



REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

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

CORAM: KIHARA KARIUKI, PCA, VISRAM & OKWENGU, JJA.

ROYAL MEDIA SERVICES LIMITED..... 1ST APPLICANT

**NATION MEDIA GROUP LIMITED..... 2ND
APPLICANT**

STANDARD GROUP LIMITED..... 3RD APPLICANT

VERSUS

ATTORNEY GENERAL..... 1ST RESPONDENT

THE MINISTRY OF INFORMATION

COMMUNICATIONS AND TECHNOLOGY..... 2ND RESPONDENT

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

SIGNET KENYA LIMITED..... 4TH RESPONDENT

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

PAN AFRICAN NETWORK GROUP KENYA LTD..... 6TH RESPONDENT

GOTV OF KENYA LIMITED..... 7TH RESPONDENT

CONSUMER FEDERATION OF KENYA

(COFEK)..... 8TH RESPONDENT

WEST MEDIA LIMITED..... 9TH RESPONDENT

(An application for injunction pending the lodging, hearing and determination of an intended appeal from the judgment of the High Court of Kenya at Nairobi)

(Mr. Justice Majanja) dated 23rd day of December, 2013

In Petition No. 557 of 2013

ORDER OF THE COURT

(1) In this Notice of Motion before us, dated 24th December 2013 made under Rules 1(2) and 5(2) (b) of the Court of Appeal Rules, the Applicants, Royal Media Services Limited, Nation Media Group Limited and Standard Group Limited seek an order of injunction against the 2nd and 3rd Respondents and a stay of execution of the judgment and orders issued by the High Court at Nairobi in High Court Petition No. 557 of 2013 on 23rd December 2013, pending the hearing and determination of an intended Appeal against the said judgment.

(2) The Applicants bring the Application on the grounds that they have an arguable Appeal, which raises fundamental questions of law and fact and that the intended Appeal will be rendered nugatory if the orders sought are denied. These grounds have been supported by an affidavit sworn on behalf of the Applicants by Samuel Kamau Macharia on 23rd December 2013.

(3) The Application arises from a decision of the High Court on the nature and extent of freedom of the media protected under **Article 34** of the **Constitution of Kenya**, and whether it has been violated by the Respondents in the context of the migration of terrestrial television broadcasting from analogue to digital platform (hereinafter "digital migration").

(4) The facts relating to this application, borne out of the record, may be summarized as follows. Pursuant to the framework established by the **Convention of the International Telecommunication Union ("ITU Convention")**, a treaty ratified by Kenya in 1964, there are three technologies of television broadcasting: terrestrial, satellite and cable digital platforms. Transmission under the terrestrial television platform is currently undertaken in either digital or analogue form and the purpose of the current migration is to ensure that the terrestrial television is solely on the digital platform. This migration to digital transmission only relates to digital terrestrial television transmission.

(5) Following a series of Conferences under the aegis of the ITU Convention, member states agreed on the planning parameters and criteria for digital terrestrial television broadcasting. States further agreed to formulate and develop draft frequency plans taking account of bilateral and multilateral negotiations carried out by the relevant municipal bodies of the different member states. A process of rationalization of the various national draft frequency plans followed. The last of these Conferences, the Regional Radio Communication Conference - 06 (RRC-06) produced the Final Acts of the planning of the digital terrestrial broadcasting service. Among other things, RRC-06 agreed on **17th June 2015** as the switch off date for transition from analogue to digital terrestrial television broadcasting for member states present at RRC-06. These Final Acts formed the basis of the Government of Kenya's local preparations to transit terrestrial television broadcasting from the analogue platform to the digital platform.

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

(7) This Court has considered the Applicants' case and the Respondents' positions as advanced in the pleadings and oral submissions. In giving due consideration to the matter, we understand that at this stage our role is to grant an injunction, when (i) there are grounds for an arguable appeal, and (ii) where not granting such orders would render an arguable appeal nugatory. These principles have been held in **ISHMAEL KAGUNYI THANDE V HOUSING FINANCE COMPANY OF KENYA LIMITED, Civil Application No. 157/2006 NAI** thus:

"The jurisdiction of the court under Rule 5(2) (b) is not only original but also discretionary. Two principles guide the Court in the exercise of that jurisdiction. These principles are now well settled For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory."

(8) In considering the application and applying these principles, we have formed the opinion that there are grounds for an arguable appeal and that such appeal would be rendered nugatory should we not grant the order of injunction sought.

(9) It was the averment of learned counsel for the Respondents that the Application had been overtaken by events. However, we were told by the Applicants that the fact of this Application was made known to the Respondents. We have considered the circumstances and take the view that the Respondents' invitation to this Court to take a technical approach would be fatal to the essence and substance of the judicial process before us. Such an approach, moreover, would be contrary to **Article 159** of the **Constitution of Kenya**, which enjoins us to administer justice without undue regard to such procedural technicalities. To this, we may add, our duty to uphold the overriding objective principle under **section 1A** and **IB** of the Civil Procedure Act (Cap 21) and **section 3A** and **3B** of the Appellate Jurisdiction Act (Cap 9).

(10) In view of the urgent nature of the Application before us, we are not able to render the reasons for our conclusion and finding above. We have therefore exercised our discretion to reserve our reasons, which we will render on the 31st January, 2014.

(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 45 days from the date of this Order and we accordingly restrain the 2nd and 3rd Respondents from switching off the Applicants' analogue frequencies, broadcasting spectrums and broadcasting services, and if already switched off, to reinstate the same pending the hearing and determination of the intended Appeal on or before 6 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 submissions within seven (7) days of their receipt of the proceedings;

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

(e) **THAT** such submissions 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.

Dated and delivered at Nairobi this 27th day of December, 2013.

P. KIHARA KARIUKI

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**PRESIDENT,
COURT OF APPEAL**

ALNASHIR VISRAM

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JUDGE OF APPEAL

H.M. OKWENGU

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JUDGE OF APPEAL

I certify that this is
a true copy of the original

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DEPUTY REGISTRAR