

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Ojwang & Wanjala, SCJJ.)

CIVIL APPLICATION NO. 9 OF 2014

-BETWEEN-

COMMUNICATIONS COMMISSION OF KENYA.....APPLICANT

-AND-

ROYAL MEDIA SERVICES LIMITED.....

NATION MEDIA GROUP LIMITED.....

STANDARD MEDIA GROUP LIMITED.....

CONSUMER FEDERATION OF KENYA.....

ATTORNEY GENERAL.....

THE MINISTRY OF INFORMATION

COMMUNICATIONS AND TECHNOLOGY.....

SIGNET KENYA LIMITED.....

STAR TIMES MEDIA LIMITED.....

PAN AFRICAN NETWORK GROUP KENYA LIMITED.....

GOTV KENYA LIMITED.....

WEST MEDIA LIMITED

RESPONDENTS

(Being an application for stay of execution of the judgement and consequential orders arising from the judgement by the Court of Appeal delivered by Nambuye, Maraga and Musinga JJA on 28th March, 2014, in Civil Appeal No. 4 of 2014)

RULING

A. INTRODUCTION

[1] By separate but concurring decisions of the Honorable Justices Nambuye, Maraga and Musinga, the Court of Appeal issued the following Orders as indicated in the judgment of Lady Justice Nambuye:

- (i) *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.*
- (ii) *In its composition at the material time, CCK was not the independent body envisaged by Article 34(3)(b) of the Constitution to regulate airwaves in Kenya; and consequently, the public procurement process of determining applications for the Broadcast Signal Distribution (BSD) licences that it conducted in connection with this matter, was null and void.*
- (iii) *An independent body or authority constituted strictly in accordance with Article 34(3)(b) shall conduct the tendering process afresh.*
- (iv) *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 licence 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.

- (v) The issue of a BSD licence 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 licence.*
- (vi) 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.*
- (vii) In order to comply with these orders, the new switch-off date shall not be later than 30th September, 2014.*
- (viii) 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.*

[2] As a result of the decision of the Court of Appeal, three applications seeking a stay of the foregoing Orders were lodged before the Supreme Court.

B. APPLICATIONS FOR STAY

[3] On 7th April, 2014, *Civil Application No. 9 of 2014* was lodged by the Communications Commission of Kenya under certificate of urgency, seeking the following orders:

A stay of execution of the following final orders of the Court of Appeal in the judgment delivered at Nairobi on 28th March, 2014 in *Nairobi Civil*

*Appeal No. 4 of 2014 - **Royal Media Services Limited and 2 others vs Attorney General and 8 Others**, that:*

- (a) 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, and consequently the public procurement process of determining applications for the BSD licences that it conducted in connection with this matter was null and void.
- (b) An independent body or authority constituted strictly in accordance with Article 34(3)(b) shall conduct the tendering process afresh.
- (c) 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 licence 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.
- (d) The issue of a BSD licence 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 licence.
- (e) 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.

- (f) In order to comply with these orders, the new switch-off date shall not be later than 30th September, 2014.
- (g) 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.

[4] On 7th April, 2014, *Civil Application No. 11 of 2014* dated 4th April, 2014 was filed by the Pan Africa Network Group Kenya Limited and Star Times Media Limited, also under certificate of urgency seeking:

- (i) The grant of a conservatory order suspending the effect of the judgment of the Court of Appeal to the extent that it nullified the issuance of a BSD licence to the Pan Africa Network Group Kenya Limited, and the procurement process leading to the issuance of that licence.
- (ii) An order that the Pan Africa Network Group Kenya Limited be at liberty to continue utilizing the licence obtained on 7th October, 2011 (BL/CCK/BSD/2011/02), notwithstanding the decision of the Court of Appeal nullifying the issuance of the licence and the procurement process.
- (iii) An order of injunction directed at CCK estopping it from acting on the orders of the Court of Appeal to refund the licence fee paid for the grant of the BSD licence.
- (iv) An order stopping CCK from advertising for fresh tenders with regard to the award of the transmission licences.

[5] On 8th April, 2014 the Hon. The Attorney-General and the Ministry of Information, Communications and Technology filed ***Civil Application No. 13 of 2014***, also under a certificate of urgency, seeking stay of the Orders granted by the Court of Appeal in ***Nairobi Civil Appeal No 4 of 2014***, pending the hearing and determination of the intended appeal.

[6] On 7th April, 2014, the certificate of urgency in *Civil Application No. 9 of 2014* was heard and granted by the Hon. Justice Wanjala (SCJ), and an *inter partes* hearing set for 10th April, 2014 before Justices Ojwang & Wanjala (SCJJ).

[7] At the hearing of the application *inter partes*, the Court (Ojwang, Wanjala SCJJ) signalled the need to hear the intended substantive appeal on the basis of priority, as a basis for conclusive orders on the complex issues. The Court perceived that such expedition would be in the best interests of the parties as well as the public. As this position had general acceptance, the Court invited comment from counsel, especially on the expediency of foregoing a protracted scheme of interlocutory applications.

[8] Counsel for the 1st, 2nd and 3rd respondents, Senior Counsel Paul Muite, opposed the grant of stay orders at this stage, and was of the view that it was preferable to proceed to substantive responses to the applications seeking stay of the Orders of the Court of Appeal. Learned counsel, Mr. Kiragu Kimani and Mr. Phillip Murgor, appearing with Senior Counsel Paul Muite, expressed concern that issuing orders of stay, at this stage, would enable the 7th, 8th, 9th and 10th respondents to continue in alleged breach of the intellectual property rights of the 1st, 2nd and 3rd respondents, through airing these parties' material without their consent. In response, learned counsel Mr. Kilonzo, appearing for the Communications Commission of Kenya, gave an undertaking to advise the affected parties to cease broadcasting the said matter until the hearing and

determination of the intended appeal. He also gave an undertaking on behalf of the Commission, not to switch off any signals until the determination of the intended appeal.

[9] Learned counsel Mr. Nyaoga, for the 8th and 9th respondents, proposed an approach to expedition in this matter. He indicated that the Court of Appeal had assured counsel that the text of its proceedings would be ready by 11th April, 2014, and thereafter the parties undertake to file the Petition and Record of Appeal within 10 to 14 days. He urged, however, that orders to preserve the substratum of the pending cause would be essential; for if the Court of Appeal's decision were to be implemented, it would negate the very essence of the further appeal. He was particularly concerned that the Court of Appeal's order nullifying the operating licence of the 9th respondent until hearing and determination of the intended appeal, should rest in abeyance.

[10] Learned counsel, Mr. Njoroge, appearing for the Attorney-General and the Ministry of Information, Communications and Technology, and learned counsel, Mr. Monari appearing for GOTV, supported the proposal by Mr. Nyaoga for expediting the substantive appeal.

[11] Learned counsel, Mr. Wambua Kilonzo appearing with learned Senior Counsel Fred Ojiambo, and learned counsel Ms. Wahito for the Communications Commission of Kenya, expressed concern that a hearing of the interlocutory applications would take a substantial amount of time. In the circumstances, Mr. Kilonzo suggested that the Court do preserve the substratum of the appeal, and the parties, thereafter, do lodge the appeal within the strictest timelines, in accordance with the directions of the Court. Urging conservation of the substratum of the appeal, counsel submitted that execution of the Orders of the Court of Appeal, particularly with regard to the constitutional standing of the

Commission, would have grave and most unpredictable consequences upon numerous other sub-sectors regulated by the Commission, all through since the promulgation of the Constitution of Kenya, 2010.

C. ORDERS

[12] The facts and the context of this case, as these emerge from the pleadings and from the submissions of the learned counsel, reveal both the complexity entailed for the parties, as well as the ramifications for the public interest. We have noted the importance and urgency of entertaining the substantive appeal, as a basis for determining the contending claims on merit. In that behalf, and taking into account the several undertakings quite properly made by learned counsel, we hereby give directions for the resolution of the matter, within the framework of the following *Orders*:

- (i) *Signet Kenya Limited, Star Times Media Limited, Pan Africa Network Group Kenya Limited and GOTV Kenya Limited are hereby prohibited from broadcasting any content from Royal Media Services Limited, Nation Media Group Limited and Standard Group Limited without their consent, pending the hearing and determination of the intended appeal.***
- (ii) *The Communications Commission of Kenya is prohibited from switching off any frequencies, broadcast spectrums or broadcasting services pending the hearing and determination of the intended appeal.***
- (iii) *The legal effect of the Court of Appeal's declaration that the Communications Commission of Kenya was not the***

independent body envisaged under Article 34(3)(b) of the Constitution, as a regulator of airwaves, is held in abeyance pending the hearing and determination of the intended appeal.

- (iv) The declaration by the Court of Appeal that the BSD license issued to Pan Africa Network Group Kenya Limited is null and void, shall rest in abeyance, pending the hearing and determination of the intended Appeal.***
- (v) The Court of Appeal's Order setting the new switch-off date to a date not later than 30th September, 2014, shall remain valid, pending the hearing and determination of the appeal.***
- (vi) The main Petition(s) and Record(s) of Appeal, and the written submissions in support thereof, shall be filed and served within 14 days from the date hereof, or as this Court may from time-to-time direct.***
- (vii) The respondents shall file and serve their written responses within 7 days after service.***
- (viii) The appellant(s) shall thereafter, file and serve any written responses within 7 days from the date of service.***
- (ix) Authorities filed together with written submissions shall conform to the requirements of Rule 16(2) of the Supreme Court Rules.***

(x) This matter is to be mentioned on 27th May, 2014 before the Deputy Registrar of the Supreme Court, to confirm compliance and to fix hearing dates on a priority basis.

DATED and DELIVERED at NAIROBI this 11th Day of April, 2014.

.....
J.B OJWANG
JUSTICE OF THE SUPREME COURT

.....
S.C WANJALA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR, SUPREME COURT