



REPUBLIC OF KENYA



KENYA LAW
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Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14 ,14A,14B & 14C, 14A, 14B & 14C of 2014 (Consolidated)) [2015] KESC 15 (KLR) (5 January 2015) (Ruling)

Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2015] eKLR

Neutral citation: [2015] KESC 15 (KLR)

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IN THE SUPREME COURT OF KENYA

PETITION 14 ,14A,14B & 14C, 14A, 14B & 14C OF 2014 (CONSOLIDATED)

WM MUTUNGA, CJ & P & MK IBRAHIM, SCJ

JANUARY 5, 2015

BETWEEN

COMMUNICATIONS COMMISSION OF KENYA 1ST APPELLANT
THE HON ATTORNEY GENERAL 2ND APPELLANT
THE MINISTRY OF INFORMATION COMMUNICATIONS AND TECHNOLOGY 3RD APPELLANT
SIGNET KENYA LIMITED 4TH APPELLANT
PAN AFRICAN NETWORK GROUP KENYA LIMITED 5TH APPELLANT
STARTIMES MEDIA LIMITED 6TH APPELLANT

AND

ROYAL MEDIA SERVICES LIMITED 1ST RESPONDENT
NATION MEDIA SERVICES LIMITED 2ND RESPONDENT
STANDARD MEDIA GROUP LIMITED 3RD RESPONDENT
CONSUMER FEDERATION OF KENYA (COFEK) 4TH RESPONDENT
GOTV KENYA LIMITED 5TH RESPONDENT
WEST MEDIA LIMITED 6TH RESPONDENT

Competency by a Two Judge Bench to hear an Application in a Matter where the Orders sought could Affect the Decisions of a Seven Judge Bench

Reported by Phoebe Ida Ayaya



Civil Practice and Procedure – preliminary objection – where the preliminary objection sought was filed subsequent to a notice of motion – where the matter was pending enforcement of judgment of a seven judge bench – where the preliminary objection was filed before a two judge bench – whether the two judge bench was competent to hear an application of a seven judge bench when the orders sought in the said objection could affect the orders of the seven judge bench – Supreme Court Act, 2011, section 24(1).

Brief facts

A preliminary objection was raised to the hearing of a Notice of Motion, on the grounds that the application sought final substantive orders which would determine the proceedings and/or dispose of the issues before court. This was argued as falling outside the purview of section 24(1) of the Supreme Court Act, 2011 and as such could not be heard and determined by a two judge bench.

Issues

- I. Whether a two judge bench was competent to hear an application in a matter where the orders sought could affect the decision of a seven judge bench.

Relevant provisions of the Law

Supreme Court Act, 2011

Section 24

Interlocutory orders and directions by the Court

(1) In any proceeding before the Supreme Court, any Judge of the Court may make any interlocutory orders and give any interlocutory directions as the judge thinks fit, other than an order or direction that determines the proceeding or disposes of a question or issue before the Court in the proceeding

Held

1. The court when constituted by two judges had to protect the integrity of the decision of a 7 Judge Bench.
2. Although the preliminary objection as filed invoked section 24(1) of the Supreme Court Act, the provisions of the section usually contemplated interlocutory matters filed simultaneously with a petition or shortly after seeking interlocutory orders or directions at the onset of the proceedings. In the circumstances of the case, judgment had been rendered and all questions and issues conclusively disposed. The only remaining aspect was the enforcement and compliance of court orders.
3. Through the orders previously given, and which were subject to the notice of motion and subsequent preliminary objection, the court retained a residual jurisdiction to monitor and ensure compliance with the orders in the judgment through a mention to be heard by the full bench that initially heard the appeal.
4. Any orders given by a two-judge bench of the Court, as constituted, could lead to inconsistency and even interference with the judgment. The right bench to hear the application would be the full bench of seven judges who heard the case in the first place.

Preliminary objection upheld.

Orders

- i. Order of stay of switch off of the analogue frequencies of the 1st, 2nd and 3rd respondents until further orders.
- ii. Costs in the application.

Citations

Statutes

1. Supreme Court Act

Advocates

None mentioned



RULING

1. On the date set for the inter partes hearing of the application by the 1st, 2nd and 3rd respondents filed on 30th December, 2014, the 1st Appellant, the Communications Commission of Kenya (CAK) filed a preliminary objection to the hearing of the said application in the following terms:

...TAke Notice That The Communications Commission Of Kenya, the 1st Appellant/ Respondent herein, shall raise a preliminary objection to the hearing of the 1st to 3rd Respondents' Notice of Motion Application lodged in this Honourable Court on 30th December 2014 ("the Application") by a 2-Judge Bench of this Honourable Court on the ground that the Application seeks final substantive Orders that would determine the proceedings and/or dispose of questions or issues before the Court and, as such, it falls outside the purview of Section 24(1) of the *Supreme Court Act*, 2011 and cannot therefore be heard and determined by a 2-Judge Bench as presently constituted."
2. We have considered the said preliminary objection, the submissions by all counsel and have carefully perused the application by the 1st, 2nd and 3rd Respondents and the prayers sought.
3. In our Judgment dated 9th September, 2014, we gave inter alia, the following Orders:
 - (d) The 1st Appellant shall, in exercise of its statutory powers, and within 90 days of the date hereof, consider the merits of applications for a BSD licence by the 1st, 2nd and 3rd respondents, and of any other local private sector actors in the broadcast industry, whether singularly or jointly.
 - (e) The 1st Appellant (CAK) shall, in exercise of its statutory powers, ensure that the BSD licence issued to the 5th Appellant herein, is duly aligned to constitutional and statutory imperatives.
 - (f) The 1st Appellant (CAK), in exercise of its statutory authority, shall, in consultation with all the parties to this suit, set the time-lines for the digital migration, pending the international Analogue Switch-off Date of 17th June, 2015.
 - (g) Upon the course of action directed in the foregoing Orders (d & e) being concluded, the 1st Appellant (CAK) shall notify the Court through the Registry; and the Registrar shall schedule this matter for mention, on the basis of priority, before a full Bench.
4. It is our view that the Court as constituted by the 2-Judges herein must protect the integrity of the decision of the 7-Judge Bench delivered on 29th September, 2014. Our interpretation of our decision of 29th September, 2014 when we gave the parties 90 days subsequent mention on priority basis before a full Bench implied that there was to be subsequent finality to the compliance of all consequential Orders. There was to be a "Returnable Date" through a mention after the 90 days. It is on this basis that the 1st Appellant (CAK) through its letter dated 19th December 2014 wrote to the Registrar of this Court requesting a mention date.
5. It is clear from the application herein and annexed affidavits that there has been much progress towards compliance with the Orders contained in the said Judgment. However, it clearly appears there has been subsequent disagreement regarding the question of the analogue switch off date of 31st December 2014 which was declared by the 1st Appellant (CAK). This has resulted in the application by the 1st, 2nd and 3rd Respondents reasons of which are on record.



6. In the preliminary objection the 1st Appellant has invoked the provisions of Section 24(1) of the Supreme Court Act, 2011. We are of the view that the principles set out in the Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board Petition No. 5 of 2012 (the Erad Case) are still in force. But we have to distinguish the facts of Erad and the instant case. Section 24 usually contemplates interlocutory matters filed simultaneously with a petition or shortly after seeking interlocutory orders or directions at the onset of the proceedings. In this case, Judgement had been rendered and all questions and issues conclusively disposed. The only remaining aspect is the enforcement and compliance of the Orders of the Court.
7. It is our view, that in terms of Orders (d), (e), (f), and (g) this Court retained a residual jurisdiction to monitor and ensure compliance with the Orders in the Judgment through a mention on the basis of priority to be heard by the full Bench which initially heard the appeal.
8. In view of the foregoing, and in exercise of our discretion we are of the view that this matter should be scheduled for mention through the office of the Registrar as contemplated by the Orders of this Court.
9. In view of the nature and terms of the Orders sought in the Application, we are apprehensive that any Orders we may give could lead to inconsistency and even interference with the Judgement of the Court. In the circumstances, the right bench to hear this application would be the full bench of 7-Judges who heard the case in the first place.
10. We hereby adjourn the hearing of this matter to a date to be fixed before the Registrar of the Court, to be heard by the full bench of 7-Judges.
11. In the meantime, at the ex parte stage, the Rawal, DCJ & VP, granted some interim Orders to be in force until today. These are on record and counsels have made observations on the same. As a natural consequence, the said Orders shall be extended until further directions of the Court.
12. Mr. Kilonzo was of the view that the 1st Appellant (CAK) has not switched off the analogue frequencies of the 1st, 2nd and 3rd Respondents and that a switch off only takes place upon the compliance of the directions of CAK to switch off by the broadcasters.
13. At this stage, the Court does not have the full facts as to how the technology of switch-off takes place and who triggers it. For the avoidance of doubt and to avoid an embarrassing situation, threatening the respect and the dignity of this Court, lest the fears of the 1st, 2nd, and 3rd Respondents are justified we hereby give an Order of stay of switch off of the analogue frequencies of the 1st, 2nd and 3rd Respondents until further Orders.
14. Costs in the application.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JANUARY, 2015.

W. M. MUTUNGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

