REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mutunga, CJ & P; Rawal, DCJ & V.P; Tunoi; Ibrahim; Ojwang; Wanjala and Njoki, SCJJ)

PETITION NO. 14 OF 2014

AS CONSOLIDATED WITH PETITION NO. 14A OF 2014;

PETITION NO. 14B OF 2014;

AND

PETITION NO. 14C OF 2014

-BETWEEN-

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

} APPELLANTS

-AND-

1. ROYAL MEDIA SERVICES LIMITED.....
2. NATION MEDIA SERVICES LIMITED.....
3. STANDARD MEDIA GROUP LIMITED.....
4. CONSUMER FEDERATION OF KENYA (COFEK).....
5. GOTV KENYA LIMITED.....
6. WEST MEDIA LIMITED.....

} RESPONDENTS

RULING

A. THE CONTEXT AND THE ISSUES

(i) The Background

[1] The appeal in this matter was heard and determined by this Court in a Judgment delivered on 29th September, 2014. On its way to pronouncing the final Orders, the Court made the following observation (at paragraph 388):

> ***"In resolving this dispute, account must be taken of the nature of the resource (Spectrum) being contested, the economic fundamentals under-girding its capitalization, the country's obligations under international law, and the values decreed in our Constitution. At the end of the day, the people of Kenya, local investors, and international investors all have a stake. Of course, care must be taken so as not to leave this resource to 'the tragedy of the commons'."***

[2] The Court, in that context, made 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."

[3] The foregoing Orders were issued with finality, for the purpose of disposing of the dispute. However, by virtue of the essence of Orders (d), (e), (f) and (g), the Court retained a residual jurisdiction to monitor the scope of compliance. Hence, in terms of Order (g), the Communications Authority of Kenya was required to notify the Court, through the office of the Registrar, as to the progress of the implementation of the Orders, whereupon the Registrar would cause the matter to be mentioned before a full Bench.

[4] Thus, on 22nd December, 2014, learned counsel Mr. Kilonzo, through the firm of M/s. Sisule Munyi Kilonzo and Associates, filed a letter dated 19th December, 2014 in the Registry. In this letter was enclosed 'a self-explanatory letter dated 17th December, 2014 from the Communications Authority of Kenya addressed to the Registrar of the Supreme Court', detailing compliance status.

Counsel requested the Registrar to cause the matter to be mentioned before the Court.

[5] While this notification was pending action by the Registrar, the 1st, 2nd and 3rd respondents filed a Notice of Motion application dated 30th December, 2014 seeking several Orders. This application is not the subject of this mention, though it is to be noted that in response to it, the 1st appellant filed a replying affidavit dated 14thJanuary, 2015, by its Director-General, Mr. Wangusi. This affidavit, in our view, is the 1st appellant's statement detailing the extent to which it has complied with the Orders of this Court.

[6] Subsequently, the matter was mentioned before the full Bench, on 28th January, 2015, on which occasion all parties were present and/or represented.

(ii) The 1st Appellant's Account on Compliance with this Court's Orders

[7] Learned counsel for the 1st appellant, Mr. Kilonzo averred that the 1st appellant had duly complied with the Orders of the Court. He tendered the contents of the notification letter of 19th December, 2014 and the affidavit of Mr. Wangusi. He conducted the Court through a chronological account of the course of action following the Court's Judgment of 29th September, 2014.

[8] Counsel indicated that on 1st October, 2014 three respondents (Royal Media Services, Nation Media Group Limited, and Standard Group Limited) had submitted an application for a BSD licence to the 1st appellant, through a consortium known as Africa Digital Network Limited. The 1st appellant acknowledged receipt of this application on 13th October, 2014. Applications were also received from other local private-sector actors, and duly responded to by the 1st appellant. Counsel then gave an account of the internal procedures of

the 1st appellant, upon receipt of an application for a licence. It was submitted that this was the regular process, to which the respondents' application for a BSD licence had been subjected.

[9] The 1st appellant published a notice in the *Kenya Gazette (Gazette Notice* No. 9088) on 19th October, 2014 informing the public of the application by the respondents herein, and inviting any objections thereto, if any.

[10] Meanwhile, on 17th October, 2014 the 1st appellant (by notice in the *Kenya Gazette,* No. 7434 in Volume CXVI No. 24) published an amendment to the National Information and Communications Technology Policy, *inserting a new clause to allow for the grant of self-provisioning licences for broadcast-signal distribution.*

[11] On 27th October, 2014 the 1st appellant held the *first consultative meeting*, which was attended by all parties to this matter. The meeting was aimed at coming up with workable solutions to the issues at hand. It was reported that *further meetings were held by all parties on the 4th, 14th, 20th and 28th November, 2014.* However, it was indicated that the three respondents initially declined to attend the meetings, pending 1st appellant's reconsideration of their application for a BSD licence; at the meeting on analogue switch-off dates held on 4th November, 2014 the following invitees were absent without apology: Mr. Shollei of Standard Group; Mr. Gitahi of Nation Media Group, and Mr. Macharia of Royal Media Services.

[12] *The three respondents later reconsidered their position, and participated in subsequent consultative meetings.* Through a letter dated 30th October, 2014 they made it a condition for their participation in the consultation process, that there be a reconsideration of their application for a BSD licence.

[13] *On 25th November, 2014 the 1st appellant issued the respondents with a temporary authorization for Self-Provisioning Digital Signal Distribution*. Subsequently, on 27thNovember, 2014 the respondents wrote to the 1st appellant, proposing a *migration date* most convenient to them, 30th April, 2015.

[14] By a letter dated 28th November, 2014 *the 1st appellant assigned broadcasting frequencies to be used by the applicants, in those sites where the applicants were already carrying out analogue terrestrial broadcasting*.

[15] *A final consultative meeting was held on 28th November, 2014 with all the parties present*. The outcome of this last meeting was the indication of migration dates as follows:

(a) for phase 1 (Nairobi and its environs), the digital migration date was set as 31st December, 2014;

(b) for phase 2 (Mombasa, Malindi, Nyeri, Meru, Kisumu, Webuye, Kakamega, Kisii, Nakuru, Eldoret, Nyahururu (Nyadundo) Machakos, Narok and Londiani), the migration date was set as 2nd February 2015; and

(c) for Phase 3 (Garissa, Kitui, Lodwar, Lokichoggio, Kapenguria, Kabarnet, Migori, Voi, Mbinzau/Kibwezi, Namanga and other remaining sites) the migration date was set as 30th March 2015.

[16] On 1st and 2ndDecember, 2014 the 1st appellant responded to the respondents' letter dated 27th November, 2014 (in which they had stated their convenient migration date as 30th April, 2015), stating that it had taken all possible measures to facilitate the due process for the issuance of a new licence, and had considered the views of all the parties to the consultations in reaching

the migration dates. It appears that the three respondents, on 15th December, 2014 wrote to the Ministry of Information Communication and Technology, complaining about these dates. The 1st appellant, by a letter dated 24th December, 2014 signalled that the indicated migration dates had arisen from proper consultation between the parties.

[17] Learned counsel, Mr. Kilonzo submitted that the 1st appellant had taken all due action to comply with the directions of this Court, and had undertaken consultations with all stakeholders, including the three respondents herein. He urged that such consultation need not amount to consensus, so long as it was done in good faith, with a view to reaching a solution. Counsel submitted that the three respondents had not taken a good-faith approach to digital migration, and their strategy had been such as would frustrate the due discharge of the 1st appellant's public mandate.

[18] With the exception of the 1st, 2nd and 3rd respondents, all the other parties to these proceedings agreed with the submissions of learned counsel for the 1st appellant, as being a true reflection of the situation that had transpired.

(iii) The 1st, 2nd and 3rd Respondents' Account on the Issue of Compliance with this Court's Orders

[19] Learned Senior Counsel, Mr. Muite for the 1st, 2nd and 3rd respondents, contested the emerging impression that his clients had not adhered to the terms of the consultation process. Mr. Muite submitted that immediately after the Court's decision on 29th September, 2014 it was his clients who had taken the first initiative, on 1st October, 2014 by writing to the 1st appellant, requesting it to convene consultative meetings.

[20] Learned counsel urged that consultation and dialogue as ordered by the Court, was a two-dimensional process, leading towards a BSD licence to the three respondents as well as an agreement on a convenient digital migration date.

[21] Counsel urged that the consultative meetings with the 1st appellant had led to certain agreed terms, namely:

(i) a self-provisioning licence was to be issued to the 1st, 2nd and 3rd respondents, to allow them to migrate to the digital platform pending the procurement of the 3rd BSD licence; and in fulfilment of this agreement, a self-provisioning licence had been issued on 25th November, 2014;

(ii) digital frequencies were to be allocated to the respondents, to allow them to order transmission equipment and set-top boxes; and on that basis, one digital frequency had been issued for Nairobi, and one more had been promised;

(iii) the conventional "must-carry rule" be reviewed, with a view to ensuring that the respondents and other content-producers' matter is protected; and the Cabinet Secretary for Information, Communication and Technology, or the 1st appellant was to issue appropriate guidelines in this regard.

[22] Learned Senior Counsel urged that there has been insufficient time for the 1st, 2nd and 3rd respondents to put their infrastructure in place, an issue raised by the respondents at the consultative meeting of 28th November, 2014 and in a letter of 15th December, 2014.

[23] Counsel submitted that on 8th January, 2015 the three respondents requested for a meeting with 1st appellant, to resolve the pending issues which, according to them, included the grant of additional frequencies, and a simulation period for setting up their digital infrastructure.

[24] While the three respondents concede to having participated in the consultative meetings, they contend that the Orders of this Court issued on 29th September, 2014 have not been complied with. In particular, they argue that they have been allocated a single UHF frequency, while they merit three, to be able to carry their content. They also urge that they need sufficient time to order transmitters. The respondents contend that the digital-migration date set by 1st appellant is not convenient to them, as they are yet to import their set-top boxes. They pray that the Court sets the date at 30th April, 2015.

[25] It was also submitted by learned Senior Counsel, Mr. Muite that the temporary authorization for a self-provisioning licence had since been withdrawn by the 1st appellant. This assertion (to which we shall return in a moment) was not contested by counsel for the 1st appellant.

B. THE FINDINGS

[26] As already stated, the object of this mention was to enable the Court determine whether and to what extent its Orders of 29th September, 2014 had been complied with. Consequently, we shall confine ourselves to the relevant Orders, namely, clauses (d), (e), (f) and (g), as contained in the Judgment of that date. It is towards that end, that we have analyzed the submissions made by counsel on 28th of January, 2015. We have also considered the contents of all the affidavits filed in Court, and which were placed before us in the course of the mention. We would view the said affidavits as averments regarding the degree of compliance, and nothing more.

[27] On that basis, we find as a fact that, in conformity with Order (d), the 1st appellant *did* consider the merits of the applications for a BSD licence by the 1st, 2nd, and 3rd respondents, and other local private-sector actors. *This action by the 1st appellant culminated in the issuance of temporary authorization for self-provisioning digital signal distribution to the three respondents, on 25th of November 2014.* The authorization was a precursor to the issuance of a BSD licence. The three respondents were also issued with one digital frequency, to enable them to commence operations within Nairobi and its environs. In addition, these respondents were issued with 20 more digital frequencies to enable them to commence operations in all other areas outside Nairobi, where they had been transmitting on the analogue platform.

[28] While we are not in a position to determine the adequacy or otherwise of the digital frequencies thus issued to the three respondents, we recognize that by being granted a temporary authorization for self-provisioning digital signal distribution, pursuant to the Orders of this Court, *the respondents had been placed in an advantaged and a realistic position to enter upon competition with other players in the digital-transmission sector.*

[29] However, in a departure from the ethos of consultation and compromise which this Court decreed, and from the symbolic opening-up to the transmission medium which had been achieved, the 1st, 2nd and 3rd respondents commenced a scheme of public advertisements which led to retaliatory actions (namely, cancellation of the temporary authorization and withdrawal of digital frequencies) by the 1st appellant. It is not necessary for this Court to address the full details of such factious courses of action at this stage. We would only note that the totality of such actions had the effect that the relevant parties were resiling from the commitments flowing from Order (d) of the Judgment of this Court.

[30] By acting as if they had never submitted their long-running dispute to this Court for final resolution, the two sides (i.e., the 1st appellant on the one hand, and the 1st, 2nd, and 3rd respondents on the other hand) had engaged in conduct the effect of which was to undermine the integrity of the Court's Judgment. As the Court had determined the dispute, and issued Orders with which the parties were to comply within a specified period, it behoved the parties to not only comply, but to desist from any actions such as would tend to undermine the authority of the Court. Thus, the parties should have dutifully awaited their turn to address the Court, regarding their compliance with its Orders.

[31] As regards Order (e) of this Court's Judgment, we find that 1st appellant has taken notable steps to ensure that the transmission licence issued to the 5th appellant is duly aligned to relevant constitutional and statutory requirements.

[32] Before considering the extent to which Order (f) has been complied with, we should place the term "consultation" in perspective. We note that the Constitution places a "duty to consult" upon specified public agencies, where certain appointments to public office are being made. In our perception, consultation entails a consideration of the advice, opinion or concerns of the person or persons to be consulted, before a decision is made. Consultation is a process with no prescribed order. It may be oral, or in writing. While consultation does not necessarily mean concurrence with the person consulted, it entails a genuine, honest, and serious communication between the parties, with opinions sought, and opinions accorded serious consideration, before a decision is made (relevant decisions and dicta, in this regard, are found in ***Agricultural, Horticultural and Forestry Training Board v. Ayelsbury Mushrooms Ltd.*** [1972] 1 All ER 280 at 284; ***Maqoma v. Sebe & Another 1987 (1) SA 483,*** and ***Sinfield and Others v. London Transport Executive*** [1970] 2 All ER 264 (CA)).

[33] Thus, as regards Order (f) of the Judgment, we find as a fact that a number of consultations had taken place between 1st appellant and the several parties in this matter, with a view to setting the time-lines for digital migration, pending the International Analogue Switch-off Date of 17th June, 2015. Initially, the 1st, 2nd and 3rd respondents declined to participate in meetings convened to deliberate upon the switch-off date, unless active consideration was accorded to their request for a BSD licence. These respondents subsequently changed their position, and became part of the consultative meetings. Their change of mind, in our perception, would have been influenced by the temporary authorization for self-provisioning digital distribution, which was, quite properly, granted to them by 1st appellant.

[34] It is clear to us that, following the Judgment of this Court, and the appropriate acts of compliance which have been summarized in this Ruling, the stage was properly set for migration from the analogue to the digital platform in broadcast transmissions, and there was, and is, a new national and international reality in that regard, to be adopted and internalised by all parties who have come before us. From the foregoing observation, and from our Ruling as a whole, it should be clear that there is in place no cogent foundation to the application filed by the 1st, 2nd and 3rd respondents before this apex appellate Court. From the terms of this Ruling, the Orders of which we set out below, it will be evident that no matter is pending before this Court, to be preserved by interim Orders.

C. FINAL ORDERS

[35] We conclude with final Orders in the following terms:

(a) All interim Orders in place, made in applications brought under the instant cause, are hereby discharged.

(b) The 1st appellant is to immediately restore the 1st 2nd and 3rd respondents to the position they were in after 25th of November, 2014 before the withdrawal of the digital frequencies it had earlier granted to the said respondents; and for the avoidance of doubt, the 1st appellant is to restore the Authorization for Self-Provisioning Digital Signal Distribution and the several digital frequencies it had granted to the said respondents—if it has not already done so.

(c) The 1st, 2nd and 3rd respondents are to abide by all the conditions that had earlier accompanied the grant of the Authorization for Self-Provisioning Digital Signal Distribution and the several frequencies.

(d) The general switch-off dates from the analogue to the digital platform shall remain as scheduled by the 1st appellant.

DATED and **DELIVERED** at **NAIROBI** this **13th Day of February, 2015.**

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W. M. MUTUNGA **CHIEF JUSTICE & PRESIDENT** **OF THE SUPREME COURT**	**K. H. RAWAL** **DEPUTY CHIEF JUSTICE &** **VICE-PRESIDENT** **OF THE SUPREME COURT**
.....	.....
P. K. TUNOI **JUSTICE OF THE SUPREME COURT**	**M. K. IBRAHIM** **JUSTICE OF THE SUPREME COURT**
.....	.....
J.B. OJWANG **JUSTICE OF THE SUPREME COURT**	**S. C. WANJALA** **JUSTICE OF THE SUPREME COURT**

.....

N. S. NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR, SUPREME COURT