & another [2016] eKLR.**

[57] In the circumstances, the appellant has not demonstrated the existence of property it has acquired which are capable of protection under **Article 40** of the **Constitution.** We find that the learned Judge did not err in finding that the regulatory actions of the 3rd respondent of sending the impugned letters to the appellant and issuing the Notice, the 3rd respondent did not infringe the appellant's rights to property which are protected under **Article 40** of the Constitution.

[58] The appellant further argued that the demand letter dated **3rd August, 2012** from the 3rd respondent offends **Article 47** of the **Constitution** as it was made dishonestly, arbitrarily and in bad faith. **Article 47** of the **Constitution** provides in part as follows:

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."

[59] The 3rd respondent relied on the persuasive authority of **Diana Kethi Kilonzo & another v Independent Electoral & Boundaries Commission & 2 others [2013] eKLR** where the High Court stated as follows:

"We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."

[60] We reiterate that the 3rd respondent was acting within its mandate in investigating any complaints of interference with allocated frequencies. From the record, we are satisfied that the 3rd respondent followed the due process in enforcing the regulation of airwaves as mandated and that the impugned letters and Notice were issued in accordance with **Section 41** of the **Kenya Information and Communication Act**. We find that there was sufficient evidence that there was prior communication from the 3rd respondent to the appellant giving the appellant an opportunity to respond and remedy any breach. The learned Judge did not therefore err in finding that the 3rd respondent did not infringe on the appellant's rights under **Article 47** of the **Constitution**. We therefore find that the 3rd respondent did not violate the appellant's rights under **Article 47** of the **Constitution**.

[61] On the question whether the letters dated **6th March, 2012, 3rd August, 2012** and the Notice published in the *Daily Nation* on **17th May, 2012** were issued in contempt of the conservatory orders issued on 14th November, 2011 in the **Media Owners' case**; and whether the learned Judge erred in hearing the 3rd respondent when it had allegedly disobeyed the said orders. We have looked at the record and considered the findings of the learned Judge on this issue. The Notice impugned in the instant appeal is the Public Notice in the Daily Nation of **17th May, 2012** which was not in issue in the **Media Owners' case**. It is notable that the orders granted by the Court in the **Media Owners' case** have since been lifted and the **Media Owners' case** dismissed by the High Court on 22nd June, 2012 in the following terms:

"It therefore follows that this Court is bound by the holding of the Supreme Court that the 3rd respondent was by then the independent body envisaged under Article 34 of the Constitution prior to the enactment of the statute contemplated for the establishment of such a body. That finding also addresses the issues in contention in the

Petition because the impugned notices were issued at the time when the 3rd respondent was the body lawfully mandated to issue the same. In my view therefore and in light of the Supreme Court decision, this substantive issue in the Petition has been addressed and the resultant and consequential issues have also been answered.

I have shown that issue No. (i) was conclusively determined by the Supreme Court in S.C Petition No. 14 of 2014 (supra) and so the same is moot. As regards issue no. (ii), it is not contested that by a notice issued on 30th January 2015, the prior notice issued on 11th November 2011 was revoked by the Communications Authority of Kenya and so there is nothing left for this Court to declare null and void even if there was merit in the Petitioner's case in that regard."

[62] From the record, there was no material placed before the High Court or before this Court to demonstrate that the appellant had instituted any contempt proceedings against the 3rd respondent within the **Media Owners' case**. Accordingly, we find that the letters dated **6th March, 2012, 3rd August, 2012** and the Notice published in the *Daily Nation* on **17th May, 2012** were not in contempt of the conservatory orders issued in the **Media Owners' Case**. We therefore find that the learned Judge did not err in finding that the 3rd respondent was not in breach of the conservatory orders issued in the **Media Owners' case.**

[63] The upshot is that this appeal lacks merit and is hereby dismissed. Taking into account that the appeal relates to the enforcement of fundamental rights and freedoms, the order that commends itself to us is that each party shall bear their own costs.

Dated and delivered at Nairobi this 24th day of July, 2020.

W. KARANJA

…….……

JUDGE OF APPEAL

F. SICHALE

..……

JUDGE OF APPEAL

J. MOHAMMED

……

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR