IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MWERA & AZANGALALA, JJ.A)

CIVIL APPEAL NO.121 OF 2012

BETWEEN

COMMUNICATION COMMISSION OF KENYA…APPELLANT

AND

TETRA RADIO LIMITED……RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Gacheche, J.), dated 22nd June, 2011 in Misc. Civil Application No.141"B" of 2008)

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JUDGMENT OF THE COURT

On 24th June, 2011, the High Court (***Gacheche, J.)*** delivered a judgment in a judicial review application which was filed by the respondent, Tetra Radio Ltd, against the appellant Commission. The notice of motion brought under the then ***Order LIII rule 3(1)*** (now ***Order 53 rule 3(1)) of the Civil Procedure***

Rules sought the following:

i. an order of *certiorari* to move into the High Court and quash the decision of the appellant dated 18th October, 2007 purporting to cancel a Commercial Trunked Radio Operator Licence (CTROL) issued to the respondent, without issuing the requisite notice under the Kenya Communications Act;

ii. an order of prohibition directed at the appellant prohibiting it from carrying out and proceeding with the decision dated18th October, 2007 (above); and

iii. an order of prohibition directed to the appellant prohibiting it from utilizing, appropriating or allowing the exclusive use by the applicant of the frequency range between 370 MHz and 470 MHz. The grounds on which the above prayers were premised included the following: that the actions of the appellant were *ultra vires* the Kenya

Communication Act, hereinafter the Act; the actions of the appellant were discriminating against the respondent and they constituted abuse of power. Further, that those actions complained of infringed on the respondent's legitimate expectations and were against the principles of the rules of natural justice. Finally, that the appellant's actions were illegal. Accompanying the notice of motion was the verifying

affidavit and the statement of facts, earlier filed with a chamber application for leave, which in essence, contained the material presented to the learned judge in support of the prayers.

The appellant filed a replying affidavit sworn on 21st April, 2009 by its Company Secretary, ***John Ouko***, followed by a further affidavit by the same deponent on 29th October, 2009. Each side annexed various documents which the parties referred to during the arguments before ***Gacheche, J***.

After all the arguments for and against the orders sought, the learned judge referring to the stated letter dated 18th October, 2007, which the respondent took to have canceled the licence it claimed was issued to it, said that:

> ***"One would have expected CCK to avail proof of the relevant proceeding that would have led to the decision, but none was availed, which tends to raise doubts as to the legality of the decision contained in the letter of 18th October, 2007 and which would thus mean that the license (sic) was not cancelled and in a lawful manner. The omission is a clear indication that CCK overstepped its mandate, when it issued the letter by its Director/Licensing and Standard, an act that was clearly*** *ultra vires* ***and unlawful."***

The judge added that the appellant acted in an unreasonable manner, a manner that was against Tetra's legitimate expectations which had all along been made to believe that, not only were its activities acceptable to the appellant, but that also as a licensee it would be accorded fair and reasonable treatment. The judge found the letter impugned null and void and so issued the following orders:

"An order of certiorari to remove and quash the decision of the Communications (sic) Commission of Kenya dated 18th October, 2007 purporting to cancel the Commercial Trunked Radio Operator Licence issued to the Company. An order of prohibition is hereby directed at the respondent prohibiting it form utilizing, appropriating, allocating, activating, allowing to be used in any other manner prejudicing the excessive (sic) use by the applicant of the frequency range 370 to 470 MHz (both inclusive)." And on account of the fact that the matter was being concluded in the year 2011, the judged directed that: ***"…and in keeping with the understanding reached in the course of the negotiations of the licence terms, which fact has not been controverted by the respondents (sic), that Tetra's proposal to remit the licence fee of $5.2 million in three equal installments was accepted in 2004, I do hereby order that Tetra do make payment in three equal installments of $1.73 million each, the first such installment to be paid on or before 31st December, 2011 and thereafter on or before 31st December, of each succeeding year. I do also order that subject to Tetra paying the first installment, CCK shall release the contracted and reserved bandwidth in the range of 320 MHz to 470MHz (both inclusive) to the exclusive and sole use by Tetra together with the additional broadband spectrum bandwidth in the 2.3-2.5 GHz necessary for the proper and effective operationalization of the project."*** (underlining supplied.) Costs were awarded to the respondent. Being dissatisfied with that High Court judgment, the appellant filed the memorandum of appeal herein with five grounds, in which it was contended that the learned judge was in error to find that a licence had been issued to the respondent; she was faulted for awarding additional broadband frequency spectrum in that that amounted to usurping the mandate of the appellant to award frequencies and that there was no such a prayer before her, placing that order beyond the jurisdiction of judicial review proceedings. The other ground was that the judge fell in error by granting the exclusive use of the bandwidth between 370 – 470 MHz contrary to the judicial review proceeding in court. Also complained of was the order of the judge requiring the respondent to pay the licence fees in instalments, a matter that fell beyond the borders of judicial review, and which abrogated the appellant's mandate. And lastly, that the High Court decision and orders were contrary to the evidence adduced. Both sides filed written submissions alongside authorities. In presenting the arguments ***Mr. G. Oraro***, learned Senior Counsel led ***Mr. D. Angwenyi***, while Mr. Nowrojee, learned Senior Counsel led ***Mr. K. Kiplagat*** holding brief for ***Mr. S. M. Mwenesi***. Both sides adopted the filed submissions and proceeded to highlight the same.

Mr. Oraro gave a brief history of the judicial review proceedings in the High Court and moved straight to the decision whereby the learned judge not only directed that the respondent could pay licence fees in

instalments, but also that on paying the first instalment, the appellant had to release the bandwidth in range between 370 – 470 MHz. We heard that that order to release amounted to a mandatory injunction or an order of mandamus, none of which were sought in the judicial review application or fell within it. We were reminded that the respondent only sought one order of *certiorari* and two of *prohibition* following a tender as evidenced by the letter dated 18th February, 2002. The judicial review proceedings were then filed six years later, premised on the appellant's letter dated 18th October, 2007. This letter, we heard, was a reply to one written by the respondent on 15th June, 2007 asking that it be granted indulgence to pay by instalments the sum of $5.2 million for winning the tender bid for the licence. To the appellant, the letter of 18th October, 2007 only informed the respondent that according to the former, the matter was considered closed because of the inability of the respondent to fulfill its obligations, including other extra-ordinary concessions. It did not constitute a decision to cancel a licence, we heard, which could be quashed by the court.

The letter of 18th October, 2007 was simply a reply to the request, declining to grant the respondent indulgence to pay $5.2 million in instalments - a sum that had not been paid since 2002 when the respondent won the tender bid.

Re-emphasizing that the letter dated 18th October, 2007 did not constitute a decision to be quashed by way of certiorari and that the order to release the bandwidth went beyond judicial review prayers, ***Mr. Oraro*** stated that no licence was ever issued and so none had been cancelled. That issuing a gazette notice under section 78(1)(b) of the Act was an invitation to the public to comment on the licence applied for and not the licence itself. And as regards section 79 of the same Act, counsel told us that it provided for issuance of a licence but subject to payment by the applicant, and a demand for such payment did not mean that a licence had been issued and that is why by its letter of 25th July, 2003 the appellant notified the respondent that it had not paid the initial licence fee and so its intended licence could not be processed. The respondent was given up to 30th August, 2003 to pay up or the whole process of the licence issue could be cancelled – a whole 4 years before the impugned letter – dated 18th October, 2007, the subject of the judicial review proceedings.

Mr. Oraro continued that the respondent's letter dated 28th February, 2003 forwarded a draft licence to the appellant – not the other way round. This was not the licence itself as the learned judge took it, and also she fell in error to find that the requisite fee for the licence was ever paid.

Focus then moved to the spectrum aspect of the order of the court.

Looking at the invitation to tender for the issuance of the licence herein, abbreviated as CTRO, we heard that the bands available on offer were VHF 150 MHz and UHF 400 MHz, but the court proceeded to order the release and use of a totally different lot: 370 MHz and 470 MHz – such could only be considered after the licence had issued. The notice of motion was seeking orders of prohibiting the appellant to issue the bands yet the court ordered release of the same to the respondent. The bandwidth was not in issue. Drawing our attention to the provisions of ***Order 53 rule 1(2) of the Civil Procedure Rules*** it was reiterated by ***Mr. Oraro*** that only the statutory statement could contain the reliefs sought and such could not be validly laid before court by way of submissions. Citing a case of ***Galaxy Paints Company Ltd vs Falcon Guards Ltd [2000] 2 EA 385***, counsel posited that the issues for determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgment on such and not any other. So, it was not right for the trial court to determine and make orders on what was not contained in the statutory statement, and accordingly the trial court proceeded improperly to give orders of mandamus to release the bandwidth herein - a thing that did not fall within the certiorari and prohibition orders sought in the notice of motion. Such an approach to judicial decisions was not tenable as stated in the case of ***Provincial Insurance Company of East Africa Ltd vs***

Mordecai Mwanga Nandwa Civil Appeal No.129/1995 (unreported) in that an issue neither raised nor canvassed by any party, is not open to a trial judge to deal with. Doing so could only mean exceeding powers.

And finally, we heard that the learned judge in determining and ordering how the licence instalments were to be paid, she exceeded what was sought in the notice of motion.

In counter arguments ***Mr. Nowrojee's*** position was that only two grounds fell to be determined for this appeal to succeed or fail, namely:

i. ***whether or not a licence was granted by the appellant; and***

ii. ***whether or not the letter of 18th October, 2007 constituted a decision.***

Beginning with the replying affidavit of ***John Omo*** earlier noted above, and particularly paragraphs 5 and 6 thereof, we were told that the respondent was asked to pay and it paid Sh.10,000/= to enable the appellant to process the CTRO licence applied for. The licence was granted on 21st march, 2003 to operate for 15 years. So it could not be disputed whether the licence was issued or not, no matter that ***John Omo*** tried to make an about-turn on this in the subsequent affidavit. It made no sense because with the licence issued, ***sections 28, 29 of the Act*** kicked in; a gazette notice was to issue. The licence issued subject to the respondent making payments provided that where a licence had been denied, the appellant would inform the respondent of the reasons in 30 days, and if dissatisfied, the respondent would appeal to theTribunal provided for in the Act. Since the appellant did not notify the respondent that it had refused to issue licence, the same was validly issued as per the procedure laid out in the Act. So many years went by without the appellant issuing the requisite gazette notice, and precisely twelve years passed without the appellant complying with the statutory procedure. Accordingly, so we were told, using any other course to refuse to issue or cancel the licence, and particularly the letter dated 18th October, 2007 could not be of any effect. Therefore, the application for the order of certiorari was warranted; it was issued.

According to the respondent, the appellant had only two options under section 79 of the Act – to issue or to refuse to issue a licence, with no negotiations involved.

Regarding the averment by ***John Omo*** in his further affidavit that the respondent did not pay US $5.2 million for the licence, Mr. Nowrojee argued that that did not have any substance because on 18th February, 2002, the appellant had sent to the respondent the conditions attached to its tender application for the CTRO licence wherein CONDITION 25 on LICENCE FEES required that upon the grant of the licence, the respondent had to pay a fifteen– year fee of $5.2 million. Therefore, that meant that the payment had to be made after the licence had been issued, yet the appellant was demanding the fee before issuing the licence, which was wrong.

Referring to the same conditions sent to the respondent on 18tFebruary, 2002, ***Mr. Nowrojee*** turned to Clause 7 therein which required that the appellant could revoke a licence by giving a notice of six months. No such a step had been taken by the appellant to notify the respondent that fees due had remained unpaid for 45 days. Therefore, there having been no steps taken as per section 79 of the Act by the appellant to revoke the licence, its letter of 18th October, 2007 purporting to do that had no validity and was properly quashed by the High Court. However, so we were told, if the appellant maintained the position that the letter dated 18th October, 2007, was not a decision to bar the respondent form carrying out any operations, then the latter should freely operate.

Asked about the respondent's stand on the position taken by the appellant that the trial judge's order to release the use of the bandwidth and the broad band spectrum went beyond the orders sought in the notice of motion, ***Mr. Nowrojee*** told us that the appellant had not objected to these orders.

In response, ***Mr. Oraro*** referred to ***John Omo's*** further affidavit (paragraph 21) wherein he stated that the frequency spectrum resources did not fall for determination in the judicial review proceedings. We heard that the tender bid was not followed by a contract in which a licence could or did issue. So there was no licence to cancel or bring to an end. There were payments to be made; the respondent did not make payments to facilitate the process to issue it with a licence. Being anxious to know whether the licence in question was ever issued, the court's attention was drawn by ***Mr. Oraro*** to the letter dated 18th February,

2002 by which the appellant forwarded a draft license.

However, the same was never executed and so no licence issued. Our further attention was drawn to the respondent's own letter dated 28th February, 2003 to which a draft licence was appended, and which was intended to be a basis to commence negotiations. That by that letter, the respondent informed the appellant that since it had submitted its bid, it was in the process of preparing to pay the licence fee of $5.2 m. So all the time even as per the terms and conditions of the tender, only a draft licence featured. And that even as at 25thJuly, 2003 or at any time thereafter, the respondent never paid initial licence fee or the fee itself. So all in all, everything remained at the tender stage. The respondent never fulfilled its part in order to have the licence issued to it. It cannot therefore be heard to say that a licence was issued to it. And therefore without the licence having been issued, sections 78, 79, 80 of the Act could not apply, counsel concluded.

After the long and powerful submissions by either side, we were left to fully acquaint ourselves once again with the orders sought in the notice of motion, the affidavits for and against, the arguments that proceeded before the High Court, the decision of that court, the written and oral submissions before us together with the law and the cases cited. But not least, we have had due regard to the documents produced. By going over what transpired in the High Court we are in a position to make our own conclusions in the light of the submissions before us.

In our view, from all the foregoing, we think about three broad grounds fall to be determined:

i. ***whether the licence was ever issued;***

ii. ***whether the letter dated 18th October, 2007 amounted to a decision by the appellant to cancel that licence; and***

iii. ***the parameters of the judicial review orders sought vis a vis the orders of the High Court***.

Beginning with the ground whether the licence applied for was ever issued or not we can safely say that from the letters exchanged forwarding the respective documents, and particularly that entitled: Invitation to Tender for a Concession to Construct and Operate Commercial Trunked Radio Communication Networks, and the letter by the respondent to the appellant dated 28th February, 2002, plus such other material as we have alluded to above, there was no licence issued to the respondent as per its tender bid which it won. In the letter of 28th February, 2003 (above) the respondent in the main body thereof told the appellant that:

> ***"Tetra Radio Limited has submitted a Bid and Performance***
>
> ***Bond for the above license, as we prepare to pay for the license fee of $5,200.00, we would like to commence the process of draft license negotiations.***
>
> ***Please find attached a draft copy of the license required for discussions. Kindly confirm…***
>
> ***(signed)"***

The reference is to a draft licence. And if the letter can be considered in that perspective, we take it that the responses that followed from the appellant included the letter dated 25th July, 2003. It was stated therein in the main that:

> ***"You are no doubt aware that in February, 2003, your bank furnished us with a bid and performance bond. In that bid you undertook to pay the Commission the initial license fee on or before 21st M arch, 2003.***
>
> ***We note that to date you have not paid the initial licence fee to facilitate the issuance of the***

CTRO licence to you.

Take notice that unless payment is made of initial licence fee in full on or before 30th August, 2003, the commission shall proceed to cancel the whole process altogether. Please be advised accordingly.

(signed)"

In this connection, may we refer to the invitation to tender and what it said of Terms and Conditions applicable:

"4.4 <u>Financial conditions on the Applicant</u>

The applicant must specify the amount to be paid as an initial license fee and the number of stations/user groups connected and operational in Year 3 of the build out program.

In the application, the applicant must undertake a commitment that in case of a successful application, and within 7 days from the date of selection, the applicant shall submit a bank bid performance bond, quoted in USD or Kenya Shillings, issued to a reputable bank acceptable to the Commission for an amount representing <u>five per cent</u> (5%) of the applicant's financial offer.

The winners of the tender shall be expected to meet the following payment obligations with regard to CTRO license in order to have the right to construct a telecommunications network and provide service:

a. ***A payment to the Commission of Kshs.10,000 (Ten thousand) as application fee, to be submitted, together with the Commissioner's application form No.AF2 duly completed;***

b. ***A payment to be determined through the tendering process of an initial licence fee;***

c. ***Payment to the Commission of an amount equal to 0.5 per cent of gross revenue, or Kshs.1.5 million whichever is the larger as an annual licence fees (sic); and***

d. ***Payment of the requisite fee for assignment of frequencies based on the method and payment structure shown in Annex 1 below."***

Then:

"<u>4.5 Draft License</u>

A draft copy of CTRO license can be found in Annex 3 of the tender document.

It is important to note that the draft license is part of the tender process and bidders are expected to factor the license conditions in their bids. Negotiations on the license conditions will, as far as possible, be confined to the Annexes to the draft license."

All appears to stop here for now. We do not have evidence that the tender process ended and a contract was signed for the issuance of a licence. There has not been evidence from the respondent that the initial licence fee of Sh.1.5 million so that the process could continue to the end, despite the reminder of 25.7.2003. For not having completed the preliminaries as set out in the tender conditions, by 30th August, 2003, the respondent was notified that the whole process could be cancelled. There is no evidence that the respondent replied to the notice or it made the required payments. And as stated earlier, the respondent did not furnish/display before the High Court or before this Court of a licence it claimed to have been

issued and which, it claimed the letter of 18th October, 2007 purported to cancel. If drafts of the licence were exchanged, as it appears to have been the case, then those did not amount to the licence that was expected. The respondent vehemently argued that the replying affidavit of ***John Omo*** averred that a licence was issued to it, a thing that deponent by a further affidavit stated as not being the correct position. He, however, acknowledged that sh.10,000/= was paid. But as the tender application condition, that sum was the application fee, not the licence fee. Having failed to satisfy us that a licence was indeed issued to it, we are unable to agree that a licence ever issued at all. Nothing could have been easier for the respondent than to place before the High Court a copy thereof. It did not do so and we hold that no licence was ever issued. We uphold the appellant on this ground.

On 15th June, 2007 the respondent wrote a letter to the appellant on the subject CTRO licence. Again in its body the letter stated:

> ***"In 2002, we were privileged to be awarded a tender to construct and operate a Commercial Trunk Network in the UHF band at a winning bid price of $5.2 million. We have attached the relevant supporting documents.***
>
> ***We subsequently made a request to CCK to pay the licence fee in instalments as a way of cushioning the users (who are main emergency service providers) against high network charges. The Commission allowed us to pay an initial instalment of $1.5 million and subsequently pay $1 million per year until full payment subject to the application of interest.***
>
> ***We have been dealing with several logistical and financial matters that have held us back from rolling out our network. However, we are now ready to move forward our roll out.***
>
> ***We are therefore seeking the Commission's confirmation that we may proceed on the basis of the valid licence herein and also requesting the Commission to confirm that we may pay <u>the first original instalment</u> of $1.5 million within the next six months. The six months time frame within which to pay <u>the initial instalment</u> is necessary as the financing package involves various institutions whose approval processes necessarily require time.***
>
> ***We look forward to receiving your support in this regard.***
>
> ***(Signed)"*** (Underlining supplied.)

Even before we move to the reply which is the letter impugned in the notice of motion, may we at this point observe that the respondent appears not to have made due payments five years after it won the tender. By its letter above and four years since it was notified, that appears to be the position.

That it had failed to make the initial fee payment as per the conditions in the tender, it was seeking indulgence to pay the original initial installment fee of sh.$1.5 million and then probably pay the licence fee of $5.2 million. There is absolutely no reference to the notice of 25th July, 2003 to the effect that if the respondent did not pay the initial licence fee by 30th August, 2003 then the whole process could be cancelled. So even as we peruse this letter of 15th July, 2007, it is clear that the respondent never made payments as per the financial obligations in the tender document. It does not appear that it paid at any other time at all and if the notice aforesaid is considered, by 15th June, 2007, the whole process of issuing the license had been cancelled. Nonetheless, we now turn to the reply by the appellant dated 18th October, 2007 referring to the very subject of CTRO Licence. In its body it says:

> ***"We refer to your letter dated 15th June 2007 as well as previous correspondences on the above-captioned subject matter.***
>
> ***According to our records, this matter is considered closed. This followed your inability to fulfill your obligations including the extra-ordinary concessions extended to you by the Commission – in January, 2004.***

We are therefore, not in a position to consider any further request in this regard.

We thank you for your interest in the development of the communications industry in Kenya.

(Signed).”

This is a reply not a decision. A decision had been taken earlier not to continue contacts with the respondent in the matter as per the appellants' communication of 25th July, 2003 which gave the respondent up to 30th August 2003 to pay up or the licence process could be cancelled. But not quite so. The appellant extended further indulgence to the respondent in the matter in January, 2004, which it again ignored or neglected. With all that, we do not consider the letter of 18th July, 2007 to be a decision to cancel a licence. It brought to an end the process to consider issuing a licence, the process which to us, the respondent itself frustrated by not complying with the financial requirements by paying the initial sum of Kshs.1.5 million towards the licence fee. If it is, as we have found, the letter of 18th October, 2007 was not a decision to cancel any licence and so it could not be the basis to obtain an order of *certiorari*. And such and order ought not have been granted. It is trite law that the order of *certiorari* issues to bring up a decision by a public body mandated by law to do something in the arena of public administration, which action is found to have been taken by that body contrary to or outside the law, procedure or against the rules of natural justice. We do not have to cite the long and many cases on this point or the treatises that espouse the efficacy and applicability of judicial review orders generally and certiorari in particular, but suffice it to note the ***Kenya National Examination Council vs Geoffrey Gathenyi Njoroge & Others Civil appeal 266 of 1996*** which has gained importance in this area and ***Halisbury's Laws of England, 4th Edition Vol.1*** as good and ready sources on this subject.

Having found that the letter dated 18th October, 2007 did not constitute a decision to attract an order of *certiorari*, but that it was only a reply to what the respondent had inquired about, we now move to the third ground namely, whether the High Court granted orders outside the scope of the notice of motion before it.

We have earlier said that he respondent sought orders of certiorari and two of prohibition. The order of *certiorari* was directed to bring into the High Court and quash the letter dated 18th October, 2007 which the respondent thought purported to cancel his licence. We have found that the process did not go beyond the tender stage in the issuance of a licence and none was issued or placed before court. So none could be cancelled. Then we have found that that letter was a mere reply to the respondent and not a decision taken by the appellant to cancel a licence. In consequence we find that the first order prohibiting the appellant form proceeding with the decision dated 18thJuly, 2007, does not lie because there was no decision to cancel.

As for the 2nd order, prohibiting the appellant from appropriating or allocating the use of frequencies in the range of 370 to 470 MHz to any other party to the prejudice or the exclusive use by the respondent, we found that rather tricky. Tricky because we do not know where they came from. We noted in the tender document that the Government intended to make available to the CTRO's Spectrum suitable for the Radio Network within the UHF 400MHz band. The appellant was not only ordered to release the 370 to 470

MHz bandwidth – but also to give the additional spectrum bandwidth in 2.3 –2.5 GHz frequencies, all on payment of the 1st instalment of the licence fee.

We found both the order directing how the respondent was to pay by instalments licence fees and the order for the appellant to release the frequencies way out of the ambit of the judicial review proceedings before the learned judge. First, taking the course to order how the licence fee was to be paid amounts to usurping the administrative function of the appellant. It was not sought in the notice of motion and such could not be sought in judicial review proceedings. Before the court were prayers for orders of certiorari and prohibition only. And that is how judicial review proceedings go. Moving out to order how the appellant could receive the licence fee by paying the requisite fees in instalments, fell well outside the

jurisdiction of the court

Then as observed above, the trial court made orders of a mandatory nature to release the frequencies. Mandamus was not one of the orders sought and more particularly, frequencies in the broadband spectrum were not in issue. The judge made all the foregoing orders rather gratuitously but not within the proceedings before her and among the prayers sought. We quote from the case of the ***Communications Commission of Kenya & Others vs Royal Media Services & Others*** ***S.C. Petition No.14A, B & C of 2014***, wherein in a matter touching on issuance of licence, the learned judges of this Court delivered themselves thus:

> ***"As regards issuance of a BSD licence, this is a function reposed exclusively in the 1st appellant. As an independent body discharging a public a public function, the 1st appellant is not subject to control or direction by any person or authority, as regards issuance of a licence. Issuance of licences is subject to conditions such as 1st appellant, on its own accord, may prescribe."***

We could not agree more. The trial court usurped the power of the appellant not only to direct how the licence fee could be paid, and we have found that there was no licence ever issued, but also to order the appellant to release frequencies including those not tendered for. All in all this order fell outside of the court's function. It also constituted a direction to an independent body discharging a public function which it ought to do subject to conditions it may prescribe on its own accord. We may at this stage add that having found as we have done, sections 78, 79, 80 of the Act did not fall to be applied. They only apply when a licence has been issued and here none was issued. Again we are minded to allow this ground.

In the result, this appeal is allowed; we set aside all the orders issued by the trial court on 24th June, 2011 for the reasons set out above. We also order that the respondent do pay the costs of this appeal to the appellant, here and in the High Court.

Dated and delivered at Nairobi this 25th day of September, 2015.

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR