



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANILNI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

Petition No. 346 of 2012

BETWEEN

ROYAL MEDIA SERVICES LTD.....PETITIONER

AND

THE HON ATTORNEY GENERAL.....1ST RESPONDENT

**THE MINISTER OF INFORMATION AND BROADCASTING.....2ND
RESPONDENT**

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

JUDGMENT

Introduction and Background

1. The subject of this decision is the nature and extent of **Article 34** of the Constitution which guarantees the freedom of the media and its relationship with the regulatory responsibilities of the Communications Commission of Kenya (“the CCK”) and the fundamental rights and freedoms of the petitioner.

2. Royal Media Services (“RMS”), the petitioner, is a private limited liability company incorporated under the *Companies Act (Cap 486 of the Laws of Kenya)*. It carries out

broadcasting and owns several well-known radio stations in the country. It has since 1997, carried on radio or television broadcasting business under licences granted to it by the 2nd respondent and utilizing frequencies granted by the CCK and its predecessor, the KPTC.

3. The CCK is established under **section 3** of the *Kenya Information and Communications Act (Act No. 2 of 1998)*. CCK was bestowed with the initial mandate to: *“licence and regulate telecommunications, radio communication and postal services.”* Its mandate was thereafter expanded by the *Kenya Communications (Amendment) Act, No. 1 of 2009* to include *“facilitate the development of the information and communications sector (including broadcasting multimedia telecommunications and postal services) and electronic commerce”* and to *“licence and regulate postal information and communication services in accordance with the provisions of the Act.”*

4. Prior to 1998, the mandate to regulate communications services lay with the defunct Kenya Posts and Telecommunication Corporation (“KPTC”) established under the *Kenya Posts and Telecommunication Corporation Act, (Chapter 411 of the Laws of Kenya (now repealed))*. For purposes of the regulation of the sector, the CCK is the successor to KPTC.

5. In addition to the statutory mandate, the CCK is the municipal government body responsible for the implementation of the international obligations that the Republic of Kenya has to the International Telecommunication Union (“the ITU”), a specialized UN agency in the field of information and communication technology and to which Kenya is a member.

Petitioner’s Case

6. The petitioner’s case was triggered by a public notice issued by the CCK on 17th May 2012 in the Daily Nation (“the Notice”) on the following terms,

PUBLIC NOTICE UNAUTHORISED USE OF BROADCAST FREQUENCIES.

The Communications Commissions of Kenya (CCK) is the regulatory authority for the communications sector in Kenya with responsibilities in telecommunications, broadcasting, electronic transactions, and postal services, CCK is also charged with the responsibility of managing the country’s numbering and frequency spectrum resources.

CCK wishes to remind the licensed frequency users that all radio frequency transmitters must be operated under a valid licence whose conditions must be adhered to. In accordance with the *Kenya Information and Communications Act, Cap 411A*, operation of radio services without a licence is an offence that attracts a fine of Kshs.5 million and imprisonment for a term not exceeding three years or both.

It has come to the attention of the Commission that the following frequencies are being operated without a licence and therefore, in contravention of the law. The current users of these resources are hereby served with a 30 day notice to surrender the frequencies, failing which CCK shall take the necessary action at its disposal.

| | Site | Frequency | Station identity |
|--|------|-----------|------------------|
|--|------|-----------|------------------|

| | | | |
|-----------|-----------------------|-----------|---------------|
| 1. | Enchoro Hill | 88.8 MHz | Egesa FM |
| 98.5 MHz | Change FM | | |
| 90.2 MHz | Radio Citizen | | |
| 2. | Migori | 95.4 MHz | Ramogi FM |
| 93.2 MHz | Radio Citizen | | |
| 3. | RIAT Kiboswa | 96.8 MHz | Change FM |
| 100.4 MHz | Mulembe FM | | |
| 4. | Siaya | 99.6 MHz | Radio Citizen |
| | | 101.0 MHz | Ramogi FM |
| 5. | Webuye | 99.0 MHz | Radio Citizen |
| 6. | Nyahururu (Maili Nne) | 95.3 MHz | Radio Citizen |
| 103.2 MHz | Inooro FM | | |

| | | | |
|-----------|---------------|---------------|---------------|
| 7. | Nyadundo | 98.6 MHz | Change FM |
| 8. | Mazeras | 94.2 MHz | Bahari FM |
| 98.9 MHz | Inooro FM | | |
| 9. | Msamweni | 96.2 MHz | Bahrai FM |
| 101.1 MHz | Radio Citizen | | |
| 10. | Kilifi | 94.5 MHz | Radio Citizen |
| 102.2 MHz | Bahari FM | | |
| 11. | Malindi | TV Channel 39 | Citizen TV |
| 12. | Meru | 104.7 MHz | Muuga FM |
| 13. | Vuria Hill | 97.1 MHz | Bahari FM |
| 14. | Narok | 92.6 MHz | Inooro FM |

Director/Frequency Spectrum Management,
Communications Commission of Kenya,
P.O. Box 14448, Nairobi 00800,

NAIROBI

7. RMS avers that the frequencies referred to were allocated it by the respondents and it has used them for more than ten years and was using them when the Constitution came into force on 27th August 2010. RMS contends that it was entitled to continue using the above mentioned frequencies until such time that the body envisaged by **Article 34** for licensing and issuing broadcaster's frequencies is established. **Article 34** provides as follows;

34. (1) 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).

(2) 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 of information by any medium; or (b) penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.

(3) 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.

(4) All State-owned media shall—

(a) be free to determine independently the editorial content of their broadcasts or other communications;

(b) be impartial; and

(c) afford fair opportunity for the presentation of divergent views and dissenting opinions.

(5) 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 sections of the society; and

(c) set media standards and regulate and monitor compliance with those standards.

5. RMS contends that the Notice is *ultra vires* **Article 34** as the CCK is not the licensing body established under **Article 34(5)**. It is the petitioner's position that the effect of the Constitution is to require, inter alia, a reorganisation of the organs of state touching on freedom of the media so that they protect the newly created broadcasting freedom and to suspend all the licensing provisions and functions of the CCK under the *Kenya Information and Communications Act*. RMS maintains that since the promulgation of the Constitution, **Article 34** suspended the powers of the CCK until such time as a successor body is established under **Article 34(5)** and that the Constitution has ushered in a fundamental change in the regulation of the media particularly in view of the protections to freedom of expression

under **Article 33**, freedom of the media under **Article 34** and the right to administrative action that is expeditious, efficient, lawful, reasonable and fair under **Article 47**.

6. RMS avers that the Notice contravenes its broadcasting freedom guaranteed under **Article 34** and is a violation of the petitioner's right to property guaranteed under **Article 40** and also a violation of the petitioner's right to fair administrative action guaranteed under **Article 47**. It argues that the issuance of a frequency is analogous to the issuance of licence under law to undertake a function and a licence is a species of property protected under **Article 40**.

7. RMS objects to the Notice contending that it was issued in contempt of an order issued by Honourable Justice Lenaola on 14th November 2011 in *Petition No. 244 of 2011, Media Owners Association v Attorney General, the Ministry of Information and Communication and the Communication Commission of Kenya* (“*the Media Owners Case*”). That order restrained the Ministry of Information and Communication and the CCK from cancelling, stopping, suspending, restricting or in any manner whatsoever from interfering with the petitioner's and members licences, frequencies, broadcasting spectrums and broadcasting services pending the hearing of the matter. RMS states that the CCK forfeited its right to be heard in opposing this petition as it disobeyed the order and contravened the petitioner's right of access to justice. Counsel for the petitioner cited the principle stated in *Mawani v Mawani* [1977] KLR 159 that a party who contravenes a court order should not be given audience by the Court until the contempt is purged.

8. In addition, RMS pleads that by disobedience of the order issued in the *Media Owners Case*, the CCK Commissioners, by failing to observe Court orders demeaned their office and therefore breached **Article 75** which governs the conduct of the State officers. Consequently, the petitioner argues that the CCK Commissioners have forfeited their office and lack authority to serve as such and the CCK should be reconstituted.

9. RMS also asserts that the Notice was made in bad faith since it and other broadcasters have been discussing with the respondents the nature of the institution contemplated under **Article 34(5)** and which should allocate frequencies. Furthermore, the High Court had in *Nairobi HC Misc. Appl. No. JR 284 of 2011 Magic Radio Ltd v The Communications Commission of Kenya* (“*the Magic Radio Case*”), granted leave to operate as a stay of a notice dated 11th November 2011 issued to all broadcasters by the CCK purporting to nullify all grants of frequencies and requiring them to apply for frequencies afresh.

10. RMS also complains about a letter dated 3rd August 2012 from CCK addressed to it. The letter titled, “*Notice of Violation*” particularises the nature of infractions alleged against RMS and it states as follows;

3rd August 2012

Mr Wachira Waruru,

Managing Director,

Royal Media Services Ltd,

P. O. Box 7468-00300,

NAIROBI

REF: NOTICE OF VIOLATION

This is in reference to the recent inspection of your FM and TV broadcast installations around the country carried out by Commissioner officers.

During the exercises, several non conformities were noted as tabulated below;

| | Location | Station | Frequency | Nature of violation |
|----|-------------------------------|----------------|------------------|---|
| 1. | Kapenguria (Kapkoris Hill) | Radio Citizen | 96.1 MHz | No Band Pass Filter Fitted |
| 2. | Webuye (Chetambe Hill) | Sulwe FM | 100.5 MHz | Unauthorised Transmitter |
| 3. | Webuye (Chetambe Hill) | Radio Citizen | 94.5 MHz | No Band Pass Filter Fitted Transmitter (Broadcast Electronics FM 2C not Type Approved. |
| 4. | Webuye (Chetambe Hill) | Mulembe FM | 89.6 MHz | No Band Pass Filter Fitted |
| 5. | Webuye (Chetambe Hill) | Citizen TV | TV CH 50 | Transmitter (Advanced Broadcast |

| | | | | |
|----|--------|------------------|--------------|---|
| | | | | Electronics (TX2000) not Type Approved |
| 6. | Limuru | Radio Citizen | 106.7 MHz | <ul style="list-style-type: none"> · No Band Pass Filter Fitted · Transmitter (Broadcast Electronics FM 10T) not type Approved. · Exceeded Maximum Authorised ERP. |
| 7. | Limuru | Inooro FM | 98.9 MHz | <ul style="list-style-type: none"> · No Band Pass Filter Fitted · Transmitter (Broadcast Electronics FM 10T) not type Approved. · Exceeded Maximum Authorised ERP. |
| 8. | Limuru | Ramogi FM | 107.1 MHz | <ul style="list-style-type: none"> · No Band Pass Filter Fitted · Transmitter (Broadcast Electronics |

| | | | | |
|-----|--------|------------|-----------|---|
| | | | | FM 10T) not type Approved. |
| 9. | Limuru | Change FM | 90.4 MHz | · No Band Pass Filter Fitted · Transmitter (Marti PNP 1000) not Type approved. |
| 10. | Limuru | Egesa FM | 103.2 MHz | · No Band Pass Filter Fitted · Transmitter (Marti PNP 1000) not Type approved. |
| 11. | Limuru | Mulembe FM | 97.9 MHz | · No Band Pass Filter Fitted · Transmitter (Marti PNP 1000) not Type approved. · Exceeded Maximum Authorization |
| 12. | Limuru | Hot 96 | 96/0 MHz | · No Band Pass Filter Fitted · Transmitter |

| | | | | |
|-----|---------------|---------------|-----------|--|
| | | | | (Broadcast Electronics STX) not Type Approved. |
| 13. | Limuru | Citizen TV | TV CH 39 | · Transmitter (Advanced Broadcast Electronics TX 10000) not Type Approved. |
| 14. | Kisekini | Muuga FM | 94.2 MHz | · No Band Pass Filter Fitted |
| 15. | Kisekini | Musyi FM | 102.2 MHz | · Transmitter (Broadcast Electronics STX) not Type Approved |
| 16. | Londiani Hill | Radio Citizen | 100.5 MHz | · Transmitter (Broadcast Electronics STX) not Type Approved |
| 17. | Londiani Hill | Chamge | 95.0 MHz | · Transmitter (Broadcast Electronics FM2C) not Type Approved |
| | Londiani | Inooro | 89.8 MHz | · |

| | | | | |
|-----|----------------------------------|---------------|--------------|---|
| 18. | Hill | FM | | Transmitter (Broadcast Electronics FM2C) not Type Approved |
| 19. | Londiani Hill | Hot 96 | 102.5 MHz | · Transmitter (Marti PNP 1000) not Type approved. |
| 20. | Londiani Hill | Citizen TV | TC CH 12 | · Transmitter (Advanced Broadcast Electronics TX2000) not Type Approved |
| 21. | Eldoret (Eldoret Airstrip) | Mulembe FM | 94.2 MHz | · No Band Pass Filter Fitted · Transmitter (Marti PNP 1000) not Type approved. · Broadcast from Non Designated Site |
| 22. | Eldoret (Eldoret Airstrip) | Chamge FM | 97.5 MHz | · No Band Pass Filter Fitted · Transmitter (Broadcast |

| | | | | |
|-----|----------------------------------|------------------|--------------|---|
| | | | | Electronics FM2C) not Type Approved Broadcast from Non Designated Site |
| 23. | Eldoret (Eldoret Airstrip) | Hot 96 | 87.7 MHz | · No Band Pass Filter Fitted · Transmitter (Broadcast Electronics FM2C) not Type Approved Broadcast from Non Designated Site |
| 24. | Eldoret (Eldoret Airstrip) | Inooro FM | 107.0 MHz | · No Band Pass Filter Fitted · Broadcast from Non Designated Site |
| 25. | Eldoret (Eldoret Airstrip) | Radio Citizen | 90.4 MHz | · No Band Pass Filter Fitted · Transmitter (Broadcast Electronics FM2C) not Type Approved Broadcast |

| | | | | |
|-----|----------------------------------|---------------|----------|---|
| | | | | from Non Designated Site |
| 26. | Eldoret (Eldoret Airstrip) | Citizen TV | TV CH 31 | · Transmitter (Advanced Broadcast Electronics TX2000) not Type Approved · Broadcast from Non Designated Site |

These are in contravention of the frequency assignment conditions. The Commission is concerned that despite being asked to correct these anomalies Royal Media has not taken any action. In this regard, you are required to take corrective measures within 30 days from the date of this letter to ensure that you install the band pass filters, obtain Type Approval for your transmitters, shut down unauthorised stations and relocate to the designated broadcast sites.

(Signed)

Francis W Wangusi

Ag DIRECTOR GENERAL

11. RMS contends that the letter falsely accuses it of breaching “*the frequency assignment conditions*” contained in licences granted to it in connection with several broadcasting frequencies allocated to it. It avers that the letter lacked any basis as the CCK had inspected the petitioner’s actual radio and TV sites and broadcasting equipment in 2003 and had confirmed that it had complied with law and since then it has not altered its broadcasting equipment to date. RMS argues that the demand is also null and void as it is made by a body not established under **Article 34(5)** and contravenes and **Article 47** as it is made dishonestly, in bad faith, arbitrarily and capriciously.

12. RMS further avers that since March 2012 the CCK embarked on a systematic damage of its broadcasting interests when exercising its purported power to allocate or grant broadcasting frequencies by allocating to other persons, frequencies so close to one granted to and operated by it resulting in interference with its broadcasting stations. RMS cites two instances of what it terms as mischievous purported allocations. The first incident is that on

6th March 2012, RMS alleges that CCK allocated another frequency 94.3 MHz thereby interfering with its frequency 94.2 MHz. The CCK wrote to RMS a letter dated 6th March 2012 where it stated as follows;

6th March 2012

Mr Wachira Waruru

Managing Director

Royal Media Services

P O Box 7468-00300

Nairobi

Dear Wachira,

RE: UNAUTHORISED BROADCAST ON 94.2 MHz IN MAZERAS INTERFERING WITH 94.3 MHz ASSIGENED FOR USE IN MAZERAS

This is further to our letter dated 13th July 2010 requiring Royal Media Services Ltd to cease unauthorized broadcast on 94.2 MHz in Mazera with immediate effect.

The Commission has noted with concern that Royal Media Services Ltd continued to broadcast unauthorised transmissions on Bahari FM on 94.2 MHz in Mazeras, and is interfering with another broadcaster who has been assigned the 94.3 MHz frequency for use in Mazeras.

This is therefore to require you to cease unauthorised broadcasts on 94.2 MHz frequency in Mazeras within the next seven days, failure to which the Commission will take steps at its disposal to remedy the situation at your own risks and costs.

(Signed)

Francis W Wangusi

Ag DIRECTOR GENERAL

13. The second incident is that on or about 3rd August 2012. RMS alleges that CCK allocated another broadcaster frequency No. 100.5.3 MHz thereby interfering with its broadcasts in Kisumu through 104.4 MHz. This incident was the subject of a previous letter from CCK dated 3rd March 2012 addressed to RMS as follows;

3rd August 2012

Mr Wachira Waruru

Managing Director

Royal Media Services

P O Box 7468-00300

Nairobi

Dear Wachira,

RE: UNAUTHORISED BROADCAST ON 100.4 MHz IN KIBOSWA INTERFERING WITH 100.5 MHz ASSIGENED FOR USE IN KISUMU

This is further to our letter dated 13th July 2010 requiring Royal Media Services Ltd to cease unauthorized broadcast on 100.4 MHz in Kiboswa (Kisumu) with immediate effect.

The Commission has noted with concern that Royal Media Services Ltd continued to broadcast unauthorised transmissions as Mulembe FM on 100.4 MHz in Kiboswa, and is interfering with another broadcaster who has been assigned the 100.5 MHz frequency for use in Kisumu.

This is therefore to require you to cease unauthorised broadcasts on 100.4 MHz frequency in Kisumu within the next seven days, failure to which the Commission will take steps at its disposal to remedy the situation at your own risks and costs.

(Signed)

Francis W Wangusi

Ag DIRECTOR GENERAL

14. The petitioner seeks the following reliefs in the amended petition dated 29th October 2012;

*a. It be declared that the respondents have not complied with the mandatory requirements of **Article 34** of the Constitution to establish licensing procedures to regulate the airwaves and other forms of signal distribution which procedures are independent of control by government, political interests or commercial interests.*

*b. It be declared that the respondents have contravened the petitioners' rights under **Articles 34, 40 and 47** of the Constitution.*

*bb. It be declared that the actions embodied in the letters dated 6th March 2012, 3rd August 2012, 6th August 2012 and the Public Notice published in the issue of Daily Nation of 17th May 2012 are null and void because of the rule in **Kenya Tourist Development Corporation v Kenya National Capital Corporation Nairobi HCCC No. 6776 of 1992**.*

bbb. It be declared that the 3rd respondent has forfeited the right to be heard on the petition herein for disobeying the order made on 14th November 2011 in favour of the Petitioner in High Court Petition No. 244 of 2011.

*bbbb. It be declared that the 3rd respondent has contravened the petitioner's rights under **Articles 27 and 48** of the Constitution.*

bbbbb. It be declared that the Commissioners who constitute the 3rd respondent have demeaned their offices.

bbbbbb. It be declared that the 3rd respondent has contravened the petitioner's rights to impart information under Article 33(b) of the Constitution.

bbbbbbb. An order that the commissioners of the 3rd respondent be removed from office forthwith.

c. A permanent injunction restraining the 3rd respondent from usurping the licensing and regulatory powers and functions of the body to be established by the Parliament under Article 34(3) and 34(5) of the Constitution;

d. A permanent injunction restraining the 3rd respondent acting on its letter dated 3rd March 2012 addressed to the petitioner, its notice published in the issue of the Daily Nation on 17th May 2012 and its letters addressed to the petitioner dated 3rd August 2012 respectively.

e. An order that the 3rd respondent's letter dated 3rd March 2012 addressed to the petitioner, its notice published in the issue of the Daily Nation of 17th May 2012 and its letters addressed to the petitioner dated 3rd August 2012 respectively be brought to this Honourable Court and be quashed.

f. A permanent injunction to restrain the 2nd and 3rd respondents from interfering with the petitioner's exercise of its broadcasting freedom enjoyed through the frequencies pleaded in paragraph 10, 12 and 16 above.

g. A permanent injunction restraining the 2nd and 3rd respondents or any of them from cancelling, stopping, suspending, restricting or in any way whatsoever interfering with the petitioner's licences frequencies, broadcasting spectrums and broadcasting services.

h. General damages

i. Exemplary damages

j. An order that the costs of this petition be provided for.

15. On 22nd October 2012, I granted leave to RMS to amend the petition and the amended petition dated 29th October 2012 included a further claim for discrimination and added prayers (bb) to (bbbbbbb) to the amended petition. The gist of the claim based on the breach of **Article 27** and is that the CCK engaged in selective and discriminatory enforcement of the **Kenya Information and Communication Act**.

16. RMS avers that the CCK set in motion a process of enforcing the provisions of the Act against it for allegedly using non type approved transmitters but took no action against other broadcasters. That CCK referred matters relating to RMS broadcasting business to the National Assembly for debate whilst no other broadcaster's matters were referred through the same. RMS complains that other persons interfering with its allocated frequencies were not acted upon. It decries the fact that CCK applied for search warrants against it whilst it did not do so against other broadcasters and that the Act was being enforced for alleged interference with frequencies of other users. Finally, the RMS complains that the notice published on 17th May 2012 is a list of alleged unauthorised frequencies used by it whilst no similar notice was published of and concerning other broadcasters.

17. The petitioner's case is supported by two affidavits of Samuel Kamau Macharia, a shareholder and Chairman of the Board of Directors of RMS sworn on 13th August 2012 and 14th September 2012 respectively. There is also an affidavit of 19th October 2012 sworn by Samuel Kamau Macharia in support of the application for amendment of the petition which I deemed as one in support of the amended petition. The petitioner also relies on three sets of written submissions; the first is filed on 22nd October 2012, the second is filed on 5th November 2012 and the third set is filed on 20th December 2012.

Respondents' case

18. The CCK has opposed the petition on the basis of the replying affidavit of John Omo, the Commission Secretary, sworn on 30th August 2012. The 1st and 2nd respondents did not file a replying affidavit but opposed the application by filing written submissions in opposition. The CCK relied on written submissions filed on 19th October 2012.

19. According to the CCK, frequency spectrum is a scarce public resource allocated to nations in accordance with complex international agreements and in Kenya it is by the CCK in order to ensure utilization in a co-ordinated manner so that frequency users do not interfere with each other. The CCK therefore assigns frequencies to applicants including broadcasters, strategic national institutions such as the Kenya Defence Forces, the Kenya Civil Aviation Authority, the Kenya Police, the Kenya Wildlife Service, among others, based on a national frequency plan which it develops and maintains. CCK also maintains that frequency regulation is critical to the security of the nation and the safety of its population.

20. Mr Omo explained that CCK is empowered by the Legislature to regulate radio communications under the *Kenya Information and Communication (Amendment) Act, 2009* and the *Kenya Information and Communications (Radio Communications and Frequency Spectrum) Regulations, 2010* ("*The Regulations*"). In practice, the CCK assigns frequencies to users subject to terms and conditions contained in their respective frequency assignment letters/licenses. Amongst the terms and conditions, CCK specifies the frequencies, location of the transmitter, geographical transmitter site coordinator, and maximum effective radiated power. The users are required to deploy transmitters that are type approved. Licencees are also required to install with band pass filters to eliminate emissions outside the assigned broadcast bands.

21. Mr Omo deposes that sometimes frequency users, especially broadcasters, install transmitters and commence making transmissions without the necessary type approval of the equipment and or the installation of band pass filters and in the process, cause interference with neighbouring frequencies assigned to other users. In 2006, CCK started receiving several complaints from broadcasters and strategic national institutions including the Kenya Civil Aviation Authority, concerning interference with the frequencies assigned to them. CCK thereafter carried out inspection exercises in various places within the country to determine the cause of the interferences and in the process established that several broadcasters were causing harmful interference with frequencies lawfully assigned to aeronautical services and to other broadcasters. As a result it gave appropriate notices to offending broadcasters notifying them of their breaches and directing them to put remedial measures in place. CCK issued a public notice on 6th April 2010 titled "*Unauthorised Operation of FM Broadcasting*

Stations” indicating that several broadcasters had been found to be operating contrary to the authorised frequencies. Once the concerned broadcasters, including RMS, were notified, they put in place remedial measures.

22. Mr Omo depones that CCK sent notices of violation to RMS for various breaches and upon receipt of these notices the petitioner did undertake to install band pass filters and to remedy the anomalies identified by the Commission. It is against this background that CCK wrote to RMS the letter dated 3rd August 2012 notifying it of the need to install band pass filters and obtain type approval for its various equipment. According to CCK, the petitioner continues to be in violation of its licence conditions for the various frequencies assigned to it.

23. CCK also avers that in the course of the said surveillance and inspection visits, it discovered that RMS had been making transmissions on the following frequencies from the specified locations, without due assignment and hence in contravention of the law:

| | Site | Frequency | Station identity |
|-----------|---------------|-----------|------------------|
| 1. | Enchoro Hill | 88.8 MHz | Egesa FM |
| 98.5 MHz | Chamge FM | | |
| 90.2 MHz | Radio Citizen | | |
| 2. | Migori | 95.4 MHz | Ramogi FM |
| 93.2 MHz | Radio Citizen | | |
| 3. | RIAT Kiboswa | 96.8 MHz | Chamge FM |
| 100.4 MHz | Mulembe FM | | |
| 4. | Siaya | 99.6 MHz | Radio Citizen |

| | | | |
|-----------|-----------------------|---------------|---------------|
| | | 101.0 MHz | Ramogi FM |
| 5. | Webuye | 99.0 MHz | Radio Citizen |
| 6. | Nyahururu (Maili Nne) | 95.3 MHz | Radio Citizen |
| 103.2 MHz | Inooro FM | | |
| 7. | Nyadundo | 98.6 MHz | Change FM |
| 8. | Mazeras | 94.2 MHz | Bahari FM |
| 98.9 MHz | Inooro FM | | |
| 9. | Msamweni | 96.2 MHz | Bahari FM |
| 101.1 MHz | Radio Citizen | | |
| 10. | Kilifi | 94.5 MHz | Radio Citizen |
| 102.2 MHz | Bahari FM | | |
| 11. | Malindi | TV Channel 39 | Citizen TV |

| | | | |
|-----|------------|-----------|-----------|
| 12. | Meru | 104.7 MHz | Muuga FM |
| 13. | Vuria Hill | 97.1 MHz | Bahari FM |
| 14. | Narok | 92.6 MHz | Inooro FM |

24. As a result of these violations, CCK wrote to RMS several letters notifying it of the unauthorized use of the abovementioned frequencies and demanding that it ceases to make unauthorised transmissions. Despite these demands CCK avers that RMS has continued to operate on unlicensed frequencies thereby causing harmful interference to aeronautical services and other broadcasters.

25. It is in light of the persistent failure by RMS to comply with its directions, that CCK issued the Notice which is subject of the present case. CCK further alleges that since filing of this petition, RMS has also been transmitting on unauthorised frequencies as follows;

| Site | Unauthorised Frequencies |
|-------------|---------------------------------|
| Nanyuki | 103.0 MHz (Radio Citizen) |
| Nanyuki | 94.0 MHz (Muuga FM) |
| Karue Hill | 95.4 MHz (Radio Citizen) |
| Karue Hill | TV Channel 36 (Citizen TV) |
| Vuria Hill | TV Channel 36 (Citizen TV) |

| | |
|------------------------|------------------------|
| | TV) |
| Narok | 103.5 MHz (Maa FM) |
| Enchoro Hill | 88.3 MHz (Egesa FM) |
| 98.3MHz (Change FM) | |

26. CCK avers that RMS is unable to provide any evidence to this Court that it is authorized to use the above stated frequencies and as such the Court should not entertain these proceedings that are founded on an illegality. Furthermore, the RMS has failed to make material disclosure to the Court that it had been using frequencies without a licence or any form of authorization from the CCK or its predecessors and that no evidence has been provided as proof of the grant of a licence to RMS to operate the frequencies.

27. CCK avers that the question as to whether it is the body envisaged under **Article 34** to regulate broadcasting is the subject matter of other proceedings before the Honourable Court in the *Media Owners Case* as consolidated with the *Magic Radio Case* and is best left for that Court to determine. The CCK further denies all the allegations of contempt made against it and avers that any allegations of contempt can only be addressed within the context of the proceedings within which the contempt is alleged.

28. CCK also denies the allegations of bad faith and further contends that the stay by this Honourable Court in *Media Owners Case* and the *Magic Radio case* relates to the transition of existing broadcasters to the new regulatory framework as advertised in the Daily Nation of 11th November 2011 and the aforesaid stay does not apply to the use of unauthorised frequencies by the petitioner.

Issues for determination

29. The parties vigorously contested each other's positions and filed written submissions setting out their respective positions. Having considered the matter, I think the real dispute in this matter flows from the notice issued by the CCK on 17th May 2012 which notice triggered these proceedings and its legality and the letters dated 3rd March 2012, 3rd March 2012 and 3rd August 2012 (the Notice of Violation) threatening regulatory action and whether these letters and the notice violated the petitioner's fundamental rights and freedoms.

30. The petitioner raised issues of freedom of expression and of the media contained in **Articles 33** and **34** respectively. Dr Kamau Kuria relied on several cases decided in other jurisdictions to emphasise the importance and fundamental nature of freedom of expression
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and that of the media. Counsel cited *Groppera AG and Others v Switzerland* [1990] ECHR 7, *Radio ABC v Austria* [1997] 2 EHRR 185 and *Informationsververin Lentia v Austria* [1993] 17 EHRR 93 to support the petitioner's case. These cases were decided on the basis of the European Human Rights system which protects, at **Article 10** of the *European Convention*, freedom of expression which includes the right to receive and impart information and ideas without interference by public authority and regardless of frontiers. This right, the European Court of Human Rights has held, includes principle that the refusal to grant a radio or television licence is an infringement of the freedom to disseminate ideas and information and such a refusal may be upheld if it reasonably justified in a democratic society.

31. Dr Kuria also cited the two Privy Council cases; *Cable and Wireless (Dominica) Limited v Marpin Telecoms* (2000) 9 B.H.R.C 486 and *Observer Publications Limited v Campbell Mickey Mathew and Others* (2001) 10 B.H.R.C. 252. These cases, from the Commonwealth Caribbean, deal with constitutional provisions relating to freedom of expression similar to those of the former Constitution. In the *Cable and Wireless (Dominica) Case*, the Court concluded that a person's freedom to communicate ideas and information through telecommunications could be threatened by the grant of a statutory monopoly. In *Observer Publications Case* the Court held that freedom of expression includes freedom to disseminate information and ideas by broadcast and that denial of a broadcasting licence through administrative procrastination was totally unjustified. The Court went further and held that a broadcasting licence could only be refused on grounds consistent with the Constitution.

32. I agree with the broad principles concerning freedom of expression enunciated in those cases but ultimately this case must be decided in light of the specific facts giving rise to the dispute. The Court's primary obligation to the parties is to resolve the issues in dispute and it is a well-established principle that the Court should avoid pronouncement on Constitutional issues unless it is necessary to do so to resolve the case (See *Muskrat v United States* 219 US 346(1911), *Peter Kaluma v Attorney General Nairobi* Petition No. 79 of 2011 (Unreported), *Harun Mwau and Others v Attorney General and Others Nairobi* Petition No. 65 of 2011 (Unreported) and *Jesse Kamau and 25 Others v The Attorney General, Nairobi Misc. App. No. 890 of 2004 (Unreported)*). The cases cited on behalf of RMS to support its case can be readily distinguished as this case does not concern the grant of a monopoly to a state broadcaster nor is this a case where RMS has been denied a licence by CCK upon application.

33. Having considered the petition and respective depositions, the issues for determination are as follows;

(1) Whether the CCK is entitled to continue the role of regulation of airwaves and other forms of signal distribution in light of the fact that Parliament has not passed legislation contemplated under **Article 34**.

(2) Whether the letters and Notice issued by CCK to RMS contravene or violate its fundamental rights and freedoms under **Articles 34, 40, 47 and 48**.

Effect of pending cases

34. Before I proceed to determine the issues framed, it is important to consider pending cases namely the *Media Owners Case* which was consolidated with the *Magic Radio Case*. Both cases were triggered by a notice issued by the CCK on 11th November 2011 and published in the press on 12th November 2011 titled, “*Licensing of Broadcasters under the New Regulatory Framework.*” The notice required all broadcasting licence holders to apply for licences. Aggrieved by this notice, the Media Owners Association, an umbrella body representing broadcasters, moved the Court to stop the implementation of the said notice and also nullify the notice. In the *Magic Radio Case*, the applicant applied for orders of certiorari to quash the said notice and for the order for leave to operate as a stay of the notice. These two cases have since been consolidated and are pending before the Court.

35. RMS applied for consolidation of this case with the *Media Owners Case* and the *Magic Radio Case* and in my ruling dated 2nd October 2012, dismissing the application, I stated as follows, “[4] *What is in issue in each case is the nature and extent of the application of the fundamental rights and freedoms protected by the Constitution. Each case arises from a specific set of facts in which the court will be required to consider the applicability of Article 34 and other provisions of the Constitution. The Petition No. 346 of 2012 is about the alleged illegal use by the petitioners of frequencies allocated to it and the attempt by the 3rd respondent to deal with the petitioner’s alleged infractions. HC Misc. Application No. 244 of 2011 and HC Misc. Civil Appl. 284 of 2011 deal with broadcasters generally and the transition to a new regulatory framework triggered by a notice published by the 3rd respondent to that effect and whether such regime is consistent with the Constitution. [5] The primary responsibility of the court is to resolve the dispute based on the facts presented to it by application of the law. Application of the provisions of the Constitution to the specific facts may yield a different result because of the peculiarities of each case. In the circumstances, I take the position that given the specific facts applicable in each case, an order for consolidation may lead to a situation where the facts may be confused, proceedings convoluted and ultimately the issues for determination obscured. This will in turn lead to delay of the proceedings with the result that the overriding objective, which the petitioner has alluded to, is undermined.*”

36. The *Media Owners Case* and the *Magic Radio Case* were brought to challenge a specific notice issued by the CCK, the notice “*Licensing of Broadcasters under the New Regulatory Framework.*” As I stated, even though **Article 34** is in issue in all the cases, the genesis of each case is different and the Court is required to address itself to the specific fact situation and the legal consequences thereof in order to determine whether to provide relief to the petitioner if a case is made out. Consequently the question whether CCK is the proper body to regulate airwaves is necessary and incidental to determining the legality or otherwise of the acts impugned by RMS.

37. Since the *Media Owners Case* is grounded on specific facts and in particular the notice issued by CCK, it follows that Honourable Justice Lenaola’s order of injunction issued on 14th November 2011 must be read in light of what was sought in the suit. I shall revert to this issue later in the judgment.

Whether the CCK is entitled to regulate the airwaves as contemplated by Article 34

38. The legality of the 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 by the wayside on the effective date therefore the CCK cannot purport to exercise licensing authority by issuing the notice and demand.

39. 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 v Attorney-General of Uganda* [2002] 2 EA 508). Law, like nature, abhors a vacuum and the promulgation of the Constitution did not happen in a vacuum, it was superimposed on an existing legal framework. I therefore agree with the respondents' argument that the framers of the Constitution intended that over time this framework would 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.

40. The transformation of the existing law was also underpinned by the 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.*" The provisions of the Schedule to the Constitution are a part of the Constitution and must be read with it so that **Article 34** must be read together with the provisions of the schedules to the Constitution (see *Dennis Mogambi Mong'are v Attorney General Nairobi Petition No. 146 of 2011 (Unreported)* [2011] eKLR).

41. 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. CCK is established by legislation currently in force and is empowered to, inter alia, licence and regulate postal, information and communication services.

42. Another reason why I think the argument raised by Dr Kuria is untenable is that **Article 259(1)** requires that the Constitution be interpreted in a manner that promotes, its purposes values and principles, advances, the rule of law, human rights and fundamental rights and freedoms in the bill of rights and permits development of the law and contributes to good governance. I would reiterate what Justice Achode stated in *Ruth Muganda v Kenya Anti-Corruption Commission and Director of Public Prosecutions Nairobi HC Misc. Crim. Appl. No. 288 of 2012*, "[46] *A purposive approach to this issue [Whether the Ethics and Anti-Corruption Commission survives the Constitution] requires the Court, in the spirit of the Constitution, to promote the continuing and intended objects and functions of the Commission throughout the transitional process as opposed to extinguishing its existence.*" (See also *Africa Center for International Youth Exchange (ACIYE) and Others v Ethics and Anti-Corruption Commission and Others Nairobi Petition No. 334 of 2012 (Unreported)* and *John Kimanathi Maingi v Andrew Ligale & Others Nairobi Petition No. 72 of 2010 (Unreported)*). For the Court to permit a situation where a legally constituted

body is extinguished leaving the airwaves unregulated would undermine constitutional objectives of good governance.

43. In the circumstances, I find and hold that the CCK is properly constituted and empowered to carry out its statutory responsibilities including regulation contemplated under **Article 34** until such time as the body contemplated under **Article 34(5)** is established.

44. I also do not consider bad faith that the CCK continues to carry out its regulatory function despite the fact that the institution contemplated is not yet established. The three year period contemplated for enactment of legislation under **Article 34(5)** as read with **Fifth Schedule** is intended to provide a period of consultation with stakeholders in accordance with the values of public participation. It is admitted by RMS and its Chairman, who is the Chairman of the Media Owners Association that there have been intense consultations involving the Office of the Attorney General, the Commission for the Implementation of the Constitution and other stakeholders in discussing the shape and form of proposed legislation envisioned in **Article 34(5)**. I do not think such a consultative process or proposed legislation is a substitute for the existing law and the current law still applies subject to the Constitution. I also do not think that any statements attributed either to CCK or its Director General, within the context of discussing the reform initiatives in the telecommunications and broadcasting sector, to the effect that CCK is not the body contemplated under **Article 34(5)** have a bearing on the legal issue before the court. The Court is the final arbiter of what the law is and in carrying out this obligation it is guided by the Constitution and the law.

45. This finding necessarily means that the CCK was entitled to take regulatory action as required by the legislation and regulations made thereunder. This brings me back to the order of Justice Lenaola in the *Media Owners Case* which I alluded to earlier. The order was specifically in reference to enforcement of the notice titled, *“Licensing of Broadcasters under the New Regulatory Framework”*. It could not have been the intention of the learned judge by judicial fiat to immunize all and any broadcasting stations from regulatory authority of the CCK.

46. But the issue raised by RMS is not new at all and was considered in the case of *Royal Media v Telkom Kenya EALR [2001] 1 EA 2010 (CCK)* where RMS sought redress for the dismantling and seizure of its broadcasting equipment by CCK pursuant to search warrants obtained from the Court. In a previous case *Royal Media Services Limited v Telkom Kenya and Others Milimani HCCC No. 15 of 2000 (Unreported)*, Justice Kasanga Mulwa by a ruling dated 29th February 2000 dismissed an application for a mandatory injunction restraining the defendants from interfering with its frequencies and broadcasting equipment. By a ruling dated 1st March 2000, Justice Kasanga Mulwa granted a conditional stay on certain terms. Part of the argument proffered by RMS in the subsequent case was that the actions of search and seizure complained of contravened the decision of Justice Kasanga Mulwa. Justice Visram stated as follows, *“Having carefully perused the court record in this case, it appears to me that the cause of action before Mulwa J was wholly different from the one now before this Court. The case before Mulwa J related to different complaints which are separate from the alleged breaches that led to the present case. The case before Mulwa J related to different location and included breach of contracts between Royal Media and the first three defendants. Even if the factual distinction is no sufficient, it is clear that*

Mulwa J did not, in his ruling grant Royal Media a carte blanche to operate without the law. If anything, that ruling was properly qualified by placing an obligation upon Royal Media to comply with “all the requirements as contained in the licences in the (KCA)”. As per that ruling, the CCK was left free to enforce compliance with the requirements of the KCA so that if there was any fresh breach, it was free to act as empowered under the Act.” (See Lenaola J., in *Andy Forwarders Services Limited v Capital Market Authorities Nairobi Petition No. 216 of 2011 (Unreported)* at paras. 9, 10 and 11 on the same issue)

47. I agree with the observations of Justice Visram and like him, I find and hold that the orders of *Media Owners Case* were limited to the four corners of the said suit and the matters in issue in that suit and did not afford RMS a *carte blanche* to operate without the law. I agree with Mr Kilonzo that if RMS considers that there had been contempt of the said order, nothing would have been easier than to invoke the proper procedure to take out contempt proceedings in that case rather than filing a fresh suit. The case of *Mawani v Mawani (Supra)* is not relevant to these proceedings as there are no contempt proceedings pending nor has a finding of contempt been made against the respondents. The principle stated in *Kenya Tourist Development Corporation v Kenya National Capital Corporation (Supra)* that an act done in disobedience of a court order is null void is not applicable to these proceedings. Simply stated, the order in the *Media Owners Case* has no relevance to these proceedings. If anything, the filing of a fresh suit goes to show that the matters are distinct and arise from a different set of facts.

Whether the petitioners fundamental rights and freedoms have been infringed

48. The issue then is whether the letters and notices issued by CCK contravene the petitioner’s rights and fundamental freedoms protected under **Articles 27, 34, 40, 47 and 48** as alleged or at all.

49. I agree with the CCK proposition that frequency spectrum is a scarce public resource allocated by the CCK in order to ensure utilization in a co-ordinated manner so as to benefit the public as a whole. In *Observer Publications Limited v Campbell “Mickey” Mathew et. al (Supra)*, the Privy Council noted, at p. 49, “*The airwaves are public property whose use has to be regulated and rationed in the general interest.*” The basis for regulation of airwaves was clearly enunciated in *Red Lion Broadcasting Co. v FCC 395 US 367 (1969)* where the Supreme Court stated, “*Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalised only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably be heard. Consequently, the Federal Radio Commission was established to allocate frequencies among competing applicants in a manner responsive to public ‘convenience, interest and necessity.’*”

50. **Article 34** does not exclude regulation of electronic media and in fact contemplates licencing procedures that, “*are necessary to regulate the airwaves and other forms of signal distribution.*” The regulation of the airwaves takes place within a statutory framework and which as I have held is within the constitutional mandate of the CCK until such time as the

body contemplated by **Article 34(5)** is established by the legislation. Such regulation is subject to the Constitution and the values of democracy, human rights, human dignity, public participation and all the other values set out in **Article 10**.

51. Both **Article 40** and **47** prohibit arbitrary action that results in taking of property or violating a proprietary right. **Article 40** protects property but it is by no means absolute. **Article 40(2)** prohibits arbitrary and discriminatory taking of any property while **Article 40(6)** excludes protection of property that is found to have been unlawfully acquired. **Article 47** entitles every person to the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. **Article 47(1)** and **(2)** provide as follows;

47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

52. These provisions read together, at their core, embody the principles of due process which has been emphasised in the past cases involving the petitioner. In order to determine whether the petitioner's rights and fundamental freedoms have been infringed, it is necessary to appreciate the petitioner's prayers in the amended petition and the acts complained of by reference to the letters and the notice published in the newspaper. I have set out the letters dated 3rd August 2012, 6th March 2012 and 3rd August 2012 ("Notice of Violation") at paragraphs 13, 12 and 10 above respectively. The notice published on 17th May 2012 is at paragraph 6 above.

53. The letter dated 6th March 2012 and 3rd August 2012 are letters directed to RMS drawing its attention to interference with certain frequencies. It is within the province of CCK regulatory authority to ensure that licence holders adhere to the terms of the licence and these letters are no more than informing RMS of breach and giving RMS an opportunity to remedy any defects in its apparatus and if RMS does not comply to take such steps within its power to enforce its rules and regulation having regard to the due process requirement inherent in administrative processes. The issues of interference raised by CCK in respect of Kiboswa and Mazeras in the two letters was not being raised for the first time, both letters reference previous letters written to RMS on the same issue dated 13th July 2010. In my view, RMS had sufficient time to respond thereto. The subsequent letters provide another for RMS to make its case to CCK. I therefore decline to quash the letters dated 6th March 2012 and 3rd August 2012.

54. My views are fortified by the fact the correspondence challenged by RMS was written within the regulatory context and it is clear that it was written after several broadcasting stations were found operating in contravention of authorised parameters thereby causing interference to other stations and essential services. CCK issued a notice in the newspapers dated 16th April 2010 requesting errant broadcasters to remedy any contraventions. Several radio stations among them Neutral Digital Broadcasters Limited, Trans World Radio – Kenya, Real-Time Solutions Limited, Imani Radio & TV Ministries Capital FM and other stations duly complied with the direction and informed the CCK that they had installed band filters to

minimise harmful interference. RMS has also shown, in the Replying Affidavit sworn on 14th September 2012, that there were instances where it was notified by CCK of harmful interference and given time to minimise such interference. The letters dated 3rd May 2010, 7th September 2010 and 9th September 2010 written by RMS to CCK confirm that it took steps to install band filters approved by CCK to minimise interference. It is in this broad context that the letters dated 3rd March 2012 and 6th March 2012, now assailed by RMS, were issued.

55. Dr Kuria submitted that in light of the cases of *Groppera Radio AG Case (Supra)* that interference is a normal hazard. This may well be true but I am not in position to make such a finding for several reasons. The history of interaction between the CCK and other broadcasters has been the subject of regulations which entitle CCK to notify broadcasters of interference and require them to take action to minimise interference. Broadcasters including RMS have taken steps to comply with this regulatory directive. It is the CCK to decide whether interference is such that it violates the licence conditions and once it is admitted that the licence condition imposed on a broadcaster requires it to operate within a specific frequency, CCK is obliged to enforce that condition and the licensee must comply with the terms of the licence in this respect.

56. A perusal of the correspondence annexed to the affidavit of Mr John Omo discloses that the letters are issued pursuant to **section 41** of the *Kenya Information and Communications Act* which provides as follows;

41. (1) *If the Commission is of the opinion -*

(a) *that any apparatus does not comply with the requirements applicable to it under regulations made for the purpose under subsection (1) of section 40; or*

(b) *that either: -*

(i) *the use of the apparatus is likely to cause undue interference with any radio communication used for the purpose of any safety of life service or for any purpose on which the safety of any person or of any vessel, aircraft or vehicle may depend; or*

(ii) *the use of the apparatus has caused or is causing undue interference with any other radio communication n apparatus in circumstances where all reasonable steps to minimise interference have been taken in relation to the situation or apparatus receiving such radio-communication, it may serve on the person in whose possession the apparatus is, a notice in writing requiring that, after a date fixed by the notice, not being less than thirty days from the date of service thereof, the apparatus shall not be used, whether by the person to whom the notice is given or otherwise, or shall only be used in such manner, at such times and in such circumstances as may be specified in the notice:*

Provided that if the Commission is satisfied that the use of the apparatus in question is likely to cause undue interference with any radio communication used for the purpose of any safety-of-life service or for any purpose on which the safety of any person or of any vessel, aircraft

or vehicle may depend, the date to be fixed by the notice may be the date of the service thereof.

(2) A notice under subsection (1) may be revoked or varied by a subsequent notice in writing by the Commission, served on the person in whose possession the apparatus then is:

Provided that where a notice under this section has the effect of imposing any additional restrictions on the use of the apparatus, the provisions of subsection (1) relating to the coming into force of the notice shall apply in relation to the subsequent notice as if it had been a notice served under subsection (1).

(3) Where a notice has been given under subsection (1), any person having possession of, or any interest in, the apparatus to which the notice relates may, at any time whether before or after the date fixed by such notice, by notice in writing served on the Commission, show reasons why the apparatus in question complies with the requirements applicable to it under the regulations and if the Commission is satisfied that -

(a) the apparatus in question so complies, it shall revoke the notice; or

(b) the said requirements ought to be relaxed in relation to the apparatus, may revoke, the notice or vary it in such manner as the Commission may deem fit:

Provided that, nothing done under this subsection shall prevent any person from serving another notice and shall not, where the Commission is satisfied that there has been a change in the circumstances, prevent the Commission from giving a further notice.

(4) A revocation or variation made under subsection (2) or (3) may be absolute or may be conditional on such steps being taken in relation to the apparatus or on the apparatus being made to comply with such requirements as may be specified in the direction and any questions as to whether or not the apparatus has been made to comply with the requirements shall, on the application of the Director-General or of any person having possession of or any interest in the apparatus, be determined by the Tribunal.

(5) Any person who, knowing that a notice of the Commission under this section is in force with respect to any apparatus, uses such apparatus, or causes or permits it to be used in contravention of the notice, commits an offence and shall be liable on conviction to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years, or to both. [Emphasis mine]

57. The tenor and effect of this provision is that it embodies a due process by requiring the licensee alleged to be in breach of licence conditions to show cause why CCK should not take

regulatory action. It is not inconsistent with **Article 34** for the CCK to require the petitioner to show cause why regulatory action should not be taken and in my view this action is consistent with **Article 47**. The letter dated 3rd August 2012 is a clear notice providing the petitioner an opportunity to present its case and arguments to the CCK in respect of the matters stated in the notice. CCK is obliged to exercise its power in accordance with the rules of natural justice, implicit in **Article 47(1)** and thereafter give written reasons for its decision before taking appropriate action that may affect the rights of the petitioner. It is clear that in accordance with **section 41(4)** that if there is a dispute then the matter may be referred to the Appeals Tribunal established under **section 102** of the Act as the case may be. I do not find the notice a breach of the provisions of **Articles 34, 40** or **47**. In other cases where there has been such infraction, there is evidence annexed to Mr Omo's affidavit that when notice has been given under **section 41**, the petitioner and other broadcasters have made efforts to comply with the directions and have indeed complied by rectifying the equipment or broadcasting apparatus to comply with licence requirements.

58. As I have held the letters referred to provide the petitioner an opportunity to present its case and it is for this reason that I have declined to address, the factual issues relating to the licences raised by both parties as these are live issues on which the CCK will be required to make a determination in exercise of its power under the provisions of the Act. It is also for this reason that I declined, in my ruling of 15th November 2012, to permit the cross-examination of Mr John Omo as requested by counsel for RMS. The duty of the Court, in considering the actions of CCK, is not to take the place of the statutory authority but to ensure that it acts within statutory limits (See *Republic v Independent Electoral and Boundaries Commission & Another ex parte Councillor Eliot Lidubwi Kihusa*, Nairobi JR Misc. App. No. 94 of 2012 at para. 73). RMS is entitled to be heard and to present its position before the CCK which will arrive at a decision which may be subject to court challenge or determination by the Appeals Tribunal as the case may be.

59. Likewise, I have not deemed it necessary to address the concerns of the irregularity or illegality of frequencies used by the petitioners. The CCK case, as urged by its counsel, Mr Kilonzo, is that the petitioner is broadcasting without licences from the places and on frequencies outlined in the notice issued on 17th May 2012 as such this Court should not give imprimatur to such an illegality by entertaining these proceedings. Counsel relied on several cases to support the principle encapsulated in the well-worn latin maxim *ex turpi causa non oritur actio*; that no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act (see *Attorney General v Sunderji Trading as "Crystal Ice Cream"* (1986) KLR 67, *Festus Ogada v Hans Mollin* CA Mombasa Civil Appeal No. 100 of 2007 (Unreported)[2009] eKLR).

60. The issue here is one of whether the CCK is entitled to take regulatory action and having found that it is entitled to do so, I do not think it is necessary to make any findings as to the legality or otherwise of the petitioner's licences as this is a matter for the CCK to take regulatory action. In my view, the use of broadcasting apparatus to make unauthorised broadcasts contrary to licence requirements falls within the purview of CCK's power under **section 41** of the Act. Thus, once the 30 day notice has been issued to the RMS, it will be required to show cause why regulatory action should not be taken in accordance with the

provisions of the Act. In my view the 30 day notice issued by CCK affords the RMS sufficient time and opportunity to contest regulatory action and in due course CCK will make an affirmative decision that may be subject to challenge.

61. Finally, the petitioner's case for discrimination was introduced after I granted leave to amend the petition on 22nd October 2012. I agree with Mr Kilonzo, that this was a new cause of action not covered by the leave granted to amend the petition. That notwithstanding, I have considered the action complained of by RMS set out at paragraph 15B of the petition and I am satisfied that CCK's actions were not discriminatory in any way. First, I do not think that preferring regulatory action of itself is discriminatory nor is the enforcement of the provisions of the statute. As regards, the nature of infractions by other broadcasters, there is insufficient evidence to support any finding of discrimination quite apart from the fact that it would be improper for the Court to make a finding that would affect them adversely without giving them an opportunity to be heard. Secondly, I am unable to comment on matters concerning the National Assembly as these are matters specifically within the province of the legislature which controls its own business.

Conclusion and disposition

62. In summary, I find and hold that the CCK is entitled to exercise regulatory authority over broadcasting and other electronic media pursuant to the *Kenya Information and Communications Act* until such time as Parliament establishes the body contemplated under **Article 34(5)** of the Constitution. Thus prayers (a), (b) and (c) of the amended petition are dismissed.

63. I find and hold that the letters dated 6th March 2012, 3rd August 2012, the Notice of Violation dated 3rd August 2012 and the notice issued in the Daily Nation of 17th May 2012 are not in contravention of the petitioners rights protected by **Articles 34, 40 and 47** of the Constitution as they are in the nature of notices that afford RMS to show cause why regulatory action should not be taken against it. As a consequence, I reject prayers (d), and (e) of the amended petition.

64. The grant of prayers (f) and (g) of the amended petition would have the effect of excluding RMS from statutory regulations. As I have held, I do not think regulatory action, which entitles the RMS to due process is a violation of the Constitution nor does such action interfere with its fundamental rights and freedoms of the petitioner.

65. In view of the findings I have made, the petition is dismissed. As this is a matter for the enforcement of fundamental rights and freedoms I decline to make an award for costs.

66. I thank counsel who appeared in this matter for their detailed submissions.

DATED and DELIVERED at NAIROBI this 18th day of January 2013.

D.S. MAJANJA

JUDGE

Dr Kamau Kuria instructed by Kamau Kuria and Kiraitu Advocates for the petitioner.

Mr Kaumba, Litigation Counsel, instructed by the State Law Office for the 1st and 2nd respondents.

Mr Kilonzo instructed by Sisule Munyi Kilonzo and Associates for the 3rd respondent.



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