



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: P. KIHARA KARIUKI, PCA, VISRAM & OKWENGU, JJA.)**

**CIVIL APPLICATION NO. NAI 341 OF 2013 (UR 251/2013)**

**BETWEEN**

**ROYAL MEDIA SERVICES LIMITED.....1<sup>ST</sup>  
APPLICANT**

**NATION MEDIA GROUP LIMITED.....2<sup>ND</sup>  
APPLICANT**

**STANDARD GROUP LIMITED.....3<sup>RD</sup>  
APPLICANT**

**VERSUS**

**ATTORNEY GENERAL.....1<sup>ST</sup>  
RESPONDENT**

**THE MINISTRY OF INFORMATION COMMUNICATIONS AND TECHNOLOGY.....2<sup>ND</sup>  
RESPONDENT**

**COMMUNICATIONS COMMISSION OF KENYA.....3<sup>RD</sup>  
RESPONDENT**

**SIGNET KENYA LIMITED.....4<sup>TH</sup>  
RESPONDENT**

**STAR TIMES MEDIA LIMITED.....5<sup>TH</sup>  
RESPONDENT**

**PAN AFRICAN NETWORK GROUP KENYA LTD.....6<sup>TH</sup>  
RESPONDENT**

**GOTV OF KENYA LIMITED.....7<sup>TH</sup>  
RESPONDENT**

**CONSUMER FEDERATION OF KENYA (COFEK).....8<sup>TH</sup>  
RESPONDENT**

*(An application for injunction pending the lodging, hearing and determination of an intended appeal from the judgment of the High Court of Kenya at Nairobi (Majanja, J.) dated 23<sup>rd</sup> day of December, 2013*

in

*Petition No. 557 of 2013*

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**REASONS FOR THE RULING OF THE COURT**

1. In our Order of the **27<sup>th</sup> December 2013**, we allowed the application for injunction pending the lodging, hearing and determination of an intended appeal from the judgment of the High Court of Kenya at Nairobi (**Mr. Justice Majanja**) dated the **23<sup>rd</sup> December, 2013** in Petition No. 557 of 2013. In that Order, we granted an injunction for a period of 45 days from the date thereof but reserved the reasons for our decision. We now wish to give those reasons today.
2. In the application under Notice of Motion dated 24<sup>th</sup> December 2013 made pursuant to **Rules 1(2) and 5(2)(b)** of the **Court of Appeal Rules**, the applicants sought an Order of Injunction against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and a stay of execution of the judgment and orders issued by the High Court at Nairobi in **High Court Petition No. 557 of 2013** on **23<sup>rd</sup> December 2013**, pending the hearing and determination of an intended Appeal against the said judgment.
3. The applicants, Royal Media Services Limited, Nation Media Group Limited and Standard Group Limited, sought Orders in the said application on grounds that their intended appeal was arguable, based on 13 reasons stated in the Notice of Motion. Further, it was the applicants' case that their intended appeal would be rendered nugatory if the Orders sought were not granted. Those grounds were supported by an affidavit sworn on behalf of the applicants by **Samuel Kamau Macharia** on **23<sup>rd</sup> December 2013**.
4. The application arose from a decision of the High Court on the nature and content of freedom of the media protected under **Article 34** of the **Constitution of Kenya**, and whether it has been violated by the respondents in the context of the migration of terrestrial television broadcasting from analogue to digital platform (hereinafter "digital migration").
5. The facts relating to the application, which we earlier outlined in our Order, may be restated as follows. Pursuant to the framework established by the **Convention of the International Telecommunication Union ("ITU Convention")**, a treaty ratified by Kenya in 1964, there are three technologies of television broadcasting: terrestrial, satellite and cable digital platforms. Transmission under the terrestrial television platform is currently undertaken in either digital or analogue form and the purpose of the current migration is to ensure that the terrestrial television is solely on the digital platform. This migration to digital transmission only relates to terrestrial television transmission.
6. Following a series of Conferences under the aegis of the ITU Convention, member states agreed on the planning parameters and criteria for digital terrestrial television broadcasting. States further agreed to formulate and develop draft frequency plans taking account of bilateral and multilateral negotiations carried out by the relevant municipal bodies of the different member states. A process of rationalization of the various national draft frequency plans followed. The last of these conferences, the Regional Radio Communication Conference - 06 (RRC-06) produced the Final Acts of the planning of the digital terrestrial broadcasting service. Among other things, RRC-06 agreed on **17<sup>th</sup> June 2015** as the switch off date for transition from analogue to digital terrestrial television broadcasting for member states present at RRC-06. These Final Acts formed the basis of the Government of Kenya's local preparations to transit terrestrial television broadcasting from the analogue platform to the digital platform.
7. The Government of Kenya first set a series of transitional mechanisms to guide the move from

analogue to digital broadcasting. Among these included a Taskforce which was mandated to *give recommendations to the government on the required policy and regulatory framework to address the introduction of digital broadcasting* and a Digital Television Committee (DTC) to *develop an appropriate switchover strategy*. This Committee held multiple stakeholder consultations and public awareness campaigns. At its 65th meeting held on the **6th August 2013**, the DTC set new switch off dates. In a **Gazette Notice No. 13869** dated **1st October 2013** by the Cabinet Secretary in charge, the intended switch off date and the programme for implementation for the digital migration in accordance with the powers conferred upon him by **section 5A of the Kenya Information and Communications Act (Chapter 411A of the Laws of Kenya)** were published.

8. These facts set in motion the filing of the Petition in the High Court, in which the Court held that:

***“The petitioners are not entitled to be issued with [Broadcast Signal Distribution] BSD licences by the CCK on the basis of their established status or on the basis of any legitimate expectation. Licensing is subject to statutory provisions which allow the CCK in exercise of its mandate to make certain considerations and impose conditions that are necessary for the achievement of the objects and purposes of the Constitution and the law. The issuing of BSD licence to other licensees to the exclusion of the petitioners as alleged in the petition is not a violation of Articles 33 and 34 of the Constitution. ...***

***The implementation of the digital migration is not a violation of the petitioners’ fundamental rights and freedoms and no basis has been made by the petitioner to stop, delay or vary the digital migration process. The process of migration of the broadcasting platform from analogue to digital was consultative and participatory and in line with Kenya’s international obligations.”***

9. It is from the above judgment that this application was borne. The application came before us on the **27th December 2013** having been certified as urgent on **24th December 2013**. At the hearing, Mr. Paul Muite, S.C & Mr. Mansur Issa appeared for the applicants; Mr. Mwangi Njoroge for 1<sup>st</sup> and 2<sup>nd</sup> respondents; Mr. Protas Saende for 4<sup>th</sup> respondent; Mr. Wambua Kilonzo & Ms. Wahito Ndegwa for 3<sup>rd</sup> respondents; Mr. Wanyonyi Wekesa for the 9<sup>th</sup> respondent; Mr. Geoffrey Imende for 5<sup>th</sup> & 6<sup>th</sup> respondents; Mr. Anthony Njogu for the 7<sup>th</sup> respondent and Mr. Henry Kurauka for the 1<sup>st</sup> interested party.
10. At the hearing, counsel for the applicants led by Mr. Muite SC, submitted that the intended appeal raised substantive questions as to meet the requirement for an arguable Appeal. Mr. Muite, SC, argued that the deadline of June 2015 set for digital migration was subject to a 5 year extension period; that the Applicants would suffer prejudice as they have invested Kshs. 40 billion whilst the said investments risked going to waste; that should the said analogue frequencies and broadcasting spectrums be switched off, the Applicants would lose their clients; and that the intended appeal would be rendered nugatory, if successful, should the Orders sought not be granted.
11. Counsel argued further that under the principle of proportionality, this Court should exercise its discretion in granting the injunction sought; that while the switching off of the analogue frequencies and broadcasting spectrums had been done, it could be undone, more so since the 2<sup>nd</sup> and 3<sup>rd</sup> respondents’ action of switching off the frequencies and spectrums was aimed at negating the injunction sought; and that in the circumstances, an appropriate injunction was necessary to serve the ends of justice. These submissions were supported by Mr. Issa, counsel for the applicants, who told the Court that the fact of the application and intended appeal had been made known to the respondents before their action of switching off the frequencies and spectrum, thus barring any claim as to the appropriateness of the injunction sought.
12. In opposing the application, the respondents submitted that the said digital migration had not sprung suddenly as the applicants had been fully represented in the Digital Migration Committee (DMC), as were members of the Media Owners Association (MOA). It was their argument that Article 34 of the Constitution does not entitle the applicants to a digital signal distribution licence as a matter of fact; that the said right is not absolute; that there is no arguable Appeal as the date for digital migration as set by an international convention was neither reversible nor subject to extension; and that the Court ought to balance all interests, including the said benefits of digital

migration; and that the alleged quantum of investment had not been established. The respondents further urged that the import of the applicants' intended appeal was to enroll the courts in policy making in contravention of the doctrine of separation of powers. Finally, it was the respondents' submission that the applicants had not shown that the intended appeal would be rendered nugatory as the applicants had switched off their broadcasts voluntarily on the **23<sup>rd</sup> December 2013**.

13. This Court considered these able submissions of counsel and made appropriate Orders on the **27<sup>th</sup> December 2013** as follows:

**THAT** the Applicants' Prayer 2 in the Notice of Motion dated 23<sup>rd</sup> December 2013 is hereby granted for a period of 45 days from the date of this Order and we accordingly restrain the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from switching off the Applicants' analogue frequencies, broadcasting spectrums and broadcasting services, and if already switched off, to reinstate the same pending the hearing and determination of the intended Appeal on or before 6<sup>th</sup> February 2014;

**THAT** the Registrar of the High Court shall supply the proceedings in the High Court to the Applicants within the next seven (7) days from today;

**THAT** the Applicants shall file and serve their Record of Appeal together with their respective written submissions within seven (7) days of their receipt of the proceedings;

**THAT** the Respondents shall file and serve their respective written submissions within seven (7) days of service of the Applicants' submissions;

**THAT** such submissions shall be limited to a maximum of twenty (20) pages typewritten 1.5 spaced in font size twelve (12).

14. In making our Orders, we considered the applicable law, the applicants' submissions and the respondents' positions as advanced in the pleadings and oral submissions. Given the nature of the application, our decision and reasons therefore must of necessity eschew any preemption of the intended appeal.

15. The controlling principles under which this Court's jurisdiction may be exercised under **Rule 5(2) (b)** of the Court of Appeal Rules (hereinafter Rules) in granting an injunction pending the lodging, hearing and determination of an appeal or intended appeal are now clear beyond peradventure. These principles require

- i. that the applicants have an arguable appeal or intended appeal, which is not frivolous in its grounds; **and**
- ii. that unless the relief sought is granted, the appeal or intended appeal would be rendered nugatory were it to succeed.

16. These requirements are conjunctive; an applicant must meet the two requirements [**See J.K. Industries Ltd v Kenya Commercial Bank Ltd (1982- 88) 1 KAR 1088, Reliance Bank Ltd v Norlake Investment Limited (2002) 1 EA 227 and Ismael Kagunyi Thande v Housing Finance Company of Kenya Limited, Civil Application No. 157/2006 NAI**].

17. This Court's grant of Orders of injunction on the **27<sup>th</sup> December 2013** was founded on our conclusion that the application met these requirements. It now remains to elaborate how we came to the conclusion following consideration of the above principles in the application at hand.

18. The application raised legal questions relating to the extent of Article 34 of the Constitution and the legality or otherwise of the switching off of analogue frequencies and broadcasting spectrums of the applicants. Based on the rights centered approach pursued by the applicants, we were not only addressed on the public interest of the intended appeal, and its policy implications, but we were also urged of private investments, which risked going to waste. To these claims were also counterclaims. In our evaluation of the record before us and the submissions made at the hearing of the application, the issues raised by the applicants cannot be dismissed as merely frivolous,

speculative or idle, but are in our view prima facie substantive as to form the basis of an arguable appeal. We hasten to add that this finding is not conclusive on the merits of the matter neither should it prejudice the intended appeal, which is yet to be brought before us

19. It now remains to consider the second requirement whether the intended appeal would be rendered nugatory, if the injunction is not granted, in the event that the intended appeal is successful. The applicants addressed us on potential loss of business, clientele and goodwill. It was their case, further, that there would be irreversible effects resulting from alleged violation of constitutional and legal rights. The respondents submitted that the applicants had not shown that the intended appeal would be rendered nugatory as the applicants had switched off their broadcasts voluntarily on the **23<sup>rd</sup> December 2013**. Having considered these submissions and the record before us, it is our finding that the second requirement has been met. In our view, although it was contended by the respondents that the application was an attempt to lock the stable door after the horse has bolted, such an approach would serve to defeat justice by entertaining preemptive actions of respondents calculated at sweeping the substrata of intended or existing appeals. Moreover, in considering this second limb, we are also bound to consider the conflicting claims of both sides and the applicant need not demonstrate an overwhelming probability that the application would be rendered nugatory in the absence of the relief sought [See **Reliance Bank Ltd. v Norlake Investment Ltd.** (Supra)]. We must also reiterate at this point our earlier determination that the spirit and letter of **Article 159** of the **Constitution of Kenya** and the overriding principle under **section 1A** and **1B** of the Civil Procedure Act (Cap 21) and **section 3A** and **3B** of the Appellate Jurisdiction Act (Cap 9) enjoin us to administer justice without undue regard to procedural technicalities.
20. In our view, therefore, the twin conjunctive principles were satisfied in accordance with **Rule 5(2) (b)** of the **Court of Appeal Rules**. It is for all the aforesaid reasons that we allowed the Application and accordingly issued the Orders of the **27<sup>th</sup> December 2013**.

**Dated and delivered at Nairobi this 7<sup>th</sup> day of February, 2014.**

**P. KIHARA KARIUKI**

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**PRESIDENT, COURT OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**H.M. OKWENGU**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**REGISTRAR**