IN **THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, MARAGA & MUSINGA JJ.A)**

**CIVIL APPEAL NO. 4 OF 2014**

**BETWEEN**

**ROYAL MEDIA SERVICES LIMITED……1ST APPELLANT**

**NATION MEDIA GROUP LIMITED……2ND APPELLANT**

**STANDARD GROUP LIMITED…..……3RD APPELLANT**

AND

**ATTORNEY GENERAL ……..…1ST RESPONDENT**

**THE MINISTRY OF INFORMATION COMMUNICATION**

**AND TECHNOLOGY…..……2ND RESPONDENT..**

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

**SIGNET KENYA LIMITED……..….....……4TH RESPONDENT**

**STAR TIMES MEDIA LIMITED.....…….5TH RESPONDENT**

**PAN AFRICAN NETWORK GROUP**

**KENYA LIMITED……..…….....……..6TH RESPONDENT**

**GOTV KENYA LIMITED…….....……7TH RESPONDENT**

**CONSUMER FEDERATION OF KENYA….....8TH RESPONDENT**

**WEST MEDIA LIMITED…….....…9TH RESPONDENT**

**(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Majanja J) Dated 23rd December,**

**2013**

**in**

**H.C. Petition No. 557 of 2013)**

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**JUDGMENT OF NAMBUYE –JA**

## 1. INTRODUCTION

The 1st, 2nd, and 3rd appellants, **Royal Media Services Limited, Nation Group Limited and Standard Group Limited** presented Petition Number 557 of 2013 under Articles 2,3,10,20, 22, 23, 33, 34,40,46,47 and 259 of the Kenya Constitution of Kenya, 2010, directed against the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th respondents, the **Attorney General, the Minister of Information and Technology, Communication Commission of Kenya, Signet Kenya Limited, Star Times Media Limited, Pan African Network Group Kenya Limited and GOTV Kenya Limited** respectively. In The course of the proceedings two interested parties were brought on board, namely Consumer Federation of Kenya as the first interested party now the 8th Respondent and West Media Limited as the second interested party now the 9th Respondent.

. The appellants sought:

## 2. RELIEFS SOUGHT IN THE HIGH COURT PETITON.

***1. " A declaration that the petitioners' rights as a broadcaster under Articles 33 and 34 of the Constitution had been infringed and threatened with violation by the 2nd and 3rd respondents.***

***2. A declaration that the respondents in limiting the Broadcast signal licence to five licensees had violated the freedom of establishment of the media contrary to Article 34 of the Constitution.***

***3. A declaration that the petitioners' right of establishment as television broadcasters protected by Article 34 (3) of the constitution is violated and rendered meaningless by the failure to issue the petitioners with digital signal Distribution licences and digital Frequencies.***

***4. A declaration that the proposed switch off date of 13th December, 2013 is punitive and against public interest and infringes on the petitioners right of establishment as media houses and broadcasters and will disenfranchise the publics right to receive information.***

***5. A declaration that analogue and digital broad casting spectrum can co-exist and the 2nd and the 3rd respondents are under an obligation to give to the public the right to choose until such a time that there are adequate number of universal set top boxes in the country.***

***6. A declaration that the petitioners are entitled to be issued with a Broadcasters signal distributors licence and digital Frequencies by the government and in default, they should be allowed to continue with the current analogue broad casting services.***

***7. An order compelling the government through the 1st and the 2nd respondents to issue the petitioners with digital Broadcast signal distributor licences and Digital Frequencies.***

***8. An order of injunction restraining the 2nd and 3rd respondents from switching off the petitioners analogue frequencies broadcasting spectrum and broadcasting services on 13th December, 2013 or at all pending the determination of the issue of Broadcasters signal Distributor licences and Digital frequencies to the petitioners, a reasonable period to roll out digital television broadcasting services and the supply of universal set top boxes to all consumers with televisions sets.***

***9. An order of permanent injunction restraining the 4th , 5th, 6th and 7th respondents by***

***themselves, their licensees and/or agents from broadcasting, distributing or in any way interfering with the petitioners programmes, broadcasting copy righted material and productions or in any way infringing the petitioners intellectual property rights."***

**3. GROUNDS IN SUPPORT OF THE HIGH COURT PETITION.**

The petition was grounded on the facts in its body. In a summary, that the appellants are leading licenced radio and television broadcasters with the 1st appellant having been licenced in 1997, the

2nd in 1998, while the 3rd in 1989; that since then they have invested heavily in the form of staff, installation of broadcasting masts, town transmitters, broadcasting studio facilities, local film comedy and drama productions to the extend of kshs.4o billion for 1st appellant, Kshs. 2 billion for the 2nd appellant and Kshs.2.10 billion for the 3rd appellant; that in view of all these, the appellants had a legitimate expectation that the government would not interfere in their broadcasting business and that any licensing requirements and regulations would facilitate and not impede their broadcasting services.

4. The appellants concede that they are aware of the RRC-04 and RRC-06 International Conferences which were held under the ITU **(International Telecommunication Union)**. They also concede Kenya is a signatory to the I.T.U. They are aware of the International switch off deadline set for 15th June, 2015. They are also aware that in preparation to meet its International obligations, Kenya as a country set up a Task Force to come up with recommendations on migration from Analogue to Digital transmission. The Task Force report also recommended that the appellants as existing analogue broadcasters would be considered for the issuance of digital signal distribution licence.

5. The appellants stand aggrieved because the process initiated by the 3rd respondent to issue a signal distributors licence was unfair, flawed and lacked transparency; that the 1st and 2nd appellants' move to acquire the licence was rejected on a technicality; that the 4th respondent had been issued with a licence ex-gratia earlier while the 6th respondent was issued with one following the flawed licensing process.

6. The appellants second grievance arose from the fact that the 1st respondent had failed in its duty to advise the government to refrain from infringing on the appellants rights guaranteed by Article 34 of the Constitution; to protect the appellant's rights to carry on their business guaranteed by the constitution; to protect the appellants' rights as a licenced radio, and T.V. broadcasting licensees. The 2nd respondent failed to ensure that media broadcasting policies were in accordance with the Constitution of Kenya and that the government does not overstep its mandate in its regulation of the media in broadcasting services; to ensure the availability of affordable and good quality universal set top boxes through physical and policy measures; to advise the government to avail free set top boxes to every citizen; to ensure that all the licenced digital signal Distributors adhere to the minimum standards for set top boxes which should be universal; to advise the Government that it has an obligation to respect the constitution. The 4th to 8th respondents had an obligation to respect the intellectual property rights of the petitioners that are safeguarded and protected by Article 40 of the Constitution.

**7. PETITIONERS ISSUES FOR DETERMINATION BY THE HIGH COURT.**

On the basis of the afore set out set of facts, the High court was invited to determine-

***(i) Whether the switch from analogue to digital broadcasting as was being implemented by the 3rd respondent violated the petitioners rights as broadcasters as guaranteed by Article 34 (2) of the Constitution;***

***(ii) Whether the failure by the 2nd and 3rd respondents to issue the petitioners with broadcast signal Distributors licences was discriminatory and contravenes the petitioner's fundamental rights as guaranteed under Article 34 (3) of the Constitution and the regulation of airwaves and other signal distribution was a violation of Article 34 (3) of the Constitution.***

***(iii) Whether the failure by the 1st and 2nd respondents to establish an authority independent of***

***government control to be in charge of licensing of broad casters and the regulation of airwaves and other signal distribution was a violation of Article 34(3) of the Constitution;***

***(iv) Whether the decision to issue only four Broad cast signal distribution licences excluding the current broad casters who had invested billions of shillings was in contravention of Article 34 (3) of the Constitution.***

***(v) whether the policy decisions of the 2nd respondent being implemented by the 3rd respondent would unreasonably interfere with the petitioner's broadcasting services in violation of the Constitution.***

***(vi) Whether the 2nd respondents' directives and decisions to unreasonably limit and restrict the public right to choose between analogue and digital broadcasting services was unconstitutional of the Constitution?***

***(vii)Whether the migration to digital broadcasting as was being implemented by the government services as guaranteed by the Constitution?***

**8. SUMMARY OF CONTENTS OF AFFIDAVITS IN SUPPORT OF THE PETITIONS.**

The petition was also supported by supporting affidavits deponed on the 22nd day of November, 2013 by **Samwel Kamau Macharia** Chairman Royal Media Services Limited; **Linus Gitahi,** Chief Executive Officer National Media Group Limited and **Sam Shollei** Chief Executive Officer Standard Group Limited together with the annextures thereto. I have perused these and I find that they are a reiteration of the contents of the historical background information and the grievances set out in the petition, hence there is no need for me to reproduce them here.

**9. A GLOBAL SUMMARY OF THE CONTENT OF ALL REPLYING AFFIDAVITS FILED IN OPPOSITION TO THE PETITION.**

The petition was opposed by the respondents' replying affidavits and annextures thereto. The affidavit on behalf of the 2nd respondent was deponed by **Joseph Tiampati Ole Musuni** on the 4th day of December, 2013; that of the 3rd respondent which, apparently is the bedrock of the respondents' case, comprised 138 paragraphs deponed by one **Francis Wangusi** in his capacity as the Director General of the Communication Commission of Kenya; that of the 4th respondent was deponed by one **Waithaka waihenya** on the 3rd December, 2013; that of the 5th and 6th respondents was deponed by one Leo Lee in his capacity as the Managing Director of Star Times Media Limited. For the 7th respondent was deponed by **Mr. Felix Kyengo** the General Manager of GOTV Kenya Limited, a company incorporated in Kenya and fully licenced to conduct business in Kenya; that of the 1st interested party was deponed by one **Stephen Mutoro** in his capacity as the then Secretary General of the 1st interested party, a society registered under the Societies Act Cap 108 of the Laws of Kenya. While that of the 2nd interested party was deponed by **Dr. Philip Muyoti** on 4th December, 2013 in his capacity as a Director of West Media Limited.

10. A part from the 1st interested party now the 8th respondent, **Consumer Federation of Kenya**, who fully supported the petitioner's petition, and even still do so on appeal, the rest of the respondents and the 2nd interested party **West Media Limited** now the 9th Respondent have all opposed the appellants' appeal. I have read all their depositions and find them almost similar in the major respect of the matters in controversy. These will therefore be assessed globally.

11. On Kenya's International obligation under the International Telecommunication Union (ITU), all the respondents are in agreement with the appellants that Kenya acceded to the ITU convention in 1964; that by virtue of this accessation, it became bound by the doctrine of **Pact Sunt Servanta**, where by it is bound to comply with any International treaty obligations initiated under the I.T.U. Two important international conferences targeting modalities on how to migrate from analogue terrestrial broadcasting to digital terrestrial broadcasting were planned and held under the I.T.U. Kenya as a country participated in

both conferences namely the RRC-04 and the RRC -06 and made representations. The latter conference namely the RRC 06 is the one which came up with the final analogue switch off date ASO of 16 th June,

2015.

12. In fulfillment of its international mandate, Kenya as a country first of all rolled out its own home grown ICT policy effective March, 2006. It then prepared a report which was submitted to the RRC-06 conference in Geneva Switzerland. Kenya also participated in the drawing up of the resolutions arrived at at the RRC-06 Conference, popularity referred to in these proceedings as the final Acts of the RRC-06.

13. On coming back home, the country put in place a Task Force to that effect. The membership of the Task Force comprised all stake holders in the broadcasting industry including representatives of the appellants. The Task Force came up with recommendations which were implemented by the 1st, 2nd and 3rd respondents. Relevant amendments to the Kenya Information and Communication Act 1998 and regulations on digital migration licensing were put into effect.

14. One of the terms of the policies on digital migration was that, there be separate licensing for content providers and digital signal distribution service providers. This was in line with making the industry more competitive in order to improve on the efficiency of service delivery to the consumers, allegedly in line with the provisions of the law and the regulations, the 3rd respondent as a regulator decided to float the licensing bids through the tendering process. The appellants participated in that process through their flagship **National Networks Signals limited** but then lost during the first round. Appellants appealed to the Public Procurement Administrative Review Board and they also lost. The appellants then appealed to the then Permanent Secretary for Information and Communication who offered them a conditional licence which the appellants rejected and instead turned to Court with a flurry of litigation which they have kept on losing.

15. Turning to their specifics, **Mr. Francis Wangusi** for the 3rd respondent maintained that the 3rd respondent acted within the law and the regulations and is faultless. As for the 4th respondent, **Mr.Waihenya** deponed that the 4th respondent is an outfit of the Kenya Broadcasting Corporation a public entity. It was given a digital signal distributors licence ex-gratia way back in 2009 in line with the recommendations of the Task Force on digital migration for which the appellants never objected. That the 4th respondent had already commenced operations and had even carried and aired with the consent of the appellants, the appellants' content during the simulcast (pilot project) period. The 3rd respondent takes issue with the appellants' about turn on the migration process. That the 4th respondent had no hand in the process that led to the failure of the appellants to be awarded a DSD licence.

16. As for the 5th and 6th respondents, they contended that they participated in the tendering process which to them was fair, open and transparent. They fairly worn and they should be left to carry on their assignment. The 7th respondent on the other hand denied trespassing on the appellant's contents. They only aired these pursuant to agreements reached between them and the appellants, which agreements had been exhibited to their replying affidavit and had not been denied by the appellants. The 9th respondent decried the protracted litigation in Court which was hurting the 9th respondent who moved into the industry on the promise by the 3rd respondent that there was going to be a level playing field. It is further the 9 th respondents' stand that the appellants are just dangling the consumers' plight as a carrot through which to champion their own private commercial monopoly of the broadcasting industry hither to known under the analogue broadcasting arrangement.

17. Generally on the consumers' plight, the respondents deponed that consumers were brought on board; that they too participated in the Digital Migration Committee meetings; that they were sufficiently sensitized on the benefits of migrating from analogue broadcasting to digital broadcasting. That the government has done its best by waiving duties and other related taxes and making available the importation of set top boxes at affordable prices and in large quantities to make these easily accessible in the open market. That the consumers too have been sensitized on the switch off date and the exercise should be allowed to proceed un impeded by the appellants.

## 18. SUMAMRY OF THE HIGH COURT DECISION

In the High Court, the parties elected to proceed by way of written submissions, followed by oral highlights. In a judgment delivered on the 23rd day of December, 2013, **David Majanja J** ruled against the appellants. In dismissing the appellants' petition, the learned trial Judge made the following final orders:-

***Summary of Findings***

***136. Having considered the petition my findings on the three issues framed for determination are as follows:-***

***(a) Whether and to what extend the petitioners are entitled to be issued with BSD licence by the CCK and whether the issue of the licences to other licensees to the exclusion of the petitioners is a violation of Article 33 and 34 of the Constitution.***

***The petitioners are not entitled to be issued with 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 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.***

***(b) Whether implementation of the digital migration constitutes a violation of the petitioners fundamental rights and freedoms and if so whether the process should be stopped, delayed or varied in order to vindicate or a meliorate the petitioners fundamental rights.***

***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 Kenyas' International obligation.***

***(c) Finally as regards the 4th, 5th, 6th and 7th respondents whether they have breached and or violated the petitioners' intellectual property rights.***

***The petitioners have not established that their intellectual property rights were violated by the 4th, 5th, 6th and 7th***

***respondents.***

***137. The result of this determination is that the petition is dismissed. I now turn to consider the issue of whether the petitioners should be mulcted with costs.***

***COSTS***

***138. The general principle is that costs are at the discretion of the Court. In cases of enforcement of fundamental rights and freedoms, the Court will be reluctant to award costs against a person who has lost as this would hinder the free access to the Court provided under Article 22 of the Constitution (See John Harum Mwau & others versus the Attorney General & others Nairobi Petition No. 65 of 2011 ( unreported) paras 179-182)***

***139 However in this case the respondents are deserving of costs. Several factors have influenced my decisions in this respect. First, as I have outlined in the Judgment the process of digital migration***

***process was long drawn and the petitioners participated in its development and implementation. The switch-off date of 13th December, 2013 was reached with the participation and consent of the petitioners and despite having so participated filed the application very late in the day.***

***140. I also find and hold that the petitioners' substantial interest in filing this petition as evidenced by the prayers in the petitioner is to secure BSD licences. I am convinced that these proceedings were intended to protect the petitioners commercial interests as evidenced by the minutes of the 65th DTC meeting I have set out in paragraph 107 above., these proceedings were not in the nature of public interest litigation and any concern of the public by the petitioners was a by- product or a collateral benefit of their agitation for BSD licences.***

***141. It is on these circumstances that I award costs of this***

***petition to the respondents and 2nd interested party.***

***Disposition***

***142. The petition be and is hereby dismissed with costs to the respondents and 2nd interested party."***

## 19. SUMMARY OF THE APPELLANTS GROUNDS OF APPEAL

17. The appellants were aggrieved by Majanja J's decision dismissing their petition. They proffered an appeal to this Court citing fifteen (15) grounds of appeal. In a summary, these are that the learned Judge erred in law in-

(1) Holding that the digital migration as was being implemented by the 2nd and 3rd respondents was not in violation of the appellants Constitutional rights.

(2) Holding that the appellants were not entitled to a digital broadcasting licence and digital Frequencies despite the provision of Article 34 of the Constitution, 2006 National ICT policy and the recommendation of the government Task Force on migration.

(3) Holding that the rights and freedoms guaranteed under Article 34 of the Constitution were subject to government policy that was formulated prior to the promulgation of the Constitution.

(4) Failed to interpret and give effect to the clear express rights and duties under Articles 33 and 34 of the Constitution.

(5) Misinterpreted the transitional provisions and erred in law in holding that the 3rd respondent was the body contemplated in Article 34 of the Constitution to regulate the licensing of broadcasters despite it being wholly controlled by the government.

(6) Holding that any claim for the issuance of a Broadcast signal Distribution licence was barred by the doctrine of issue estoppel and was a collateral attack on the decision of the Public Procurement Administrative Review Board.

(7) Holding that the appellants did not have a legitimate expectation that they would be granted digital licences and digital Frequencies on account of their substantial investment in broadcasting.

(8) Holding that the appellants' intellectual property rights were not violated by the Respondents in broadcasting the appellants' programmes and content without their consent.

(9) Holding that infringement of intellectual property rights could not be the subject of a Constitutional petition.

(10) Holding that the Regional Conference Agreement of 2006 could be enforced in violation of

the Constitution and failed to appreciate that all commitments and obligations under a treaty or convention were subject to the Constitution.

(11) Misdirected himself in disregarding the uncontroverted fact that the award of the digital broadcasting license to the 6th respondent was procured through bribery and corruption with 5% of the shareholdering being ceded to government officials to facilitate the award of tender.

(12) Failing to consider the structures and spirit of the constitution and instead dwelt and based his decision on a selective and incorrect reading of the 2006 ICT policy, 2007 government Task Force Report and the Digital Television Committee Minutes.

(13) Holding that the petitioner could not seek relief in Court on the grounds that they had failed to apply for a broadcast signal distribution licence through the National Signal Networks Limited without considering the unreasonable conditions imposed by the 2nd Respondent.

(14) Striking off paragraphs of the petition and supporting affidavits without any formal application being made and therefore exceeded his jurisdiction.

(15) Completely misunderstood the constitutional issues that had been framed for determination, the Appellants submission, and the authorities cited to him and consequently arrived at the wrong decision.

20. In consequence thereof, the appellants prayed for orders that the appeal be allowed with costs; the judgment and decree of **David Majanja J** of 23rd December, 2013 be set aside and judgment be entered as prayed in the petition dated 22nd November, 2013 and that the Court grants such further reliefs as it deems appropriate to give effect to the constitution.

21. The above grounds can be clustered into the following:-

***(i) Wrongfulness or otherwise in the learned trial Judge's exercise of judicial discretion in striking out paragraphs 50 & 51 of the petition and paragraphs 16, 17 & 18 of the supporting affidavit of Samuel Kamau Macharia and Paragraph 19 of the supplementary affidavit of Linus Gitahi.***

***(ii) Infringement on appellants' intellectual property rights.***

***(iii) Infringement on the appellants 'legitimate expectation.***

***(iv) Applicability or otherwise of the doctrine of issue estoppels.***

***(v) Failure to realign the various Digital migration policies with prescriptions in the Kenya Constitution 2010.***

***(vi) The legal status or locus standi of the CCK as was constituted as at the time actions complained of were executed by it vis avis the provisions of Article 34 (5) of the Kenya Constitution 2010.***

**22. DIRECTIONS OF THIS COURT ON THE MODE OF PROCEDURE IN THE DISPOSAL OF THE APPEAL.**

On the 27th day of December, 2013 this Court gave the following directions under item eleven (11) of the orders made on that date:-

***"(11) We make the following orders pending the delivery of the full ruling.***

***(a) That the applicants prayer 2 in the Notice of motion dated 23rd December, 2013 is hereby***

***granted for a period of forty five (45) days from the date of this order and we accordingly restrain the 2nd and 3rd respondents from switching off the Applicants analogue frequencies, broad casting spectrum and broadcasting services, and if already switched off to reinstate the same pending the hearing and determination of the intended Appeal on or before 6th February, 2014;***

***(b) 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.***

***(c) That the applicants shall file and serve their record of appeal together with their respective written submission within seven (7) days of their receipt of the proceedings.***

***(d) That the respondents shall file and serve their respective written submission within seven (7) days of service of the Applicants submission.***

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

***12. In exercise of our discretion, we order that the costs in this Application be in the intended Appeal"***

**23.PARTIES SUBMISSIONS**

**(A) APPELLANTS SUBMISSION**

Oral highlights in Court were based on submissions filed in obedience to this Courts order of 27th day of December,2013. The first to take the stand on behalf of the appellants was **Mr. Paul Muite** Senior Counsel. To **Mr. Muite**, a proper construction of article 33 , 34 of the Constitution is one which provides that the public has a right to receive information and the media has a right to provide that information. That the appellants were genuinely aggrieved when they moved to the seat of justice in the High Court seeking to redress the violation of their rights under Articles 33 and 34 of the Constitution. The appellants are still aggrieved and that is why they are before the seat of justice in this Court. It is undisputed argued **Mr. Muite** that the appellants are already established in the media industry and all that they went to the High Court seeking to enforce was for the 1st, 2nd and 3rd respondents to facilitate them to continue doing what they knew best without interference from the 1st , 2nd and 3rd respondents.

24. Senior counsel **Mr. Muite** also contended that it was not correct as portrayed by the learned Judge of the High Court that appellants wanted a monopoly or were bent on frustrating the migration process from analogue broadcasting to digital broadcasting. All that the appellants were seeking for was that they were ready and willing to migrate from analogue to digital but in the condition they were in namely, to be allowed to translate their broadcasting from analogue to digital. The appellants are opposed to being told, coerced and forced by the 1st, 2nd and 3rd respondents to develop their content and then hand them over to the 5 th and 6th respondents to air them on the appellants' behalf without their consent, as the 4th, 5th and 6th respondents are appellants' competitors in the media industry. Also accountability may be a problem as the appellants will have no hand in what the 4th, 5th and 6th respondents may choose to air or not to air.

25. On the issue of the number of entities to be licenced under the digital regime, it is senior Muite counsels' argument that there is nothing in the initiating policies stemming from the 2006 ITU Conference that makes suggestion on the number of licences to be issued. This was the making of the 1st, 2nd and 3rd respondents. This arrangement has led to the appellants as the incumbent media providers being denied licences and instead such licences being given to new entrants into the media industry. To **Mr. Muite**, this was an affront to the very reason fronted for moving from analogue to digital which was aimed at increasing Frequencies as opposed to stiffling them. Opening up the industry was meant to bring on board more players in this industry as there was no suggestion that there would be shortages.

26. Learned senior counsel concedes that the Task Force report was meant to be a vehicle that the 1st, 2nd and 3rd respondents were to use to facilitate the migration process. This had its roots in the 2006 ITU conference which predates the Kenya Constitution 2010. It policies were used wrongly to withhold the licence from the appellants without considering whether these complied with the requirements of the current constitution or not. To senior counsel Muite, they do not and should not have been relied upon by the learned trial Judge to with hold reliefs sought by the appellants. It is his stand also that this Court is properly mandated to correct the error made by the learned Judge by reversing his decision.

27. **Mr. Kimani Kiragu** learned counsel also appearing for the appellants reiterated the stand taken by senior counsel **Mr. Muite** that the appellants are well known personalities in the media industry. Appellants `have invested substantially in this industry a matter well recognized by the 1st, 2nd and 3rd respondents both in the Task force report on the digital migration process and the internal ICT policy. Whatever content the appellants prepare for broadcasting or acquire for broad casting falls within the definition of intellectual property protected by the constitution and as such the 4th to the 7th respondents had no mandate to air any of that content without the consent of the appellants.

28. **Mr. Kimani** went on to submit further that appellants have hitherto been practicing what they call Free To Air (FTA) broadcasting where consumers watch their programmes free of charge. They appellants are still willing to do so after migrating to digital broadcasting. The 1st, 2nd and 3rd respondents have no right to frustrate this effort on this account, argued **Mr. Kimani**, the learned trial Judge was wrong in failing to respect that arrangement. Instead the Judge went on to promote the 1st, 2nd and 3rd respondents political and commercial interests.

29. Turning to the RRC-06, the internal ICT policy 2006, and the Task Force report on migration, **Mr. Kimani** urged that all these recognized the appellants presence in the industry. Implementers of these policies were duty bound to realign them to the constitutional provisions in order to ensure that the appellants entrenched constitutional rights were not infringed by the implementation of these policies. It is **Mr. Kimani's** stand that the appellants had sufficiently demonstrated the infringement of their rights before the High Court but the High Court wrongly failed to find for them an error the appellants are asking this Court to reverse.

30. **Mr. Murgor** also for the appellants on the other hand submitted that they acknowledge that Kenya is part of the International Community and by reason of which it is part of the migration process from analogue broadcasting to digital broadcasting. The appellants too have embraced this process added **Mr. Murgor**, All that the appellants were saying when they moved to the High Court to oppose the then proposed shut down date of 13th December, 2013 as the migration date set was that there were genuine concerns which needed to be addressed by the 1st, 2nd and 3rd respondents before the implementation of the switch off date. These involved the Government's intervention to make the accessibility of set top boxes to ordinary Kenyans more available as opposed to abandoning these citizens to market forces and secondly for setting in place a fair process for licensing of content carriers. To **Mr. Murgor**, the learned trial Judge was wrong in declining relief to the appellants on allegations, that appellants were attempting to block the migration process in order to protect their commercial interests. It is **Mr. Murgor's** view that the learned trial Judge adopted a wrong approach to the decision making process as he made up his mind first and then started working towards it. All that the appellants did was to express genuine concerns that there were no adequate inbuilt redress mechanism in the implementation policy to cushion the appellants who had not been licenced as carriers against the licenced carriers in the event these licenced carriers turned predatory, extortionate and or exploitatory.

31. **Mr. Murgor**, continued that the appellants had a legitimate expectation that Kenya being a Democracy which embraces free market, policies, they appellants would be considered for licencing as own content carriers as opposed to being required to do so through 3rd parties. Lastly that existence of an alternative avenue for relief was no bar to the appellants seeking redress in the High Court manner done considering that what they were championing before the High Court first was protection of appellants constitutional rights, and secondly to prevent the 1st, 2nd and 3rd respondents from disobeying their own policies.

32. **Mr. Kurauka** learned counsel for the 8th respondent fully supports the appellants appeal on the grounds that the appellants had raised genuine concerns for the benefit of the consumers which the 1st, 2nd and 3rd respondents needed to address before the implementation of the migration process in order to make the process credible and avoid prejudice, unfairness, and hardship to all stakeholders. To **Mr. Kurauka**, the 8th respondent is not opposed to migration from analogue to digital, but is opposed to the proposed timelines for migration because the 1st, 2nd and 3rd respondents have not addressed the genuine concerns of the consumers namely lack of civic education, lack of sufficient public awareness programmes, lack of adequate time to prepare to migrate; lack of intervention in the market forces to bring down the prices of the Gadgets (set top boxes). **Mr. Kurauka** was also of the opinion that there is no need to hurry as the International switch off date of 15th June, 2015 is far away enough to enable remedial measures to be taken before its implementation country wide. That care should be taken to ensure that the process complies with the National values enshrined in Article 10 of the Constitution. **Mr. Kurauka** stressed that Kenya should learn from the experiences in Tanzania and avoid hurrying with the process. Lastly that care should be taken to avoid infringement on the consumers' right to receive information.

**33. B. FIRST AND SECOND RESPONDENTS SUBMISSIONS**.

Turning to the respondents' submission **Mr. Mwangi Njoroge** leading **Mr. Humphrey Moimbo** for the 1st and 2nd respondents opposed the appellants appeal on the grounds that the same is unmeritorious; that the learned trial Judge exercised his discretion Properly when he struck out paragraphs 50,51 and 73 of the petition and paragraphs 16,17,18 and 32 of the supporting affidavit **of S.K. Macharia** and paragraph 19 of the supporting affidavit of **Mr. Linus Gitahi** as these were based not only on unfounded but also unsubstantiated allegations of bribery and corruption. These also offended the law on affidavits which requires that affidavits be deponed based on the deponents, own knowledge of the facts, or on statements of beliefs and information. The paragraphs struck out by the learned Judge also offended the rule on pleadings. As such, the learned trial Judge rightly exercised his inherent jurisdiction to strike out scandalous material in order to pave the way for speedy disposal of the matter.

34. Turning to the standard of proof, it was **Mr. Njoroge's** arguments that the appellants failed to prove their allegations (i) that they appellants and not their would have been flagship **National Signals Networks Limited** had applied for a Broadcast Distributors licence, (ii) that the application was rejected on flimsy grounds, in order to confer an undue advantage to abid by a Chinese consortium, (iii) that the process was flawed, (iv) that the 6th respondent does not have the requisite 20% Kenyan Equity; (v) that any licence had been issued without following proper procedures, (vi) that the country was not yet ripe (ready) to switch to digital television Broadcasting, (vii) that the 170,000 set top Boxes already on the local market were not universal, (viii) that Star Times was facing financial problems, (ix) that the government had not instituted measures for the availability of set top boxes or that these were out of reach of the Mwananchi, (x) that Tanzania Migration process failed , (xi)that the Kenyan and the Tanzanian experience will be similar. Lastly neither was there proof that the petitioners would incur losses if their content were to be carried by the already licensed content carriers.

35. Turning to constitutional interpretation by the learned Judge, **Mr. Njoroge** argued that the learned Judge committed no error in his construction and or interpretation of the constitutional provisions because under Articles 10 and 159 of the constitution, the Court is mandated to protect and uphold the constitution, protect parties who are not parties to matters before it from being unjustifiably scandalized without being given an opportunity of being heard. That the Court was justified in upholding the implementation of policies that the appellants had been aware of and had been familiar with for eight (8) years as they had been part of the Task Force which formulated the policies and the committee formed for the implementation of those policies and in respect of which there had been no demonstration as to how the implementation of these policies infringed the appellants rights enshrined in Articles 33 and 34 of the Constitution. To **Mr. Njoroge**, Article 34 of the Constitution does not provide for an automatic right to a digital broadcasting licence. That a distinction has to be made between the right to broadcast which the appellants were already enjoying to the right to digital signal distribution for which the appellants were to compete for along side other competitors. In applying the law and procedures evenly, the 1st and the 2nd respondents were simply complying with the principle of equality, reasonableness, fairness in line with

the national values in Article 10 of the Constitution.

36 On the necessity to forge a head with the implementation process, **Mr. Njoroge** argued that Kenya as a State party to the **ITU** is under an obligation to fulfil obligations under the convention which Kenya is required to perform in good faith. In fulfilment of this International obligation, Kenya came up with the internal ICT policy to facilitate Kenya's Migration to Digital Broadcasting. 1st and 2nd respondents are alive and acknowledge Article 34 of the Constitution protects media freedom, but to them this does not outlaw application of licensing procedures that are necessary for the regulation of the distribution of airwaves. This regulation **Mr. Njoroge** argued is independent of control by the government, political or commercial interests, but the process does not guarantee any single person to any kind of licence without procedures. The decision to issue or not to issue a Broadcast Signal Distribution licence lay solely in the preserve of the 3rd respondent who decided that the tendering process was the proper mode of licensing. The appellants acceded to and were part of the tender licensing process, and when they lost out on this, the proper procedure to redress their grievance should have been through an appeal against the Public Procurement Arbitration Review Boards' decision under the Public Procurement and Disposal Act, a process which cannot be substituted for by a petition. The Court was right argued **Mr. Njoroge**, in shutting out the appellants' claim as in presenting it by way of a petition, appellants were simply collaterally re-opening and making an attempt to re-litigate a matter which had already been heard and determined through the tendering process procedures.

37. On conflict of law, **Mr. Njoroge** contends that the constitution cannot unjustifiably displace the succinct provisions of any statute such as the Public Procurement and Disposal Act, 2005 which provides for a mechanism to deal with procurement procedures. The appellants indolence in failing to diligently challenge the issuance of the digital Broadcasting licences to the 6th respondent **argued Mr. Njoroge,** did not give them an excuse to reopen and re-litigate the licence issue before the High Court.

38. On policy making, **Mr. Njoroge** argued that the power to make policy decisions regarding technology was vested in the Ministry and the Communication Commission of Kenya (CCK) by the legislature submitted **Mr. Njoroge**. These are the two entities which had been given the responsibility to weigh, balance and take into account commercial, consumer and technical considerations through a participatory process to come up with an opportune policy suitable to the Kenyan circumstances, which policy had also to be based on Kenya's endevour to uphold her international undertaking under the ITU and her regional commitments under the EACO (East African Communication Organization). In its attempt to review the exercise of executive authority, **Mr. Njoorge** said, the Court has to bear in mind the doctrine of separation of powers which should be looked at with a deference and the presence of wide latitude given to public bodies in developing and implementing policies which process Courts of law are neither expected nor required to micro- manage. On this account, **Mr. Njoroge** does not expect this Court to review policies which had been taken on through a consultative basis by applying experiences from other countries.

39. On the locus standi of the CCK, (Communication Commission of Kenya) **Mr. Njoroge** argued that the CCK was the only body that was in existence then as mandated to deal with the issues relating to licensing of communications as at the time of the application for licence by the **National Signals Networks Limited** was made and that it, the CCK was therefore the only body mandated to deal with matters of BSD licensing.

40. On alleged infringements of intellectual property rights of the appellants, **Mr. Njoroge** argued that this should form the basis of a civil right litigated between two individuals via an ordinary civil suit and should not have been included in a petition agitating for infringement of constitutional rights. The above not withstanding, the 1st and 2nd respondents contended that the broadcast of the content of the appellants by other broadcasters' signal distribution companies joined as Co-respondents to the petition were carried by appellants express consent and that there was no change of content provided for distribution. On that account, the 1st and 2nd respondents urged the Court to find that the learned trial Judge understood the constitutional issues that had been framed for determination by him as well as those that arose from the facts as they had been placed before him by the parties and in arriving at its conclusion, the court comprehensively addressed and acquainted itself on the history of the digital

migration process, applied the law correctly to the said appraisal of facts and arrived at the correct conclusion which is un assailable.

**41. C. SUBMISSIONS OF THE 3RD RESPONDENT.**

**Mr. Wambua Kilonzo** learned counsel for the 3rd respondent in opposition to the appeal fully associated himself with submissions of the other learned counsel made on behalf of the Co-respondents. He adopts the deposition in the replying affidavits filed in opposition to the petition in the High Court as laying out detailed accounts of the history on Digital migration process in this country. The appellants' **Mr. Wambua** said, in their pleadings did not move to attack the procedures, decisions, actions and steps taken prior to arriving at the switch off date. Their move to attack that date perse through their submissions does not hold. What the appellants' complaint to the High Court, **Mr. Wambua's** submitted, was that by reason of their long investment in the Broadcasting industry, they were entitled to be granted a licence under Article 34 of the Constitution as of right. To **Mr. Wambua**, the learned High Court Judge considered, the facts, drew out issues for determination and fully determined those issues. Instead of the appellants pointing out what errors were committed by the learned Judge, they have instead introduced anew cause of action which this Court has to exercise caution when dealing with and treat their failure to raise it in the High Court as a waiver. These new issues according to **Mr. Wambua** touch on such issues as (i) allegations that the 2006 ICT policy were not revised to align themselves to the requirements of the Kenya Constitution 2010, (ii) that the Task Force policy was implemented discriminately, (iii) that the current Broadcasting signal distributors were not selected through an equitable process, (iv) that appellants had not been given equal protection of the law, (v) that licences so far issued do not reflect a Kenyan identity or its cultural diversity, (vi) that there was no public participation in the licensing process.

42. On the identity of the entity properly mandated so to over see and or implement the migration process, **Mr. Wambua** argued that the body properly so mandated was the CCK as it was the statutory regulator under the Information and Communication Act as at the time of promulgation of the 2010 Constitution. The 5th schedule of the new Constitution provided for a period of 3 years within which to legislate on this issue. The issue of whether CCK is the body envisaged under Article 34 or not has been a subject of litigation at the High Court. The High Court had ruled in favour of the 3rd respondent and that litigation was pending on appeal in this very Court of Appeal. This Court had to be cautious in making a pronouncement on this issue cautioned **Mr. Wambua**, as in doing so, it might preempt the outcome of the pending litigation (appeal). Alternatively this Court was urged to confirm the High Court's stand that the issue of whether CCK was the body envisioned under Article 34 of the Constitution was resjudicata on account of a similar ruling by the same Judge in litigation.

43. On the totality of the process of migration from Terrestrial analogue Broadcasting to Terrestrial Digital Broadcasting, **Mr. Wambua**, argued that this process had not been executed through legislation but through executive actions. These were through the country's commitment to the ITU Conferences RRC 2004 and 2006, translation of the resolutions in RRC 06 into action plans through the Task Force formed by the relevant ministry to midwife the migration process. Also though the attendant ICT policy of 2006 and the giving effect to the 19th E.A Countries Communication Congress which came up with a resolution to separate the content providers from the signal distribution carriers. To **Mr. Wambua**, this was in line with the principle of good governance, Equity, sustainable development and efficient utilization of natural resources (Airwaves are a scarce natural resource) in line with the principles enshrined in Article 10 of the Constitution. It is this same executive action which came up with the decision that award of Digital signal distributorship licences should be through the tendering process. The 1st and 2nd appellants subjected themselves to this process through a subsidiary they had formed for that purpose (**National Signal Networks Limited**) but lost to the 4th and 6th respondents who are the only current two Digital signal content carriers. It is **Mr. Wambua's** contention that the High Court was right in holding that it had no authority to interfere with the exercise of that executive action and this court is urged to affirm that stand. They also argue that even if this Court were to hold that the said executive action had to align itself with the constitution, the Court is urged to note that this same Constitution vests different functions in State organs and the 3rd respondent is such a State organ whose functions should not be micro-managed by a Court of law.

44. Turning to the actual licence, **Mr. Wambua** argued that the 3rd respondent had regulations in place. These were used as guides in the licencing policy. Key of these was the requirement that the signal Distributors do not carry any Broadcasters content without their consent and that licences are not issued as of right. **Mr. Wambua** therefore urges this Court to affirm the High Court's stand that appellants were not entitled to a distributors' licence as of right, more so when they intended to play the double role of being both content providers as well as carriers without making provision for basic concerns for other licensed content providers not licensed as such. There is nothing in article 34 argued **Mr. Wambua** which mandates this Court to issue a distributors licence to the appellants as in doing so, the Court would be usurping executive power and may also open a flood gate of litigation for other players in the industry coming to Court to seek direct licensing. Such a move would be contrary to the provisions of Article 34 which does not exclude regulations.

45. On the final orders issued by the High Court which should be affirmed by this Court, **Mr. Wambua** argued that there had been no demonstration as to how the 2nd, 3rd, 4th, 5th and 6th respondents had violated the appellants rights under Article 34 of the constitution; that appellants are to blame for their woes in failing to take advantage of the window availed to them by the government vide the letter of 22nd July, 2011; that appellants complaints have been overtaken by events upon the coming into effect of the Kenya Information and Communication (amendment bill 2013) effective 2014; that the doctrine of legitimate expectation is not interchangeable with the right of entitlement as of right of a licence under Article 34 of the constitution. Still maintains that the claim to infringement of intellectual property right is not only a civil claim but it has also been directed to the wrong forum; that there was no declaration which sought to quash the final acts of the RRC-06 and lastly that the offending paragraphs of both the petition and the supporting affidavits were properly and procedurally struck out by the High Court.

**46. D.SUBMISSIONS ON BEHALF OF THE 4TH RESPONDENT.**

**Protas Saende,** learned counsel for the 4th respondent has also opposed the appellants appeal. He submitted that the 4th respondent is one of the two current licence holders for Digital distribution. The 4th respondent came into being following the recommendations of the Task Force on the Digital migration policy, formed to formulate policies to give effect to the RRC 2006 Acts. The 4th respondent concedes that it carried the content of the appellants on its signal distribution during the simulcast (pilot project) exercise, but such carriage was by mutual consent of the appellants: The appellants raised no complaint thereafter from that arrangement regarding alteration of their content. **Mr. Saende** also adopted and reiterated both the deponements and the submissions of Co-respondents on the history of the migration process from Analogue transmission to Digital transmission. It was also **Mr. Saende's** stand that appellants were fully aware and were also involved in that process. Also added that the appellants only had themselves to blame as they declined to take advantage of the alternative route availed to them by the government. As such, they have no justiciable rights arising from alleged infringement of Article 34 of the Constitution. The appellants cannot also complain of unfair exercise of either administrative or executive action when they have all along been party to such arrangements.

**47. E. SUBMISSIONS ON BEHALF OF THE 5TH AND 6TH**

**RESPONDENTS.**

**Geofrey Imende** for the 5th and 6th respondents urged the Court to dismiss the appeal. To learned counsel, it is not correct as argued by the appellants that they were entitled to the broadcasting signal distribution licence irrespective of whether they fulfilled the laid down regulations requirements or not. To counsel, the first and second appellants participated in the decision making process which resolved as recommended by the Task Force report on digital migration process that the first licence be given to 4th respondent through KBC, because KBC is a public corporation, while the 2nd one was to be issued through a competitive open tender process. The 1st and 2nd appellants' consortium **National Signals Networks Limited** indeed participated in the tender process but lost. It appealed against that loss but also lost. For this reason, the appellants were estopped from raising before the High Court through a constitutional petition and now this Court through this appeal the very grounds they raised for appeal before the Public Procurement Arbitration Board. To **Mr. Imende**, the appellants failed to move to the

High Court to challenge that process through a judicial review. They cannot therefore be heard to complain. It is **Mr. Imende's** further arguments that reopening this process will reopen the closed procurement process to the detriment of the winning entity in that process namely the 6th respondent. It will also amount to an abuse of the Court process as whatever was being complained of by the appellants through their fronted consortium National Signal Networks Limited had been exhaustively determined.

48. **Mr. Imende** also maintained that there had been no demonstration that appellants rights had been infringed under Article 34 of the constitution; that the 3rd respondent complied with all the required prerequisites with regard to the issuance of the second licence; that the requirement of cultural diversity does not rule out the inclusion of other Nationalities in the acquisition of the BSD licence. Added that appellants had only themselves to blame as they were offered an alterative route to acquire a licence which they turned down citing presence of unreasonable terms which they did not move to Court to quash.

49. As for the Judgment sought to be impugned, **Mr. Imende** urged this Court not to upset the reasoning of the learned trial Judge as it had been based on sound facts and the law placed before him. To **Mr. Imende,** the learned Judge rightly struck out the offending, un supported material because there was no supportive proof. Laments there was no sufficient time to call for cross- examination of the deponents considering the time line which had been set for the disposal of the matter but the Judge was asked to strike out the offending paragraphs in the course of the submission which was proper. **Mr. Imende** also argued that the learned Judge rightly applied the doctrine of issue estoppel as issues placed before him for litigation by the appellants had already been litigated upon in other forums. The appellants were also guilty of non disclosure of material facts as they failed to disclose to the Judge that they had challenged the issue of the licence before the Public Procurement Arbitration Review Board and lost.

50. **Mr. Imende** also maintained that the appellants' plea of breach of their intellectual property rights does not hold as there was no demonstration that the 4th, 5th and 6th respondents had trespassed on to their contents without their consent. Alternatively, even if there was such breach, then the proper forum to redress that grievance should have been a civil action through a civil suit. Lastly that the learned Judge was right in holding that appellants were pursuing their own commercial interests as all that they were complaining about was that by virtue of their investments in the industry they should have been issued with a licence as of right.

**51. F. SUBMISSIONS OF THE 7TH RESPONDENT**.

**Mr. Ngatia** learned counsel leading **Mr. E. Monari** and **Mr. A. Njogu** for the 7th respondent on their part re-echoed what had been echoed by other learned counsel for the co-respondents a head of him that appellants participated in the entire migration process as well as the process culminating in the issuance of the current two licences one to the 4th respondent Signet and a 2nd one to the 5th respondent **Pan Africa group of companies (K) Limited.** The appellants' flagship **National Signal Networks Limited** participated in the tendering process but lost. They followed the inbuilt grievances redress mechanism within the public procurement mechanism procedures but they also lost. They had an opportunity to move to the High Court and challenge the decision of the Public Procurement Arbitration Board through a judicial review process but they chose not to. With this, **Mr. Ngatia** argues, the appellants lost their right to complain about not only the process leading to their failure to be awarded a signal Distributors licence, but also alleged infringement of theri rights.

52. It is further **Mr. Ngatia's** argument that the 1st and 2nd appellants participated in the selection of the switch off date. They had even agreed to have their content carried by the 4th and 7th respondents since 2009. There are commercial agreements to that effect tendered in evidence and not denied by the appellants. The 1st and 2nd appellants only changed their minds and moved to Court to challenge the switch off date for their own commercial interests. **Mr. Ngatia,** also adds that the 1st and 2nd appellants' failure to make a break through for the issuance of the BSD licence through the open and competitive procurement process not withstanding, the Ministry through the relevant permanent secretary offered them a conditional avenue which they refused to take up citing unreasonable conditions without specifying what they meant by **"unreasonable".** They appellants took no action to have those conditions

either varied or withdrawn by the relevant permanent secretary.

53. Turning to the Judgment sought to be impugned, **Mr. Ngatia** argued that the learned Judge made a correct interpretation of both the constitutional provisions and other provisions of law based on the evidence that was before him and made a correct finding that the appellants' allegations were without basis.

54. **Mr. Ngatia**, reiterated the earlier stand of other learned counsel for the respondents that the Judge was perfectly in order in striking out the offending paragraphs of both the petition and the appellants supporting affidavits firstly for the reasons advanced by the Judge, and secondly because the learned Judge had an inherent power to strike out any offending or scandalous evidence from the record.

56. **Mr. Ngatia,** further argued that the Judge weighed the probative value of the facts before him as against the applicable principles of law and found the facts to be wanting. The injunctive order sought against the 7th respondent was rightly with held as issuance of such an order would have disrupted privately and legally entered into commercial agreements. It is **Mr. Ngatia's** stand that the 1st and 2nd appellants did not challenge the existence of the commercial agreements between them and the 7th respondent and as such, the appellants were not entitled to complain. It was also **Mr. Ngatia's** arguments that the appellants were also guilty of material non disclosure as they failed to disclose to the High Court the existence of these commercial agreements. The 3rd appellant even signed one such agreement four (4) days to the presentation of the petition (26th November, 2013)

57. **Mr. Ngatia** also reiterated earlier arguments that no public interest was at stake and all that appellants were doing were just to champion their commercial interests based on their fear that the new era would usher in open competition and deny them a large viewership based on their longetivity in the Broadcasting market industry. Article 34 of the constitution was correctly interpreted as a whole said **Mr. Ngatia,** as in doing so the Judge held all Kenyans to be equal before the law.

58. Turning to the composition of the CCK- (Communication Commission of Kenya), **Mr. Ngatia** maintained that the learned Judge made a correct finding that pending the creation of the independent authority for the regulation of the media contemplated under Article 34(5) of the constitution, the body that should carry out the regulation of the media and air waves is the 3rd respondent. The Judge was also right in taking into account the fact that the Kenya Information and Communication Act 1998 and the regulations made there under remain in force as they had been saved by the transitional provisions namely Section 7(1) of the sixth schedule of the Constitution 2010. Reversal of the Judges holding on the status of the 3rd respondent **Mr. Ngatia** warned could lead to chaos in the industry as a legal vacuum would be created which would be dangerous to the survival of the industry. The holding of the Judge should be affirmed as it is in line with the doctrine of separation of powers.

59. **Mr. Ngatia**, also urged this Court to affirm the trial Judge's finding that issue estoppel doctrine and Resjudicata also apply to alleged breaches of fundamental rights as there was clear demonstration that the appellants were misusing the constitutional procedures after abandoning the right course to redress their alleged grievances through the tendering process or administrative process in line with the established regime of law which requires parties to exhaust avenues available to them to redress their legal grievances before moving on to other available regimes (i.e from statute first to constitutional).

60. On the burden of proof, the Court was urged to find as did the learned trial Judge that this had not been discharged to the required threshold as (i) the appellants had failed to disclose material facts, (ii) failed to show how their rights had been infringed, (iii) failed to show that by reason of the 4th and 5th respondents having been granted licences, the appellants too should have been granted one as a matter of right, (iv) failed to oust the respondents opposing contention that they had been involved throughout in the process which culminated in the choosing of the switch off date forestalled by the filing of the petition. Lastly that costs were rightly awarded against the appellants as their petition was unnecessary in the circumstances.

**61. SUBMISSIONS OF THE 9TH RESPONDENT.**

**Mr. Cyprian Wekesa** leading **Richard Malebe** for the 9th respondent also vigorously opposed the appeal. Learned counsel argued that they joined the appellants' petition at the High Court level in their capacity as one of the new comers in the media industry. They reiterate the content of the replying affidavit deposed on their behalf by **Dr. Philip Muyoti**. It was **Mr. Wekesa's** argument that prayers 4,5,6 and 8 of the appellants petition should not be granted because first, they seek to perpetuate the existence side by side of the analogue broadcasting spectrum and or delay indefinately the transition switch off process from analogue to digital; second, they seek to make the grant of BSD licences to the appellants conditional to the switch off; third, it will not only harm but it will be an affront to the enjoyment of the 9th respondent's rights guaranteed under Article 34(3) of the constitution; fourth, it will be an erosion of the principle of equality before the law and equal protection of the law; fifth, it will portray the appellants as unique legal persons in the Broad casting industry, and by reason and or virtue of this privilege if any and notwithstanding any existence of government regulations on licencing in the industry they should be awarded a licence; sixth, it will elevate the rights of the appellants under Article 34 above those of under claimants.

62. Learned counsel **Mr. Wekesa** took issue with the appellants assertion of heavy investments in the industry allegedly jeopardized by lack of a licence because, there was no supportive evidence for the figures quoted. Also considering the period of time appellants had monopolized the 85% of the Industry, **Mr. Wekesa** opined, this was sufficient to recoup themselves and it should therefore not be fronted as a ground to delay the switch off date. The Court was urged to note that the Frequency spectrum having been judiciously acknowledged as a scarce public resource managed by the CCK, the Court should not allow itself to be used as a cloak by the majority players in this industry to perpetrate their monopoly. The Court should not create an impression that this scarce resource should not be regulated and or rationalized by the government but to be left under the control of those who had allegedly heavily invested into it. In doing so, **Mr. Wekesa** argued that the Court would be allowing the appellants to use the mask of Articles 33 and 34 of the constitution to seek to perpetuate the status quo, a scenario the people of Kenya rejected when they agreed to the promulgation of the constitution which were incorporated into Articles 33,34,40 and 10. It will also render nonsense principles and national values enshrined in Article 10 of the constitution and it will in essence negate the freedom of the media enshrined in the constitution if the appellants claims were to succeed.

63. Turning to the migration process, **Mr. Wekesa** reiterated the earlier submission of other co-respondents that the documentation exhibited before the High Court and as currently exhibited before this Court all go to demonstrate that the appellants participated in that process at every stage upto the choosing of the switch off date of 13th December, 2013. Appellants agreed that licensing would be by way of competitive tendering process. Appellants also fronted their consortium **National Signal Networks Limited** as their flagship in the tendering process but they lost fairly. They appellants appealed against that process and also lost. They did not apply for judicial review to quash the PPARB decision. Instead they moved to the High Court by way of a petition to challenge the same process taking on board the 3rd appellant who had not even applied for the licence. In the absence of the 3rd appellants participating in the licencing process and or proceedings, the 3rd appellant cannot reasonably agitate for redress for infringement of rights under the named Articles of the Constitution.

64. Turning to the role of this Court in the resolution of this dispute, **Mr. Wekesa** urged the Court to find as did the learned trial Judge that the rights enshrined in Articles 33,34 are subject to licensing procedures that are necessary for the regulation of air waves and other forms of signal distribution. Such regulation should be independent and free from commercial and political interests. On the basis of the material before this Court, the appellants are pursuing own commercial interests coumflaged as media rights under Article 34 to the detriment of other media players in this industry. Upholding their claim **Mr. Wekesa** argued, would be tantamount to the Court assisting them to perpetuate the old status quo and instead, this Court should uphold the principles and values enshrined in Article 10 of the Constitution. Still reiterated that granting orders 4,5,6 and 8 of the petition would violate the 9th respondent's rights and would not thus give effect to the values that under pin an open and democratic society based on human dignity and fundamental freedoms which cannot be achieved if the appellants were to be allowed to continue shifting goal posts whenever it suited them in their effort to scuttle the migration process.

65 **Mr. Wekesa** further urged this Court to adopt the stand taken by the High Court when construing Article 262 of the constitution and hold that the ICT policy formulated in 2006 still has life in it. That it was not contrary to the constitution. The Court Should uphold the principle in Article 159 of the same constitution and not to allow the appellants escape from taking responsibility for the role they have played in the migration process for several years. This Court holding a contrary view **Mr. Wekesa** argued, will harm the 9th respondent who has also invested heavily in this industry.

66. Turning to the right of the appellants to champion public interest rights, **Mr. Wekesa** argued that the Judge was right when he held that in blocking the migration process, the appellants were in essence pursuing their own commercial interests Appellants should not be allowed firstly to use the public as an object of sympathy and secondly to hold all stake holders in the digital migration process at ransom. Instead, the Digital migration process should be allowed to progress on as the appellants pursue their licence.

67. To **Mr. Wekesa,** the 3rd respondent is the current regulator. The appellants acknowledged this fact when they submitted themselves to the migration process under it. It has been operating as such since the promulgation of the constitution on 27th August, 2010 and ruling it non existent will create a vacuum. It is the duty of the Court to protect the constitution from being mutilated in order to protect appellants interests in the media industry.

**68. APPELLANTS RESPONSE TO THE RESPONDENTS**

**SUBMISSION.**

(A) In response to the respondents' submissions, senior counsel **Mr. Muite** conceded that Kenya ratified the I.T.U. The RRC 06 was anchored on the ITU, but as at the time these regulations took effect they had no legal bearing in Kenya; Kenyan should have introduced legislation to domesticate these. To senior counsel **Muite** treaty law does not have primacy over the constitution, nor does it have the same status as the constitution. Lastly that the ICT policy was formulated in March, 2006 before the coming into force of the RRC 06 and the formation of the Task Force to vehicle the migration process. It is therefore not true as claimed by the respondents that the limitations of the BSD licence to only two has any legal backing in any known legal provision.

69. (B) **Mr. Issa** on the other hand responded that the Task Force report is not the foundation upon which the Digital migration process was founded. It was only a vehicle. The ICT policy was not anchored on the RRC 06 which took effect in June, 2006 as the ICT policy had already taken effect in March, 2006.

70. **Mr. Issa** continued to add that, in order for the ICT policy to hold, it had to conform to the constitutional provisions as at the time of its implementation. **Mr. Issa** concedes that they did not challenge the procurement procedure process through a judicial Review process but instead chose to challenge that process through a constitutional petition, because they realized that the Public Procurement process was unlawful and secondly they could not condone or be party to the Governments move to go against its own policy.

71. On adherence to International obligations, **Mr. Issa** maintained that the respondents cannot hide under this as it is their own admission that the frequencies to the 4th respondent were even released before its incorporation. It was therefore not proper for the respondents to argue that appellants too had failed to incorporate their flagship before tendering for the licence. It is **Mr. Issa's** argument that appellants could have even been considered for the licence even before incorporation of their flagship (**National Networks Ltd).** It is also appellants stand that if KBC was allowed to comply later why not the appellants. Acting otherwise asserted **Mr. issa,** would be discriminatory.

72. On the number of licences that were capable of being awarded, **Mr. Issa** argued that the respondents' assertion that the choice of two was dictated by market forces has no legal basis both in the parent Act or the attendant Regulations made hereunder. Neither was that number set by the Task Force report.

73. Appellants concede, added **Mr. Issa** that **Ian Fernandes** and another who had links with the appellants were drafted into the implementation committee on Digital migration, but they deny that these were drafted into that committee as representatives of the appellants. They were so drafted based on their experience in the media industry. Lastly that the appellants still reiterate that Communication Commission of Kenya CCK is not the body envisaged under Article 34 of the Constitution as at the time actions complained of took place it was wholly owned by the government.

74. (C) **Mr. Ochieng Oduol** on the other hand maintained that this Court has jurisdiction not only to intervene but also to direct and supervise the granting of an alternative remedy. To **Mr. Ochieng**, there was sufficient justification for the appellants' about turn and abandoning of the procurement process redress mechanism, and instead opting for redress through a constitutional process. This was because the procurement process was incapable of yielding a constitutional interpretation and the giving of maximum returns on all that the appellants sought from the High Court and are still seeking from this Court, namely, to check on the excesses of executive power. The excesses of executive power that the appellants sought to keep in check and are still seeking to overturn is the issue of confining the Broadcasting Signal Distribution licence (BSD) to only three without any legal basis and also to separate content providers from broadcasters. Also the issue that there be an order that the issue of BSD licensing be left to an independent entity envisaged under Article 34 of the Constitution. **Mr. Ochieng**, maintained that they contended before the High Court and they still contend before this Court that the 3rd respondent as was constituted as at the time events leading to this appeal took place and as currently constituted was not that entity (body).

75. **Mr. Ochieng** continued to state that the 3rd appellant did not indeed participate in the tendering process but that not withstanding, it is an aggrieved party as it too had been affected by the actions complained of and it was entitled to team up with the 1st and 2nd appellants as other like minded parties who had heavily invested in the media industry to seek redress based on the principle of equal treatment or equality of arms. **Mr Ochieng**, went on to further argue that the issue of application of the doctrine of issue estoppel had no application to these proceedings as issues pertaining to the tendering process in so far as these purport to affect the appellants cannot operate to oust the appellants constitutionally entrenched rights being championed herein. The appellants still maintain that it was improper for the learned trial Judge to strike out the alleged offending portions of the appellants petition and supporting affidavits considering that these had not been controverted by the respondents, and secondly the appellants were not proceduraly given an opportunity to respond to the request for striking out.

76. Turning to the merits of the appeal, **Mr. Ochieng** maintained that the appellants' complaints had merits before the High Court and still have merits before this Court as the appellants had raised issues of violation of fundamental rights which the High Court shied away from resolving and for which they seek a resolution from this Court. **Mr. Ochieng** still reiterates that the appellants participation in the tendering process could not be held against them as they have demonstrated that they are entitled to the Constitutional reliefs as formulated and that the tendering procurement process was flawed and was rightly abandoned by them in favour of a constitutional petition.

**77. CASE LAW ANALISIS.**

Parties referred the Court to a wealth of case law from around the globe, legal treatises, constitutional and other legal provisions of law in support of their competing interest. The Court has endevoured to go through all these and will endevour to reflect the principles enunciated in them in its reasoning in the determination of this appeal. Only a few will be sampled herein for purposes of the record and not in any particular order.

**(i) The speaker of the National Assembly versus Karume [2008] 1KLR (E.P) 425** wherein the Court of Appeal held inter alia that:

> ***"Where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of parliament, that procedure should have been strictly followed."***

**(ii)** The case of **KEMRAJ H. Harrikissoon versus Attorney General of Trinidad and Tobacco [1980] A.C.** 265 wherein the Privy Council held inter alia that:

> ***"It was an abuse of the process of the Court for a party to apply for a judicial remedy when there was no proven breach of a fundamental right."***

**(iii) Anarita Karimi Njeru versus the Republic No.2 [1979] KLR 162 where in the Court of Appeal ruled that:**

> ***"It only has such jurisdiction as is expressly conferred on it by statute".***

**(iv) The case of kwacha Group of Companies and another versus Tom Mushindi & 2 others [2011] eKLR** wherein Rawal J as she then was ruled inter alia that:

> ***"The rights granted by the constitution should be enjoyed as well as governed equally amongst all persons."***

**(v)** The case of **Republic versus National Environment Management Authority [2011] eKLR** wherein the Court of Appeal reiterated the principle that ***where there was an alternative remedy especially where parliament had provided a statutory appeal procedures, it was only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it was necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what in the context of the statutory powers, was the realy issue to be determined and whether the statutory appeal procedure was suitably to determine it".***

**(vi) The case of Hunter versus Chief Constable of Wrest Midlands Police and others [1981] 3WLR 906. A House of Lords** decision wherein **Lord Diplock** cited with approval observation by **A.L. Smith C.J. in Reichel versus Magraph14 App. Cas. 665** thus:-

> ***"The Court ought to be slow to strike out a statement of claim or defence and to dismiss an action as frivolous and vexatious, yet it ought to do so when, it has been shown that the identified question sought to be raised has been already decided by a competent Court".*** Then with approval from the passage from Lord Halsburrys speech at the same page thus:-
>
> ***"I think it would be a scandal to the administration of justice if the same question having been disposed of by one case, the litigant were to be permitted by challenging the form of the proceedings to set up the same case again"***

(**vi)The case of Trade Bank Limited versus L.Z. Engineering Construction Limited [2000] IRA 266** wherein the Court of Appeal held inter alia that:-

> ***"Issue estoppel bars a person from re-litigating matters already ruled on by the Court. It only arises regarding determination of fact. Regarding determination of law, the quality of the decision will be a relevant factor in determining whether or not to follow that decision."***

**(vii)** The case of **Zola and another versus Ralli BrothersLimited and another [1969] EA 691.** Wherein the Court of Appeal for Eastern Africa declined to strike out an affidavit because it had been made by a person who could swear positively to the facts verifying the cause of action and secondly the Judge had a discretion to excuse mere defects.

**(viii)** The case of **Owners of the Motor Vessel "Lilians versus Caltex Oil (Kenya) Limited [1989] KLR** wherein the Court of

Appeal held inter alia that:-

***"A question of jurisdiction may be raised by a party or by a Court on its own motion and must be decided forth with on the evidence before the Court"***

**(ix)**The case of ***Tiwi Beach Hotels Limited versus Stamin [1991] KLR 658*** wherein the Court of Appeal held inter alia that material non disclosure is an affront to the dignity and credibility of the Court.

(x) The case of ***Red Lion Broadcasting CO. Inc. versus FCC-395U.S.367*** a decision of the U.S. Supreme Court wherein observations were made that since frequencies were a scarce natural resource, its regulation is inevitable for the benefit and interest of the viewers.

(xi) The case of ***Petronella Nellie Nelisine chairwa versusTransnet Limited and 2 others [2007] 2ACC23*** a decision of the constitutional court of South Africa wherein the need to direct complaints for redress to the right forum was stressed.

(xii) The case of ***Morgan versus Simpson and another [1974] 3ALLER 722*** and ***Gun and others versus Sharpe and others [1974] 2ALLER 1058.*** Also ***Riffie versus Rogers and others [1982] 3ALLER 157.***

These dealt principally with election irregularities but the principle of law enunciated in them is that it is only trivial errors and irregularities which do not go to negate the integrity of the process, which are excusable. Anything that goes to discredit the process and bring it into disrepute cannot be allowed to stand.

(xiii) The case of ***Nderitu Gachegua versus Dr. Thuo Mathenge and 2 others [2013] Eklr.*** This too is an election petition. But in it, there is a wealth of principles on construction of both statute law and the constitution drawn from over all the globe. In a summary, and without citing the particular cases from which these principles were drawn by the learned Judges, these are (i) the constitutionality of an Act of Parliament must be construed vis avis the constitution, (ii) the spirit and tenor of the constitution which embodies the ideals, aspirations and values of the Kenyan citizens must preside and permeate the process of interpretation, (iii) the constitution is not an Act of parliament but the supreme law of the land. It is therefore not to be interpreted in the same manner as an Act of parliament. It is to be construed liberally to give effect to the values it embodies and the purpose for which its makers framed it (iv) the constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a mirror reflecting the national soul, the identification of ideals and aspirations of a nation of the articulation of the values of bonding its people and discipline its government. The spirit and tenor of the constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion, (v) that in determining and understanding the spirit of the constitution, a Court of law ought to take into account the language of the various provisions of the constitution, (vi) a Court of law has to gather the spirit of the constitution from the language of the constitution what one may believe or think to be the spirit of the constitution cannot prevail if the language of the constitution does not support that view (vii) that the constitution ought to be given a purposesive interpretation, (vii) that the constitutions is a living instrument having a soul and consciousness of its own. It must be construed in line with the lofty purposes for which its makers framed it. A Timorous and un imaginative exercise of the judicial power of constitutional interpretation leaves the constitution a stale and strircle document, (ix) a Court should always take into account the principle of harmonization whenever it interprets provisions of the constitution, (x) where the constitution contains several provisions relating to an issue, these provisions must be looked at as a whole (xi) that the entire constitution has to be read as an integrated whole and no particular provision destroying the other but each sustaining the other. (xii) Constitutional provisions must be construed as a whole in harmony with each other without insubordination from one provision to the other. (xiii) it is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the, others and to be considered above but that all provisions bearing upon a particular subject to be brought into view and to be interpreted as to effectuate the great purpose of the instrument (xiv) that interpreting the constitution is a task distinct from interpreting the ordinary law. The very style of the constitution compels a broad and flexible approach to interpretation.

Turning to statute interpretation in the same decision and also drawing inspiration from legal treaties and case law from round the Globe, the learned Judges laid down the following principles on construction and or interpretation of a statute. That is, (i) that the cardinal rule for construction of a statute is that, it should be construed according to the intention in the statute itself, (ii0 that the object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. It therefore follows that the object in construing an Act OF Parliament is to ascertain the intention of parliament as expressed in the Act considering it as a whole and in its context, (iii) that an Act is to be read as a whole so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act, (iv) that the essence of construction as a whole is that, it enable the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act.

**(xiv)** Supreme Court Petition Number 4 of 2012, [2013] ***eKLR Jasbir Singh Rai and 3 others versus Tarcochan SingRai and 4 others.*** At paragraph 89,90,93,95 of the judgment there is observation that:-

> ***"There is no doubt that the Constitution is a radical document that looks to the future that is very different from our past, in its values and practices. It seeks to make a fundamental change from the 68 years of colonialism, and 50 years of independence. In their wisdom, the Kenyan people decreed that past to reflect a status quo that was unacceptable and unsustainable, through provisions on the democratization and decentralization of the executive; devolution; the strengthening of institutions; the creation of institutions that provide democratic checks and balances, decreeing values in the public service, giving ultimate authority to the people of Kenya which they delegate to institutions that must serve them and not enslave them. Prioritizing integrity in public leadership, a modern bill of rights that provides for economic; social and cultural rights to enforce the political civil rights, giving the whole gamut of human rights the power to radically mitigate the status quo and signal the creation of a human rights state in Kenya mitigating the status quo in land that has been the country's Achilles heel in its economic and democratic development. These instances among others reflected the will and deep commitment of Kenyans, reflected in fundamental and radical changes through the implementation of the constitution.***
>
> ***…. It is also the will of the people that they rely on the judiciary to protect and develop the constitution. …. The principle of the supremacy of the constitution declared in Article 2, particularly sub-article 4 which defines in extremely broad terms laws and acts that may be questioned for compatibility with the constitution expresses the intent that all provisions of the constitution are justiciable….***
>
> ***Article 20(4) requires Courts and other relevant authorities, an interpreting the bill of rights to promote (a) the values that under lie on an open and democratic social based on human dignity, equality, equity and freedom and (b) the spirit purport and objects of the Bill of Rights.***

**(xiv)** In the Supreme Court constitutional application No. 2 of 2011 [2011] eKLR. At paragraphs 43,49,54,59 and 60 inter alia the Supreme Court had this to say in a summary, that the High Court has been entrusted with the mandate to interpret the constitution but such jurisdiction is not an exclusive jurisdiction; that both the Court of Appeal and the Supreme Court are also equally empowered to interpret the constitution; that the effect of the constitution detailed provision of the rule of law in the process of governance was that the legality of executive or administrative action is to be determined by the Courts, which are independent of the executive branch; that the essence of separation of powers, in this context was that, the totality of governance powers is shared out among different organs of government and that the organs play mutually countervailing roles and none of the government organs function in a splendid isolation; that the Courts mandate is limited to making decisions on specific cases before them; constitutional questions cannot be answered in the abstract as this depends on the application of the law to particular facts; that the plain terms of the constitution should be read in broader context of its spirit and philosophy; that interpreting the constitution is a task distinct from interpreting the ordinary laws. The very style of the constitution compels a broad and flexible approach to interpretation.

**(xvi)** The case of ***Mumo Matemo versus Trusted Societyof Human Rights Alliance and five others Civil Appeal No.290 of 2012 [2013] eKLR.*** At paragraph 49 thereof the Court had this to say on the doctrine of separation of powers:

> ***"It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However separation of powers does not only prescribe organs of government from interfering with the others functions. It is also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers however are not a licence to take over functions vested elsewhere. There must be judicial legislature and executive deference to the repository of the function"***

**78. MANDATE OF THIS COURT.**

This being a first appeal, the mandate of this Court is as set out in Rule 29(1) of this Court's Rules, namely, to re-appraise the evidence and to draw inferences of fact. It is now trite that this path is well beaten right from the days of the predecessor of this Court, the Court of Appeal for Eastern Africa, to the present day. In ***Peters versus Sunday Post [1958] EA 424*** it was held, inter alia, that:-

> ***"Whilist an Appellate Court has jurisdiction to review the evidence to determine whether the conclusions of the trial Judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate Court will not hesitate so to decide"***

**79. DETERMINATION**

I have taken into consideration the totality of the massive paperwork that was placed before me by all those on board in the light of the rival arguments as set out above as well as principles of case law and law relied upon by either side and I proceed to determine the appellants' complaints as follows:

**80. Striking out of alleged offending paragraphs of the petition and supporting affidavit.**

The appellant fronted 15 grounds of appeal. Since these were interrelated these will be argued globally. With regard to the striking out of alleged offending paragraphs of the petition and the supporting affidavits filed in support of the petition, it is common ground that these paragraphs had not been controverted by the respondents. Neither did the affected respondents apply to have the deponents of those paragraphs cross-examined. The excuse Mr. Imende gave was that, the time line within which to finalize the litigation could not allow for this. No formal application was made by the respondents to have these paragraphs struck out before commencement of final submissions. Objection was however raised to these in the course of submissions, responded to and then ruled upon by the learned Judge as a preliminary issue. This is found in paragraphs 75, 76 and 77 of the Judgment. The judge made observations that the facts contained in paragraphs 49 to 75 of the petition were the basis upon which the relief was being sought; that the respondents had complained that the deponents had deponed to unsubstantiated facts as some of the facts lacked sources of information or belief, while some were clearly scandalous.

81. On the basis of that complaint, the Court opined that the proceedings being a matter of record it was only proper and in the interests of justice that the matters complained of be disposed of first to prevent the affected parties from continuing to be prejudiced by those facts. After due reconsideration, the learned Judge made findings that allegations that appellants were true holders of BSD licences was unsubstantiated as according to the material before the Judge, only two licences had been issued namely to the 4th respondent **Signet** and the 6th respondent **Pan African Network Group.** The 5th and the 7th respondents are pay T.V. brought on board for purposes of migration. From the Task Force report any other licences were to be issued when the market conditions were suitable. The allegation that the Star Times, the 5th respondent was insolvent was unfounded as it was based on news paper extracts. To the

Judge, this was the kind of allegation that would cause a company's' repute grave injury given the impact of judicial proceeding. The Judge went further to state that an allegation that, **Signet** was incapable of funding the cost of infrastructure roll out and therefore **DSTV** a South African Company stepped in to fund the country wide roll out in exchange for the right to distribute **GOTV** content gives rise to an inference that **Signet** was being used for a private purposes as opposed to it being used for public service for which it was set up. The Judge found that no document had been attached to that effect. Regarding the allegation of **Linus Gitahi** that the 5th respondent ceded 5% of its share holding to government officers to facilitate and procure the award of the BSD licence. The Judge found that this too was also unsubstantiated in so far as it alleged corrupt practices without proof. On that account the affected paragraphs of the petition and the supporting affidavits were struck out.

82. I have revisited the affected paragraphs of the petition. I find, as did the learned trial Judge, that the sources of the information contained in those paragraphs were not disclosed. The assumption, however, is that since there was no way proof of these allegations could have been annexed to the petition itself, such proof could have found its way in the supporting affidavits in support of the petition in the form of annextures. It is common ground that indeed the appellants' petition had supporting affidavits. These too were required to conform to the prerequisites set by Rules 3(1), 6 and 7 of Order 19

Civil Procedure Rules. These provide:

> ***"Rule 3(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove provided that in interlocutory or by leave of the Court an affidavit may contain statements of information and belief showing the sources and grounds thereof.***
>
> ***(6) The Court may order to be struck out from any affidavit any matter which is scandalous irrelevant or oppressive.***
>
> ***(7) The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the party or otherwise in the title or other irregularity in the form thereof or on any technicality"***

83. From the above, it is clear that an affidavit so relied upon by a party in support of his pleadings can only pass the test if the deponent has personal knowledge of the facts deponed to. Excuse from this requirement arises only where leave of the Court has been sought for such a deponent to rely on matters of belief and information whose sources have to be disclosed. It is only in interlocutory matters that an affidavit so deponed may be allowed to pass the test if it is based on belief and information whose sources have been disclosed. Rule 7 excuses an affidavit to pass if the defect is limited to misdescription or technicalities. It is now trite that misdescription is limited to parties' names or litigating positions, while technicalities are limited to things like paragraphing or failure to insert a date. It has nothing to do with the substance of the message intended to be conveyed by the particular affidavit. Since the complaint herein was on the content the affected affidavits failed the test.

84. As for the action of the Judge, rule 6 is permissive. The Judge could have even moved on his own motion under this rule to fault those paragraphs. Mention has also been made of the exercise of the inherent jurisdiction of the Court. Section 3A of the Civil Procedure Act cap 21 Laws of Kenya provides:-

> ***"Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court"***

85. A wealth of case law has crystallized parameters of the exercise of this jurisdiction. In the case of **Communication Commission of Kenya versus Tetra Radio Limited Nairobi CA( Application) No.121 of 2012 (UR)**, the Court of Appeal had this to say:-

> ***"We have no doubt in our minds that our Courts have inherent power to ensure compliance with their orders, that is the written or implied power which emanates from the very nature of***

***the institution of the Court and without which the Court cannot function properly at all"***

In ***Equity Bank Limited versus West Link MBO Limited Civil Application Number 78 of 2011 (UR) Musinga, JA.*** Held, inter alia, that:-

> ***"Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law, to ensure ends of justice are met. Inherent power is the authority possessed by a court implicitly without it being derived from the Constitution or statute"*** Lastly in ***The case of the BoardofGovernorsMoi HighSchoolKabarakS.C. Petition Nos. 6 and 7 of 2013*** the Supreme Court had this to say inter alia:
>
> ***"The inherent powers of a Court are not substantive powers upon which a party can found a cause of action. Such powers do confer jurisdiction and therefore cannot form the basis for assumption of jurisdiction where none has been created. Inherent powers are purely endowments to enable the Court discharge and regulate its constitutional and legal mandate."***

86. Applying the above case law principles to the rival arguments on this point, it is clear that in the circumstances of the High Court, the learned trial Judge did not only have the Courts inherent power at his disposal but an express provision in rule 6 of Order 19 Civil Procedure Rules to do just what he did. In doing so it cannot be said that the Judge was implying that the Courts process was being abused by the appellants. He has simply reminding the appellants that they had overlooked a necessary procedural requirement in their presentation of both the facts in support of the petition and the deponements in their supporting affidavits. I agree with the respondents' contention that no error was thereby committed by the learned Judge when he struck out the offending paragraphs both in the petition and supporting affidavits mentioned above. I find no merit in the grounds of appeal fronted in relation to that complaint.

**87. ALLEGED INFRINGEMENT ON THE APPELLANTS INTELECTUAL PROPERTY.**

On alleged infringement on appellant's intellectual property rights ,the learned trial Judge's reasoning runs from paragraph 130 of the Judgment. The appellants grievance arose from a letter dated 19th August, 2013 where in the 3rd respondent had allegedly authorized the 4th, 5th, 6th and 7th respondents to intercept, transmit and broadcast the petitioners locally produced programmes and third party licenced programmes without their authorization or consent, in respect of which the appellants sought a permanent injunction against the 4th, 5th, 6th and 7th respondents to refrain from that violation. After due consideration of the rival arguments, the learned Judge delivered himself inter alia thus in this point:

> ***"Thus on this point in any case a violation of intellectual property rights is not a matter to be addressed by a petition to enforce fundamental rights and freedoms because there is a specific regime established by law to address intellectual property rights.***
>
> ***This Court has on several occasions emphasized that where there is a specific mechanism of dispute resolution established by ordinary law, then such a process ought to be pursued and that not every wrong attracts constitutional relief. In Sanitam Services (EA) LimitedversusTamiaLimitedand othersNairobi Petition No.305 of 2012 [2012] eKLR the Court noted that "[10] Any breach of the intellectual property rights against the respondents can be enforced through the legal mechanisms provided by statute or common law, where applicable, hence it is unnecessary to invoke the provisions of Article 22 to enforce what are ordinary rights. I find and hold that the allegation against the 4th, 5th, 6th and 7th respondents concerning intellectual property rights violation are frivolous"***

88. Appellants contention against that reasoning was that this right is constitutionally entrenched and it is constitutionally justiciable. Reliance was placed on the provisions in Article 40(5) of the Constitution 2010, which requires the State to support, promote and protect the intellectual property rights of the peoples of Kenya. The intellectual property right in issue is the content either developed by the appellants or acquired through 3rd parties. The theme running through the respondents' responses is that there was

no violation neither had there been such a threat. To the respondents, all that happened was that during the simulcast exercise (pilot project exercise), the appellants among others executed mutual commercial agreements permitting the then only two licenced Broadcasting signal distributors to air the appellants contents with the appellants consent.

89. The 7th respondent exhibited some of these agreements and even stated that one such agreement involving the 3rd appellant was executed four (4) days to the presentation of the petition to the High Court. The appellants did not controvert this argument. The agreements exhibited and perused by me were not denounced by them (appellants). However, great exception was taken of the letter of 19th August, 2013. The letter originated from **Francis Wangusi** of **CCK.** It was addressed to one **Mr. Richard Bell** Group Chief Executive Officer Wanainchi Group (Kenya) Limited. The subject concerned clarification on FTA channels (Free to Air channels) carried by subscription Broadcasting Service Providers. It was in reference to the addressees letter dated 15th August 2013 informing the Commission that the addressee had received a notice to remove from their plat form the Free to Air (FTA) channels of three media houses namely **Nation Media Group, Standard Group Limited and Royal Media Group Limited.** There is mention that the letter had requested for guidance from the commission with respect to the above matter.

90. **Mr. Francis Wangusi** responded to the effect that Regulation 14.2 (b) requires subscription broadcasting providers to provide local FTA channels; that authorization from the CCK meant that the subscribers were to continue to receive the FTA channels even when they were not up to date with their subscription payments; that the requirement was applicable for all subscribers irrespective of whether set top boxes were subsidized or not; that the option to meet the requirement for only subsidized set top boxes was not acceptable; that the local FTA broadcasters were required to make their FTA channels available to the subscription broadcasting service providers in order to facilitate subscription providers to meet the requirement to provide FTA services. The letter gave subscription broadcasting service providers and signal distributors who were not compliant a period of fourteen (14) days with effect from the date of the letter to take corrective measures to ensure that subscribers could continue to receive FTA channels even when they were not upto date with subscription payments. The letter also directed the addressees to make their FTA channels available to the subscription broadcasting service providers.

91. The appellants took issue with that directive because it required them to relinquish their contents to others for airing without their consent. The letter gave them no choice but to comply. To them, this was an infringement of their intellectual property rights. I do appreciate that the content both developed and acquired from 3rd parties fits the definition of intellectual property. The appellants have a right to protect its use without their consent. As indicated in Article 40(5), the State has a duty to protect that property. Since these fall into the category of broadcasting material, the relevant protective regime is found in the Kenya Information and Communication Act together with regulations made there under. I have perused these, and I find as conceded by both sides that it is heavily regulated. Penetration is subject to licensing, which licensing is conditional. Regulation 29 of LN 187 of 31st December, 2009 has a specific provision that a licensee has no authority to broadcast any information from any person without that persons consent, save in instances where there is need to establish the credibility and authenticity of the source, or on matters of security. Both sides agree that once content is developed or acquired from a 3rd party. It became personal property and in terms of the regulation 14 (2) (b) and 29 of LN 187/2009, any accessing and airing of such material with the consent of the owner becomes a trespass. The moment it becomes personal property, then it falls into the protective bracket provided in Article 40(1) of the Constitution.

92. The interpretation and general provisions Act Cap 2 Laws of Kenya defines property as including ***money, goods, Chooses in Action, land and every description of property whether moveable or immovable and also obligations, easements and every description of estate interest and profits, present or future vested or contingent arising out of or incidental to property as herein defined***. This definition is wide enough to include broadcasting material. This same definition is found in Article 260 of the Constitution. Considering that the regulations require the owners consent before any 3rd party broadcasts or airs them, the ultimatum given by **Mr. Francis Wangusi** on behalf of CCK in this letter of 19th August 2013 amounted to an interference with appellants' intellectual property. The 3rd respondent did not deny authoring the offending letter.

93. As for the other agreements exhibited by the 7th respondent and not denied by the appellants, I agree these were mutual commercial agreements which were outside the letter of 19th August, 2013. The appellants' failure to deny these agreements categorically does not oust their right to complain about the content of the letter of 19th August, 2013. I agree with **Mr. Kimani's** contention that **"person"** in Article 40 includes corporate persons. The appellants are such corporate persons. I find merit in the appellants' contention that their intellectual property rights had been violated and there was a real threat of continued violation if no restraint order was forthcoming from the Court.

**94. LEGITIMATE EXPECTATION**

On legitimate expectation, I have had an occasion to read the sentiments of my brother Judge **Musinga JA** on this. I do not agree. My view is as set out hereinafter. The rival arguments on legitimate expectation have two limbs to it. The first limb touches on an alleged legitimate expectation that the system would protect the appellants' already vested establishment in the broadcasting industry. The second limb touches on the appellants expectation that they would be fairly processed for licensing. The trial Judge dealt with this under paragraphs 79, 80, 85,86,87,88 and 89 of his Judgment. In a summary, the learned Judge made observations that Article 34 embodies a free standing freedom of the media; that this freedom is intended to buttress the freedom of expression guaranteed under Article 37; that the appellants had anchored their case on the right of establishment and the fact that as established broadcasting media houses, their substantial investment entitled them to the grant of digital broadcasting; that Article 34 does not exclude regulation of electronic media and in fact contemplates licensing procedures; that there is nothing in Article 34 that excludes the petitioners or any other media house from the power of regulation that is necessary.

95. Article 34 of the Constitution makes provision that **"Broadcasting and other electronic media have freedom of establishment subject only to licensing procedures that:**

> **"(a) Are necessary to regulate the air waves and other forms of signal distribution and**
>
> **(b) Are independent of control by government, political interests or commercial interest"**

96. The parent statute law, the Kenya Information and Communication Act Cap 411A. Vide Section 46 thereof makes provision for requirements of a broadcasting licence. Subsection 1 makes provision that ***"subject to the Act no person shall provide broadcasting services except in accordance with a licence issued under this part."*** Section 46D makes provision for eligibility for licensing and consideration for grant of a licence. Under this section, a person shall not be eligible for the grant of a broadcasting licence if such a person is a political party, is adjudged bankrupt or has entered into a composition or scheme of arrangement with his creditors; is of unsound mind and does not fulfill such other conditions as may be prescribed.

97. Under the same provision, the Commission has an obligation when considering application for the grant of a broadcasting licence to have regard to among others to issue of public interest, efficiency, availability of frequencies, suitability of the applicant, financial means and good track record. **Section 46J** s makes provision for the revocation of licences. Whereas **Section 46K** donates power to the Minister in consultation with the Commission to make regulations generally with respect to broadcasting services and among others mandating the carriage of contents, in keeping with public interest obligation, across licensed broadcasting services or prescribing anything that may be prescribed under the Act.

98. On the basis of the authority donated by **Section 46K, legal notice number 187 of 31st December, 2009** was issued bringing into effect the Kenya communication (**Broadcasting Regulations [2009].** Regulation 3(1) thereof makes provision that any person who wishes to provide broadcasting services in Kenya shall apply to the commission for the licence through the prescribed procedure. Regulation 4 and 5 on the other hand make provision for application for a commercial Broadcasting licence and a community broadcasting licence respectfully. There is also provision for renewal of a licence. Regulation 14 on the other hand makes provision for subscription broadcasting service licence and subscription management services, among them provision of a prescribed minimum number of Kenyan Broadcasting channels.

Regulation 15 imposes obligation for subscription broadcasting services licences and subscription management services.

99. Turning to signal distribution, **Section 46N (1)** makes provision that subject to the Act ***"no person shall provide signal distribution services within Kenya or from Kenya to other countries except in accordance with a licence issued under this part."*** Whereas Section 46 O(1) on the other hand makes provision that ***"the Commission may upon an application in the prescribed manner and subject to such condition as it may deem necessary grant a licence authorizing any person or persons to provide signal distribution services."*** Subsection 2 prescribes obligations that may be attached to a signal distribution licence namely, provision of signal distribution services as a common carrier to broadcasting licences, provision of services promptly upon request in an equitable, reasonable, non-preferential and non-discriminatory manner, provision of capability for a diversity of broadcast services and content, provision of an open network that is interoperable with other signal distribution networks and to comply with any other condition that the Commission may determine.

100. The accompanying regulation to signal distribution is regulation 16 of L.N 187/2009. Under regulation 16(1), ***"the Commission may upon application grant in the prescribed form a licence for the provision of terrestrial digital broadcasting signal distribution services."*** There is jurisdiction vested in the Minister under sub regulation 2 of this Regulation to require the licensee to distribute on its digital platform free to air (FTA) and subscription broadcasting services and related data on behalf of other licensed broadcasting players, to submit to the Commission for approval any contractual agreements entered into with other licensed broadcasters for the distribution of broadcasting services prescribed under its licence, provide its services on such terms and conditions as to access, tariff and quality of service as the commission may prescribe, terminate the provision of services to a broadcaster within fourteen days of notification by the Commission. Under sub regulations 3, 4 and 5 respectfully, there is liberty to the licensee to impose charges for services rendered, and in consultation with other broadcasters prepare a user friendly programme guide. Lastly, Regulation 17 donates power to the Commission to issue other broadcasting service licences as it may deem necessary from time to time.

101. The above survey of both the constitutional provision, Article 34(3) as read with Article 33 and provisions of the Act as well as regulations made thereunder are clear proof that the broadcasting industry is heavily licenced. Senior Counsel **Mr. Muite** submitted that the appellants' legitimate expectation was based on the fact that by virtue of their heavy investment, appellants had a legitimate expectation that the government would not interfere in their broadcasting business and that any licensing requirements and regulation would take this into consideration.

102. Both sides of the divide have agreed that appellants have been on the scene for long. They have indeed invested in the infrastructure they have put in place. These belong to them. They have been recognized as such by the RRC 06, the 19th African Regional Communication Conference, the ICT policy, the Task Force report and specifications in the Tender notice.

103. There has been no mention in the paperwork before me to show that they are disentitled to a licence otherwise than by reason of what was put before me as a reason for excluding them from the tendering process. Since Article 40 stipulates protection of intellectual property, appellants have a right to protect what they own. As senior **Muite** put it, they want to continue doing what they know best. They are willing to migrate as they are. There is no mention in any of the policy documents assessed that it is impossible to consider application for licencing other than through a tendering process. As such there is nothing wrong in appellants asking to be licensed as they are. Considering that they already have infrastructure in place and are holding onto convertible frequencies.

104. Turning to the second limb of the appellants' legitimate expectation that they would be subjected to a fair process in the event of an application for consideration as a BSD licensee, it is undisputed that Article 34(3) of the Constitution which entrenched rights in relation to broadcasting is part of the bill of rights. The bill of rights is an integral part of Kenya's democratic State and is the frame work for social, economic and cultural policy (Article 19(1). It applies to all persons and binds all State organs (Article (20(1)). Courts of law are enjoined when interpreting prescriptions in the bill of rights to adopt the

interpretation that most favours the enjoyment of a right or fundamental freedom and to promote the values that under lie an open and democratic society based on human dignity, equality, equity and freedom (Article 20(3) (b), (4) (a) (b)). Every person is equal before the law and has the right to equal protection and equal benefit of the law (Article 27(1). There is also provision that a person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or if appropriate another independent and impartial tribunal or body (Article 50(1).

105. As mentioned above, the broadcasting industry is heavily licenced. The regulations have donated power to determine the mode of licensing. In the circumstances of this case, the regulator decided that BSD licences, would be considered through a competitive tendering process. It is common ground that in pursuant to the relevant provisions, the 3rd respondent as the Regulator issued a tender notice. I have perused the same. In the said tender notice the addressees were required to express an interest for provision of broadcasting distribution licences to undertake a country wide Digital Television signal roll out in preparation for migration from analogue to digital broadcasting in Kenya. The invitation was open to suitably qualified, experienced and competent persons, both local and International. The mandate was to build and operate a national broadcasting signal distribution and transmission infrastructure as specified. The networks which were expected to cover the entire country were to be operated on the principles of open access among others.

106. In order to optimize the utilization of the existing broadcasting infrastructure, the commission encouraged the licenced broadcasters who already owned broadcasting net works to participate in the tendering process. The conditions precedent were only five (5) namely, (i) that the applicant is not a holder of a distribution licence, (ii) is not a political party, (iii) is not adjudged bankrupt or (iv) has entered into a composition or scheme of arrangement with creditors, (v) must demonstrate ability to roll out and operate the facility country wide within one year after grant of the licence and if a company's it has to be registered in Kenya. The accompanying documents comprised, company profile, company history, contact service, affiliation if any, official documents including certificate of incorporation, evidence of financial capability to undertake a project of this magnitude and a proposal plan and schedule of implementation of the project within one year after the award of the licence.

107. It is common ground that the first and the second appellants participated in the tender process through their flagship, ***National signals Net works Limited.*** The tendering process closed on 9th March, 2011. The flagship company profiles as well as communication on financial capability and ability to roll out the programme within the stipulated time were supplied. These were conveyed to the 3rd respondent vide communication dated 30th May, 2011 and 31st May, 2011. The 3rd respondent responded to that communication vide their letter REF.CCK/Proc/RFP/09/2010-2011 dated June 17, 2011. It was under the hand of **Joyce Nyanamba** (Mrs) and addressed to **National Signal Networks Limited** C/O. **Mr. Linus Gitahi** group Chief Executive National Media Group. The content read:

> ***"Reference is made to the above tender proposal for award of licence to Roll out and operate a National Broadcasting Signal Distribution Network in Kenya and your subsequent submission of a bid. The Commission wishes to inform you that the technical evaluation of the above tender is now complete. We regret to inform you that your technical proposal was disqualified at the mandatory evaluation stage because your bid security did not meet the required tender security validity period as provided in clauses 3.8, 3.9.1, and 3.9.2 of the tender document.***
>
> ***Your financial proposal will therefore be returned unopened after completing the selection process.***
>
> ***We however invite you to witness the opening of the financial proposal for those who were successful on Monday 20th June, 2011 at 2.30pm. This will take place at the CCK Centre first floor meeting room 1.***
>
> ***We thank you for participating in this tender and look forward to your continued support."***

108. The tender document was not exhibited for me to know what those mentioned clauses contained. It

is however common ground that the first and the second appellants appealed to the Permanent Secretary Ministry of Information and Communications against disqualification of their bid on account of security issued to a 3rd party vide their letter dated 4th July, 2011. The appellants claimed the disqualification was unfair because the regulations permitted extention of the security bond; that fairness would have required that the consortium be requested to extend the validity period of the bid security before such harsh action could be taken against them; that the rejection of the bid was communicated to them on a Friday thus denying them an opportunity to rectify the bid security. The appellants also complained that they were not informed of the disqualification until after the technical evaluations were complete. This late communication was prejudicial to the appellants as it denied them an opportunity and ability to take measures of ameliorating the situation by extention of the bid security. They also argued that the bid security that they provided had an expiry date of 23rd July, 2011 and was therefore still valid and remained so valid as at the time of the disqualification. As such there was no basis to determine that their bid was invalid when it had not infact expired and was still valid as of the date of the appellants' letter of complaint.

109. The 1st and 2nd appellants continued to state that by reason of this action, CCK as the regulator had effectively locked out local investors from participating in the tendering process despite their investments in the infrastructure that the members of the consortium had made with regard to broadcasting services within Kenya. By reason of the complaints raised above the 1st and 2nd appellants asserted that the administrative process that resulted in their disqualification from proceeding further in the licence biding process was unfair and irregular. They thereby urged the permanent secretary to rescind the decision to disqualify them from the process and their tender bid to be given consideration under the Technical evaluation guidelines along side others. The Permanent Secretary was urged to give due consideration to their concerns and ensure that principles of fairness and reasonableness were injected into the bid evaluation so as to give the public faith in the process whatever the outcome.

110. The above complaint attracted a response from the addressee vide the Permanent Secretary's letter dated the 22nd day of July, 2011.

Ref: MIC/Conf/12/23.

The content read:

> ***"Your letter dated July 4, 2011 refers.***
>
> ***We have noted the contents therein and in view of the fact that your organizations have substantially invested in the broadcast infrastructure the Government has directed the Communication Commission of Kenya CCK to consider issuing you with the third signal distribution licence. However since this will be on affirmative action. The licence will come with certain conditions including;***
>
> > ***(i) Open access where other parties will access the channel.***
> >
> > ***(ii) Prove to CCK that other current infrastructure providers have no interest in investing in <u>National Signal Networks.</u>***
>
> ***In view of the foregoing and if the proposal is acceptable to you, submit your application directly to CCK and a copy to the Minister for Information and Communication"***

111. The above survey is a clear demonstration that the 1st and 2nd appellants' legitimate expectation that they would be subjected to a fair tendering process with regard to their application for a BSD licence was not met. My reasons for saying so are that first, the 3rd respondent as mandated by the relevant Act and regulations made thereunder elected to subject the intending licensees to the tendering process. Second, the 1st and 2nd appellants were specifically invited to participate in the tender process within the content of the tender notice because they were already involved in the industry and had at their disposal relevant infrastructure. Third, the tender notice specifically set out the conditions for disqualifications for

application for such a licence which were in tandem with the disqualification set by both the parent Act and regulations assessed above. Fourth, the letter of regret forwarded by the 3rd respondent did not specify that the disqualification was on account of the 1st and 2nd appellants' failure to meet the required conditionalities for the grant of such a licence as set out in the tender notice. Instead the disqualification was based on failure to comply with conditions in the tender document namely clauses 3.8, 3.9.1. and 3.9.2. Fifth, the tender notice did not make compliance with the conditions in the tender document as part of the conditions to be met by the intending applicants. This therefore took the 1st and 2nd appellants by surprise. Sixth, the regret was communicated belatedly after the technical tender evaluation procedures had been completed. No explanation was given as to why there was this delay in passing on this information to the appellants as argued by the appellants, considering that they were already on board in the broadcasting industry, the issue of a security bond should not have been a very big issue. It was also correctly contended by the appellants that the 3rd respondent had power to call for additional documents, considering that all that was required was for the bid security document to be validated to read 120 days instead of the days which had been indicated. Regulation 4 of the licensing regulation (LN 187/2009) provides that the commission may require an applicant to provide additional documentation or information that is directly relevant to assessing whether the applicant meets the criteria established in the Act and regulation for the grant of the licence or not. The exercise of this power by the 3rd respondent was withheld. The framing of the regulation tends to give an impression that reasons have to be given as to why an additional document is either called for or not called for. The 3rd respondent failed to accord the appellant such an opportunity.

112. Turning to the letter from the Permanent Secretary, it gave pre-condition as a qualification for the 1st and 2nd appellants applying for consideration for the award of a licence on the basis of affirmative action. This was without jurisdiction and stands faulted on two fronts. First the powers donated to the 3rd respondent by both the substantive law and the regulation is not subject to directions from any quarter. The Permanent Secretary's purported directions were therefore without basis. Secondly, Regulation 16 (2) (LN 187/2009) makes provision that conditions may be attached after the granting of a licence. There was no jurisdiction to attach conditions before issuance of the licence. In the premises, I am satisfied that the doctrine of legitimate expectation operates on this second limb as well. This arises from a promise by the 3rd respondent as a public body or its officers. Through the framing of the tender notice, the 3rd respondent held out to the intending licensees that the conditions put out in the tender notice were the only conditions that were required to be fulfilled by an intending licensee. They also held out as saying that they would comply with both the substantive statute law and regulations. Provisions on licensing and the attendant regulations give an impression that that was the practice. A practice recognized by the Constitution in Article 34(3) of the Constitution. The 1st and second appellants knew of the existence of these procedures and that is why they insisted on having their bid re- considered in accordance with those provisions. As long as the provisions of the substantive law and regulations made their under remained in force, the 1st and 2nd appellants as players in the media industry were expected to continue benefiting from them. These symbolize formal processing of any licence application. The 3rd respondent breached these by elevating tender document conditions over those both of the substantive law and regulatory law. Appellants are entitled to complain that their legitimate expectation was not met by the 1st, 2nd and 3rd respondents as regards the granting to them of a BSD licence in the condition in which they were so as just to translate from analogue to digital broadcasting.

**113. ISSUE ESTOPPEL**

I agree with **Maraga JA** in his final conclusion on this issue, notwithstanding that I have taken my own route to arrive at the same conclusion on this issue. As for the doctrine of issue estoppel and Res judicata, the learned trial Judge dealt with this issue at paragraphs 88,89,90,91,92,93,94 and 95 of his Judgment. In summary, the learned Judge was of the opinion that the 1st and 2nd appellants' consortium, **National Signal Networks Limited** having participated in the tendering process and lost; having appealed to the PPARB against the decision of the tender board and lost and having failed to exercise their right under Section 100 of the Public Procurement Act to appeal to the High Court against that decision, their chances of raising a complaint about that procedure was foreclosed. The learned Judge drew inspiration from the decision of the house of Lords in the case of ***Hunter versus Chief Constable of the West Mid Land Police and others [1981] 3WLR900*** wherein **Lord Diplock** had this to say inter alia:

***"It would be a scandal to the administration of justice if the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again."***

114. Also the case of ***Trade Bank Limited versus LZ Engineering Construction Limited [2000] IEA 266*** wherein the Court of Appeal held, inter alia, that ***"issue estoppel bars a party from re-litigating matters already ruled on by the Court. It only arises regarding determination of fact."***

> Section 120 of the evidence Act chapter 80 Laws of Kenya makes provision that ***"when one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceedings between himself and such person or his representative to deny the truth of that thing."***

115. As per the decision in **Trade Bank Limited versus LZ Engineering Construction Limited (Supra)** issue estoppel, applies to matters ruled upon by a Court of law and on issues of fact. On my own, issue estoppel does not apply here. My reasons are that first, while dealing with the issue of legitimate expectation to be subjected to a fair tendering process, it has been demonstrated that that process was not fair because the 3rd respondent acted outside the confines of the substantive provisions of the governing law as well as the regulations made there under. Two, the 1st and 2nd appellants did not Acquiesce to that process and challenged it immediately. Three the conditions precedent for the issuance of a licence by the Permanent Secretary were also without basis as it was contrary to the same provisions of law and regulations.

116. Further, there was sufficient material to link the appellants claim to Constitutional issues capable of being adjudicated upon by the High Court such as infringement of Article 34(3) of the Constitution in connection with denial of the subject licence to the appellants; issues as to whether CCK the 3rd respondent was the body contemplated in Article 34(5); whether own content or that acquired from 3rd parties fell into the category of intellectual property and was capable of being protected as such. There is no set number of issues required to be met before one can access a Constitutional Court. To me, even one issue surfices. Herein there were several constitutional issues which called for a merit determination by the learned Judge. Also as mentioned elsewhere in this Judgment this was a claim laid under the Bill of Rights. The proper forum mandated by the Constitution to adjudicate over issues touching on the Bill of Rights is the High Court. (Article 20(3) 21 (1).

117. It is appreciated that the complaints raised to the PPARB were almost similar to those raised in the letter to the Permanent Secretary dealt with under legitimate expectation and will not be repeated here. Save that there was a clear complaint that provisions of the regulations made thereunder had been violated and that reliance on a technicality to knock appellants out of the tendering process had infringed the provisions of Article 159(1) of the Constitution of Kenya 2010. In consequence thereof, the appellants sought an order that the decision of the procuring entity contained in the letter dated 17th June, 2011 be annulled or set aside, that the appellants bid be declared and /or deemed to be responsible, that the procuring entity be directed to evaluate the appellants bid on both the technical and financial aspect, and such other or further order as may be granted together with costs.

118. The decision of the PPARB was dated 19th day of July, 2011 vide which the Public Procurement Administrative Review Board rejected the appellants' claim. In a summary the PPARB upheld the primacy of the tender clauses over the statutory and regulatory provisions and the requirement of security under regulation 14 over the conditions in the tender notice and the overall Statutory requirement of the conditions for disqualification of a licensee. When the PPARB's attention was drawn to avenues of redress both in the statute and the regulations made thereunder, it folded its arms and said that it lacked jurisdiction to make any findings regarding the provisions of the CCK Act as the jurisdiction of the board was limited by Section 93(1) of the Public Procurement and Disposal Act 2005.

119. Turning to the question of Article 159 (2) (d) of the Constitution, the board claimed that Article 159 (i) deals with the judiciary in the discharge of its functions and not with administrative bodies such as the

procuring entity. The PPARB having declined to interrogate the fairness of the process as envisioned by the governing statutory and regulatory provisions of the Act under which the tendering process was initiated and on the basis of which the 3rd respondent acted, paved the way for the presentation of the petition to Court. As for failure to interrogate Article 159 of the constitution, this too is constitutional and justiciable as such as constitutional provisions bind State organs as well as public bodies. The PPRAB was such a public body.

120. Considering the 3rd appellants lack of participation in the initial proceedings and their decision to jump into the band wagon at the petition presentation stage, the relevant articles on the enforcement of the bill of rights assessed above gave them mandate to do so as they too were aggrieved. Further Article 258(1) of the Constitution gives mandate to **"every person"** a right to institute Court proceedings claiming that the Constitution has been contravened or is threatened with contravention.

I therefore find that the principle of issue estoppel does not apply to these proceedings.

**121. FAILURE TO REALIGN THE MIGRATION POLICY PROCEDURES WITH THE CONSTITUIONAL REQUIREMENTS.**

On failure to realign the migration policy to the Constitution, it is undisputed that Kenya became a member of the International Telecommunication Union (I.T.U.) on 1964/04/11 (See Pr.8 of the replying affidavit of ***Joseph Nampati Ole Musuni***). By virtue of this membership Kenya became bound by international norms codified in the various conventions as mandated by the law of Treaties 1969. In fact it was ***Mr. Njoroge's*** argument that that commitment ushered in the operation of the doctrine of ***Pacta Sunt Servanta*** as enshrined in Articles 26 and 27 of this treaty. These provide that "***every treaty in force is binding upon the parties to it and must be performed by them in good faith".*** Secondly that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. But the rule in Article 27 is indicated to be without prejudice to Article 46. Article 46 makes provision that a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

122. To **Mr. Njoroge** this doctrine now belongs to a body of international norms known as **JUS Cogens** from which Kenya cannot free itself which have now been crystallized in Article 2(5) (6) of the current constitution. Both sides have no problem with the proposition, that Kenya as a Nation has an obligation to honour its international obligations inclusive of those on Digital migration. It is common ground that two international conferences have featured prominently in the migration process. The RRC-04 and the RRC-06 during which certain resolutions were passed having a bearing on the litigation culminating in this appeal.

123. I find these to have been covered by the learned trial Judge in paragraphs 103,104,105,105,107,108,109,110,111,112 of the Judgment. The findings of the learned Judge are in agreement with the submission of both sides as assessed herein on the totality of the history of the Digital migration process.

**124. THE INTERNAL ICT POLICY 2006**

In a summary and for purposes of the record, it is clear that the in house ICT policy effective January, 2006 is the fore runner of the latter arrangements. This contained a component on broadcasting. The way forward comprised a recommendation under clause 4.2. These read:

> ***"The overall policy objective for the Sector is to create an environment that enables broadcasting service to be provided in the public interest and to contribute equitably to the Socio-economic and cultural development of Kenya. Specific objectives of the policy are:-***
>
> ***(a) Development of a legal and regulation frame work as a basis for investment in growth and sustenance of broad casting services and in dispute resolution.***

***(b) Encouraging the growth of a broad casting industry that is efficient competitive and responsive to audience needs and susceptibility. (c) Provision of a licensing process and for the acquisition of licence and allocation of frequencies through an equitable process.***

***(d) Ensuring the development of broadcasting services that reflect a sense of Kenyan identity, character, cultural diversity and expression through the development of appropriate local content.***

***(e) Promoting diversity in ownership and control of broadcasting services and availability throughout Kenya.***

***(f) Promoting fair competition, innovation and investment in the broadcasting industry.***

***(g) Ensuring adherence to social responsibility by encouraging the development of and respect for codes of practice by all broadcasting licensees.***

***(h) Promoting Research and development; and***

***(i) Ensuring universal access to, and viability of public service broad casting.***

125. Clause 4.6 on signal Distribution provided thus:-

***"The government will licence signal distribution services to ensure that the use of broadcasting infrastructures is maximized. A signal distributor will be required to provide services to licensees on a non-discrimination basis." Whereas clause 4.7 on*** Digital Broadcasting provided:

***"The government will promote the introduction and uptake of digital broadcasting in the country by managing the transition from analogue to digital broadcasting.***

126. In the same year of 2006 the RRC-06 final Acts were born. These have been well summarized and captured in annexture JTM 3 to the replying affidavit of **Joseph Tiamphiti Ole Musuni**. Of importance to this Judgment is that, Kenya appears to have all along been alive to the ongoings in the ITU conferences since becoming a member inclusive of the arrangements and ongoings in the RRC-04 which was the forerunner of the RRC-06. There is mention that even a draft policy was prepared on the Kenyan case and presented at the said conference. The provisions of the RR-06 became provisionally applicable as from 17th June 2006 but entry into force was effective 17th June, 2007. Observations made on the impact of the deliberations among others were that one; that the planning exercise had failed to take account of the existing assignment which needed to be protected throughout the transition period; two, that the new digital plan had been developed in the same frequency bands accommodating the existing analogue television plan; three, that digital broadcasting was expected to be more efficient in the use of broadcast spectrum since one frequency channel could carry more programmes than the existing analogue broadcasting system and lastly, four, that in order to activate the digital spectrum, the analogue spectrum had to be switched off.

**127. TASK FORCE REPORT 2007.**

The RRC-06 country report made various recommendations among them to set up a Task Force comprising all stake holders in the broadcasting industry to midwife the Digital migration process. On 4th March, 2007 the then Minister for Information and Communication **Mutai Kagwe** launched the Task Force on Digital migration. Two reports have been exhibited as a rising from that effort. One bearing the date of July 2007 and another September 2007. I have had the advantage of perusing both. These contain recommendations which are almost similar. I elected to assess the latter in time, that is of September, 2007 annexed to the replying affidavit of **Wathaka Waihenya** as WW1. As pointed out to the Court by the respondents, the Task Force members comprised personalities with close links to the appellants namely **Ian Fernande's** for Nation media group, **Esther Kamwaru** from Media Council of Kenya and **John Kopiyo** for Standard Group.

128. In a summary some of the recommendations of the Task Force were that the switch off of analogue terrestrial broadcasting would release some frequency spectrum in the UHF and UHF frequency bands for reassignment to other services; that frequency spectrum is a scarce public resource whose assignment or allocation neither confers ownership nor a continued right to a particular radio frequency; that in the case of digital broadcasting, this was achieved by creating separate market segments for signal distribution providers and content providers.

Principal recommendations on signal Distribution were as follows:

> (***1) KBC shall be required to form a separate company to run the signal distribution services in order to avoid conflict of interest or cross subsidization.***
>
> ***(2) Interested investors including current broad casters may be licenced to offer signal distribution services.***
>
> ***(3) Asignal distributor will be required to provide signal distribution services as a common carrier to broad casting licencees upon their request on an equitable, reasonable, non preferential and non discrimination basis.***

129. Other recommendations of the Task Force related to the requirement that existing analogue terrestrial broadcasting services do migrate to digital transmission networks based on their own commercial strategy and economic consideration; that the government in consultation with CCK do establish a multi stake holder working group to be known as Digital migration board to manage the migration process within a specified timetable. This board was expected to develop appropriate switch over strategy, identify likely bottlenecks to the uptake of digital broadcast, make recommendations relating to fiscal measures, develop appropriate consumer awareness strategy, design the methods of monitoring and evaluating the awareness, lock up and use of new services and adjust the campaign accordingly. CCK was mandated to provide appropriate regulations and necessary incentives towards implementation of digital broadcasting.

130. It is common ground that a digital migration Committee (D.T.C.) was formed. This Committee brought on board all stake holders in the media industry, government, and the communication sector. These were placed under the direction of the regulator CCK. Several meetings were held and recommendations on the way forward made, inclusive of the effective date for switch off from Analogue to Digital broadcasting. There were also stake holders' forums held. Two of these have been documented, one held on 24th August, 2011 at Ole Sereni Hotel, while the second one was held on 11th April, 2012 at Hotel Intercontinental. Notable out of these is that in the meeting of 24th August, 2011 the Permanent Secretary Ministry of Information and Communication made a promise that **Media Owners Association** would be given the third licence after the first two had been awarded to KBC through **Signet** and the second one through a competitive process to **Pan African Network Group (K) Limited**

**131. WAS THERE ANY NEED TO ALIGN THE IMPLEMENTATION POLICIES TO THE KENYA CONSTITUTION 2010?**

124. My response to this is yes. My reason for saying so is that, one, the International treaty on treaty compliance (The Viena treaty on the law of treaties) (Supra) enjoins a State party not to use its internal law as an excuse for failure to abide by its commitments to any treaty. Herein Kenya's commitment to the I.T.U. convention was to facilitate the migration process. Two; though the process of migration started way back ion 2004, it was not implemented until after the promulgation of the Kenya Constitution 2010 and there is no way the provisions of the constitution could be ignored. Three, it was submitted by both **Mr. Njoroge** for the 1st and second respondents and **Mr. Kilonzo** for the 3rd respondent, that no statute law was put into place to govern the Digital migration process. It was therefore imperative on the implementers to ensure that the executive action and policies to be executed were within the prescriptions permitted by the constitution. Four, since the ICT policy 2006, the RRC-06 country report, the Task Force digital migration report 2007 and the various digital migration committee reports recognized the presence and investments of those who were already players in the broadcasting industry, and recognized the need

to bring these on board, it was necessary to ensure that the executive actions would recognize the constitution and provisions of law regarding protection of property as it is undisputed by both sides herein that whatever had been put in place in the form of infrastructure as well as content belonged to those who had undertaken their development. Five, since no new law was brought on board, it was necessary to ensure that the parent Act (the Information and Communication Act as well as Regulations made thereunder, were realign to the requirements of the constitution. It is therefore not correct as argued by **Mr. Njoroge** that it was the constitution which was required not to ignore the presence of the Act. The constitution itself states clearly that "any law in consistent with it is void to that extent. Article 2(4). The same constitution also stipulates that international law is part of the law of Kenya (Article 2(5) (6)). The constitution of Kenya does not elevate international law over it. It means it is the constitution which has primacy over international law. Six, in terms of the consumers who are the viewers, especially in instances where these had the option of either opting for FTA channels (Free to Air Channels) offered by the appellants and those opting for set top boxes, the implementers had a duty to balance the interests of both to ensure that right of the service providers as well as those of the recipient viewers were respected. The service providers to continue providing free services so long as they complied with the law. While viewers continue to receive information free of charge. FTA services can comfortably fall into the value of social justice in Article 10 of the Constitution. Investors giving free services to the community.

132. It is noted that the digital migrations implementing committee opted for piece meal implementation starting with Nairobi and its environs, followed by major Towns country wide and then the rest of the country. This had to take note of the constitutional prescriptions on equal treatment before the law to avoid those in the affected areas moving to Court to challenge the piece meal implementation programmes on account of discrimination.

**133. WERE THE COSNTITUIONAL EXPECTATIONS MET IN THE IMPLEMENATTION PROGRAMME?**

This will depend on my findings on the various aspects of the implementation process that follows. Article 1(1) of the Constitution provides that all sovereign power is vested in the people of Kenya.

Under sub Article 3, of Article 1, this sovereign power is donated to State organs among them Parliament. In matters affecting the Bill of Rights, the rights belong to each individual, do not exclude other rights granted by other law and is subject to limitations contemplated in the Constitution (Article 1(a). They are binding on all State organs and all persons (Article 20 (1)). The rights are justiciable in the High Court (Article 23(1). These are capable of being limited by law subject to such limitations being reasonable and justifiable bearing in mind the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, and the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others and the relation between the limitation and its purpose and whether these are less restrictive.

134. Means to achieve this purpose are set out in the same Article (Article 24(1). Under sub Article 2, either the State or a person seeking to justify a particular limitation has the obligation to demonstrate to the Court, tribunal or other authority that the requirement of this Article had been satisfied. Under sub Article 5, there is provision that despite clause (1) and (2), a provision in a legislation may limit the application of the rights or fundamental freedoms in an Article.

135. From the above survey, it is clear that Article 34 under which the appellants claim of rights is anchored is restricted by the major enforcement provision on the enforcement of the Bill of Rights namely Article 24(5). It permits both substantive and regulatory law to have restrictions. Since this same Article makes provision that the media industry is subject to regulation, It is prudent for one to say that perhaps the regulator if properly mandated can restrict the number of licences or how licensing should be done considering that all the documentation in Digital migration both at the International, regional and also national levels are in agreement that Airwaves and frequencies are a scarce natural resource.

136. There is however a safety valve in the same Article 24(3) which requires the entity intending to

create a limitation on the enjoyment of any particular right to justify that limitation both in the intended law and the regulation. Herein, it was therefore important for the CCK as the regulator and provider of this scarce resource to justify the limitation. No justification was put forth by the 3rd respondent in the documentation surveyed. All that was done was to state that this was agreed upon in the 19th Congress of the East African Communication Organization countries held in Bujumbura Burundi from 28th May to 1st June, 2012 annexed to the replying affidavit of Francis **Wangusi,** Wherein there is observation that there are at least 3 main players' namely broadcasters producing content, signal distributors and viewers. It was recommended at clause 51:0 that the content service provider should not be allowed to assume the fucntionality of a signal distributor and vise varsa.

137. It also has to be borne in mind that the RRC-06 did not set out a straight jacket program. It left it to the individual member States to work out their programmes bearing in mind the peculiar circumstances prevailing at home. In the absence of a specific home grown statute and or regulation limiting the number of licences capable of being issued, the regulator was obligated to justify the limitation. In addition to this, the regulator was duty bound to ensure that the implementation policies complied with the standard set in Article 10 of the constitution namely human dignity, equity, equality, human rights, non discrimination, good governance, integrity, transparency and accountability.

138. Good governance demanded of the regulator CCK to comply with the conditionalities set by both the substantive law and the regulations on disqualification for one to hold a BSD licence. This they did not as they disqualified the 1st and 2nd appellants from the tendering process on grounds placed in the tender document and yet to their knowledge these had not been made as one of the disqualifying conditions in the tender notice. 2ndly it was deeming and humiliating to degrade appellants by knocking them out of the industry as such a technicality. It gave the wrong impression that appellants were persons without integrity. This was contrary to the requirement of holding human dignity under Article 10. The move also did not respect the appellants' right to continue in the media industry as long as they complied with the law. No breaches of law in the conduct of their business in this industry were ever throughout the proceeding. It means appellants abided with the law in the discharge running of their business highlighted by the appellants were therefore genuinely aggrieved.

139. This brings me to the hottest issue herein as to whether the 3rd respondent as currently constituted is the body envisaged under article 34(5) of the Constitution. It provides:

"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 section of the society and***

***(c) Set media standard and regulate and monitor compliance with those standard"***

140. This issue was covered by the learned trial Judge at paragraph 81,82, 83 and 84 of the Judgment. In a summary, the learned Judge's findings were that under the Kenya Information and Communication Act the CCK is the body mandated to regulate broad casting and other electronic media by way of licensing; that this mandate is donated by Section 5 of the Act; that Article 34(5) required Parliament to enact legislation establishing an independent body to regulate the media within three years of promulgation; that it was an issue as to whether CCK as was then established was the body envisaged under the said Act. After reviewing in all the relevant provisions of the Constitution, the learned Judge arrived at the conclusion that CCK was that envisaged body. The Judge has been fully supported on this by all the respondents. The 3rd respondents has further thrown in a caution that this same issue is pending before this Court arising from a different litigation and that I should not pre-empt the outcome of that litigation. Secondly that the appellants' complaints have now been overtaken by events upon the coming into effect of the Kenya Information and Communications (Amendment) Act 2013 No.41A vide Kenya gazette supplement of 18th December, 2013.

141. It is not disputed that indeed it is the CCK as was then constituted which received the mandate both

from the International body RRC-06 and the Regional body the 19th congress for the East African communication organization (EACO), Internal ICT POLICY and Task Force report to set the ball rolling for digital migration in this country.

142. The Task Force report on Digital migration in its report of September, 2007 mandated the Communication Commission of Kenya (CCK) the 3rd respondent to come up with appropriate regulations. The 3rd respondent is a creature of statute having been brought into being by virtue of Section 3 of the Kenya Communication Act No.2 of 1998 as a body corporate with perpetual succession and a common seal and which in its corporate name is capable of suing and being sued. Upon its creation, it was placed under the management of a board of Directors. Section 6 of the Act provided:-

> ***"The management of the commission shall vest in a board of Directors of the commission which shall consist of:***
>
> ***(a) Chairman who shall be appointed by thePresident.***
>
> ***(b) The Director General who shall be appointed by the minister.***
>
> ***(c) The Permanent Secretary in the ministry for the time being responsible for communication or his representative.***
>
> ***(d) The Permanent Secretary in the ministry for the time being responsible for finance or his representative.***
>
> ***(e) The Permanent Secretary for the time being responsible for internal security or his representative.***
>
> ***(f) The Permanent Secretary in the ministry for the time being responsible for information and broad casting or his representative, and***
>
> ***(g) At least five other persons not being public officers appointed by the minister by virtue of their knowledge or experiences in matters relating to postal services , telecommunication, radio communication commerce or related interests and the minister shall have due regard to registered societies representing such interests in exercising his powers under this paragraphs.***

143. This legislation was revised in 2009. The revision introduced Section 5A which empowered the minister to issue to the Commission policy guidelines of a general nature relating to the provisions of the Act as may be provided. This was to be done in writing and published. Section 5B on the other hand requires the Commission to exercise its functions independently of any person or body. The appointment of Directors under Section 6(1) (a) (b) (c) (d) (e) of the old Act remained intact. Specifics were given of the class of persons the minister was mandated to bring on board namely one having experience in matters of law, postal services, broadcasting, radio, communication, information technology or computer science, telecommunications, consumer protection. Regard to registered societies was retained but under subsection (2). This is the law that was in operation and on the basis of both its substantive relevant provisions and regulations made thereunder that the 3rd respondent embarked on the exercise culminating in this appeal. It is also clear that the 2009 amendment came on board before the promulgation of the Kenya Constitution2010. This legislation was therefore a saved legislation.

144. Article 261(1) of the Constitution makes provision that ***"parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the fifth schedule commencing on the effective date"*** The 5th schedule mandated that legislation relating to freedom of the media to be effected within three years.

Section 7(1) of the sixth schedule makes provision for existing laws. It provides:

> ***"All law in force immediately before the effective date continues in force and shall be construed***

***with the alteration, adaptation, qualification and exception necessary to bring it into conjunction with this constitution"***

145. It was therefore correctly found by the learned Judge that all subsisting laws prior to the promulgation of the Constitution together with their inbuilt execution components or organs were saved intact. Issue only arises when it comes to construction of these laws. Such construction should be aimed at bringing such law in conformity with the constitution. No issue arises with the requirements that BSD licences be regulated; that the regulator is the same old outfit under the saved statute. The major issue is whether this outfit fits the description envisaged under Article 34(5) of the Constitution which is categorical that the outfit must be ***"a body independent of control by government….."*** From the provisions highlighted above, the composition of the CCK both under the 1998 and the 2009 Acts was government controlled.

146. In the case of ***Reyes versus the Queen [2002] 2AC 235 a decision of the Privy Council page 245 – 256*** there is found observations on interpretation of both the constitution and statute. The following extracts of the said observations are relevant to the issues for determination herein: -

> **"(i) When enacted law is said to be incompatible with a right protected by a Constitution, the court's duty remain one of interpretation. Where an issue arises as to the meaning of the law the court has to resolve that issue and having done so it must interpret the Constitution to decide whether the enacted law is incompatible or not.**
>
> **(ii) When called upon to interpret the Constitution the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution---. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own moral values into the Constitution but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right.**

147. Article 259(1) of the some constitution provides:-

> **"This Constitution shall be interpreted in a manner that:**
>
> ***(a) Promotes its purposes, values and principles.***
>
> ***(b) Advances the rule of law and the human rights and fundamental freedom in the Bill of Rights.***
>
> ***(c) Permits the development of the law, and***
>
> ***(d) Contributes to good governance"***

148. It is undisputed and this Judgment as well as the respondents have acknowledged that appellants are seasoned media broadcasters. They have been in this arena for quite some time. It can safely be said that they are seasoned. All the International, Regional and National policies on digital migration acknowledged them as players in this industry. They currently hold on some Frequencies. It has come out clearly from the content of the expert reports contrary to the appellants' contention that both Analogue and Digital broadcasting can be peaceful bed fellows. I agree with the expert reports that these cannot coexist peacefully. One has to give way to the other hence the migration marathon.

149. It is also common knowledge that the appellants lost out in the race for the Digital licence. One of their grievances is that this deprivation has been carried out by an entity not mandated to do so. The case law cited as read together with Article 259 of the constitution enjoins me to interpret the constitution in such away so as not to withhold the fundamental right. I have done so and I find that the key operative words in Article 34(5) is **"Independent of the government".** CCK as at the time of execution of its mandate in relation to litigation giving rise to this appeal was not independent of the government. It

therefore had no legitimacy to do what it did.

150. As for this Court to refrain from ruling on the locus standi of the CCK because it is a substantive issue in another upcoming appeal, because in doing so, I might preempt the outcome of that other appeal, I am of the opinion that doing so would be tantamount to the Court abdicating from its duty as vested in it by the appellate Jurisdiction Act namely, to hear and determine appeals from the **High Court, in cases in which an appeal lies to the Court of appeal** and as lawfully and constitutionally mandated by Article 164 (3) of the Constitution namely to hear appeals from the High Court and any other Court or tribunal as prescribed by an Act of Parliament. Rule 29(1) of this Court's Rules also enjoins the Court of Appeal to re-evaluate the facts and determine all issues raised in an appeal presented to it. There is no room in all these provisions that can be employed by me to exclude any issue that may be knowingly or unknowingly pending before the same Court in another appeal.

151. As for the complaint being overtaken by events on account of the coming into effect of the new Act, I have schemed through it. Its commencement date is 2nd January, 2014. None of its provisions has a retrospective effect. Article 24(3), 261 and the 5th schedule are all forward looking. This means that CCK is not that body envisaged by Article 34(5) of the Constitution. Its action in so far as these went to affect the right of the appellants under the constitution stand voided.

**152. CONCLUSIONS**

For the reasons given in the assessment and since **Maraga JA** agrees, I partially dismiss the appellants appeal in relation to **Majanja J's** order in his Judgment dated 23rd December,2013 striking out paragraphs 50 & 51 of the petition and paragraph 16, 17 & 18 of the supporting affidavits **Samuel Kamau Macharia** and paragraph 19 of the supplementary affidavit of **Linus Gitahi.** The rest of the appeal is allowed. I therefore proceed to make the following as orders of the Court.

1. The appellants' grounds of appeal that the learned Judge erred in striking out the above mentioned paragraphs of the petition and supporting affidavits in support of their petition are hereby dismissed.

2. In view of the violation of the Constitution in failing to reconstitute CCK in tandem with the requirements of Article 34(3) (b) the appellants were entitled to seek relief by way of a constitutional petition.

3. The 3rd respondent's direction to the 4th, 5th, 6th and 7th respondents to air the appellants' FTA programmes without their consent is a violation of the appellants' Intellectual Property Rights and is hereby declared null and void.

4. That in its composition at the material time, CCK was not the independent body envisaged by Article 34(3)(b) to regulate airwaves in Kenya after the promulgation of the Constitution of Kenya, 2010 consequently the public procurement process of determining applications for the BSD licenses that it conducted in connection with this matter was therefore null and void.

5. An independent body or authority constituted strictly in accordance with Article 34(3)(b) shall conduct the tendering process afresh.

6. In view of the appellants' massive investment in the broadcasting industry, we direct that the independent regulator constituted as stated above do issue a BSD license to the appellants without going through the tendering process upon meeting the terms and conditions set out in the appropriate law and applicable to other licensees.

7. The issue of a BSD license to the 6th respondent is hereby declared null and void. The 3rd respondent shall refund to the 6th respondent whatever fees it paid for that license.

8. Pending compliance with the above orders as regards BSD licensing, the 2nd and 3rd respondents are hereby restrained from switching off the appellants' analogue frequencies, broadcast spectrums and

broadcasting services.

9. In order to comply with these orders, the new switch-off date shall not be latter than 30thSeptember, 2014.

10. The 1st, 2nd, and 3rd respondents shall pay the appellants' and the 8th respondents' costs of this appeal and those of the High Court. The other respondents shall bear their own costs.

**Dated and delivered at Nairobi this 28th day of March, 2014**

**R.N. NAMBUYE**

**……..……**

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

D/O

**IN THE COURT OF APPEAL AT NAIROBI**

**(CORAM: NAMBUYE, MARAGA & MUSINGA, JJ.A)**

**CIVIL APPEAL NO. 4 OF 2014**

**BETWEEN**

**ROYAL MEDIA SERVICES LIMITED…….……1ST APPELLANT**

**NATION MEDIA GROUP……2ND APPELLANT**

**STANDARD GROUP LIMITED…….…….3RD APPELLANT**

**VERSU**

**ATTORNEY GENERAL……..…..……..…...1ST RESPONDENT**

**THE MINISTRY OF INFORMATION COMMUNICATION &**

**TECHNOLOGY…….....2ND RESPONDENT**

**COMMUNICATIONS COMMISSION OF KENYA….....3RD RESPONDENT**

**SIGNET KENYA LIMITED…….....…..4TH RESPONDENT**

**STAR TIMES MEDIA LIMITED…….....….5TH RESPONDENT**

**PAN AFRICA NETWORK GROUP KENYA LTD…….....6TH RESPONDENT**

**GOTV KENYA LIMITED…….....….7TH RESPONDENT**

**CONSUMER FEDERATION OF KENYA…….....….8TH RESPONDENT**

**WEST MEDIA LIMITED…….....……..9TH RESPONDENT**

(Being an appeal from the judgment of the High Court of Kenya at Nairobi (Majanja J) dated 23rd December,2013.

in

HIGH COURT PETITION NO. 557 OF 2013)

**********

**JUDGMENT OF MARAGA, J.A**

**Introduction**

1. This appeal has been fought with the vigour and enthusiasm that I have not seen in our courts in the recent past. It raises a fundamental issue of the nature and scope of the right and/or freedom of establishment of the media protected by **Article 34** of our Constitution. It arises from the judgment of Majanja, J delivered on 20th November 2013 in which the learned Judge dismissed with costs the appellants' Constitutional Petition No. 557 of 2013. In that petition, the appellants had mainly accused the 2nd and 3rd respondents of violating their constitutional rights under **Article 34** of the Constitution in the proposed migration from analogue to digital terrestrial broadcasting platform by refusing to grant the 1st and 2nd appellants a Broadcasting Signal Distribution license (BSD license).

**Brief Statement of Facts of the Case**

2. A brief statement of the facts of the case and the background information are that the global telecommunication frequencies are allocated and managed by the International Telecommunication Union (the ITU) under the International Telecommunications Union Convention (the ITU Convention). The ITU is responsible for planning and allocation to member states of the global frequency spectrum resources and ensures that there is compatibility of the frequencies across states to minimize interference in their use between and within the member states. The ITU comprises of three sectors: the Radio Communication (ITU-R), Standardization (ITU-T) and Development (ITU- D). ITU-R combines both radio and TV broadcasting and it is the one we are concerned with in this appeal.

3. For purposes of easy and efficient management of these resources, the world is divided into three ITU Regions. Kenya is in ITU Region 1 which comprises of Western and Eastern Europe, Africa and the Middle East.

4. There are three technologies of TV broadcasting: terrestrial, satellite and cable digital platforms. Transmission of television broadcast is currently in both analogue and digital form. Under analogue transmission, at any one time, one channel can only broadcast one programme and one transmitter can only broadcast through one frequency range. That necessitates control of an entire broadcast by one entity which maintains the transmission infrastructure and develops the content which it rolls out to the viewing public. Under digital terrestrial broadcasting; however, one frequency can carry several channels and a distinction is made between a broadcaster and a signal distributor. A broadcaster can but does not have to combine his role with that of a distributor. In the modern technology, it is advisable that these tow roles be segregated so that the broadcaster provides the broadcast content to a distributor who rolls it out to viewers at an agreed fee. The distributor therefore is the one who erects and maintains the transmission infrastructure.

5. Following developments in technology and the need to efficiently utilize the scarce frequency spectrum resources and meet competing demands for them, countries in ITU Regions 1 and 3 held discussions from the year 2000 with a view to migrating from analogue to digital transmission.

6. ITU Region 1 held its first Regional Radio Communications Conference in 2004 (the RRC-04) in Geneva, Switzerland in which it agreed to establish the base for digital broadcast in its region. The second Regional Radio Communications Conference held in the same city in 2006 (the RRC-06) agreed that except for the territory of Mongolia and the Islamic Republic of Iran, the rest of ITU Region 1 should migrate from analogue to digital transmission and the RRC-06 Final Acts set 17th **June 2015** as the switchover date.

7. To comply with the terms of the RRC-06 Agreement, the Government of Kenya, as a State Party to the ITU Convention which it had ratified on **11th April 1964** and as a signatory to the RRC-06 Agreement, established a Taskforce (the Taskforce) on the migration from analogue to digital broadcasting to advise it on the modalities of migration and set December 2012 as the transition deadline to enable the country have flexibility to address any difficulties that might arise. The Taskforce gathered views from all stakeholders and presented its report (the Taskforce Report) to the Government on 4thOctober, 2007.

8. The Taskforce recommended, inter alia, that to efficiently utilize the scarce frequency spectrum resources, Kenya should establish a common transmission platform and that digital signal transmission should be undertaken by entities separate from the content providers. In this regard, the Taskforce recommended that the Kenya Broadcasting Corporation (KBC) being the designated public broadcaster should be required to incorporate a separate company from the current statutory entity to undertake digital signal distribution services. Acknowledging the current broadcasters'substantial investment in the broadcasting industry, the Taskforce further recommended that a second distribution license be issued to them through a subsidiary company they should incorporate to undertake digital signal distribution services. The licensed signal distributors would be required to provide signal distribution services as common carrier to broadcasting licensees upon their request on an equitable, reasonable, non- preferential and non-discriminatory basis.

9. To implement the recommendations of the Taskforce, on 5th December, 2007 the Minister for Information and Communications (the Minister) established an implementation body known as the Digital Television Committee (the DTC) comprising of members from various stakeholders including representatives of the appellants to spearhead the migration.

10. Pursuant to the Taskforce recommendations, the 3rd respondent issued a broadcasting signal distribution license (the BSD license) to Signet Kenya Ltd, a subsidiary of KBC, in 2009 and later commenced the procurement process for the issue of a second BSD license by advertising and inviting expression of interest from any interested parties. The 1st and 2nd respondents through a firm known as National Signal Networkstendered but failed to meet the criteria on the bid security validity period. The Pan-Africa Network Group (Kenya) Limited, the 6th respondent, qualified and was issued with the second signal distribution license. The 1st and 2nd respondents' appeal to the Public Procurement Administrative Review Board (the Procurement Review Board) was dismissed on 19th July 2011.

11. Before that dismissal, however, the 1st and 2nd respondents had petitioned the Minister for a BSD license. In a letter dated 22nd July 2011 from the Permanent Secretary, Ministry of Information and Communications (the Permanent Secretary), the Government directed the 3rd respondent to consider issuing a third BSD license to them on condition of permitting open access of their channels to other parties and proof that the other current broadcasters have no interest in joining in that application. The 1st and 2nd respondents, however, failed to submit their application and instead, on 22ndNovember, 2013, over two years later, filed the petition giving rise to this appeal.

12. The DTC had recommended 1st July, 2012 as the switch-off date but due to delay, the Government deferred the switch-off to 31st December, 2012. Due to a petition filed by the 8th respondent, the Government was again forced to defer the switch-off date to 13th December 2013. Come that date, as stated, the appellants filed the petition giving rise to this appeal and obtained stay orders.

**The Appellants' Claim in the High Court Petition**

13. In their petition dated 20th November 2013 and brought under **Articles 2, 3, 10, 20, 22, 23, 33, 34, 40, 46, 47** and **259** of the Constitution, the appellants, as petitioners, claimed that they are duly licensed radio and television broadcasters providing analogue terrestrial television broadcasting services throughout the country. Collectively they are the three leading television broadcasters with a combined viewership of over 85% across the country. Since commencement of their operations in 1997, 1998 and 1990 respectively, the 1st appellant has invested a whooping Kshs.40 billion in infrastructure plant and equipment and has currently a workforce of 1350 employees. On their part the 2nd and 3rd appellants have respectively invested Kshs.2 billion with 350 employees and Kshs.2.670 billion with 205 employees.

14. The appellants further claimed that despite the Taskforce recommendation that the current TV broadcasters be issued with the second BSD license on account of their said heavy investment, the 3rd respondent conducted a flawed and uncompetitive tender process which lacked transparency and accountability and rejected the 1st and 2nd appellants' bid for a BSD license at the technical evaluation stage on the ground that the validity period of their bid bond security of Kshs.500,000/= was for only 53 days instead of the required validity period of 120 days. The appellants claimed that that period of 120 days was not required in the original tender. Thereafter the 3rd respondent issued a distribution license with 3 frequencies to the 6th respondent, Pan Africa Group Kenya Ltd, a Chinese incorporated firm which had not even met the 30% Kenyan equity participation requirement as required by the Taskforce Report.

15. In response to the 1st and 2nd appellants' request for a reconsideration of their BSD license application, on 22nd July 2011, the Permanent Secretaryadvised them that the Government had directed the 3rd respondent to consider issuing them with a 3rd BSD licenseon impractical conditions which negated the Taskforce recommendations.

16. The appellants further stated in their petition that the RRC – 06 Agreement allowed State parties an additional 5 years period beyond the 2015 cut off point. As the Kenyan public cannot afford to acquire the set top boxes (the STBs), the gadgets which will enable analogue TV sets to receive digital signals, currently retailing at between Kshs.5,000/= and Kshs.6,000/=and to give the current broadcasters sufficient time to prepare to migrate, the appellants petitioned the Kenyan Government to opt for the stated extension and migrate in 2020 otherwise the appellants' broadcasting infrastructure will go to waste and a majority of the Kenyans will be locked out of television viewing and thus lose their constitutional right to information.

17. The appellants claimed that the Kenya Government refused to take the extended period option and instead wrote on 18th October 2013 that it would carry out a phased switch-off starting with Nairobi on 12th December 2013. That forced the appellants to file the said petition in which they sought:-

> i***) A declaration that the Petitioners' rights as broadcasters under Articles 33 and 34 of the Constitution have been infringed and threatened with violation by the 2nd and the 3rd Respondents;***
>
> ***ii) A declaration that the Respondents in limiting the Broadcast Signal Distribution license to five licensees has violated the freedom of establishment of the media contrary to Article 34 of the Constitution;***
>
> ***iii) A declaration that the Petitioners' right of establishment as television broadcasters protected by Article 34(3) of the Constitution is violated and rendered meaningless by the failure to issue the Petitioners with Digital Signal Distribution licenses and Digital frequencies;***
>
> ***iv) A declaration that the proposed switch off date of 13th December 2013 is punitive and against public interest and infringes on the Petitioners' right of establishment as media houses and broadcasters and will disenfranchise the public's right to receive information;***
>
> ***iv) A declaration that analogue and digital broadcasting spectrums can co-exist and the 2nd***

***and the 3rd Respondents are under an obligation to give the public the right to choose until such time that there are adequate number of universal set top boxes in the country;***

***v) A declaration that the Petitioners are entitled to be issued with a Broadcast Signal Distribution license and Digital frequencies by the Government and in default they should continue with the current analogue broadcasting services;***

***vii) An order compelling the Government through the 1st and the 2nd Respondents to issue the Petitioners with Digital Broadcast Signal Distribution licenses and Digital frequencies;***

***viii) An Order of injunction restraining the 2nd and the 3rd Respondents from switching off the Petitioner's analogue frequencies, broadcasting spectrums and broadcasting services on 13th December 2013 or at all pending the issuance of the Broadcast Signal Distribution licenses and Digital frequencies to the Petitioners, a reasonable period to roll out digital television broadcasting services and the supply of universal set top boxes to all consumers with television sets;***

***ix) An order of permanent injunction restraining the 4th, 5th, 6th and 7th Respondents by themselves, their licensees and/or agents, from broadcasting, distributing or in any way interfering with the Petitioners' programs, broadcasts, copyrighted material and productions or in any way infringing the Petitioners' intellectual property rights; and***

***x) The Respondents to pay the Petitioners costs of the Petition in any event.***

**The Response to the Petition**

18. In response to the petition, Joseph Tiampati Ole Musuni, the Principal Secretary in the Ministry of Information and Communications and Francis Wangusi, the Director General of the Communication Commission of Kenya and representatives of the other respondents swore replying affidavits in which they stated that Kenya is a State Party to the International Telecommunications Union (the ITU) Convention which it ratified on **11th April, 1964** and which, by dint of Article 2(6) of the Constitution, is now part of the law of Kenya. In 2006, the ITU convened the RRC-06 which resolved that in order to avail themselves of the benefits of modern technology including increased access to information by enabling more programmes channels to be accommodated in one frequency thereby attracting new investments and creating job opportunities and to keep abreast with contemporary development in information and communications technology, member states should migrate from analogue terrestrial broadcast to digital terrestrial broadcast. The member states set the **17th June, 2015** as the switchover date. Kenya is signatory to RRC-06 and is not one of the countries exempted and allowed to migrate in 2020. To alter its obligations under the RRC-06 Agreement, Kenya has to cause the ITU to convene another RRC conference under Article 11 of the RRC-06 Final Acts and get all the member States to agree to the change which will be no easy task. Kenya is therefore bound by the terms of the RRC-06 and has to migrate by 17th June 2015.

19. The Taskforce acknowledged the current broadcasters' substantial investment in the broadcasting industry and recommended that they may also be licensed through a subsidiary company to undertake digital signal distribution services. The 1st and 2nd respondents, through a firm known as National Signal Networks, tendered for a BSD license but failed to meet the criteria on the bid security validity period. Their appeal to the Procurement Review Board having been dismissed and as they refused to take the affirmative action offer of a BSD license given by the Government, the appellants had no basis for filing the petition on 22nd November 2013, over two years later.

20. It was further averred for the respondents that the appellants having been involved in the Taskforce deliberations and having been represented in the DTC, their petition had no basis and was aimed at scuttling the creation of a level playing field for all broadcasters so that they could protect their commercial interests. Article 34 of the Constitution and/or their substantial investments do not confer on them any automatic right to be issued with a BSD license. In the respondents' view therefore, the claim

that the Kenyan public will not be able to afford the cost of STBs or that there are no standard STBs is a red herring. The Government having zero rated the STBs, they are now retailing at between Kshs.5,000/= and Kshs.7,000/=. If the viewing public can afford to buy TV sets for about Kshs.10,000/= and over, they can also afford to by the STBs. The Government has also ensured that the available STBs are standard to transmit free to air (FTA) programmes and it is only those viewers who will require pay-TV programmes who will be required to get their STBs encrypted. They refuted the claim that the 3rd respondent has ordered the signal distributors to broadcast the appellants' content without their consent. They finally urged the court to dismiss the petition, for to grant any of the prayers sought in the it would not only cause the country to breach its RRC-06 obligations but would also cause enormous losses to the other respondents who have also invested in the broadcasting industry.

21. As stated, after hearing the petition, Majanja, J dismissed it thus provoking this appeal.

**Grounds of Appeal**

22. The appellants listed 15 grounds of appeal which faulted the learned Judge for: elevating the RRC-06 Agreement above the Constitution; holding that the 3rd respondent, a body wholly controlled by the Government, was the independent body contemplated by Article 34 of the Constitution to regulate the licensing of broadcasters; failing to realize that the 2nd and 3rd respondents' manner of implementing the digital migration was in complete violation of the appellants constitutional rights under Articles 33 and34ofthe Constitution; holding that the appellants' claim for a BSD license is barred by the doctrine of issue estoppel and is therefore a collateral attack on the decision of the Procurement Review Board; basing his decision on a selective and incorrect reading of the 2006 National ICT Policy (the ICT Policy), the Taskforce Report and the minutes of the DTC and thereby erred in holding that the appellants had no legitimate expectation of being granted a BSD license and digital frequencies on account of their substantial investments in broadcasting; failing to appreciate that requiring the respondents to broadcast the appellants' programmes and content without their consent would violate their intellectual property rights; holding that the infringement of the appellants' intellectual property rights could not be the subject of a constitutional petition; holding that having failed to obtain a BSD license the appellants could not seek court relief without considering the unreasonable conditions imposed by the 2nd respondent; striking off some paragraphs of the petition and the supporting affidavits without any formal application being made; and for disregarding the uncontroverted averment that the award of a BSD license to the 6th respondent was procured through bribery and corruption by way of ceding 5% of its shareholding to Government Officials to facilitate the award of the tender.

23. On the basis of these grounds the appellants sought orders that this appeal be allowed with costs and judgment be entered as prayed in the appellants' petition dated 22nd November 2013 and such further relief as this Court deems appropriate to give effect to the Constitution.

**Submissions for the Appellants**

24. In their submissions before us, Messer's Muite, Murgor, Ochieng Oduol, Kimani Kiragu and Mansur Issa, learned counsel for the appellants, clustered the 15 grounds of appeal into six categories.

25. The first two clusters relate to the appellants' constitutional rights under Article 34vis-à-vis the Government's implementation of the ICT Policy and the RRC-06. On this, counsel for the appellants faulted the learned Judge for failing to heed the cannons of constitutional interpretation spelt out in Article 259 and instead restricting the interpretation of Article 34. They said the learned Judge failed to appreciate that the body envisaged by Article 34 to license media players should be independent of government, political and commercial interests. The Communication Commission of Kenya (the CCK), which denied the appellants a BSD license, is controlled by the Government as a majority of its members are appointees of the Executiveand as such it could not render objective decisions. In so doing, they argued, the learned Judgefailed to consider the issue of the independence of CCK and instead concentrated on transitional provisions holdingthat pending the constitution of an independent body, the CCK is the body authorized to regulate the media industry.

26. Counsel for the appellants argued that Section 7 of the Sixth Schedule to the Constitution obliged the learned Judge to construe the existing licensing law, including the ICT Policy "with the alterations, adaptations, qualifications and exceptions" necessary to bring it "into conformity with the Constitution." They said if the learned Judge had properly considered this provision together with Articles10(1) and 27(4)and applied the principles of interpreting transitional provisions stated in the case DDP v. Mollison No. 21 as well as Article 19 of the ACCESS TO THE AIWAIVES: Principles on Freedom of Expression and Broadcasting Regulation2, he would have found

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[2003] UKPC 6 (22 January 2003).

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Access to the Airwaves, Principles on Freedom of Expression and Broadcasting

Regulation, Article 19, International Standards Series, London ISBN 1 902598 46 6 March 2002,

33 Islington High St., London, N1., 9LH, UK.

that, given its composition, CCK is not the independent body envisaged by Article 34(3)(b) to regulate broadcasting.

27. Regarding the RRC-06 Agreement, counsel for the appellants further argued that even if a legal provision or Government policy is constitutional, if its implementation violates the Constitution, that taints it and obligates courts, as stated in Article 2(4)of the Constitution, to strike it down for unconstitutionality. On migration, counsel for the appellants submitted that the violation of appellants' constitutional rights cannot be justified on the need to meet the Government's commitments under the RRC-06 Agreement. They argued that a convention is on the same hierarchy as an ordinary Act of Parliament, which cannot override the Constitution. In their opinion, the whole world cannot migrate at the same time. So the Kenyan Government can overshoot the 17th June 2015 deadline without any repercussions.

28. Counsel also faulted the learned Judge for failure to appreciate that the Government had imposed upon the 1st and 2ndappellantsimpossible and unreasonable conditions for the grant to them of a BSD license which were not imposed upon other applicants for the license thus discriminating against them and failing to provide a level playground for all BSD license applicants. They said that as he had earlier held in **Beatrice Wanjiku & Another v. The Attorney General & Another** [3], the learned Judge should have given Article 34 a construction that most favours the appellants.

29. Counsel also submitted that the Kenyan people gave themselves the 2010 Constitution with media freedom. By upholding the 2nd and 3rd respondents' decision to deny the appellants a BSD license, the learned Judge restricted the public's right to access information from the appellants.

30. On legitimate expectation, counsel submitted that the appellants being the current broadcasters with massive investment in broadcasting infrastructure which has enabled them to command 85% of the TV viewership in the country and given the Government's promises in the Taskforce Report, the appellants had a legitimate expectation that they would be granted a BSD license and failure to do so renders their right to broadcasting and investment worthless.

31. Counsel for the appellants also faulted the learned Judge for treating the appellants' petition as an appeal against the Procurement Review Board's decision and applying the doctrine of issue estoppel and res judicata to it. In their petition, the appellants had raised fundamental issues of violation of their constitutional rights, which the Procurement Review Board had no

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[2012] eKLR.

jurisdiction to determine. At any rate, they said, the doctrines of issue estoppel and res judicata do not apply to petitions for the enforcement of fundamental rights and freedoms. They cited the cases of **Tellis & Others v. Bombay Municipal Corporation & Others4; Bafokeng Tribe v. Impala Platinum Ltd & Others5; and Transnet Ltd v. Goodman Brothers (Pty) Ltd** [6]for that proposition.

32. Counsel for the appellants also took issue with the 3rd respondent's order to the 4th, 5th, 6th and 7th respondents to broadcast the appellants' content without their authorization on the guise that the law requires "subscription broadcasting service providers to provide FTA channels." They said that order is expropriatory and a serious violation of the appellants' intellectual property rights (IPRs) under Article 40(5) of the Constitution, the Berne Convention of 1886 as well as Sections 26, 29 and 30 of the Copyright Act. They further argued that as a majority of viewers cannot afford the STBs, the current BSD licensees, who operate pay-TV programmes, will switch-off even the FTA programmes once subscriptions are not paid. On those

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[1987] LRC 351.

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1998 (11) BCLR 1373.

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2001 (2) BCLR 176 (SCA).

appellants' prayers in the petition.

**Submissions for the Respondents**

**Submissions for the 8th respondent**

33. Although it is not opposed to migration, the 8th respondent supported this appeal because the consumers are not ready for migration and the abrupt shutdown of analogue broadcasting will therefore be oppressive to them. Mr. Kurauka, learned counsel for the 8th respondent, argued that contrary to Article 10 of the Constitution which entrenches the right to public participation in governance issues, the Kenyan public were not involved in the formulation of the ICT Policy or the migration roadmap. At any rate the consumers do not see the need for the hurry to switchover to digital broadcasting when the RRC-06 has a rider for extension for a further period of 5 years. He said the cost of STBs, which will enable analogue TV sets to receive digital signals, is beyond the immediate reach of the Kenyan public. He submitted that the Kenyan Government should emulate its Tanzanian counterpart which brought the prices of STBs down to Kshs.1,500/=. submissions, counsel urged us to allow this appeal with costs and grant the Counsel therefore urged us to allow this appeal and give the public enough time to prepare for the switchover. He also asked for the costs of the appeal.

**Submissions for the Other Respondents**

34. Counsel for the other respondents mounted a joint opposition to this appeal.

They reiterated the principle that as the first appellate court, this Court is obliged to re-evaluate the evidence on record and determine whether or not the trial court's conclusion is supported by that evidence and is sound in law. In doing so, counsel further submitted, this Court should not interfere with the decision of the trial court unless it is satisfied that the learned Judge wrongly appraised any conflicting evidence or that he wrongly interpreted or applied any statutory provision. They cited the old cases of **Peters v. Sunday Post**[7]and **Selle v. Associated Motor Boat Co. Ltd**[8] and cautioned that *"it is not enough that the appellate court might itself have come to a different conclusion."*

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[1958] EA 424 at p. 429.

[1968] EA 123 at p. 126.

appeal will show the mutating nature of the appellants' case as was presented before the High Court vis-à-vis the case presented before this Court. They said in the High Court the appellants' case was that, because the appellants were denied a BSD license, the implementation of the ICT Policy and digital migration constitutes violation of their fundamental rights and freedoms under Articles 33 and 34 as well as their IPRs under Article 40. The migration exercise should therefore be stopped or delayed until they are issued with the license. In this Court, the appellants' case is that the ICT Policy as well as the Taskforce Report have not been revised and aligned with the Constitution and that their implementation culminating in denying them a BSD license was discriminatory and a violation of their fundamental rights and freedoms under Articles 33 and 34 as well as their IPRs under Article 40.Counsel cited this Court's decision in **Center for Rights Education and Awareness v. John Harun Mwau & 6 Others**[9] and urged us to dismiss this appeal as new issues cannot be raised in appeal.

36. Counsel also submitted that the learned Judge cannot be faulted for striking out some paragraphs of the petition and averments in affidavits in support of

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[2012] eKLR.

respondent confessed in a meeting in June 2013 that the 6th respondent gave 5% of its shares to Government officials to induce them to grant it the license did not say whether he was in that meeting and if not, what was the source of his information. The appellants' other allegation that the 5th respondent is insolvent was equally scandalous as it was based on newspaper cuttings, which are hearsay evidence. They cited the case of **Zolla v. Ralli Brothers**[10] in support of that submission.

37. Counsel for the respondents dismissed the appellants' claim that the rejection of the appellants' BSD license application amounted to a violation of their constitutional rights under Articles 33 and 34 of the Constitution. They cited the cases of **Kwach Group of Companies & Another v. Tom Mshindi & 2 Other**[11]and **Royal Media Services Ltd v. Director of Public Prosecutions**[12]and argued that the freedom of the media under Article 34,

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[1969] EA 691.

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[2011] eKLR.

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[2013] eKLR.

that is necessary to regulate the airwaves. This is because as the US Supreme Court held in **Red Lion Broadcasting Co. v. FCC,**[13] a decision cited with approval by our High Court in **Royal Media Services v. The Attorney General & 2 others** (supra), telecommunication frequencies are a scarce resource that has to be managed by the government otherwise "the medium would be of little use because of the cacophony of competing voices…"

38. In this case the 1st and 2nd appellants tendered for a BSD license like other interested parties but lost. They appealed to the Procurement Review Board and challenged the grant of the license to the 6th respondent but again lost. Having not challenged the Procurement Review Board's decision by way of a judicial review application to the High Court within 14 days or at all, by dint of **Section 100 of the Public Procurement and Disposal Act**, the Board's decision became final. That Section declares that:

> **"A decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board's decision."**

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395 US 367 (1969)

envisaged by the Constitution and the ICT Policy does not exclude the participation of other nationalities in commercial enterprises in the country as long as such participation is open and competitive. To argue otherwise would be reading into the Constitution xenophobic nuances which do not exist. Although the 6th respondent is partly owned by foreigners, so is the 1stand 2ndappellants' consortium, National Signals Network, which had applied for a BSD license.

40. On whether or not CCK is the independent body envisaged by Article 34 of the Constitution to regulate airwaves, counsel for the respondents argued that CCK did not cease to exist or to be the regulator of the communications sector on the promulgation of the current Constitution as the appellants contended. **Article 261** and the **Fifth Schedule** to the Constitution gave Parliament 3 years, which period was extended by Parliament for a further 4 months from 27th August 2031, to enact the requisite legislation under Article 34. Pursuant to those provisions, Parliament recently enacted the **Kenya Information and Communications (Amendment) Act, 2013,** which established the Communications Authority of Kenya, the independent body envisaged by Article 34 of the Constitution. Before that was done, CCK was the body authorized to regulate the airwaves. In the circumstances, they dismissed the appellants' contention that CCK should not have been involved in licensing as an absurdity which would have created an untenable legal vacuum.

41. At any rate, counsel further argued, the issue of CCK's independence was litigated in **Royal Media Services v. The Attorney General & 2 Others**[14] and is now the subject of Civil Appeal No. 43 of 2013 pending before this Court. In counsel's view, that issue cannot, in the circumstances, be entertained in this appeal as that will pre-empt the determination of that other appeal.

42. After the appellants' application for a BSD license reached a dead end, at their request, the Government took affirmative action and decided to issue them with a license on condition that they carried open access channels and confirmed that the other current broadcasters did not wish to join in their application. However, the 1st and 2nd appellants refused to submit a fresh application. Counsel dismissed their contention that the conditions attached to their offer of a BSD license on affirmative basis were onerous. They said the first condition of allowing open access to their channel is prescribed by **Regulation 14(2)(b) and 16 (2) (a)** of the **Kenya Information and Communications (Broadcasting) Regulations, 2009** the validity of which the appellants have not challenged. The two licensees, even the one with pay-TV channels, are also required to carry FTA programmes. The second condition requires inclusion of other Kenyan entities and nobody has claimed there is anything wrong with that.

43. Counsel further submitted that the appellants' petition and this appeal are therefore attempts to re-open and re-litigate the rejection of the 1st and 2ndappellants' application for a BSD license which is legally untenable as such attempts are barred under the doctrines of issue estoppel and res judicata. Counsel submitted that the principle of issue estoppel is well established in our legal system and cited this Court's decision in **Trade Bank Ltd v. LZ Engineering Construction Ltd**[15] which defined it.

44. They said where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, a party cannot be allowed to circumvent it by following other legal processes.They cited this Court's decision in **Speaker of National Assembly v. Karume**[16]

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[2000] 1 EA 266.

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and the English case of **Hunter v. Chief Constable of the West Midlands Police & Others**[17] in support of that submission and said the learned Judge was, in the circumstances, right in dismissing the appellants petition as an abuse of the court process. Counsel contended that allowing public procurement disputes to be taken to court directly will open a floodgate of litigation and thus set a dangerous and disruptive precedent.

45. Regarding the cases of **Tellis and Others v. Bombay Municipal Corporation and Others**[18], **Bafokeng Tribe v. Impala Platinum Ltd and Another**[19] and **Trasnet Limited v. Goodman Brothers (Pty) Ltd**[20] cited by counsel for the appellants,counsel for the respondents argued that they do not support the appellants' contentionthat the principle of issue estoppel does not apply to enforcement of constitutional rights. They distinguished them arguing that Tellis Case related to the principle of estoppel as formulated by Lord Denning in **Central London Property Trust Ltd v. High Trees**

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Civil Application No.Nai 92 of 1992.

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[1981] UKHL 13.

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[1987] LRC 351.

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1998 (11) BCLR 1373.

**House Ltd** [21] **premised** on an estoppel arising from a presentation by a party in previous proceedings. In the **Bafokeng Tribe Case**, a suit challenging an action taken under the apartheid discriminatory law, which prevented Africans from owning land was dismissed. In a subsequent suit after independence, the South African court refused to apply the doctrine of res judicata and issue estoppel holding that it would lead to injustice. The **Trasnet Case** related to the right to be given reasons for a decision not to a tender award to the appellant.

46. Counsel for the respondents also cited this Court's decision in Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others22 and submitted that the doctrine of separation of powers is one of the pillars of our Constitution. Under that doctrine, the court should defer to the executive in matters of implementation of policy decisions and refuse to be used to micro-manage such processes. They said where a function is reposed in one organ of government, like the implementation of the digital migration policy in this case is reposed in the executive, other organs should not interfere. Kenya being a State Party

to ITU and the RRC-06 Agreement, the

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[1947] KB 130.

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[2013]Eklr.

Government has a constitutional obligation under **Articles 2(6)** and **132(5)** of the Constitution and **Articles 26** and **27** of the **1969 Vienna Convention** to comply with the Final Acts of the RRC-06. That, obligation together with the decision to separate broadcast content provision from signal distribution, are executive decisions which the court should not interfere with.

47. Counsel for the respondents termed the roping into appellants' petition and this appeal the public interest angle as a guise and decoy intended to hoodwink this Court into the view that rejecting the appellants BSD license will affect the Kenyan public while the appellants' real objective is to protect their anachronistic and oligarchistic commercial interests and in the process hold the country hostage. Maintaining such status quo interests are among the things CJ Mutunga, in his dissenting advisory opinion in **Jasbir Singh Rai & Others v. Tarlochan Singh Rai & Others,** [23] said the Kenyans rejected in enacting the current Constitution. This Court should equally reject them and should not allow the appellants to resile from and rubbish the ICT Policy they helped develop and the migration roadmap they helped build and blow to smithereens the digital train at the 11th hour when it is about to take off. Such course of action will adversely affect the rights of the

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[2013]eKLR

other players in the broadcasting industry who, relying on the proposed migration, have rearranged their commercial affairs and also heavily invested in the industry. In any case the issuance of a BSD license to the appellants will not waive the requirement of STBs for reception of digital signals. The Government having zero-rated the STBs, migration will not affect the viewers' right to information as the appellants contended.

48. Citing the case of **Joel Nyabuto Omwenga & 2 Others v. Independent Electoral & Boundaries Commission & Another**[24] counsel for the respondents submitted that the appellants have not made out a case for the application of the doctrine of legitimate expectation and dismissed the contention that the appellants are entitled to a BSD license as of right on the basis of that doctrine. That the appellants have heavily invested in the broadcasting infrastructure does not elevate them to any higher pedestal entitling them to a BSD license as of right. In anticipation of digital migration, the respondents and other players in the broadcasting industry, including vendors of STBs who are not party to these proceeding, have also heavily invested in the industry but have not sought licenses on that account.They dismissed as baseless the appellants' contention that failure to

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[2013]eKLR

billion investment in the broadcasting infrastructure. They contended that no documentary evidence was produced to prove that figure. To the contrary, in previous litigation the 1st appellant had put its investment at about KShs. 1.5 billion. Counsel arguedthat after all the appellants' infrastructure is on analogue broadcasting.

49. On the alleged infringement of IPRs, counsel for the respondents submitted that the appellants have failed to prove how their IPRs have been or will be infringed in the migration. They accused the appellants of material non- disclosure and distortion of facts which, on the authority of the cases of **The Owners of Motor Vessel "Lillian S" v. Caltex Oil Kenta Ltd**[25] and **Tiwi Beach Hotel Ltd v. Stanm,**[26]disentitles them the orders of injunction. They said the appellants alleged in paragraph 72 of their petition that, by its letter dated 19th August 2013, the 3rd respondent had authorized the 4th, 5th, 6th, and 7th respondents to intercept and transmit the appellants programmes without their consent. This is, however, misleading because the 3rd respondent directed the 4th, 5th, 6th and 7th respondents to carry the local FTA channels

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[1989] KLR 1.

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[1991]KLR 658

which includes the appellants' channels, on the basis of Regulations **14(2) (b)** and **16(2)(a)** of the Regulations which specifically empowers CCK to require the subscription broadcast providers to carry a specific number of Kenya broadcasting channels and as Francis Wangusi stated in paragraph 130 of his affidavit digital signal distributors can only transmit the content providers' broadcast upon mutual consent.

50. Counsel also accused the appellants of distortion of facts as the carriage of the appellants' channels by Multichoice is on agreed contractual terms. Under those contracts, Multichoice was authorized to assign any of its obligations to its affiliates. GoTV, the 7threspondent is an affiliate of Multi choice a fact that the appellants concealed from the court.

51. Under the proposed arrangement, the signal distributors will transmit the material content provided by the content providers without any alteration or interference. Moreover, the engagement between the broadcast content provider and the signal distributor is contractual and there are safeguards in place to ensure the IPRs of the appellants are protected. That is why during the simulcast period for sometime now, the appellants' content has been carried by the 4th, 5th, 6th and 7threspondents without any complaint of violation of IPRs. General of Trinidad and Tobago27 and Alphonse Mwangemi Munga & Others v. African Safari Club Ltd28and submitted that ordinary civil complaints like infringement of IPRs should not be redressed through constitutional references for enforcement of fundamental rights. They said though IPRs can be enforced through a constitutional petition, there is a corpus of laws in existence for enforcement of rights under Copyright Act.

52. Counsel for the respondent cited the cases of **Harrickson v.Attorney General of Trinidad and Tobogo**27 and **Alphamose Mwangemi Munga & Others v. African Safari Club Ltd** 28 and submitted that ordinary civil complaints like infringement of IPRs should not be redressed through constitutional references for enforcements of fundamental rights. They said through IPRs can be enforced through a constitution petition, there is a corpus of laws in existence for enforcement of rights under Copyright Act.

53. In conclusion, counsel for the respondents submitted that the appellants cannot approbate and reprobate. They cannot rely on the ICT Policy as the basis for their entitlement to a BSD license and in the same breath denounce it as being contrary to the current Constitution. Having fully participated in the ICT Policy formulation, it is clearly in bad faith that the appellants are now impugning decisions they were involved in making. Their real intention is to ensure there is no level playing ground in broadcasting so that they can maintain their current commercial monopoly in the broadcasting industry. For nearly 7 years since the migration process commenced, the appellants have had enough time to put their houses in order.In the circumstances,

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[1980] AC 265.

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[2008]eKLR

counsel urged, these proceedings should be seen for what they are and be dismissed with costs.

**Issues for Determination**

54. Having considered these rival submissions and carefully read the voluminous record of appeal as well as the relevant authorities cited to us by counsel for the parties, it is clear to me that the appellants are not opposed to migration and contrary to the respondents' contention, they are not challenging the constitutionality of the ICT Policy. What they are challenging is the manner of implementation of that Policy and the RRC-06 Agreement. That, in my view, together with a perusal of the grounds of appeal, narrows down the issues for our determination to: whether or not the learned Judge erred in striking out some paragraphs of the petition and some averments from the affidavits in support of the petition; whether or not the learned Judge elevated the RRC-06 Agreement above the Constitution; whether or not the Taskforce Report and the Minutes of the DTC or any other document gave the appellants a legitimate expectation that they would be granted a BSD license; whether or not the appellants' petition was barred under the doctrine of issue estoppel; whether or not the 3rd respondent directed the 4th, 5th, 6th and 7threspondents to broadcast the appellants' programmes without their consent and whether that direction violates the appellates' IPRs; whether or not the appellates' IPRs could be constitutional petition; and whether or not the 2nd and 3rd respondents' manner of implementing the ICT Policy and the RRC-06 Agreement violates the appellants' rights under Articles 33 and 34 of the Constitution.

**Striking Out**

55. Counsel for the appellants contended that the learned Judge erred in striking out some paragraphs of the petition and the supporting affidavits without any formal application being made. I agree with counsel for the respondents that the learned Judge was perfectly entitled to strike out scandalous pleadings. The paragraphs struck out related to the allegation in Mr. Gitahi's affidavit that the 6th respondent obtained its BSD license through bribery and corruption. He claimed that that a representative of the 6th respondent confessed in a meeting in June 2013 that it ceded 5% of its shares to Government officials to induce them to grant it the BSD license. Having not said whether he was himself in that meeting and if not having not disclosed the source of that information, that was clearly a scandalous pleading (**seeZolla v. Ralli Brother**s[29]),which the learned Judge was entitled to strike out under **Order 19 Rule 6** of the **Civil Procedure Rule** seven without a formal application. The record shows that Mr.Imende, learned counsel for

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[1969] EA 691.

the 5th and 6th respondent raised the issue in their submissions. Before us he said he did that as there was no time for a formal application given the urgency with which the matter was heard. Be that as it may, as I have said, although the learned Judge could still have struck out that pleading suomoto, it is clear the issue was live before him. In the circumstances that ground of appeal fails.

**The RRC-06 Agreement**

56. The second issue raised in this appeal is whether the learned Judge elevated the RRC-06 Agreement above the Constitution. The highest level an international convention can get to in the municipal law hierarchy is that of an ordinary Act of Parliament. Having read the judgment giving rise to this appeal, I

cannot find anything in it to show that the learned Judge elevated the RRC-06 Agreement above or even equated it to the Constitution. There is therefore no basis for the appellants' claim in this ground of appeal.

**Intellectual Property Rights (IPRs)**

57. in my view, two issues arise from the appellants' grounds of appeal on the alleged violation of their IPRs. One, whether or not the 3rd respondent directed the 4th,5th, 6th and 7th respondent to broadcast the appellants' programmes without their consent and whether that direction violates the appellants' IPRs. Secondly, whether or not the appellants' IPRs could be enforced by a constitutional petition. I would like to dispose of the first issue and determine the second one along with other grounds later.

58. On the first issue, as I have pointed out, the appellants contended that, in violation of their IPRs, by its letter dated 19th August 2013,the 3rd respondent directed the 4th, 5th, 6th and 7threspondents to intercept and transmit the appellants' programmes without their consent. Besides violation of their IPRs, the appellants also claimed that to ensure their programmes are carried by the 4th, 5th, 6th and 7th respondents, they will be forced to avoid any contents critical of those carriers or the companies associated with them. In the worst scenario, as their competitors, the 4th and 6th respondents are likely to degrade the appellants' signals in their strongest markets whilst keeping theirs (the 4th and 6th respondents') clear to gain competitive advantage or simply refuse to carry the appellants' signals.

59. In my view, this contention, especially the latter part of it, is not entirely correct. With regard to the transmission of the appellants' programmes, as Francis Wangusi, the CCK Director General stated in paragraph 130 of his affidavit, signal distributors will only air the broadcasters' contents upon mutual consent. The transmission contracts in the record of appeal betweenMultichoice on the one hand Royal Media Services Ltd, Nation Media Group Ltd, and Barasa Ltd on the other testifies to this. Degrading or in any way interfering with the appellants' contents or broadcast will be a breach of transmission contracts which will entitle the appellants to damages. Under those contracts, Multichoice was authorized to assign any of its obligations to its affiliates. GoTV, the 7threspondent, is an affiliate of Multichoice. So the appellants' other contention that GoTV is transmitting their contents without their consent has no basis.

60. The appellants are, however, justified in their complaint that the 3rd respondent authorized the 4th, 5th, 6th, and 7th, respondents to broadcast their programmes without their consent. In its letter of 19th August 2013 addressed to Wananchi Group Kenya Limited which, according to Mr. Samuel Kamau Macharia the Chairman of the 1st appellants, represents the 4th , 5th, 6th, and 7th respondents, the 3rd respondent stated:

> **"Reference is made to your letter dated 15th August, 2013 informing the Commission that you have received a notice to remove from your platform the Free to Air (FTA) channels of three media houses namely Nation Media Group, Standard Group Ltd and Royal Media Services Ltd. Your letter also requested for guidance from the Commission with respect to the above matter. This is to confirm that Kenya Information and Communications Act (KICA) Regulations 14 (2) (b) requires subscription broadcasting service providers to provide local FTA channels."**

61. I understand this letter to mean that prior to their letter of 15th August 2013, the 4th, 5th, 6thand 7th respondents were transmitting the appellants' FTA programmes without their mandate on their understanding that compliance with Regulations 14(2)(b) and 16(2)(a) as their licenses required meant airing the broadcasters' FTA programmes without their consent. Because the appellants protested, the 4th, 5th, 6th, and 7th respondents, through Wananchi Group Kenya Ltd, sought clarification. Citing Regulation 14(2)(b), the 3rd respondent advised them to go on transmitting the appellants' FTA programmes.

62. In my view, this is a gross misunderstanding of the import of Regulations

**14(2)(b) and 16(2)(a).Those Regulations provide:**

**"14(2)(b) The Commission may require a licensee granted a license under paragraph (1) to-**

**Provide a prescribed minimum of Kenyan Broadcasting channel."**

**"16(2)(a) The Commission may require a person granted a license under paragraph (1) to-**

**Distribute on its digital platform free to air and subscription broadcasting services and related data on behalf of other licensed broadcasters."**

63. Paragraph 4.4 f the ICT Policy states that " *Broadcasters, including rebroadcasting free-to-air programmes will be required to meet the prescribed local content levels.* "Paragraph 4.10 thereof adds that "*to ensure that the broadcasting system meets the needs of Kenyans, effective local ownership and control of the Kenyan broadcasting system will be maintained."* In tandem with that policy, I understand the requirement "*to provide a prescribed minimum number of Kenyan broadcasting channels"* in Regulation 14(2)(b) as meant to ensure that BSD licensees provide a minimum number of channels for local content so that we do not have only foreign programmes being aired to the Kenyan viewers. And since frequency resources are scarce as I have already stated,the requirement *"to distribute on its digital free to air and subscription broadcasting services and related data on behalf of other broadcasters"* in Regulation 16(2)(a) enables the Regulator to direct the licensees to carry the programmes of broadcasters who have no BDS licenses.

64. Because not all Kenyans can afford pay-TV programmes, these provisions make it a statutory requirement that each broadcaster should air its own FTA programmes to accord Kenyans the right to information. They do not allow a broadcaster or distributor to ride on the crest of others' programmes. With respect, neither of these provisions authorizes the 3rd respondent to direct any licensee to air any other broadcaster's programme, whether FTA or any other programme, without that broadcaster's consent. In my view therefore, to allow any broadcaster to air FTA programmes of others without their consent amounts to infringement on the IPRs of the owners of those programmes. In the circumstances, I would my self allow grounds 8 and 9 and declare the 3rd respondent's direction to the 4th, 5th, 6th and 7threspondents as null and void.

**Violation of the Appellants' IPRs**

65. The next grounds of appeal I wish to deal with relate to the appellants' complaint that the manner of implementation of the ICT Policy on digital migration is contrary to the recommendations set out in the Taskforce Report and the minutes of the DTC and violates the appellants' constitutional rights under Articles 33 and 34 of the Constitution and are barred by the doctrine of issue estoppel. I shall determine them together starting with the appellants' challenge of CCK as the independent body envisaged by Article 34 to regulate the media industry.

66. On violation of the appellants' constitutional rights under Articles 33 and 34 of the Constitution, the substratum of their counsel's submissions was that, in the light of **Articles 2** and **259** and **Section 7(1)** of the **Sixth Schedule** to the Constitution, the learned Judge should have found that, in its composition at the material time, CCK had no authority to regulate airwaves and in particular to deal with the issue broadcasting licenses.

67. For the respondents on the other hand, especially for the 1st, 2nd, 3rd, and 7th respondents, it was contended that **Article 261** read together with the **Fifth Schedule** to the Constitution gives Parliament 3 years to amend any legislation inconsistent with the Constitution. So CCK, in its composition at the material time, was the body authorized to regulate licensing. Removing it before appropriate legislative action was taken would create an untenable legal vacuum.

68. Article 2, it will be recalled, provides for the supremacy of the Constitution. It states that the Constitution is supreme. Sub Article (4) thereof voids any law inconsistent with the Constitution to the extent of the inconsistency. Article 259(1) requires, in mandatory terms, the interpretation of the Constitution in a manner that-

> **"(a) promotes its purposes, values and principles;**
>
> **(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;**
>
> **(c) permits the development of the law; and**
>
> **(d) contributes to good governance."**

69. Some of the values and principles stated in paragraph (a) above are set out in Articles 10, 19, 20, 21, and 22 of the Constitution. I agree with counsel for the appellants that prior to the legislation envisaged by Article 261 and the Fifth Schedule to the Constitution, the Constitution itself demands that interpretation and application of all existing law be harmonized with the Constitution. Section 7 of the Sixth Schedule to the Constitution requires that;

"(1) 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.

> **(2) If, with respect to any particular matter-**
>
> **(a) a law that was in effect immediately before the effective date assigns a responsibility for that matter to a particular State organ or public officer; and**
>
> **(b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict."**

70. in the case of media regulation, which we are concerned with in this appeal, the law in force at the promulgation of the Constitution that has to be interpreted in tandem with the 2010 Constitution was the **Kenya Information and Communications Act 1998** together with the **Kenya Information and Communications (Broadcasting) Regulations, 2009** made there under. And the body authorized to regulate airwaves under that Act was CCK. What then is the construction to be given to that Act and its Regulations in order to bring it in line with the 2010 Constitution and when?

71. To answer these questions, I need not only to examine the relevant provisions of our law but also comparative jurisprudence from other jurisdictions in the area of media regulation.

72. The words freedom of media, freedom of press, freedom of expression, freedom of information, freedom of communication, freedom of broadcast e.t.c are used in most cases interchangeably to mean one and the same thing, that is, the freedom of communication and expression through mediums including various electronic media and published materials. There are several global instruments, charters, protocols and declarations which determine what the international community has agreed are the principles that underpin democratic media and national broadcasting regulatory framework.

73. it is not in dispute that freedom of expression is a fundamental right of the greatest importance. At its very first session in 1946 the United Nations General Assembly declared the "...freedom of information a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated." Thereafter, this freedom has been guaranteed by several international and regional conventions which incidentally use fairly similar phraseology. For example the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) provide for

it in the following terms:

> **Article 19 of The Universal Declaration of Human Rights states:**
>
> > **"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.."**
>
> **Article 19(2) of International Covenant on Civil and Political Rights states:**
>
> > **"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice"**

74. Articles 33 and 34 of the Kenya Constitution, 2010 employ fairly similar phraseology in providing for the freedoms of expression and the media respectively. As I have said, we are in this appeal concerned with the regulation of these freedoms. I shall, in the circumstances, quote only the relevant portions of our legislation on the regulation. In this regard, I wish to quote in full Article 34(3) of the 2010 Constitution which provides for the regulation of the media in Kenya. It states:

> **"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."**

75. There is no disputing the fact that telecommunication frequencies are a scarce resource which is, however, in very high demand. Its utilization therefore requires regulation by licensing. As the US Supreme Court held in Red Lion Broadcasting Co. v. FCC,30 telecommunication frequencies have to be managed by the government otherwise *"the medium would be of little use because of the cacophony of competing voices…"*

76. None of the parties to this matter disputed the fact that regulation of the airwaves by way of licensing of the frequency spectrum is necessary. As there was no suggestion that the grant of the two BSD licenses was

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395 US 367 (1969).

Influence by "political ……and[or] commercial interest", that narrows the bone of contention to the issue as to what are the required *"licensing procedures that are independent of control by government."* This brings me to the determination of the suitability of CCK as the regulatory body envisioned by Article 34(3)(b) of the 2010 Constitution.

77. Counsel for the respondents argued that the issue of the suitability of CCK as the regulator of airwaves in Kenya is a no go zone for us in this appeal as it is the subject of Civil Appeal No. 43 of 2013 pending before this Court. With respect I cannot accede to that submission. As, in my view, this is most the central issue in this appeal, failure to determine it will be a dereliction of my duty.

**Broadcasting Independence**

78. Because of high illiteracy levels and the high cost and difficulties of distributing newspapers, *"[b]roadcasting is by far the most important source of information, as well as entertainment, for most people"*31 in many countries of the world because it is cheap and more accessible. Besides this, many people *"simply find it easier and more enjoyable to watch or listen to*

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Access to the Airwaves, Principles on Freedom of Expression and Broadcasting

Regulation, Article 19, International Standards Series, London ISBN 1 902598 46 6 March 2002,

33 Islington High St., London, N1., 9LH, UK. p.1

*news than to read it…. As a result of its centrality…and growing profitability, governments and dominant commercial interests have historically sought to control broadcasting."*[32] Public broadcasters are generally mouthpieces of many governments in the world. Governments exert control through licensing processes while commercial entities focus on low quality but profitable programmes.

79. To promote a vibrant and independent broadcasting sector, there have been serious campaigns world over to free broadcasting from governmental political and commercial controls. These campaigns have resulted in the development of international principles and standards required to regulate broadcasting globally and ensure that it serves the interests of the public.[33]

80. Principle 11 of the **ACCESS TO AIR WAVES, International Principles on Freedom of Expression and Broadcasting Regulation** requires the independence of the bodies regulating the broadcast sector and prohibition of interference with their activities and membership to be specifically provided for in legislation and where possible in constitutions. Such

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Ibid.

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Access to the Airwaves, Principles on Freedom of Expression and Broadcasting

Regulation, Article 19, International Standards Series, London ISBN 1 902598 46 6 March 2002,

33 Islington High St., London, N1., 9LH, UK

provision should be to the effect that the regulatory body shall enjoy operational and administrative autonomy from any other person or entity, including the government and any of its agencies. This autonomy shall be respected at all times and no person or entity shall seek to influence the members or staff of the regulatory body in the discharge of their duties, or interfere with the activities of the body, except as specifically provided for by law.

81. Principle 13 of those principles requires the process of appointing members of regulatory bodies to be also explicitly spelt out in legislation and to be open and democratic always allowing for public participation and consultation. The members should be picked on the basis of their expertise and/or experience to serve in their individual capacities and should not be representatives of government or any entity interested in broadcasting but be reasonably representative of society as a whole. The recommended exclusions or "rules of incompatibility" which should apply in their appointment include the prohibition that no member shall be:

- An employee of the civil service or other branch of government;
- Holder of official office in, or is an employee of a political party, or holds an elected or appointed position in government;

- Holder of a position in, receives payment from or has, directly or indirectly, significant financial interest in telecommunications or broadcasting;
- A convict of violent crime or crime of dishonesty in 5 years preceding appointment.

82. Members of the media regulatory bodies should also be appointed on a fixed term and be insulated against dismissal except for good reason and only by the appointing body. The terms and conditions of membership, their remuneration and reimbursement of expenses, if any, as well as their responsibilities should be spelt out in legislation. That way, no minister or other government representative can have the power to impose terms, conditions or responsibilities on members.

83. **The African Charter on Broadcasting**[34] on **"General Regulatory Issues"** has extensively provided for media regulation. Article 1 thereof states that:

> **1. "The legal framework for broadcasting must include a clear statement of the principles underpinning broadcast regulation, including promoting respect for freedom of expression ... and the free flow of information and ideas'.**
>
> **2. All formal powers in the areas of broadcast and telecommunication**

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The Windhoek Declaration: The Windhoek Declaration on Promoting an Independent and Pluralistic Press was adopted in 1991 by participants at a UNUNESCO seminar on promoting an independent and pluralistic African press, and was thereafter endorsed by UNESCO's General Conference. The Windhoek Declaration is an important international statement of principle on press freedom and the date of its adoption, 3 May, is now the annual World Press Freedom Day- Kenya was represented in the Conference.

> **regulation should be exercised by public authorities which are protected against interference, particularly of a political or economic nature, by, among other things, an appointments process for members which is open, transparent, involves the participation of civil society, and is not controlled by any particular political party.**
>
> **3. Decision-making processes about the overall allocation of the frequency spectrum should be open and participatory, and ensure that a fair proportion of the spectrumis allocated to broadcasting uses.**
>
> **4. The frequencies allocated to broadcasting should be shared equitably among the three tiers of broadcasting.**
>
> **5. Licensing processes for the allocation of specific frequencies to Individual broadcasters should be fair and transparent, and based on clear criteria which include promoting media diversity in ownership and content.**
>
> **6. Broadcasters should be required to promote and develop local content, which should be defined to include African content, including through the introduction of minimum quotas.**
>
> **7. States should promote an economic environment that facilitates the development of independent production and diversity in broadcasting.**
>
> **8. The development of appropriate technology for the reception of broadcasting signals should be promoted."**

84. These international conventions and principles being general rules of international law and provisions of international conventions, they are, by dint of Article 2(5) and (6) of the Constitution, part of the law of Kenya.

85. If I understand the respondents well , theirs is a positive view. It is that before the expiry of the three years period in the Fifth Schedule to the Constitution, the courts should apply the existing law as it is until after that period. This also appears to have been the learned Judge's view. With tremendous respect, that is a misapprehension of the Constitution. In my respective view, if that were the case, Section 7(1) of the Sixth Schedule to the Constitution would be otiose. In its place, there would have been a provision suspending conformity to the Constitution until after the expiry of the period of 3years in the Fifth Schedule. But as I have said that is not the case. The operation of the entire Constitution, including Section 7(1) of the Sixth Schedule, commenced on the effective date, that is the 27thAugust, 2010. Article 262 of the Constitution makes that very clear. It directs that *"[t]he transitional and consequential provisions set out in the Sixth Schedule shall take effect on the effective date."*

86. It therefore follows that from the word go, as required by Article 10 of the Constitution, all State organs, State officers, public officers and all persons are to interpret, apply, enact and implement all laws as well as public policy in accordance with the values and principles of good governance which include national unity, the rule of law, democracy and public participation, human dignity, equity, social justice, equality, human rights, non- discrimination, good governance transparency, accountability and sustainable development.

87. I am reinforced in this view by decisions from other jurisdictions. Provisions similar to Section 7 of the Sixth Schedule to the Kenya Constitution, 2010 in constitutions of other jurisdictions have been interpreted in the same way. While interpreting provisions of the Jamaican Constitution similar to Section 7(1) of the Sixth Schedule to our Constitution in the case of **Director of Public Prosecutions v. Mollison (Jamaica),**[35] the Privy Council held that the conformity provision commenced on the effective date. Referring to a similar provision in **Section 21** of the Belize Constitution, which was the subject of interpretation in **San Jose Farmers Co-operative Society Ltd v. Attorney General,**[36] the Privy Council pointed out that;

> **"[Section 21] does not … detract in any way from the power of a court either during the five-year period or afterwards to construe an existing law 'with such modifications, adaptations, qualifications, and exceptions as may be necessary' to bring it into conformity with the Constitution." [Emphasis supplied]**

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UKPC 6 (22 January 2003).

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(1991) 43 WIR 63.

88. as I have pointed out, section 7(1) of the Sixth Schedule to the Constitution requires existing law to *"be construed with the alterations, adoptions, qualifications and exceptions necessary to bring it into conformity with this Constitution."* As to the extent of and the kind of the modifications, adaptations, qualifications and exceptions required, the Privy Council observed in the Mollison Case that these;

> **"must be such only as are necessary and a court must be wary of usurping the functions of Parliament by introducing new and possibly controversial legislation in the guise of a modification necessary to bring a particular law into conformity with the Constitution."**

And that the permitted modifications;

> **"transcend those of nomenclature, reaching matters of substance and stopping only where the conflict between the existing law and the Constitution is too stark to be modified by construction."**

89. In the light of the above principles of interpreting transitional provisions, I hold that in this case, immediately after the commencement of the 2010 Constitution and at least before making any major decisions like the implementation of the RRC-06 agreement with far reaching implications, the Government was obliged to strictly comply with the letter of the Constitution by altering the composition of CCK to align it with Article 34(3)(b) of the 2010 Constitution even before the requisite legislation was passed . what we see instead is a *modus operandi* as though the Constitution did not exist.

90. **section 6** of the Kenya Information and Communication Act, 1998 gives the composition of CCK at the material time as follows: The Chairman appointed by the President; the Director-General appointed by the Minister responsible for Communications; the Permanent Secretary in the Ministry for the time being responsible for information and communications or his representative; the Permanent Secretary in the Ministry for the time being responsible for finance or his representative; the Permanent Secretary in the Ministry for the time being responsible for internal security or his representative; and at least seven other persons, not being public officers, appointed by the Minister.

91. It is common knowledge that the Minister and all the Permanent Secretaries were appointees of the President who had the power to hire and fire them at any time. Since the Minister appointed the other seven members, he also had similar control over them. It therefore follows that the Government had complete control over CCK membership. The Permanent Secretary's letter dated 22nd July 2011 directing CCK to consider issuing a BSD license to the 1st and 2nd appellants on certain conditions testifies to this control. A body under such control is not the kind of regulatory authority envisioned by Article 34(3)(b).

92. the Government should be in the forefront in obeying and defending the Constitution and upholding the rule of law otherwise its organs and State officers as well as public officers, leave alone the general public, will not see the need, importance or imperativeness of the Constitution. As the custodian of the Constitution, this Court is obliged by the Constitution itself, to point out to the Government, its organs, State and public officers; in short to all and sundry, that provisions of the Constitution are there to be strictly complied with. In other words complying with the Constitution is not an option. Anybody disregarding its provisions does so at his or her own peril.

93. It follows from the foregoing analysis that the BSD licenses CCK granted after the promulgation of the 2010 Constitution are null and void. A regulator appointed strictly in accordance with Article 34(3)(b) has to conduct the tendering process afresh and issue fresh BSD licenses.

**Legitimate Expectation**

94. The next grounds of appeal I wish to consider are those relating to the appellants' claim that they had a legitimate expectation that on the basis of their extensive investment in the broadcasting infrastructure and the promises the Government made to them, would be granted a BSD license on the basis of their heavy investment in the broadcasting infrastructure. The rejection of the 1st and 2nd appellants' application for a BSD license therefore renders their right to broadcasting and investment worthless.

95. In response to that, the respondents argued that the appellants' investment in the broadcasting infrastructure per se does not elevate them to any higher pedestal entitling them to a BSD license as of right. The respondents and other media players have also invested in the broadcasting industry and have not sough BSD licenses on the basis of their investments. What is legitimate expectation?

96. As the High Court stated in the case of **Joel Nyabuto Omwenga & 2 Others v. Independent Electoral & Boundaries Commission & Another**[37];

> **"…for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i)**

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> **he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do and until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."**

Apart from being given, the expectation must be legitimate. The authors of **HWR Wade C.F. Forsyth in Administrative Law**[38], succinctly expressed this point in their observation that;

> **"[i]t is not enough that an expectation should exist; it must in addition be legitimate. But how is it to be determined whether a particular expectation is worthy of protection? This is a difficult area since an expectation reasonably entertained by a person may not be found to be legitimate because of some countervailing consideration of policy or law."**

97. On these principles, is there a basis for or evidence of the appellants having been given an expectation that they would be granted a BSD license on the basis of their investment in the broadcasting infrastructure? Put another way, is the appellants' expectation legitimate or is there a basis for it? I have read in draft the judgment of my colleague, the Hon. Justice Musinga, dismissing the grounds on legitimate expectation. On my part, however, having perused

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10th Edition (2009) at page 449.

The record, and in particular the ICT Policy, I have come to the conclusion that on the promise the Government made to them, the appellants had a legitimate expectation that given their investment in broad casting infrastructure, they or their nominees would be granted a BSD license. Clause 4.6 of the ICT Policy confirmed to the appellants *that "[t]he Government will license signal distribution services to ensure that the use of broadcasting infrastructure is maximized."* There is therefore no countervailing policy consideration as stated in the above case that would reverse the appellants' expectation of obtaining a BSD license.

98. It is not in dispute that the appellants have been in the broadcasting industry for the last 15 years. They respectively commenced their operations in 1997, 1998 and 1990. It is also not in dispute that they have heavily invested in the broadcasting infrastructure although the respondents disputed their level of investment. In the circumstances, I understand the said statement in the ICT Policy that "[t]he Government will license signal distribution services to ensure that the use of broadcasting infrastructure is maximized." to refer to their investment.

99. That is not all. In his address to the Broadcasters Forum held on 24 th August 2011 at Ole Sereni Hotel, Dr. Bitange Ndemo, the then Permanent Secretary in Ministry of Information and Communications, categorically stated that the appellants, through their flagship of Media Owners Association, were going to be granted a BSD license. This is how he put that assurance:

> **"The government has given … KBC sufficient resources and we are licensing two more signal distributors; the Pan African Group and the Media Owners whom we are going to license to provide the signal. As they already have infrastructure, the deployment would be very quick to migrate to the new digital framework."**

100. As is stated at page 613 of the record of appeal, the participants of that Forum understood the PS to state that;

**"[t]he Media Owners Association will be given the third license after the first and second ones were awarded to KBC/SIGNET in 2009 and a Chinese-owned Pan African Network Group (K) Ltd in June respectively. The Consortium will be exempted from tendering."**

101. The Government has in the last 15 years permitted the appellants to develop and transmit their broadcast content to the viewers without any hindrance. On that basis, I find that they had a legitimate expectation of being licensed to continue doing the same. And on the above assurances, I find that the appellants had an expectation, and a legitimate one at that, that given their massive investment in broadcasting infrastructure and media practice for the last 15 years or so, they or their nominees would be granted a BSD license to transmit their programmes and even those of other broadcasters, of course with their consent.

102. I agree with Counsel for the appellants that failure to grant the appellants or their nominees a BSD license affects their right to media establishment and to freely and economically broadcast their programmes and thus renders their infrastructure worthless. In the same vein I reject the respondents' contention that the appellants simply want to protect their anachronistic and oligarchistic commercial interests, and maintain their broadcasting monopoly.

103. There is nothing wrong with anyone fighting to protect his investment. Everyone has a constitutional right under Article 40 of the Constitution to protect his property. As stated, the appellants have in the last 15 years developed their businesses. Like every other Kenyan they have an equal right to seek to protect them as long as they do that legally. Given the stated Government ICT Policy to open up the broadcasting industry to more players to attract investment and thus spur economic development, the appellants cannot have been so naïve as to imagine that they would monopolize the broadcasting industry.

104. I have of course not forgotten that the Government took an affirmative action and offered the third BSD license to the appellants. I agree with counsel for the respondents that the first condition pegged on that offer of open access of their channels to other parties was a reasonable statutory requirement imposed on even the present BSD licensees. As I have said, that requirement is reasonable in view of the fact that transmission frequencies being scarce, not all broadcasters can be granted BSD licenses and so the BSD licenses have to air the contents of others. But I find the second condition requiring the 1st and 2nd appellants to prove that the other current broadcasters were not interested in a joint application for the BSD license unreasonable. The other current broadcasters had not applied. Being competitors of the appellants, they would make it difficult for them to obtain that license. In the circumstances, the ground of legitimate expectation therefore succeeds. The appellants are therefore entitled to a BSD license without going through the tendering process upon meeting all the terms and conditions applicable to other BSD licensees.

105. In coming to this decision, I am not oblivious of the principles of competitiveness, non-discrimination and fair play entrenched, inter alia, in **Articles 10, 27** and **34(3)** and **(5)** of the Constitution and in particular **Article 27(1)** and **(2)** which provides that everyone is equal before the law and that equality "*inclides the full and equal enjoyment of all rights and fundermantal freedoms.*" Equally important, however, is the protection of the right to property under **Article 40** of the Constitution which has also to be protected.

106. The issue before us in this appeal is one of the grant of BDS licenses. Let me repeat for the umpteen time that communication frequencies are a scarce resource in great demand. The competitiveness, non-discrimination and fair play principles require that there should be a level playground in the application and eventual issue of those licenses; and more importantly, that there should be fair competition in the conduct of parties' businesses thereafter. I also understand these provisions to provide for protection of private investment and to require Government not take any action that blows up into smoke private investments. In this case therefore, to achieve equality of arms for effective competitiveness does not mean reducing existing investments worthy billions of shillings into ashes so that the current investors are brought to the same level with new entrants. That would not only be outrageous but also contrary to all norms of justice.

107. KBC was granted a license in 2009 without going through the tendering process. I suppose this is because the State security agencies also use telecommunication frequencies and the Government has to have control over some frequencies. I find that perfectly in order and I believe that is why the appellants never complained about the issue of the first BSD license to KBC. Given their massive investments, which will go up in smoke if not protected, and the fact that the Government had after all offered to grant them a BSD license on affirmative basis without taking them through the tendering process, I think an exception should also be made for the appellants. After all from the ICT report, it is clear that CCK was ready to issue a third BSD license. So, though scarce, there are frequencies for issue.

108. It is for these reasons that I find that to protect their investments, the appellants are entitled to a BSD license. In so holding, I have not ignored the principle of separation of powers which, in cases like licensing, obliges the court not to interfere with matters reposed in the executive. As I have said, I respect that principle. It is not the business of courts to issue licenses and they are ill equipped to do that. However, in exceptional cases like this one, in my respective view the court has no option but to intervene. In Central Broadcasting Services Ltd & Another v. Attorney General of Trinidad and Tobago [2000] 2 LRC 19, the English Privy Council issued a mandatory injunction compelling the issuance of a broadcast license to a party who had unfairly been denied one.

**Issue Estoppel and Res Judicata.**

109. The remaining grounds are those relating to the doctrines of issue estoppel and res judicata. Counsel for the appellants also faulted the learned Judge for treating the appellants' petition as an appeal against the Procurement Review Board's decision and applying the doctrines of issue estoppel and res judicata to it arguing that these doctrines do not apply to petitions for the enforcement of fundamental rights and freedoms. They argued that in their petition, the appellants raised fundamental issues of violation of their constitutional rights, which the Procurement Review Board had no jurisdiction to determine.

110. For the respondents, it was submitted that the appellants' application for a BDS license having hit a dead end, their petition and this appeal amount to a collateral attack on the concluded Public Procurement Process which is barred by the doctrine of issue estoppel. They argued that allowing public procurement disputes which have been concluded to be re-litigated again courts will open a floodgate of litigation and thus set a dangerous and disruptive precedent.

111. the principle of issue estoppel is well established in our legal system. This Court defined it in **Trade Bank Ltd v LZ Engineering Construction Ltd** [39] as a proscription against re-opening and re-litigating a point of fact or law that has in a previous suit been distinctly put in issue and finally decided. Issue estoppel may arise where a plea of res judicata cannot be established because the causes of action are not the same. Corollary to this is the principle stated by this Court in the cases of **Speaker of National Assembly v. Karume40 and Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others**[41] that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, a party cannot be allowed to circumvent it by following other legal process.

112. I accept as correct the principles expressed in these two cases and affirm, as Lord Diplock put it in Hunter v. Chief Constable of the West Midlands Police & Others42, that:

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[2000] 1 EA 266.

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Civil Application No.Nai 92 of 1992.

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[2013] eKLR.

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[1981] UKHL 13.

> **"…it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted, by changing the form of proceedings, to set up the same case again."**

113. However, this position cannot hold if the previous proceedings were unconstitutional or the court or tribunal, which previously decided the matter, had no jurisdiction to determine it. A rule of practice, however important and well established, cannot torpedo provisions of the Constitution and more so those contained in the Bill of Rights.

114. In this appeal, as I have demonstrated, in defiance of clear provisions of the Constitution, CCK, in its purported regulation of the airwaves, dealt with the issue of BSD licensing which it had no authority to do. True the appellants should have challenged the legality of CCK's action in a judicial review application pursuant to **Section 100** of the **Public Procurement and Disposal Act**, but that is no bar as the entire procurement process conducted by CCK was fundamentally flawed. Allowing that process and the final decision of the Procurement Review Board to stand would be sanctioning a violation of the Constitution. Though I agree that there is a corpus of laws for enforcement of IPR, in this case the appellants did not need to file two cases, one, a constitutional petition to challenge the constitutionality of the tender process and another case to enforce their IPRs. I therefore find that the petition giving rise to this appeal I was competently before court and hereby all the ground of appeal on the doctrine of issue estoppel.

115. I have already found that in its constitution at the material time , CCK was not competent to conduct the tender process of awarding BSD licenses and directed that an independent body constituted strictly in accordance with Article 34(3)(b) do conduct the tender process afresh. I have also found that the appellants had and still have a legitimate expectation and are entitled to a BSD license without going through the tender process. In the circumstances, I direct that the new Regulator do issue the appellants with a BSD license upon meeting all the terms and conditions set out in the appropriate law and applicable to all applicants for that license.

**Conclusion**

116. In summary, I dismiss the appellants' claims that the learned Judge erred in striking out some paragraphs of the petition and some averments in the affidavits in support of their petition. I, however, find that by directing the 4th, 5th, 6th and 7th respondents to air the appellants' FTA programmes the 3rd respondent violated the appellants' intellectual property rights; that in its composition at the material time, CCK was not the independent body envisioned by Article 34(3)(b) to regulate airwaves in Kenya after the promulgation of the 2010 Constitution and the public procurement process of determining applications for the BDS licenses that it conducted in this matter was therefore null and void;that in view of the gross violation of the Constitution in failing to reconstitute CCK in tandem with the requirements of Article 34(3)(b) the appellants were entitled to seek relief by way of a constitutional petition; and that given their substantial investment in broadcasting infrastructure and the promises the Governments made to them, the appellants are entitled to a BSD license without going through the tendering process upon meeting the terms and conditions set out in the appropriate law and applicable to all applicants of the BSD licenses and the same should be granted to them forthwith by an independent authority constituted in strict compliance with the provisions of Article 34(3)(b) of the Constitution; that the 1st, 2nd, and 3rd respondents shall pay the appellants' and the 8th respondents' costs of this appeal and those of the High Court but the other respondents shall bear their own costs.

117. I have made this decision well aware of its ramifications on the Government's obligations under the RRC-06 Agreement on digital migration. But there is time to rectify the errors as we have more than a

year before the switchover date on 17th June 2015. Set top boxes having been imported, all that the authorities need to do is to ensure that the successor of CCK is indeed independent as required by Article 34(3)(b) and conduct a proper procurement exercise for the issue of BSD licenses and the country will be on course. If there is no procrastination, all should be done within three to six months. Even if there are appeals from the procurement decisions, if there is the necessary will to comply with the law, the entire process will be complete by 30thSeptember, 2013 which I propose should be the switch-off date. Before that date, the 1st, 2nd, and 3rd respondents are hereby restrained from switching-off or in any way interfering with the appellants' analogue broadcasting.

118. In the upshot, I allow this appeal and set aside the judgment of Majanja J dated 23rd December, 2013 with costs as stated above. As Nambuye and Musinga, JJ.A concurs, the final orders of this Court shall be as proposed by Nambuye, JA.

**DATED and delivered at Nairobi this 28th day of March, 2014**

**D.K. MARAGA**

**…….**

**JUDGE OF APPEAL**

**IN THE COURT OF APPEAL AT NAIROBI**

**(CORAM: NAMBUYE, MARAGA & MUSINGA, JJ.A.)**

**CIVIL APPEAL NO. 4 OF 2014**

**BETWEEN**

**ROYAL MEDIA SERVICES LIMITED ….....…… 1ST APPELLANT**

**NATION MEDIA GROUP LIMITED ……....…….. 2ND APPELLANT**

**STANDARD GROUP LIMITED …….....…….. 3RD APPELLANT**

**VERSUS**

**ATTORNEY GENERAL …….....….. 1ST RESPONDENT**

**MINISTRY OF COMMUNICATION**

**& TECHNOLOGY ….....2ND RESPONDENT**

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

**SIGNET KENYA LIMITED …….…….. 4TH RESPONDENT**

**STAR TIMES MEDIA LIMITED ……...…...….. 5TH RESPONDENT**

**PAN AFRICA NETWORK GROUP**

**KENYA LIMITED….……...6TH RESPONDENT**

**GOTV KENYA LIMITED …...……..….. 7TH RESPONDENT**

**CONSUMER FEDERATION OF KENYA..8TH RESPONDENT**

**WESTMEDIA KENYA LIMITED……..... 9TH RESPONDENT**

**(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Majanja, J.)dated 23rd December, 2013**

in

Petition No. 557 of 2013

**********

**JUDGMENT OF MUSINGA, JA.**

**Introduction**

1. This appeal arises from the judgment of **Majanja, J.** delivered on 23rd December, 2013 in which the learned Judge dismissed the appellants' petition dated 22nd November, 2013. The appeal brings to the fore questions as regards freedom of media and licencing of its operations as provided for under the **Constitution of Kenya, 2010** (hereinafter **"the Constitution")** and specifically Articles 33 and 34 thereof.

2. The appellants' petition against the 1st, 2nd and 3rd respondents was seeking the following prayers:

> ***"1. A declaration that the Petitioners' rights as broadcasters under Articles 33 and 34 of the Constitution have been infringed and threatened with violation by the 2nd and the 3rd Respondents.***
>
> ***2. A declaration that the Respondents in limiting the Broadcast Signal Distribution licence to five licensees has violated the freedom of establishment of the media contrary to Article 34 of the Constitution.***
>
> ***3. A declaration that the Petitioners' right of establishment as television broadcasters protected by Article 34 (3) of the Constitution is violated and rendered meaningless by the failure to issue the Petitioners with Digital Signal Distribution licenses and Digital frequencies.***
>
> ***4. A declaration that the proposed switch off date of 13th December 2013 is punitive and against public interest and infringes on the petitioners' right of establishment as media houses and broadcasters and will disenfranchise the public's right to receive information.***
>
> ***5. A declaration that analogue and digital broadcasting spectrums can co-exist and the 2nd and 3rd Respondents are under an obligation to give the public the right to choose until such time that there are adequate number of universal set top boxes in the country.***
>
> ***6. A declaration that the Petitioners are entitled to be issued with a Broadcast Signal Distribution licence and Digital frequencies by the Government and in default they should continue with the current analogue broadcasting services.***
>
> ***7. An order compelling the Government through the 1st and the 2nd Respondents to issue the Petitioners with Digital Broadcast Signal Distribution licenses and Digital frequencies.***
>
> ***8. An order of injunction restraining the 2nd and the 3rd Respondents from switching off the Petitioners' analogue frequencies, broadcasting spectrums and broadcasting services on 13th December 2013 or at all pending the issuance of the Broadcast Signal Distribution licenses and Digital frequencies to the Petitioners, a reasonable period to roll out digital television broadcasting services and the supply of universal set top boxes to all consumers with television sets.***

***9. An order of permanent injunction restraining the 4th, 5th, 6th and 7th Respondents by themselves, their licensees and/or agents, from broadcasting, distributing or in any way interfering with the Petitioners' programs, broadcasts, copyrighted material and productions or in any way infringing the Petitioners' intellectual property rights.***

***10) The Respondents to pay the Petitioners' costs of the Petition in any event."***

3. The petition was heard and dismissed. The appellants were dissatisfied with the judgment and filed an appeal raising the following grounds:

***"1. THAT, the learned Judge erred in law in holding the digital migration as being implemented by the 2nd and 3rd Respondents was not in violation of the Appellants' constitutional rights.***

***2. THAT, the learned Judge erred in law in holding the Appellants were not entitled to digital broadcasting licences and digital frequencies despite the provisions of Article 34 of the Constitution, the 2006 National ICT Policy and the recommendations of the Government Taskforce on migration.***

***3. THAT, the learned Judge erred in law in holding that the rights and freedoms guaranteed under Article 34 of the Constitution were subject to government policy that was formulated prior to the promulgation of the Constitution.***

***4. THAT, the learned Judge failed to interpret and give effect to the core expressive rights and duties under Articles 33 and 34 of the Constitution.***

***5. THAT, the learned Judge misinterpreted the transitional provisions and erred in law in holding that the 3rd Respondent was the body contemplated in Article 34 of the Constitution to regulate the licensing of broadcasters despite it being wholly controlled by the Government.***

***6. THAT, the learned Judge erred in law in holding that any claim for the issuance of a Broadcast Signal Distribution Licence is barred by the doctrine of issue estoppel and is a collateral attack on the decision of the Public Procurement Administrative Review Board.***

***7. THAT, the learned Judge erred in law in holding that the Appellants did not have a legitimate expectation that they would be granted digital licenses and digital frequencies on account of their substantial investment in broadcasting.***

***8. THAT, the learned Judge erred in law in holding the Appellants' intellectual property rights were not violated by the Respondents in broadcasting the Appellants' programs and content without their consent.***

***9. THAT, the learned Judge erred in law in holding that infringement of intellectual property rights could not be the subject of a constitutional Petition.***

***10. THAT, the learned Judge erred in law in holding that the Regional Conference Agreement of 2006 could be enforced in violation of the Constitution and failed to appreciate that all commitments and obligations under a treaty or convention were subject to the Constitution.***

***11. THAT, the learned Judge erred and misdirected himself in disregarding the uncontroverted fact that the award of the Digital Broadcasting License to the 6th Respondent was procured through bribery and corruption with 5% of the shareholding being ceded to Government officials to facilitate the award of tender.***

***12. THAT, the learned Judge erred in law in failing to consider the strictures and spirit of the Constitution and instead dwelt and based his decision on a selective and incorrect reading of the 2006 National ICT Policy, 2007 Government Taskforce Report and the Digital Television Committee minutes.***

***13. THAT, the learned Judge erred in law in holding that the Petitioners could not seek relief in court on the ground that they had failed to apply for a Broadcast Signal Distribution License through the National Signal Networks without considering the unreasonable conditions imposed by the 2nd Respondent.***

***14. THAT, the learned Judge erred in law in striking off paragraphs of the Petition and supporting affidavits without any formal application being made and therefore exceeded his jurisdiction.***

***15. THAT, the learned Judge completely misunderstood the constitutional issues that had been framed for determination, the Appellants' submissions and the authorities cited to him and consequently arrived at the wrong decision."***

**ISSUES DETERMINED BY THE HIGH COURT**

4. The learned trial Judge identified three broad issues for determination which were as follows:

***"a) Whether and to what extent the petitioners are entitled to be issued with BSD licences by the CCK and whether the issue of the licences to other licensees to the exclusion of the petitioners is a violation of Article 33 and 34 of the Constitution.***

***b) Whether implementation of the digital migration constitutes a violation of the petitioners' fundamental rights and freedoms and if so, whether the process should be stopped, delayed or varied in order to vindicate or amenurate the petitioners' fundamental rights.***

***c) Finally, as regards the 4th, 5th, 6th and 7th respondents, whether they have breached and/or violated the petitioners' intellectual property rights."***

5. The trial court set out the factual background that gave rise to the appellants' claim and thereafter summarized the submissions made by all the parties. Having done so, the court made the following determinations:

*(i) The petitioners are not entitled to be issued with BSD licences by the CCK on the basis of their established status or on the basis of any legitimate expectation.*

*(ii) The implementation of the digital migration is not a violation of the petitioners' fundamental rights and freedoms and no basis had been made by the petitioners 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.*

*(iii) The petitioners had not established that their intellectual property rights were violated by the 4th, 6th, 7th and 8th respondents.*

6. This is a first appeal. The Court is obliged to reconsider the evidence that was adduced before the trial court, assess it and make appropriate conclusions about it. See **SELLE & ANOTHER vs. ASSOCIATED MOTOR BOAT COMPANY LIMITED & OTHERS** [1968] E.A. 123. I will therefore proceed to highlight the key arguments that were advanced by the parties before the High Court and in this Court and thereafter make a determination on the grounds of appeal.

**THE APPELLANTS' PETITION IN THE HIGH COURT**

7. The petition was filed on 22nd November, 2012 and was supported by three affidavits sworn by **Mr. Samuel Kamau Macharia, Mr. Linus Gitahi and Mr. Sam Shollei. Mr. Macharia,** the Chairman of the 1st appellant, deponed, inter alia, that the 1st appellant has been providing broadcasting services since 1997 and is currently the leading broadcaster with over 50% viewership across the country. He alleged that his company has invested over Kshs.40 billion in infrastructure, plant and equipment. One of the reasons for doing such massive investment in infrastructure and equipment was to safeguard its business from unlawful interference by the government, the 1st appellant having had a bad experience when it was being hosted by the Kenya Broadcasting Corporation upto the year 2000. Its transmitters were shut down due to government interference and that had an adverse effect on its operations.

8. In making the substantial investment, the 1st appellant had legitimate expectation that the government will not interfere in its broadcasting business and that any licencing requirements and regulations would facilitate and not impede its business. Mr. Macharia added that from its inception, the 1st appellant was operating on analogue broadcasting spectrum. However, the Regional **Radio Communications Conference** held in Geneva in **2006**, hereinafter referred to as "RRC-06", established the Digital Terrestrial Broadcasting plan that required countries to start preparations to migrate from analogue to digital terrestrial broadcasting technologies. The conference set **17th June, 2015** as the deadline (the shut down date) for all countries to migrate to digital transmission.

9. The deponent further stated that the government established a Taskforce on the migration from analogue to digital broadcasting with a mandate to:

> ***(i) give recommendations to the government on the required policy and regulatory framework to address the introduction of digital broadcasting;***
>
> ***(ii) develop a Kenyan approach for transition to digital broadcasting;***
>
> ***(iii) establish a transition timeframe and a firm programme for analogue switch-off;***
>
> ***(iv) give proposals on how Kenya can adopt digital broadcasting.***

10. The Taskforce comprised of broadcasting experts and representatives drawn from the following stakeholders:

- Ministry of Information and Communications,
- National Communications Secretariat,
- Communications Commission of Kenya,
- Media Owners Association,
- Kenya Broadcasting Corporation,
- Media Council of Kenya,
- Association of Practitioners in Advertising (APA).

It published its report in **September 2007**. It noted that broadcasting in Kenya had so far evolved with broadcasters developing separate individual transmission infrastructure, which practice is at variance with the best practices in the industry where common infrastructure is used to provide transmission services to broadcasters. That is done through a common carrier company which makes its infrastructure available for hire. That arrangement would ensure optimal utilization of national resources and spur rapid growth of new value added services. It stated, inter alia:

> ***"In line with best practices, Kenya should establish a common transmission platform for all broadcasting services to optimize available resources. This common transmission of broadcasting signals should be done by a separate entity from the broadcasters."***

In view of the foregoing, the Taskforce made the following recommendations:

> ***"a) Kenya Broadcasting Corporation (hereinafter "KBC") shall be required to form a separate***

***company to run the signal distribution services in order to avoid a conflict of interest or cross subsidization.***

***b) Interested investors including current broadcasters may be licenced to offer digital distribution services.***

***c) A signal distributor will be required to provide signal distribution services as a common carrier to broadcasting licensees upon their request on an equitable, reasonable, non-preferential and non-discriminatory basis."***

11. In line with the aforesaid recommendations, the 4th respondent, a subsidiary of KBC, was the first digital television provider to be issued with a Broadcast Signal Distribution (hereinafter **"BSD")** licence by the 3rd respondent in 2009. Because the words **"signal distribution"** will keep recurring throughout this judgment, it is important to explain what that entails. Signal distribution is the process whereby the output of a broadcasting service is taken from the studio and conveyed to any target area by means of a telecommunication system. It involves construction, operation and maintenance of transmission infrastructure.

12. In paragraph 16 of his affidavit, Mr. Macharia deposed as follows:

***"The 4th respondent was incapable of funding the cost of infrastructure roll out due to the huge investment expenses involved. DSTV, a South African company, stepped in to fund the roll out country wide by providing the infrastructure in exchange for the right to distribute its pay-tv services GoTV."***

However, that averment was strongly denied by the 4th respondent.

13. In May 2011, the 3rd respondent invited Expressions of Interest from parties interested in obtaining a licence to roll out a national broadcasting signal distribution network in Kenya. Consequently, the 1st and 2nd appellants made a joint application for a BSD licence vide a consortium known as **National Signal Networks**. The joint venture application was rejected for the reason that it had not met the bid security validity period at the technical evaluation stage. Mr. Macharia alleged that the rejection of their application was calculated to confer an undue advantage to the 6th respondent which was issued with the second BSD licence. Mr. Macharia alleged that the 6th respondent is a Chinese firm that is wholly owned by the 5th respondent.

14. He further alleged that the 6th respondent was unlawfully issued with the BSD licence because it neither met the mandatory requirement of 20% Kenyan equity participation nor had any broadcasting infrastructure to enable it effectively provide the signal distribution throughout the country as required.

15. Mr. Macharia went on to state that on 4th July, 2011 the 1st and 2nd appellants, through the National Signal Networks, wrote to the 2nd respondent requesting the Ministry to reconsider its application for a BSD licence. In his reply dated 22nd July, 2011, **Dr. Bitange Ndemo**, then Permanent Secretary, Ministry of Information and Communications, stated as hereunder:

***"Your letter dated July 4, 2011 refers.***

***We have noted the contents therein and in view of the fact that your organizations have substantially invested in the broadcast infrastructure the government has directed Communications Commission of Kenya (CCK) to consider issuing you with the third Signal Distribution Licence.***

***However, since this will be an affirmative action, the licence will come with certain conditions including:***

***(i) Open access where other parties will access channels***

***(ii) Prove to CCK that other current infrastructure providers have no interest investing in National Signal Networks.***

***In view of the foregoing and if the proposal is acceptable to you, submit your application directly to CCK and a copy to the Ministry of Information and Communications."***

16. The 1st and 2nd appellants complained that the aforesaid conditions were unreasonable as they were not only impractical but also negated the recommendations of the Taskforce.

17. Mr. Macharia further stated that Kenya is not ready to switch to digital broadcasting platform as only 170,000 set top boxes ("STBS") have been distributed out of the estimated 8 million television sets in the country. Further, consumers had not been given adequate and timely information on the migration implementation time frame. That notwithstanding, he added, the 2nd respondent had stuck to the intended local switch off date of 13th December, 2013, which date has since been varied by an order issued by the High Court. He further contended that the government had ignored a crucial component of the **RRC-06** resolution that allows additional five years beyond the 17th June, 2015 switch off date.

18. Mr. Macharia further stated that the 3rd respondent, by a letter dated **19th August, 2013,** had unlawfully authorized the 4th, 5th, 6th and 7th respondents to intercept and transmit the appellants' newscasts and locally produced programmes without their authorization or consent, which is in violation of the appellants' intellectual property rights.

19. The appellants contended that denial of a BSD licence constitutes interference in their broadcasting business and is in contravention of **Article 34 (2)** of the **Constitution.** Further, their right to freedom of establishment as guaranteed under **Article 34 (2)** and of the **(3)** Constitution has been violated and/or is being threatened with violation. The appellants further alleged that their intellectual property rights have been violated by the 4th, 5th, 6th and 7th respondents and the violation has been aided and abated by the 2nd and 3rd respondents.

20. **Mr. Linus Gitahi** and **Mr. Sam Shollei,** Chief Executive Officers of the 2nd and 3rd respondents respectively, adopted the common facts as set out in the affidavit of Mr. Macharia. Mr. Gitahi also swore a supplementary affidavit on 9th December, 2013. I shall revert to that affidavit later.

21. Consumer Federation of Kenya, the 8th respondent, supported the appellants' case. In an affidavit sworn by **Mr. Stephen Mutoro**, the Secretary General of the 8th respondent, it was stated that the 8th respondent, who was the 1st interested party in the High Court matter, as well as most Kenyans, are willing to embrace digital migration save for concerns regarding preparedness and affordability of the entire process. The 8th respondent's main argument is that the price of the STBs is way beyond the reach of most Kenyans as they are retailing at between Kshs.3,500/= and Kshs.5,500/=. It was suggested that the government should subsidize the acquisition of the STBs. The organization further contends that the proposed switch off is discriminatory, abrupt and unreasonably irrational and contravenes the doctrine of public participation embraced in **Article 10** of the **Constitution**. Mr. Mutoro added that consumers are unrepresented in the Digital Television Committee.

22. Mr. Mutoro further stated that the global deadline for digital migration is 17th June, 2015 and there is no legal, economic or moral basis for Kenyans to be subjected to an earlier deadline without public participation and without demonstration that the country is ready for the said Digital Television Migration.

23. The deponent further contended that there had been no public information, education, and communication campaign to raise public awareness of the proposed migration as envisaged under **Article 46** of the **Constitution.**

**THE 2ND AND 3RD RESPONDENTS' DEPOSITIONS**

24. **Mr. Joseph Tiampati ole Musuni**, then Principal Secretary, Ministry of Information,

Communications and Technology (the 2nd respondent) and **Francis Wangusi**, the Director General, Communications Commission of Kenya **(CCK**), the 3rd respondent, swore their respective affidavits in response to the appellants' affidavits. I will endevour to summarize their depositions, particularly where such depositions are not in agreement with the averments made by the appellants.

25. Mr. Wangusi stated that CCK is established by the **Kenya Information and Communications Act, Cap 411A**, and is the municipal body responsible for implementation of the international obligations that the Republic of Kenya has to the International Telecommunication Union **(ITU).** The ITU was established by an international treaty known as The Constitution and Convention of the International Telecommunication Union which Kenya ratified on 11th April, 1964. **Article 2 (6)** of the **Constitution** states that any treaty or convention ratified by Kenya shall form part of the law of Kenya and consequently, this country is bound by the aforesaid treaty. The ITU is responsible for planning and allocation of frequency spectrum resources at the global level from which forum member states derive and develop their individual national frequency plans.

26. At the Regional Radio Telecommunications Conference 2006 in Geneva (**RRC-06**) where Kenya was represented, it was resolved, among other things that 17th June, 2015 would be the switch off date for transmission from analogue to digital broadcasting and Kenya was among the countries that signed into the RRC-06 Convention.

27. The RRC-06 produced the **Final Acts** of the Regional Radio Communication Conference (the Final Acts of RRC-06) for planning of the digital terrestrial broadcasting service for the region in which it is located. One of the provisions of the Final Acts is that for Kenya or any other ITU member State to change its obligations under the Final Acts, the ITU has to convene another RRC for that purpose.

28. The Taskforce on the migration from analogue to digital broadcasting that was set up following the 2006 Geneva meeting was tasked with the responsibility of gathering views from all stakeholders and members of the public. It did its work and presented a report to the minister. The government of Kenya accepted the recommendations contained in the Migration Taskforce Report and pursuant to the recommendations the minister established an implementation body known as the Digital Television Committee (the **DTC)** to spearhead the migration process. The members of the DTC were drawn from various stakeholders in broadcasting industry and included **Mr. Ian Fernandes** from the 2nd appellant and **Mr. John Opiyo** from the 3rd appellant. Other members were drawn from **CCK**, the **ICT Board, the National Communication Secretariat, KBC and the Ministry of Information and Communications.**

29. The migration Taskforce recommended that the migration be undertaken in three phases namely:

> ***"(i) Digital switch on: the introduction of digital broadcasting services involving the development of the digital broadcasting infrastructure – including introduction of a digital distributor, availability of set-top boxes and/or integrated digital receivers.***
>
> ***(ii) Simulcast period: In order to ensure that television viewers without set top boxes are not deprived of services, analogue and digital will have to be broadcast in tandem for some period – the "Simulcast" period.***
>
> ***(iii) Analogue switch-off: Termination of analogue transmission which assumes the completion of the switch over process, so that it will not occur, before almost all households can receive digital signals and have digital receivers."***

30. Mr. Wangusi further stated that the grant of the first signal distribution licence to the 4th respondent was in line with the recommendation of the aforesaid Taskforce. Thereafter the government set in motion the process of issue of other distribution licences following the appropriate public procurement process and invited firms to submit bids for the said licence. The tendering process for other BSD licences commenced in February 2011 with an advertisement of Expression of Interest during which six firms were pre-qualified to proceed to the tendering stage. As at the tender closing date of 31st May, 2011, 4 bidders namely **African Link Agencies Limited, Mayfox Company Limited, National Signal**

**Networks, and Panafrica Networks Group Kenya Limited** had submitted their respective bids.

31. The submitted bids were subjected to evaluation as per law required and the bid by National Signal Networks failed to meet the criteria on account of the bid security validity period. The three remaining bidders were subjected to the technical evaluation stage and only Panafrica Network Group Kenya Limited, the 6 th respondent, qualified to proceed to the Financial Evaluation stage and was eventually granted licence to roll out a national broadcasting signal network at an initial licence bid for USD450,000.

32. Being dissatisfied with the decision of the CCK to award the Digital Signal Distribution licence to the 6th respondent, the 1st and 2nd appellants through National Signal Network, invoked the procurement dispute resolution mechanism provided for under the Public Procurement and Disposal Act, 2005, by filing **Public Procurement Administrative Review Board Application No. 24 of 2011.** The Public Procurement Administrative Review Board (**PPARB**), after considering the application dismissed the same in a decision delivered on 19th July, 2011.

33. Subsequently, the switch off date has been moved forward severally and at a meeting of the DTC held on 6th August, 2013, it was agreed by all parties including the Media Owners Association, to which the appellants are members, that the new switch off dates will be 13th December, 2013 for Nairobi area, 30th March, 2014 for Mombasa, Malindi, Nyeri, Meru, Kisumu, Webuye, Kisii, Nakuru and Eldoret and 30th June, 2014 for all other remaining stations. The migration is staggered in phases so that the government of Kenya can use the lessons learnt at each phase to ensure smooth digital migration in the rest of the country prior to the 17th June, 2015 universal switch off deadline.

34. The 2nd and 3rd respondents denied that they were in any way interfering with the appellants' business or acting in concert with any of the other respondents to violate the appellants' intellectual property rights as alleged. Mr. Wangusi stated that CCK has not authorized any signal distributor to intercept any content from any broadcaster as alleged. He further contended that the appellants are opposed to digital migration because upon migration all broadcasters, whether large or small, will have a level playing field and will be able to reach all consumers and such reach will no longer be pegged on the number of transmitters or volume of infrastructure which a broadcaster has. Consequently, the broadcast monopoly or dominance jointly enjoyed by the appellants will cease.

35. On the other hand, the benefits of the migration to digital transmission are enormous and well set out in paragraph 88 of Mr. Wangusi's affidavit. The benefits of such migration are not denied by the appellants.

**4TH RESPONDENT'S RESPONSE**

36. Mr. **Waithaka Waihenya**, a Director of the 4th respondent, stated that the 4th respondent was formed pursuant to recommendations of the Taskforce on migration to run the digital distribution services. The government of Kenya provided the initial funding to establish a digital terrestrial broadcasting network.

37. The 4th respondent commenced carrying the content of other broadcasters from 2009 and that includes content from the appellants herein. Since 2009 the appellants' content and for other broadcasters has been carried for free but with the appellants' consent and active participation.

38. Mr. Waihenya further stated that the appellants' content carried by the 4th respondent is transmitted as received without any addition, alteration or reduction. He therefore denied the appellants' allegation of infringement of their intellectual property rights.

39. Regarding the switch off date that was initially intended to be 13th December, 2013, Mr. Waihenya stated that the date had been agreed upon by all the industry players, including the appellants. As such, it was improper for the appellants to come to court at the eleventh hour over an issue that they had fully participated in and which they were aware of since its inception.

40. The 4th respondent is opposed to further shifting of the migration date because it has spent considerable sums of money in preparing for the digital migration and in paying for the satellite link. The cost of transmitting the content of other broadcasters on its platform is about Kshs.8 million per month. The total amount spent so far on the satellite link alone is over Kshs.100 million, Mr. Waihenya added. Therefore, the more the digital migration is delayed, the higher the cost on the 4th respondent.

**5TH RESPONDENT'S ARGUMENTS**

41. **Mr. Leo Lee,** the Managing Director of Star Times Limited, the 5th respondent, swore a replying affidavit and stated, inter alia, that the 5th respondent was lawfully issued with a temporary licence as a Broadcasting Subscription Management Service Provider. The licence was issued on 15th August, 2012 and confirmed on 19th September, 2012.

42. Mr. Lee reiterated the averments made by the 2nd, 3rd and 4th respondents that the appellants have all along been aware of the proposed switch off dates as they were parties to the bodies that set the dates and therefore their attempt to scuttle the switch off date at the last minute was not in good faith. He downplayed the difficulties alluded to by the appellants in effecting the digital migration and stated that there was no good reason for delaying the migration any further.

43. Regarding broadcasting of free to air signals, Mr. Lee stated that **Section 25** of the **Kenya Information and Communications Act** empowers CCK to attach such conditions as it may deem necessary to licenced service providers. Such conditions are binding upon the appellants. The 5th respondent was directed by CCK, pursuant to **Regulations 14 (2) (b) and 16 (2) (a)** of the **Kenya Information and Communications (Broadcasting) Regulations 2009**, to provide a prescribed number of KBC channels.

44. Further, the distribution of free to air signals from other licenced broadcasters on the 5th respondent's digital platform is not an infringement of the appellants' intellectual property rights as alleged, Mr. Lee stated. It is expressly allowed by the Act. He stated that the 5th respondent does not intercept for transmission the appellants' content. The content is accessible by virtue of viewers possessing a digital set top box.

**6TH RESPONDENT'S REPLY**

45. **Mr. Kamal Sohrab**, the General Manager of the 6th respondent, stated in his replying affidavit that in February 2011, CCK published the tender for Request for Proposals for award of a licence to roll out and operate a National Terrestrial Broadcasting Signal Distribution Network in Kenya and the 6th respondent presented its bid. Having fulfilled the pre-qualification requirements and satisfied the evaluation criteria, the 6th respondent's bid was successful.

46. Regarding the bid made by the National Signals Network, Kamal stated that the same was declared non-responsive and did not move to the technical evaluation stage. Consequently, the National Signal Networks filed a request for review to the PPARB challenging the disqualification and subsequent award of the BSD licence to the 6th respondent. The PPARB dismissed the review application and that finding was not challenged in any court.

47. The 6th respondent further contended that the 1st and 2nd appellants' averments and alleged breaches of law in the award of the BSD licence to it amounts to a collateral attack on the decision by the PPARB.

48. The 6th respondent further stated that despite the 1st and 2nd appellants' failure in their bid for the BSD licence, they requested for a reconsideration of their application and the request was favourably considered and conditionally allowed. What the 1st and 2nd appellants were unhappy with were the conditions that were set by the 2nd and 3rd respondents. In the circumstances, Kamal added, the 1st and 2nd appellants cannot be heard to say that they have been discriminated against or unfairly treated in respect of their quest to obtain a BSD licence. In his view, this Court has no jurisdiction to order the grant

of a licence to the appellants.

49. Regarding digital migration process, the 6th respondent was in full concurrence with the sentiments expressed by the 2nd and 3rd respondents.

50. Responding to the appellants' allegation that the distribution of free to air signals from other licenced broadcasters will amount to infringement of the appellants' intellectual property rights, the 6th respondent stated that the allegation was unfounded and reiterated the averments made by the 2nd, 3rd, 4th and 5th respondents.

51. Mr. Kamal stated that it is in the wider interest of the public that Kenya migrates from analogue to digital system of broadcasting and added that the appellants had not tendered a justifiable reason as to why Kenya should postpone the switch off date any further.

**7TH RESPONDENT'S REPLY**

52. The 7th respondent opposed the appellants' petition through an affidavit sworn by **Mr. Felix Kyengo**, its General Manager. He stated that GoTV Kenya Limited is a Kenyan company that is fully authorized to conduct its business in Kenya by all relevant authorities. It is part of the Multichoice Group of Companies and has invested billions of shillings since its establishment. Mr. Kyengo denied that the company has ever funded the roll out of the 4th respondent's network as alleged by the appellants.

53. Regarding the provisions of **Article 34 (3)** of the **Constitution**, the 7th respondent stated that the right to establish broadcasting and media is subject to necessary licencing procedures to regulate airwaves and other forms of signal distribution and that it is not true, as proposed by the appellants, that anyone is entitled to a licence as of right, especially where the licencing procedures or requirements have not been followed and met.

54. Responding to the appellants' alleged breach of their intellectual property rights, Mr. Kyengo stated that the carriage of the appellants' broadcasts and programmes on GoTV Kenya's television is pursuant to valid and legally binding contractual agreements concluded between Multichoice and the appellants. It cannot therefore be true that the 7th respondent is unlawfully intercepting or transmitting the appellants' broadcasts without their authorization or consent, he added.

**9TH RESPONDENT'S REPLY**

55. On behalf of the 9th respondent**, Dr. Philip Muyoti,** a Director of Westmedia Kenya Limited, filed a replying affidavit. The 9th respondent is fully owned by indigenous Kenyans and has investments in the media industry. In 2004 the 9th respondent, upon application, was granted authority to operate FM radio stations in Western Province and North Rift, within Kenya. Though the Ministry of Information and Communications had approved that the 9th respondent be issued with a licence to operate four FM radio stations, CCK allocated the company only two FM radio frequencies, one at Webuye 94.9 and another one at Kapenguria 104.1. CCK indicated that there were no radio frequencies available to meet the Ministry's approval.

56. Since 2005 the 9th respondent has been urging CCK to allocate it two additional frequencies for expansion of its radio broadcast to other parts of Kenya including Nairobi, Eldoret, Kisumu and Nakuru but todate CCK maintains that there are no frequencies available, Dr. Muyoti stated. In 2009 the 9th respondent applied for a licence to operate a station but the same was not approved as migration from analogue to digital television broadcasting was in the process. Further, by an application dated 30th November, 2012 the 9th respondent applied for a free to air television service licence, having brought on air its broadcast content on the digital television service. The company had on 29th November, 2012 entered into an agreement with the 6th respondent as the licensee for the terrestrial digital television system platform whereby the 6th respondent would carry the 9th respondent's station known as West TV. The 9th respondent entered digital television broadcasting upon public assurances by the 3rd respondent that there was to be commencement of migration of television broadcasting from analogue terrestrial

broadcasting to digital television broadcasting from 31st December, 2012. But due to delays in the migration, the 9th respondent continues to incur rental charges for operating its digital television broadcasts as posted by the 6th respondent, Dr. Muyoti lamented. In addition, the continued failure to implement the migration has created an uncompetitive scenario in broadcasting television between the appellants and their competitors, the deponent added.

57. The 9th respondent further averred that the prevailing status quo favours the appellants and they desire to perpetuate it so as to remain the dominant actors and monopolists in the television broadcasting sector.

58. The 9th respondent concluded by stating that it would be inequitable for the appellants to delay the migration date any further for no apparent reason, having been involved in the migration process since its inception.

**PARTIES' SUBMISSIONS ON APPEAL**

59. All the parties filed written submissions but because of the nature of the dispute their respective advocates were granted reasonable time to highlight the same and make further oral submissions.

**The Appellants' Submissions**

60. The appellants were represented **by Mr. Muite, Senior Counsel, Mr. Murgor, Mr. Oduol, Mr. Kimani and Mr. Issa.** Mr. Muite started his submissions by stating that the biggest beneficiary of media freedom in this country is the Kenyan public. He added that unlike the position under the repealed Constitution, the new Constitution protects freedom of the media and in that regard referred the court to Article 34 (1) and (2) of the Constitution. Article 34 (1) states as follows:

> ***"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)."***

That Article must therefore be read together with **Article 33** which provides for freedom of expression. Mr. Muite made further reference to **Article 34 (2) (a)** which states that:

"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 by any medium; or***
>
> ***b) penalize any person for any opinion or view or the content of any broadcast, publication or dissemination."***

**Article 34 (3)** stipulates that 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."***

In his view, freedom of establishment includes protection of the established media houses, like the appellants.

61. Mr. Muite urged the Court to bear in mind the historical background that gave rise to the agitation of the new Constitution and with specific reference to this appeal, to inclusion of **Articles 33** and 34. He therefore urged the Court to interpret the provisions of those two Articles in the manner prescribed by **Article 259 (1)** of the Constitution which states as follows:

***"This Constitution shall be interpreted in a manner that-***

***a) promotes its purposes, values and principles;***

***b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;***

***c) permits the development of the law; and d) contributes to good governance."***

In that regard, Senior Counsel urged the Court not to interpret Articles 33 and 34 in a manner that restricts media freedom because such kind of interpretation will amount to a violation of the Bill of Rights.

62. Counsel faulted the trial Judge for using wrong canons in interpreting the Constitution, saying that he erred in six different ways, to wit:

*a) failing to consider the import of **Article 34** of the **Constitution** and the media rights it protects as well as the government's mandatory duty to facilitate the enjoyment of those rights that it imposes;*

*b) concentrating on whether the 2006 policy was reasonable rather than on the two issues raised by the appellants namely, whether it was constitutional and, even if constitutional, whether it had been constitutionally implemented;*

*c) misapplying the doctrine of separation of powers by failing to consider that whilst the government has plenary discretion to choose the means by which it implements decisions, if it chooses any means that violates rights or unconscionably burdens their exercise, such a choice is impermissible for unconstitutionality;*

*d) considering the appellants' petition for enforcement of fundamental rights as if it were an appeal against the decision of the Public Procurement Review Board in the National Signals Network case;*

*e) imposing an unconstitutional condition on the appellant, namely, the holding that having exercised their right to participate in the meetings that set the timetable for migration to digital broadcasting they thereby lost their constitutional right to challenge both the timetable as well as the manner of the implementation; and*

*f) holding that the re-transmission of the appellants' free to air broadcasts by pay TV broadcasters without their authorization does not violate the appellants' intellectual property rights under both the Constitution and the **Copyright Act.***

63. Mr. Muite further submitted that the appellants are not opposed to digital migration, what they oppose are the terms and conditions which they are being subjected to under the migration process, particularly transmission of their content through the 5th and 6th respondents who are their competitors. That is why the appellants want to be given a BSD licence to enable them carry the digital information themselves so that they can guarantee the integrity of the content.

64. **Mr. Issa** argued ground 5 of the appeal and also reiterated some aspects of the 1st and 2nd grounds that were argued by Mr. Muite. With regard to ground 5, it was submitted that the learned Judge misinterpreted the transitional provisions and erred in law in holding that the 3rd respondent was the body contemplated in **Article 34** of the **Constitution** to regulate the licensing of broadcasting. He submitted that the Board of CCK, as presently constituted, has majority of its appointees or representatives brought on board by the government. At paragraph

83 of the judgment, the learned Judge had referred to his earlier decision in **ROYAL MEDIA**

**SERVICES LIMITED vs. ATTORNEY GENERAL,** Petition No. 346 of 2012, where he stated, inter alia:

> ***"The legality of impugned notices and letters depends foremost on whether the CCK is the regulatory authority contemplated under Article 34 (5). Dr. Kuria argued forcefully that the CCK, as constituted fell on the way side on the effective date therefore the CCK cannot purport to exercise licensing authority by issuing the notice and demand. I think this view ignores the proper reading of the entire Constitution. It is now well established that the Constitution must be read as a whole and to accede to the petitioner's position would be akin to legislating a vacuum in the regulation of the airwaves. (See OLUM & ANOTHER vs. ATTORNEY GENERAL OF UGANDA, [2002] 2 E.A. 508). Law, like nature, abhors a vacuum and the promulgation of the Constitution did not happen in a vacuum, it was superimposed on the existing legal framework. I therefore agree with the respondents' argument that the framers of the Constitution intended that over time this framework could be transformed by legislative acts to accord with the Constitution. It is for this reason that by dint of Article 261 (1) Parliament is required to enact the legislation contemplated under Article 34 (5) within 3 years as set out in the Fifth Schedule to the Constitution. The transformation of the existing law was also underpinned by provisions of section 7 (1) of the Sixth Schedule to the Constitution which provides 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'. These provisions mean that the statutes in force governing media regulation remain in force subject to such modifications as are necessary to bring it in conformity with the Constitution. It follows that the Kenya Information and Communications Act, 1998 and all the regulations made thereunder remain in force subject to the Constitution and the transitional provision I have cited above."***

65. The learned trial Judge went on to hold that until the **Kenya Information and Communications (Amendment Bill), 2013** is enacted CCK as currently established is the body entitled under the Constitution to continue to regulate the media and airwaves.

66. Counsel submitted that in making the above conclusion, the learned Judge failed to consider whether CCK as currently constituted meets the constitutional requirement of independence and inclusiveness. He also failed to consider whether the composition of CCK violates constitutional requirements under **Article 34** and if so, the manner in which the present statute ought to be interpreted to make it conform to the Constitution. In that regard counsel cited the case of **DPP vs. MOLLISON (No. 2) [2003] LRC 756**, where the privy council, in considering whether **Section 29** of the **Jamaican Juveniles Act 1951** was compatible with the country's Constitution after Jamaica became independent on 6th August, 1962, cited with approval the case of **LIYANAGE vs. THE QUEEN [1967] 1 A.C. 259** where the court held, inter alia:

> ***"A breach of a constitutional restriction is not excused by the good intentions with which the legislative power has been exceeded by the particular law."***

Counsel added that in making an Act of parliament conform with the Constitution, parliament may be required to amend some parts of the law by either deleting or making additions thereto or substituting new provisions for the old.

67. Counsel further submitted that the relevant standards on independence and autonomy of broadcaster regulators in line with Article 34 (3) (b) have been elaborated in comparative jurisprudence and best practices. Those standards are stipulated in ACCESS TO THE AIRWAVES, Principles on Freedom on Expression and Broadcast Regulation, Article 19, 2002. Principle 10 on independence of licensing bodies states that:

> ***"All public bodies which exercise powers in the areas of broadcast and/or telecommunications regulation, including bodies which receive complaints from the public, should be protected against interference, particularly of a political or commercial nature. The legal status of these***

***bodies should be clearly defined in law. Their institutional autonomy and independence should be guaranteed and protected by law, including in the following ways:***

- ***specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;***
- ***by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body;***
- ***through the rules relating to membership;***
- ***by formal accountability to the public through a multi-party body; and in funding arrangements."***

68. In addition, as regards the composition of such regulatory bodies, Principle 13 provides, inter alia, that:

***"13.1 Members of the governing bodies (boards) of public entities which exercise powers in the areas of broadcast and/or telecommunications regulation should be appointed in a manner which minimises the risk of political or commercial interference.***

***The process for appointing members should be set out clearly in law. Members should serve in their individual capacity and exercise their functions at all times in the public interest.***

***13.2 The process for appointing members should be open and democratic, should not be dominated by any particular political party or commercial interest, and should allow for public participation and consultation. Only individuals who have relevant expertise and/or experience should be eligible for appointment. Membership overall should be required to be reasonably representative of society as a whole."***

69. In view of the foregoing, the appellants submitted that the 3rd respondent (CCK) as presently constituted is not the body contemplated by Article 34 because it is a classical executive agency and not an independent constitutional agency. (See also **Broadcasting Law, a Comparative Study**), Clarendon Press Oxford 1993 pages 32-42.

70. **Mr. Kimani** argued both grounds 8 and 9 of the appeal together. The two relate to the alleged infringement of the appellants' intellectual property rights by the respondents in broadcasting the appellants' programs and contents without their consent. He submitted that the 3rd respondent (CCK) purports to allow pay TV to violate the appellants' right on the theory that the law requires subscription broadcasting services to provide free to air channels. Counsel submitted that the said arrangement is a clear violation of the appellants' intellectual property rights because as developers of the content, the same ought not to be passed on to their competitors without their consent. Reference was made to **Article 40** of the Constitution which protects the right to property. Counsel further submitted that **Article 40** should be read together with **Article 2** which declares the Constitution the supreme law of this Republic. Under **Article 2 (6),** ratified treaties are part of the Laws of Kenya. Kenya acceded to the Berne Convention for the Protection of Literary and Artistic Works, 1886 on March 11, 1993. The treaty came into force on June 11, 1993 and is therefore part of the Laws of Kenya, the appellants contended.

71. Counsel went on to state that the appellants are free to air broadcasters whose business model rests on universal access and leveraging that access for advertising revenues. That model benefits consumers of TV programmes whose viewing is in effect paid for by advertisers. Pay TV, on the other hand, operates on viewers' ability to pay and on niche markets. By bundling the appellants' free to air programmes with their own, the owners of subscription TV have created an income stream for themselves from intellectual property of the appellants.

72. Counsel further submitted that the government has a duty to align its policies with the Constitution. **Article 10** spells out principles that are binding upon all stakeholders, State officers, public officers, and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions. **Article 10 (2)** stipulates the national values and

principles to include participation of the people, equity, inclusiveness, non- discrimination, integrity, transparency and accountability. Further, **Article 27 (1)** stipulates that all persons are equal before the law and have the right to equal protection and equal benefit of the law. In his view, the 2nd and 3rd respondents have violated some of the aforesaid national values and principles in that they have discriminated against the appellants in so far as their application for a BSD licence is concerned. Counsel lamented that the appellants' right to property was being infringed upon. He cited the case of **MARBURY vs. MADISON, 5 US (1Cranch) 137; 2L.ED.60 (1803)** where Chief Justice Marshall held:

> ***"It cannot be presumed that any clause in the Constitution is intended to be without effect."***

73. It was further submitted that the learned trial Judge failed to consider the manner in which the implementation of the migration process violates the constitutional principle of transparency and public participation. Counsel submitted that the public was not given an opportunity to participate in the process of grant of the BSD licences, say in hearings and entertaining objections.

74. Both Mr. Kimani and Mr. Murgor submitted that all along the appellants had a legitimate expectation that they would be granted a BSD licence, in the absence of any wrong doing on their part. They cited the 2006 National Information and Communications Technology (ICT policy) and the associated Report of the Taskforce on the migration of terrestrial television from analogue to digital broadcasting published in September, 2007. Their submission was two fold, one, that the commitments in those documents relate to the Constitution and given the mandatory nature of the Constitution's prescriptions, the government had a duty to scrutinize whether its policies needed to be revised to align with ordinary commands of the Constitution and two, that even if the policies were constitutional as drafted, the government has not implemented them on their own terms or consistently with the principles and requirements of the Constitution. Because of these failures, counsel added, the vested rights of the appellants have been violated. They added that in the policy and Taskforce Report the government committed itself to the development of broadcasting services that reflect a sense of Kenya identity, character, cultural diversity and expression through the development of appropriate local content. The government also pledged its encouragement of **"a broadcasting industry that is efficient, competitive and responsive to audience needs"** that is based on an **"allocation of frequencies through an equitable process".**

75. The Taskforce recommended that to reduce the cost of migration the existing designated transmitting analogue sites and infrastructure will be used for digital migration and that existing infrastructure owners will enter into agreements with signal distributors and future infrastructure investors regarding migration of their facilities into the signal distribution network. The appellants stressed that the Taskforce recommended that incumbent broadcasters be allowed to form an independent company licenced to run signal distribution services. Quoting **clause 8.2** of the Report of the Taskforce on migration (dated July 2007) that was annexed to the affidavit of Joseph Tiamapti ole Musuni, the Principal Secretary at the Ministry of Information Communications and Technology where it is stated that:

> ***"The current broadcasters will be allowed to form an independent company to run the signal distribution services in order to utilize their existing infrastructure."***

Counsel submitted that the 2nd and 3rd respondents, relying on the September 2007 edition of the same Report changed the position and stated that:

> *"**Interested investors including current broadcasters may be licenced to offer signal distribution services."***

According to Mr. Kimani, between the two editions of the Report there is a wide difference in the wording of paragraph 8.2 cited hereinabove.

76. He submitted that the appellants, having relied on the initial commitments as contained in the July 2007 edition of the Taskforce Report, are entitled to a BSD licence.

77. The appellants also cited the undertaking given to Media Owners by the Permanent Secretary in the Ministry of Information And Communications, Dr. Bitange Ndemo, during the broadcasters' forum held on **24th August, 2011.** The Permanent Secretary stated, inter alia:

> ***"The government has given, for example, KBC sufficient resources and we are licensing two more signal distributors; the Panafrican Group and the Media Owners whom we are going to licence to provide the signal. As they already have infrastructure, the deployment will be very quick to migrate to the new digital framework."***

78. From the foregoing, the gravamen of the appellants' claim under the doctrine of legitimate expectation is that the government has consistently promised that:

> *i) its actions would take account of the current broadcasters' investments in infrastructure.*
>
> *ii) even though the government expected content developers would be separate from carriers when migration to digital broadcasting would be implemented, the incumbent will have the option to form their own independent carrier company.*
>
> *iii) the government would foster competition in the market, not just in content development but also in carrier services.*

79. Submitting on ground 6 of the appeal, Mr. Issa stated that the learned Judge treated the appellants' petition as if it were an appeal challenging the decision of the PPARB in the award of BSD licence. The court invoked the doctrines of issue estoppel and res judicata, stating that the petition amounted to a collateral attack of the PPARB decision. He stated that issue estoppel and res judicata doctrines are not applicable to petitions seeking enforcement of fundamental rights and freedoms. Counsel cited several decisions among them **TELLIS & OTHERS vs. BOMBAY MUNICIPAL CORPORATION AND OTHERS [1897] LRC 351, BAFOKENG TRIBE vs. IMPALA PLATINUM LIMITED & OTHERS [1998] (11) BCLR 1373 and TRANSNET LIMITED vs. GOODMAN BROTHERS (PTY) LIMITED [2001] (2) BCLR 176 (SCA).**

80. With regard to ground 10 relating to the provisions of RCCO-06 the appellants submitted that although the ITU Convention is binding on Kenya the various commitments and modalities of implementation of digital migration reached at the RRCO-06 must be interpreted consistently with the government's obligations under the 2010 Constitution. They argued that the violation of their constitutional rights cannot be justified on the need to meet the convention commitments.

81. Submitting on ground 11 of the appeal, Mr. Murgor faulted the trial Judge for striking out paragraph 19 of Mr. Linus Gitahi's affidavit where an allegation had been made that the award of digital broadcasting licence to the 6th respondent was procured through bribery. Mr. Gitahi had stated:

> ***"19. That, in a meeting between the petitioners and the 5th respondent's directors and senior management, in June 2013 the 5th respondent confirmed to the petitioners that it had ceded 5% of its shareholding to government officials to facilitate and procure the award of tender for the digital distribution licence."***

The trial Judge held that the aforesaid allegation was unsubstantiated as there were no full particulars provided and proceeded to strike it out as scandalous. Counsel submitted that there was no application to strike out the said paragraph.

82. Mr. Issa further submitted that the learned Judge erred in law in holding that the appellants could not seek relief in court on the ground that they had failed to apply for a broadcast signal distribution licence through the National Signal Networks without considering the unreasonable conditions imposed by the 2nd respondent.

83. As earlier stated, the 8th respondent supported the appellants' case through its learned counsel, **Mr.**

**Kurauka**. He clarified that the 8th respondent, like the appellants, is not opposed to digital migration per se but is opposed to the migration process. Counsel's submission was to the effect that consumers should be given sufficient time to prepare themselves for the migration, adding that there had not been sufficient civic education provided by the 1st and 2nd respondents.

84. Mr. Kurauka further submitted that since the universal switch off date had been agreed as 17th June, 2015, it was unreasonable for the government to set a much nearer switch off date, having failed to make adequate preparations. In his view, the prices of set top boxes is considerably high and suggested that the government ought to have subsidized the same. He added that the government had also failed to do a national survey to gauge public awareness of the intended migration. Counsel further submitted that Kenyans have a right to information and are thus entitled to be properly informed about all the processes of the migration.

**THE RESPONDENTS' SUBMISSIONS**

85. Responding to the appellants' submissions, Mr. Ngatia argued grounds 1, 2, 3 and 4 together. He submitted that the digital migration process was being done in conformity with the provisions of the Constitution. He referred to the provisions of **RRC-06** and the Final Acts made thereunder which he stated form part of the Laws of Kenya in terms of **Article 26** of the **Constitution.** He reiterated that the appellants had been fully involved in the migration process starting with the National Information and Communication Policy of 2006. The objectives of the policy document included:

> ***"a) development of a legal and regulatory framework as a basis for investment in growth and sustenance of broadcasting services and for dispute dissolution.***
>
> ***b) encouraging the growth of a broadcasting industry that is efficient, competitive and responsive to the audience needs and susceptibilities.***
>
> ***c) provision of a licensing process and for the acquisition of licences and allocation of frequencies through inevitable process.***
>
> ***d) ensuring the development of broadcasting services that reflect a sense of Kenyan identity character, cultural diversity and expression through the development of appropriate local content."***

86. Mr. Ngatia then referred the Court to the RROC-06 which adopted 17th June, 2015 as the switch off date pursuant to which the government set up the Taskforce on migration from analogue to digital broadcasting. The Taskforce made various recommendations vide which the government was to undertake the migration process. In the report the benefits of migrating from analogue to digital terrestrial broadcasting were clearly set out. It was specifically stated that:

> ***"The switch off of analogue terrestrial broadcasting will release some frequency spectrum in the VHF and UHF frequency bands for reassignment to other services such as mobile telephony, fixed wireless access and mobile data casting. The release frequency spectrum is known as the digital dividend. The digital dividend will only be realized when analogue broadcasting has been switched off, hence the need to keep the period when analogue and digital signals will be broadcasting simultaneously (simulcast period) as short as possible."***

The Taskforce also pointed out the need to separate signal distribution from content development.

87. The members of the Taskforce included Ian Fernandez of the 2nd appellant, John Opiyo of the 3rd appellant, Annete Martyres of the Association of Practitioners in Advertising, Esther Kamweru (Media Council of Kenya), several officials from KBC, Henry Mungasia (Ministry of Information and Communication, several officials from CCK and the chair was Daniel Obam of National Communication Secretariat. The Taskforce set obligations of a signal distributor which include provision of services to broadcasters on an equitable, reasonable, non-preferential and non-discriminatory basis. In other words,

open access where other parties are able to access channels. That was one of the conditions stipulated by Dr. Bitange Ndemo in his letter to the 1st and 2nd appellants dated 22nd July, 2011, Mr. Ngatia stated.

88. Another recommendation made by the Taskforce was that:

> ***"Interested investors including current broadcasters may be licenced to offer signal distribution services."***

89. Following acceptance of the Taskforce Report by the government, the 2nd respondent appointed the Digital Television Committee which again included officials of the appellants. The task of the committee was to work with and advice CCK on the preparations leading to the digital migration. It was specifically mandated to:

- *manage the migration process within a specified timetable, develop an appropriate switch over strategy,*
- *recommend measures to be taken to ensure availability of set top boxes and digital transmissions countrywide at the switch over date,*
- *identify likely bottlenecks to the uptake of digital broadcast,*
- *make recommendations relating to fiscal measures, if any, that need to be taken to encourage the uptake of digital television services,*
- *develop and implement appropriate consumer awareness strategy,*
- *monitor and evaluate the awareness, take up and use of the new services, and adjust the campaign accordingly.*

90. Mr. Ngatia submitted that in the committee's second meeting held on 27th February, 2008 the committee agreed to write to CCK requesting it to issue the first signal distribution licence to KBC, which had already submitted an application. Thereafter, the committee was to ask CCK to tender for the award of the other signal distribution licences.

91. The tender process for the second signal distribution licence was commenced through a public advertisement on 16th February, 2011 and bids had to be received by 9th of March, 2011. The 1st and 2nd appellants submitted their bid vide their special purpose vehicle, National Signal Networks. Following its rejection, the 1st and 2nd appellants requested for a Review by the PPARB. The Board, in a decision dated 19th July, 2011, dismissing the Review application stated:

> ***"In any event, after a careful examination of the documents on which both parties rely, and on the evidence adduced by them, the Board is convinced that the whole process was carried out by the Procuring Entity in a transparent, competitive and fair manner. This is exemplified by the fact that on the main ground of the Application, namely compliance with the requirements of Clause 3.9.2, the Applicant was not only disqualified on a pre-disclosed mandatory requirement, but it was also, together with all other bidders, given an opportunity to rectify its mistake, but failed to do so.***
>
> ***As far as promotion of local industry is concerned, the Board finds that this was an open tender in which local and foreign bidders were invited to compete on equal footing using evaluation criteria which were pre- disclosed to all bidders. The Applicant has not produced any evidence to show that local bidders were put to any particular disadvantage vis-à-vis foreign bidders. Its failure to move to the Technical Evaluation stage was wholly due to the fact that it failed to provide a tender security with the required validity period, which all other bidders, including local ones, submitted. It stated that it would have been unfair to the other bidders, and indeed, a breach of the Act and the Regulations, had the Applicant's bid been allowed to proceed to the next evaluation stage, as that would have resulted in defeating the very principles and objectives of promoting confidence in the procurement process, fairness, and competition, which it claims were breached by the procuring Entity."***

92. Mr. Ngatia further submitted that after a period of 2 years and 131 days, the appellants filed the

petition in the High Court where they alleged, inter alia, that the tender process was flawed and uncompetitive, lacked transparency and accountability. They further alleged that the 4th Respondent was unlawfully issued

with a BSD licence as it did not meet the mandatory requirements of 20% Kenyan equity participation.

93. Counsel added that the appellants even failed to comply with the requirements that were set by Dr. Bitange Ndemo in his letter of 22nd July, 2011 after they had requested for reconsideration of their application. In the circumstances, he added, it is improper for the appellants to take the view that they were entitled as of right to be issued with a Digital Broadcast Distribution licence. In view of the sequence of events as outlined, there was no violation of **Articles 33 and 34** of the **Constitution,** Mr. Ngatia submitted. He added that the government had implemented all the recommendations made by the Taskforce Committee towards facilitation of the migration, including carrying out consumer awareness activities and zero rating import duty on set top boxes with a view to making them affordable to as many people as possible.

94. Regarding postponement of the switch off date, Mr. Ngatia submitted that following the filing of **Petition No. 563 of 2012** in the High Court by the Consumer Federation of Kenya, on **10th December, 2012,** a conservatory order was issued preventing the 2nd and 3rd respondents from switching off analogue television signal transmission in Nairobi and/or any other part of the country pending the hearing and determination of the petition. Subsequently, the 8th respondent withdrew that petition.

95. Following the withdrawal of the suit, Media Owners Association filed another case, **Petition No. 244 of 2012** against the 1st, 2nd and 3rd respondents, where they sought:

> ***"i) A declaration that the petitioners' rights under Article 34 of the Constitution have been infringed and threatened with violation by the 3rd respondent and in the discharge of its statutory mandate the 3rd respondent cannot act in a manner that infringes, violates or denies the petitioner and its constituent members their constitutional right to property.***
>
> ***ii) A declaration that Article 34 (3) of the Constitution contemplates and envisages an independent broadcasting authority which is independent of government, political interests or commercial interests.***
>
> ***iii) A declaration that the public notices issued on 5th August, 2011 and 11th November, 2011 are null and void as the 3rd respondent has no constitutional mandate to licence broadcasters under Article 34 of the Constitution.***
>
> ***iv) An order of injunction restraining the 2nd and 3rd respondents from cancelling, stopping, suspending, restricting or in any way howsoever from interfering with the petitioners' and its members' licences, frequencies, broadcasting spectrums and broadcasting services."***

That case is still pending in the High Court.

96. Mr. Ngatia further submitted that where a party files a case, and thereafter abandons it and proceeds to file a constitutional petition, such party has to convince the court that the subsequent case is not an abuse of its process. He cited **PETRONELLA N.N. CHIRWA vs. TRANSNET & 2 OTHERS [2007] ZACC 23** as well as **REDLION BROADCASTING COMPANY INCORPORATED vs. FCC, 395 U.S. 367 (1969).**

97. **Mr. Mwangi Njoroge** supported the submissions made by Mr. Ngatia. He added that the 1st and 2nd respondents had not violated any rights of the appellants as alleged. He reiterated that the migration policy was formulated more than 7 years ago with full participation of the appellants' representatives and wondered why the appellants moved to court on the eleventh hour. He pointed out that the appellants are not entitled to digital signal distribution licence as a matter of right as stated in their petition.

98. Mr. Njoroge further submitted that the affidavits sworn in support of the petition contain largely unsubstantiated statements without any specific particulars of breach of their alleged constitutional rights contrary to the legal position stated in the case of **ANNARITA KARIMI NJERU [1979] KLR 162.** In **ASHCROFT, FORMER ATTORNEY GENERAL, ET-AL vs IQBAL ET-AL, 556 U.S. (2009**), the Supreme Court of the United States held:

> ***"It follows that to state a claim on a violation of a clearly established right the respondent must plead sufficient factual matter to show that petitioners adopted and implemented policy issues not for a mutual investigative reason but for the purpose of discriminating on account of race, religion or national origin."***

99. Counsel further submitted that Kenya, as a party to the ITU, is under an obligation to fulfil the dictates of the Convention, and considering that under **Article 2 (5)** and **(6)** of the **Constitution**, the ITU Convention is part of our law.

100. As to whether CCK is the independent body that is referred to in **Article 34** of the Constitution, **Mr. Njoroge** submitted that at the time of the decision of the case appealed against there was no other body in place apart from CCK which was mandated to deal with the issue of licensing of means of communications. Further, at **Part VII** of the **Kenya Information and Communications Amendment Act**, CCK is the body that is charged with the licensing and enforcement functions.

**THE 3RD RESPONDENT'S SUBMISSIONS**

101. Mr. Kilonzo for the 3rd respondent also supported the submissions made by Mr. Ngatia. He submitted that the appellants' appeal as argued before this Court was materially different from the one that was before the High Court. In the High Court the appellants had made specific claims of constitutional rights which they alleged had been breached and also sought various tertiary orders. However, in their written submissions before this Court the character of the appellants' case had changed such that the submissions now disclose an entirely different case. He gave the following instances:

> *i) The appellants now argue that the 2006 ICT Sector policy guidelines and the migration taskforce report having been produced before promulgation of the new Constitution, have not been revised to align them with the Constitution and have not been implemented in consistence with the Constitution.*
>
> *ii) That the ICT Policy and the Migration Taskforce Report have been implemented discriminatively.*
>
> *iii) That the current BSD licences were not issued through equitable process and the appellants had not been accorded equal protection under the law.*
>
> *iv) That the BSD licences so far issued do not reflect a Kenyan identity or its cultural diversity.*
>
> *v) The BSD licences are a dualpoly.*
>
> *vi) There was no public participation in the issuance of existing BSD licences.*
>
> *vii) The ICT Policy favours pay TV and not free to air TV.*
>
> *viii) That BSD licences were issued to the appellants' competitors.*
>
> *ix) That if the appellants are not granted BSD licences their independence would be fettered and they will be intimidated and compelled to broadcast content that is friendly to the existing signal distributors.*

102. Mr. Kilonzo submitted that most of the issues that were submitted on by the appellants had not

been pleaded in the High Court and they cannot therefore be permitted to raise them for the first time before this Court. He cited the case of **CENTRE FOR RIGHTS, EDUCATION AND AWARENESS & ANOTHER vs. JOHN HARUN MWAU & 6 OTHERS [2012] eKLR**, where this Court held, inter alia, that parties are not allowed to introduce new issues that may lead to a departure of the Court's role which is basically the re-evaluation of evidence adduced in the High Court.

103. Regarding the challenges raised against CCK, it was submitted that since the promulgation of the Constitution of Kenya, 2010, the Commission did not cease being the regulator of the communication sector as the Fifth Schedule of the Constitution provides a period of 3 years from the date of promulgation of the Constitution, for parliament to enact the requisite legislation under **Article 34,** which period was extended by parliament for a further period of 4 months from 27th August, 2013. The High Court has in a number of its decisions agreed that CCK is the licensing body that is envisaged under **Section 34** of the **Constitution**. That issue was res judicata as at the time when the judgment that gave rise to this appeal was rendered.

104. In any event, the **Kenya Information and Communication (Amendment) Act, 2013** has changed the nature and character for CCK to conform to provisions of **Article 34** of the **Constitution**, Mr. Kilonzo added. Mr. Kilonzo submitted that the digital migration being undertaken is in conformity with the ICT Policy and the Taskforce Report and is consistent with the Constitution.

**THE 4TH RESPONDENT'S SUBMISSIONS**

105. **Mr. Saende** for the 4th respondent submitted that the first BSD licence was rightfully granted to the 4th respondent in accordance with the recommendations of the Taskforce on digital migration from analogue to digital. The appellants have not shown to this Court that there has been any infringement of their intellectual property rights by the 4th respondent, he stated.

106. As regards the appellants' contention that they had legitimate expectation that they would be granted a BSD licence, counsel submitted that the speech by Mr. Ndemo earlier referred to cannot form the basis of a legitimate expectation. He cited the case of **J.P. BANSAL VS. STATE OF RAJASTHAN & ANOTHER, Appeal (Civil) 5982 of 2001 (Supreme Court of India)** where the basic principles relating to legitimate expectation were enunciated by Lord Diplock in **COUNCIL OF CIVIL SERVICE UNIONS & OTHERS vs. MINISTER FOR THE CIVIL SERVICE [1985] AC 374.** It was observed in that case that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. The procedural part of it relates to a representation that a hearing or other appropriate procedure will be afforded before the decision is made. The substantive part of the principle is that if a representation is made that a benefit of a substantive nature will be granted or if the person is already in receipt of the benefit that it will be continued and not be substantially varied, then the same could be enforced.

**5TH AND 6TH RESPONDENTS' SUBMISSIONS**

107. **Mr. Imende** for the 5th and 6th respondents made submissions in respect of grounds 6, 11 and 14 which touch on the two respondents. In respect of ground 6 where the appellants stated that the learned Judge erred in law in holding that the claim for issuance of the BSD licence was barred by the doctrine of issue estoppel and that it was a collateral attack on the decision of the PPARB, Mr. Imende stated that the 1st and 2nd appellants' consortium had a right of appeal/review against the decision of the **PPARB** as provided for under **Section 100** of the **Public Procurement and Disposal Act, 2005.** That right was not exercised by the 1st and 2nd appellants' consortium and therefore the decision of the **PPARB** is final. The learned Judge was right in holding that the 1st and 2nd appellants **"cannot challenge the same through a petition seeking to enforce fundamental rights and freedoms."**

108. In grounds 11 and 14 of the appeal the appellants faulted the trial Judge for striking out some paragraphs of Mr. Gitahi's affidavit which tended to show that the award of the BSD licence to the 6th respondent was procured through bribery and corruption. The allegations were made in the supplementary affidavit of Mr. Gitahi sworn on 9th December, 2013. Paragraph 19 that was struck out stated as follows:

> ***"That in a meeting between the petitioners and 5th respondent's directors and senior management in June 2013, the 5th respondent confirmed to the petitioners that it had ceded 5% of its shareholding to government officials to facilitate and procure the award of the tender for the digital distribution licence."***

Mr. Imende supported the learned Judge's holding that the aforesaid deposition was unsubstantiated in so far as it alleged corrupt practice without full particular and basis thereof. He added that the deposition by Mr. Gitahi did not meet the evidential threshold to prove a fact in issue. Mr. Gitahi had not stated that he was making the averment of his own knowledge or upon information, and if so, from whom, Mr. Imende added.

109. Further, Mr. Gitahi did not state who was present during the alleged meeting and who made the alleged statement from amongst the 5th respondent's directors and senior management. Counsel further pointed out that the said paragraph 19 of Mr. Gitahi's affidavit was factually incorrect in so far as it alleged that the 5 th respondent ceded some of its shares to government officials in order to be awarded the BSD licence because it is not in dispute that the 2nd BSD licence was issued to the 6th respondent and not the 5th respondent. In ground 11 of the appeal, the appellants had changed the position and claimed that the learned Judge erred in failing to find that the 6th respondent obtained the BSD licence through bribery and corruption yet Mr. Gitahi had referred to the 5th respondent.

110. Regarding alleged breach of intellectual property rights by among others, the 5th and 6th respondents, Mr. Imende submitted that no evidence to that effect had been tendered by the appellants. The carriage by the 5th and 6th respondents of the free to air content developed by the appellants is in accordance with prescriptions in their licences and directions issued by the 3rd respondent under **Regulations 14 (2) (b) and 16 (2) (a)** of **the Kenya Information and Communications (Broadcasting) Regulations 2009** which had not been impugned in the petition.

## 7TH RESPONDENT'S SUBMISSIONS

111. **Mr. Njogu** for the 7th respondent submitted that the appellants are seeking, inter alia, an order of injunction to restrain the 7th respondent from carrying the appellants' channels. However, counsel stated that there was a contractual agreement between the parties regarding digital terrestrial broadcasting and the grant of rights was specific to all pay TV platforms. Further, the rights given to Multichoice Africa were to be freely assignable to its related entities, affiliates and associates. Consequently, he added, the grant of injunctive orders as sought by the appellants is intended to disrupt private contractual rights and obligations and is therefore improper and amounts to abuse of the court process.

112. Counsel further submitted that the appellants had not challenged the validity of **Regulations 14 (2) (b) of Kenya Information and Communications (Broadcasting) Regulations, 2009** which empowers CCK to require that subscription broadcast providers carry a specific number of Kenyan broadcasting channels.

## 9TH RESPONDENT'S SUBMISSIONS

113. **Mr. Wekesa** for the 9th respondent submitted that in the High Court the appellants did not invoke **Article 165 (3) (d) (1)** of the **Constitution** for determination of the question whether any law cited was inconsistent with or in contravention of the Constitution.

114. Mr. Wekesa further submitted that the 9th respondent entered the broadcasting industry on the basis of public policy announcement that digital migration was going to be implemented within a short while. The 9th respondent was given authorization by the 3rd respondent to provide digital TV services and on

30th November, 2012 it had applied for a free to air television licence.

115. The 9th respondent entered into an agreement with the 6th respondent to carry its signal for West TV and paid a substantial amount of money as consideration.

116. Mr. Wekesa urged the Court to dismiss the appeal as the appellants were seeking to perpetuate the existence of both analogue and digital broadcasting spectrums and also to delay indefinitely the switch off from analogue television broadcasting to digital broadcasting for their own commercial interest and not for protection of any fundamental right. He submitted that all players in the industry should be treated equally so as to ensure fair competition.

117. Regarding the independence of CCK, Mr. Wekesa submitted that though it is not the body that is contemplated by **Article 34 (5)** of the **Constitution,** the transitional provisions of the Constitution had saved it. In his view, the question was whether its officers are serving the public as required of them under the Constitution. The appellants had not demonstrated that CCK was not performing its role as demanded of it by the Constitution and the relevant Act. He added that the 1st and 2nd appellants in their application for signal distribution licence vide their consortium, National Signal Networks, had indicated that they would sell part of their shares to interested investors but without contravening the rules stipulated by CCK.

118. Mr. Wekesa further submitted that the appellants' contention that if they are not granted the signal distribution licence their massive investment in broadcasting will be lost was incorrect. The correct position is that it is only their analogue TV transmitters that will be rendered obsolete. He added that the appellants are at liberty to pursue the third BSD licence instead of seeking to delay the migration process unnecessarily.

## DETERMINATION OF THE ISSUES RAISED

119. Having summarized the arguments advanced by all the parties both in High Court and in this Court, I will now proceed to determine the grounds of appeal as raised by the appellants.

> ***Whether digital migration in the manner in which it is being implemented by the 2nd and 3rd respondents is in violation of the appellants' constitutional right and whether the appellants were entitled to the BDS licence as of right.***

120. There is no dispute that the appellants are major stakeholders in broadcasting industry in Kenya. Freedom of the media is a constitutional right that is enjoyed by the appellants and is guaranteed under **Article 34** of the **Constitution.** The appellants are entitled to enjoy that right and freedom to the greatest extent consistent with the right as stipulated in the Constitution. **Article 20** of the **Constitution** stipulates that in applying a provision of the Bill of Rights, a court shall, inter alia, adopt the interpretation that most favours the enforcement of a right or fundamental freedom. Further, in interpreting the Bill of Rights, the Court is enjoined to promote –

> ***"(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and***
>
> ***(b) the spirit, purport and object of the Bill of Rights." [See Article 20 (4)]***

**Article 259** of the **Constitution** also requires that the Constitution be interpreted in a broad and purposive manner that promotes its values and principles and advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights.

121. However, the appellants' freedom of establishment under Article 34 (3) is not absolute. It is subject 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."***

The freedom and independence of the appellants and indeed the media generally, though guaranteed, does not also extend to any of the exceptions specified in **Article 33 (2)** of the **Constitution** and that includes propaganda for war, incitement to violence, hate speech or advocacy of hatred. It is against the aforesaid limitations and principles of constitutional interpretation that I will consider whether the learned Judge erred in holding that the digital migration was not being implemented in violation of the appellants' constitutional rights.

122. The appellants' contention was that denial of a BSD licence by the 2nd and 3rd respondents constituted an interference in their broadcasting business. They also argued that their right to freedom of establishment had been or was threatened with violation. The appellants further averred that **Article 34** of the **Constitution** entitles them to a BSD licence as a matter of right. Mr. Oduol cited, inter alia, the Privy Council decision in **CENTRAL BROADCASTING SERVICES LTD & ANOTHER v. ATTORNEY GENERAL [2007] 2 LRC 19**, where a mandatory order was issued directing the Attorney General to do all that was necessary to procure and ensure the issue of a FM radio broadcasting licence to the appellants as per their application. He submitted that this Court has power to compel the Government through the 1st and 2nd respondents to issue the appellants herein with BSD licences and Digital frequencies.

123. I think the appellants' contention is not properly grounded, both on facts and law.

Factually, their right to broadcast is not limited by lack of a BSD licence. There is now a distinction between provision of broadcast content and signal distribution of the content. The appellants' freedom of establishment as content producers is not pegged on the issuance of a BSD licence. BSD licence is subject to licensing procedures as stipulated under **Article 34 (3)** of the **Constitution** and the Migration Taskforce Report which recommended that interested investors including current broadcasters may be licenced to offer signal distribution services. I do not consider the case of **CENTRAL BROADCASTING SERVICES LTD v. ATTORNEY GENERAL (Supra)** that was cited by the appellants quite relevant. It is persuasive but the facts therein are distinguishable from the facts in this appeal and I will set them out briefly as follows:

*(a) The appellants lodged an application for issue of a broadcasting licence for a proposed Hindu Radio Station in December 1999. Subsequently another company (CBSL) lodged an application for a similar licence in September 2000.*

*(b) The relevant legislation provided for a licence to be issued by the President acting on the advice of the cabinet, or by a minister under the general authority of the cabinet. Applications were at first insistence evaluated by the director of the Telecommunications Division of the relevant ministries and once approved by the director, forwarded to the minister with a recommendation.*

*(c) The appellants' applications were promptly evaluated by the director and forwarded with approval to the minister. However, no decision was made by the minister for a period of years, despite repeated request for a decision.*

*(d) Subsequently in August 2002 it came to the attention of the appellants that a licence had been granted to another company which had lodged its application in late 2001. The appellants commenced proceedings against the Attorney General, claiming declarations that they had been denied inequality of treatment contrary to sections 4b and d of the Constitution of Trinidad and Tobago.*

*(e) During the trial, the Judge refused to admit late evidence from the respondent that the appellants' application was incomplete. He however held that there had been an equal treatment that violated the Constitution but declined to make an order compelling the cabinet to grant licences to the appellants. On appeal to the Privy Council, the decision was overturned and an order was issued compelling the cabinet to grant the licences since the required approval had already been given.*

In this appeal the appellants' application had not been approved and this court is not considering an

appeal against CCK's refusal to grant the licence. The central question is whether the appellants are entitled to the BDS licence as of right.

124. The learned Judge was well alive to the constitutional provisions as well as the ICT Policy guidelines that regulate grant of BSD licences and carefully examined how the 1st and 2nd appellants made an unsuccessful bid for a BSD licence. Thereafter they applied for a review of the decision to the **PPARB** which was unsuccessful. The 2nd respondent through Dr. Bitange Ndemo then gave the 1st and 2nd respondents an opportunity to obtain the licence through affirmative action which was conditional but the two appellants chose not to make a further application, arguing that the conditions set by the permanent secretary were onerous and amounted to violation of their intellectual property rights. However, **Article 34 (3)** of the **Constitution** envisages licensing procedures that are necessary to regulate airwaves, an important public resource, and the learned Judge was satisfied that the conditions as stipulated by the permanent secretary were not unreasonable as they were in line with the ICT Policy. Save for certain aspects relating to the independence of CCK as the licencing body as per Article 34 (3) (b) which I shall deal with when I consider ground 5 of the appeal, grounds 1 and 2 must fail. That determination is also sufficient to dispose of grounds 3 and 4 of the appeal.

**Was CCK the independent body contemplated in Article 34 of the Constitution?**

125. **Article 34 (3) (b)** of the **Constitution** requires licensing procedures that are independent of control by the government, political or commercial interests. It was strongly argued by the appellants that the Board of CCK, as constituted then, could not be said to be independent of government and/or political control. The **Kenya Information and Communications (Amendment) Act, 2013** amended the **Kenya Information and Communications Act, 1998** which created the CCK; which is now known as the **Communications Authority of Kenya**. At the time of hearing the petition in the High Court the Bill that gave rise to the amended Act was awaiting presidential consent. The trial court did not agree with the appellants regarding the independence of CCK and the Judge remarked:

> ***"Under part VII of the KICA, the CCK is the body charged with licencing and enforcement function under the Act. I did not hear the petitioners to challenge the constitutionality of these or any of the KICA provisions."***

126. The appellants argued that the majority of CCK Board members were appointees or representatives of the government and they did not therefore have the independence that is constitutionally required of them. Although **Section 5B** of the **Kenya Information Communication Act, 1998** stipulated that the Commission **"shall exercise its functions independent of any person or body"**, the composition of the Board as set out under **Section 6** of the **Act** negates that independence. The Chairman was an appointee of the President, the Director- General was an appointee of the Minister responsible for Communications while the other members of the Board were as follows:

> ***"(c) the permanent secretary in the ministry for the time being responsible for information and communications or his representative;***
>
> ***(d) the Permanent Secretary in the ministry for the time being responsible for finance or his representative;***
>
> ***(e) the Permanent Secretary in the ministry for the time being responsible for internal security or his representative;***
>
> ***(f) at least seven other persons, not being public officers, appointed by the minister …."***

127. There is no dispute that the minister and all the permanent secretaries were appointees of the President of the Republic of Kenya and the President could therefore hire and fire them at will. The same can also be said of the seven members of the Board who were appointed by the minister. The appointment was neither transparent nor competitive. Can such a Board be said to be independent of government or political control as required by the Constitution? The answer to that question must be in the negative.

128. **Section 7 (1)** of the **Sixth Schedule** to the **Constitution** states as follows:

> ***"7(1) 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."***

With regard to this appeal, it means that for purposes of considering the role of CCK as the regulatory authority responsible for licencing, the trial court had to have in mind the constitutional requirement of such a body, even if the relevant law had not been amended to align it to the dictates of the Constitution. This Court cannot turn a blind eye to violation of a constitutional requirement as regards the independence of the licensing body for the reason that Parliament had failed or delayed enactment of the appropriate law. It is in such instances when the provisions of **Section 7 (1)** of the **Sixth Schedule** quoted above must be brought to bear.

129. Considering the importance of digital migration and all that goes with it, including issue of BSD licences, the 1st and the 2nd respondents should have ensured that the enabling law as dictated by the **Article 34 (3)** of the **Constitution** was in place. The need for unquestionable independence of the licensing body cannot be over emphasized. See **ACCESS TO THE AIRWAVES**, **Principles on Freedom of Expression and Broadcast Regulation, Article 19 (Supra).** CCK was the procuring entity in the matter of Tender No. CCK/PROC/RFP/09/2011-2011 for Request for award of the BSD licence and the procuring entity was the one that short listed the pre-qualified bidders and eventually awarded the second BSD licence. How independent was the procuring entity in that exercise? If its independence and transparency are questionable, so must be the resultant decision.

130. The letter of 22nd July, 2011 by the Permanent Secretary, Ministry of Information and Communications stating that the government had **"directed"** CCK to consider issuing the 1st and 2nd appellants with a BSD licence is a clear demonstration of the kind of control the government had over the Board of CCK. If the government could direct CCK to grant the licence, it could as well direct CCK not no grant the same. The degree of independence required of the licensing body had already been spelt out in Article 34 (5) of the Constitution, and it mattered not whether Parliament had not yet enacted the legislation to provide for the establishment of that body.

131. The licensing body had to:

> ***"(a) be independent of control of 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."***

The Constitution, having stipulated the nature of the body that was to undertake the task of licensing signal distributors, among other duties, it was incumbent upon the Attorney General and the Minister for Communications and Technology to ensure that the constitutional requirements were met.

132. Had the trial Judge correctly interpreted the relevant transitional provisions, that is, **Section 7 (1)** of the **Sixth Schedule** to the **Constitution,** he would have come to the conclusion that CCK, as constituted then, did not meet the constitutional threshold to regulate airwaves and undertake licensing of signal distribution. **Section 7 (2)** of the **Sixth Schedule** clarifies how the law should be interpreted where the Constitution assigns responsibility for actualizing a constitutional provision to a different state organ or officer, for example, where an Act of Parliament that is supposed to operationalise a provision of the Constitution is not yet in place. In such instances the provisions of the Constitution prevail to the extent of the conflict. The Section states:

> "***7. (2) If, with respect to any particular matter—***

***(a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular***

***State organ or public officer; and***

***(b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict."***

133. The independence of a constitutional or public body engenders public confidence in the decisions made by such a body and when the supreme law of the land as well as rules of international law demand such independence of a licensing authority, this Court would be failing in its interpretation of the Constitution if it were to hold that CCK was the independent body contemplated by **Article 34** of the **Constitution.** I must therefore uphold ground 5 of the appeal.

***Was the claim for issuance of a BSD licence by the appellants barred by the doctrine of issue estoppel? Was the claim a collateral attack on the decision of the PPARB?***

134. The decision of the PPARB was rendered on 19th July, 2011. That decision was not challenged in any court. The appellants had a right of appeal or could have applied for Judicial Review of the decision pursuant to **Section 100** of the **Public Procurement and Disposal Act, 2005**. In law, issue estoppel arises when a particular issue forming a necessary ingredient in a cause of action has been litigated upon and decided, and the same issue is raised in a subsequent proceeding between the same parties involving a different cause of action in which the same issue is relevant and one of the parties seeks to re-open the issue. That being the case if the appellants herein were questioning no more than the merits of the decision made by the Tender Committee of CCK or the PPARB and thereby hinging their claim for the BSD licence to such a complaint, I would agree with the respondent that they would be estopped from so doing. That would indeed amount to a collateral attack on the decision of the PPARB. However, the appellants raised the issue of constitutionality of the licensing process, given the composition of the Board of CCK. In **TRANSNET LIMITED vs GOODMAN BROTHERS (PTY) LIMITED, 2001 (2) BCLR 176 (SCA),** the Supreme Court of Appeal, South Africa, cautioned against reliance on all forms of waiver, estoppel and acquiescence to undermine fundamental rights guaranteed in the Bill of Rights. This is exactly the case in this appeal. In view of what I have already held regarding the unconstitutionality of CCK in the processing and grant of the second BSD licence, I do not think that the appellants were barred from filing their petition by the doctrine of issue estoppel; neither was it a collateral attack on the decision of the PPRAB. I must therefore uphold ground 6 of the appeal.

135. **GROUNDS 8 AND 9**

Regarding alleged violation of the appellants' intellectual property rights by the respondents, I have no hesitation in holding that the appellants were unable to prove that ground. At paragraph 72 of their petition, the appellants alleged that, **"in breach of the Petitioners' intellectual property rights, the 3rd Respondent has by letter dated 19th August, 2013 unlawfully authorized the 4th 5th and 6th Respondents to intercept and transmit the petitioners' broadcasts….without their authorization."** However, my reading of that letter reveals otherwise. The letter was addressed to Mr. Richard Bell, Group Chief Executive Officer, Wananchi Group (Kenya) Limited by the Director General, CCK. The salient part of the letter reads as follows:

***"Reference is made to your letter dated 15th August, 2013 informing the Commission that you have received a notice to remove from your platform the Free to Air (FTA) channels of three media houses namely Nation Media Group, Standard Group Ltd and Royal Media Services Ltd. Your letter also requested for guidance from the Commission with respect to the above matter. This is to confirm that Kenya Information and Communications Act (KICA) Regulations 14 (2) (b) requires subscription broadcasting service providers to provide local FTA channels."***

136. I do not understand any part of that letter to be authorizing the respondents or any service provider

for that matter to intercept the appellants' broadcasts. CCK was merely emphasizing the provisions of **regulation 14 (2) (b)** which states that the Commission may require a broadcasting services licencee to provide a prescribed minimum number of Kenyan Broadcasting channels. That is a licensing policy and cannot amount to interference with the appellants' intellectual property rights. But even if the appellants had demonstrated that as a result of the respondents' compliance with **regulation 14 (2) (b)** aforesaid that there had been violation of their intellectual property rights, I would agree with the trial Judge's holding that a violation of intellectual property rights is not a matter to be addressed by a petition to enforce fundamental rights and freedoms when there is a specific legal regime established by an Act of Parliament to address such complaints. This Court has held that where the law prescribes a special process to be followed in pursuit of certain claims or rights, it is imperative that that procedure be followed. See **SPEAKER OF THE NATIONAL ASSEMBLY v KARUME, Civil Appeal No. NAI 92 of 1992.**

I also find that since there were contractual agreements between the appellants and the 7th respondent and/or its principals, affiliates and associates regarding carrying the appellants' channels, that cannot amount to violation of the appellants' intellectual property rights.

137. **GROUND 10**

The appellants stated that the learned Judge erred in law in holding that the Regional Conference Agreement of 2006 could be enforced in violation of the Constitution and failed to appreciate that all commitments and obligations under a treaty or convention were subject to the Constitution. I do not agree. The said agreement was entered into under the auspices of the International Telecommunications Union which was established by a treaty which Kenya ratified on 11th April, 1964. By virtue of **Article 2 (6)** of the **Constitution** that treaty forms part of our law. I am not persuaded that a proper implementation of the **RRC-06** agreement can occasion any violation of the appellants' constitutional rights.

138. **GROUNDS 11 AND 14**

These two grounds relate to some paragraphs of the petition and supporting affidavit that were struck out. In one of his affidavits, Mr. Linus Gitahi had alleged that the award of the Digital Broadcasting licence to the 5th respondent was procured through bribery and corruption, in that the 5th respondent ceded 5% shareholding to government official to facilitate the award of the tender. At paragraph 106 of this judgment I have quoted paragraph 19 of Mr. Gitahi's supplementary affidavit that was struck out. It is trite law that affidavits should be confined to such facts as the deponent is able of his own knowledge to prove. However, in interlocutory proceedings an affidavit may contain statements of information and belief showing the sources and grounds thereof. See **Order 19 rule 3** of the **Civil Procedure Rules. Rule 6** of the said Order empowers the court to strike out from any affidavit any matter which is scandalous, irrelevant or oppressive. The 6th respondent's advocate raised the complaint regarding paragraph 19 of Mr. Gitahi's supplementary affidavit and the trial Judge directed that the paragraph was not to be relied upon by the appellants.

139. Mr. Gitahi's affidavit did not state that he was making the deposition of his own knowledge. If not, he needed to state the name of the person who gave him that information so that if there was need to investigate the allegation by way of cross examining the giver of the information the court would be able to summon a specific person. But what Mr. Gitahi stated was that in a meeting between the petitioners and the 5th respondent's directors (not the 6th respondent) and senior management on an unspecified date, the 5th respondent confirmed to some undisclosed directors or senior managers of the appellants that the 5th respondent had ceded 5% of its shareholding to government officials as a bribe so that it could be awarded the tender for the BSD licence. That kind of vague deposition does not meet the evidential threshold required to prove such a serious allegation. The trial Judge was right in striking out that scandalous part of Mr. Gitahi's affidavit. See **KAMLESH M. PATTNI v NASIR IBRAHIM ALI & 2 OTHERS**, Civil Application No. NAI 354 of 2004.

140. The other parts of the appellants' petition and supporting affidavit that were struck out were as follows:

*(a) Prayer 2 of the petition which alleged that the 2nd and 3rd respondents were limiting the BSD licence to five licencees. There was no material before the trial court to show that there was any plan to issue five BSD licences. There are only two BSD licencees so far, although Dr. Ndemo had indicated that the government would issue three.*

*(b) Where it was alleged that the 4th respondent was incapable of funding the cost of infrastructure roll out. No documentary evidence at all had been provided in support of that allegation.*

The learned Judge did not err in striking out those parts of the petition and the offending paragraphs of the supporting affidavits. Grounds 11 and 14 of the appeal have no merit and are hereby dismissed.

***Did the appellants have a legitimate expectation that they would begranteddigitallicencesanddigitalfrequencieson accountof their substantial investment in broadcasting as alleged?***

141. It has been stated by various legal experts that the doctrine of legitimate expectation is intended to give relief to a party who is not able to justify their claim on the basis of pure application of statutory law, though he has suffered a civil consequence because a certain lawful promise that had been made by a respondent or a party in a dispute has not been fulfilled. Several authorities were cited by all the parties. H.W.R. Wade & C.F. Forsyth in "**ADMINISTRATIVE LAW"**, 10th Edition at page 449 state that:

"***It is not enough that an expectation should exist; it must in addition be legitimate. But how is it to be determined whether a particular expectation is worthy of protection? This is a difficult area since an expectation reasonably entertained by a person may not be found to be legitimate because of some countervailing consideration of policy or law."***

142. Legitimate expectation cannot prevail against statute.See MasonHayes–Curram,2008.**"THE DOCTRINE OF LEGITIMATE EXPECTATION; RECENT DEVELOPMENTS".** I may also add that legitimate expectation, however strong it may be, cannot prevail against express provisions of the Constitution. If a person or a statutory body promises a certain relief or benefit to a claimant or undertakes to do something in favour of a claimant but in a way that offends the Constitution, the claimant cannot purport to rely on the doctrine of legitimate expectation to pursue the claim or the promise.

143. Notwithstanding the appellants' investments or promises made to them or the Media Owners Association by CCK or by Dr. Bitange Ndemo or any other government official, the constitutional principles for grant of licences must prevail and no one can claim that they are entitled to a BSD licence as a matter of right; that would be contrary to the letter and spirit of **Article 34 (3)** and **(5)** of the **Constitution** as well as the national values and principles of governance under **Article 10** which include non-discrimination, good governance, integrity, transparency and accountability.

144. The ICT Policy guidelines that were cited by the appellants speak of **"encouraging the growth of a broadcasting industry that is efficient, competitive and responsive to audience needs and susceptibilities, provision of a licensing process and for the acquisition and allocation of frequencies through an equitable process."** That cannot be achieved if a government functionary is allowed to issue an executive fiat to CCK as to who should get a BSD licence or where the appellants insist that they have to be given the licence because of their massive investment in broadcasting industry or because a certain government official promised that they would get the licence. That would be unconstitutional and cannot therefore be a basis for grant of a BSD licence on the doctrine of legitimate expectation. That expectation cannot be legitimate. What this Court must insist on is a proper and transparent licensing procedure that is conducted by an independent body that is not subject to control by government, political or commercial interests. That is what the Constitution dictates and constitutional supremacy must prevail over all other interests. I dismiss ground 7 of the appeal.

**CONCLUSION**

145. The appellants have urged the Court to allow the appeal, set aside the judgment and decree by the High Court and enter judgment as prayed in the petition. They have also urged the Court to grant further reliefs as deemed appropriate. Save what I have held regarding the independence of CCK as the independent body contemplated by **Article 34 (3) (b**) and **4 (5)** of the **Constitution,** and the issue of estoppel, the judgment entered by Majanja, J. is sound. The appellants' averment in ground 15 of the appeal that the learned Judge completely misunderstood the constitutional issues as presented before him is without basis and must be rejected.

146. Looking at the appellants' prayers in the petition that was presented before the High Court, it is clear that their main argument is that they are entitled to be issued with a BSD licence and want this Court to compel the Government through the 1st and 2nd respondents to issue them with the licence and digital frequencies. I have however held that the Constitution requires such licensing be subjected to procedures that are necessary to regulate signal distribution and that task has to be undertaken by a body that is independent of control by government, political or commercial interests and which reflects the interests of all sections of the society. It would be unconstitutional for this court to compel the government to issue the appellants with the BSD licence. This Court must recognize and appreciate the doctrine of separation of powers that requires different organs of the government to play their rightful roles but within the confines of the Constitution and/or appropriate statutes.

In **MUMO MATEMU v TRUSTED SOCIETY OF HUMAN RIGHTS & 5 OTHERS, [2013] eKLR**, this Court held:

> "***It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function."***

147. The **Kenya Information and Communication (Amendment) Act,** 2013 vests the power of issuing such licences to the Communications Authority of Kenya.

148. In my view, the composition of the Authority's Board of Directors is tailored in a manner that guarantees the constitutional independence as stipulated under **Article 34 (5)** of the **Constitution**. Further, **Section 5A (2)** of that **Act** specifically states that:

> ***"(2) In fulfilling its mandate, the Authority shall be guided by the national values and principles of governance in Article 10 and the values and principles of public service in Article 232 (1) of the Constitution."***

I believe the Authority is now properly constituted to process and grant signal distribution licences.

**Proposed orders**

149. Considering that the entire process of grant of the second BSD licence was done in flagrant violation of the Constitution, it was a nullity. If the Court were to allow the licence that was granted to the 6th respondent to remain in operation it would be perpetuating and giving a stamp of approval to an unconstitutional act and that would be an affront to the law. I am aware that the appellants merely faulted the manner the second BSD licence was granted but did not specifically pray for its cancellation. That notwithstanding, having come to the conclusion that the process of its grant was unconstitutional, I would proceed to orders its cancellation forthwith. The 6th respondent would be entitled to refund of the consideration paid to the 3rd respondent for grant of the licence.

150. The licensing Authority should proceed to advertise afresh the tender for award of licence(s) of National Terrestrial Broadcasting Signal Distribution Network in Kenya and process the licence(s) in

strict conformity to the dictates of the Constitution and the applicable law and policy guidelines.

151. The Government through Dr. Bitange Ndemo had indicated that it would licence a total of three distributors but it appears that the position changed and it licenced only two. As regards the number of the BSD licences to be issued, that is a technical issue which this Court is not competent to determine and must be left to the licensing Authority to decide.

152. Kenya must not lag behind in implementing digital immigration but the process must be done in the right way. Thankfully, the mandatory switch off date is still far away, nearly fourteen (14) months, and all the players should do all that is necessary to complete the process of migration within six months from the date hereof. In my view, the government and all the stakeholders should fix a new switch off date within that period, but in any event not later than 30th September, 2014.

153. In the meantime, pending finalization of the BSD licencing process and compliance with all the necessary statutory and policy requirements for digital migration within the period aforesaid, the 2nd and 3rd respondents are hereby restrained from switching off the appellants' analogue frequencies, broadcast spectrums and broadcasting services.

154. For the reasons stated herein, I would allow this appeal and set aside the judgment of Majanja J in respect of the findings relating to grounds 5 and 6 of the appeal.

155. The appellants' costs of this appeal as well as of the 8th respondent shall be borne by the 1st, 2nd and 3rd respondents. The other respondents shall bear their own costs. The costs of the High Court petition are awarded to the appellants as against the 1st , 2nd and 3rd respondents.

**Dated and Delivered at Nairobi this 28th day of March, 2014.**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**