IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, M'INOTI & MURGOR, JJ.A)

CIVIL APPEAL NO 214 OF 2011

BETWEEN

NATURE FOUNDATION LIMITED…….....…….APPELLANT

AND

THE MINISTER FOR INFORMATION AND COMMUNICATION…..1ST RESPONDENT

THE COMMUNICATIONS COMMISSION OF KENYA.....2ND RESPONDENT

(an appeal from the judgment and order of the High Court of Kenya at Nakuru (Wendoh, J) dated 2nd June 2011

in

Nakuru Misc Civil Application No 51 of 2010 (JR))

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JUDGMENT OF THE COURT

Nature Foundation Limited, the appellant herein, was the exparte applicant before the High Court of Kenya in the Notice of Motion dated 25th May 2010. In that application, the appellant sought, inter alia, an order of certiorari to remove into the High Court and quash regulations 46(1), (2) and (3) of the Kenya Communications (Broadcasting) Regulations, 2009, purporting to provide for "Transition of permits to licences". It was alleged that those regulations were made ultra vires, and in complete and flagrant violation of sections 46A (a) and (d), 46D (2)(b) and (d), 46K (a), and 46 (R) of the Kenya Information and Communications Act of 1998, and paragraphs 2(a) and (b) of the Fifth Schedule to the Kenya Communications (Amendment) Act, 2009.

It was the case of the appellant that prior to 2009, broadcast permits were issued by the executive to a select group of persons. In addition, there was no regulatory framework for broadcasting in the country. To illustrate this point, the appellant cited the statements of Lady

Justice Mary Kasango in ***Ahmed Rashid Jibrilvs East African TelevisionNetwork Limited & 6 Others Milimani HCCC No 651 of 1998*** wherein it was stated that:

"This case, perhaps more than any other, will stand in the annals of history as an example of how Kenya was once ruled by a clique of political elite, and where that elite did not tolerate divergent views and as a consequence, the media was effectively muffled by denial of airways for broadcasting, both in radio and television."

A clamour for reform led to the enactment of the Kenya Communications (Amendment) Act, 2009, which amended the Kenya Communications Act, 1998, and pursuant to this Act, the Kenya Communications (Broadcasting) Regulations were published.

Accordingto the appellant, the intention of Parliament in enacting this legislation was to create an objective way for the allocation of radio frequencies, liberate the airwaves and free the Communications Commission of Kenya from political interference in regulation of the broadcasting industry.

The new broadcast paradigm was to be achieved through the transitional provisions, contained in paragraph 2 of the Fifth Schedule of the Act which in part, required that parties holding broadcast licences would be granted a period not exceeding one year during which they could continue to operate with their existing permits, and then apply to the Commission to be licensed under the Act. However, the appellant submitted, the 1st respondent went against the provisions of the Act and promulgated a regulation that allowed current holders of broadcast permits to retain such radio frequency resources already assigned under the same terms and conditions of issuance. The appellants asserted that this was contrary to the provisions of the parent Act, which required all persons to apply afresh to the 2nd respondent before they were licensed. In addition, the appellants contended that regulation 46(1)(c) created a totally new substantive provision not envisaged under the Act and was therefore ultra vires.

In opposition to the application, the 1strespondent contended that the regulations are not ultra vires to the Act and urged that the court ought to read all the provisions in harmony. It was the position of the 1st respondent that the decision which was attacked and/or impugned resulted in an invitation to the court to consider the merits of the decision, which was outside of its powers. The 1st respondent further urged that to grant the orders of certiorari sought in the broadcasting industry would beagainst the public interest, since most of the players were operating with licenses granted long before the enactment of the Act, and thus, would be forced to close down.

The 1st respondent also took issue with the standing of the appellant, claiming that being a private company, it could only undertake the objects contained in its memorandum of association, and thus had not demonstrated that it had locus to institute a suit against the respondents.

The 2nd respondent on its part denied that the regulations were ultravires and stated that it had not cancelled the existing licenses due to the fact that there had been a delay in publishing regulations that would provide transition to the new regime. The 2nd respondent also stated that the principles of diversity and plurality in the Kenya Communications Act had been given

effect in other rules in the regulation, such as regulations 10, 13 and 35 of the impugned regulations. The 2nd respondent also adopted the argument that the appellant, having failed to exhibit its complete memorandum of association, had failed to demonstrate that it had locus standi in the suit.

The trial court, after consideration of the rival positions of the parties, found that regulations 46(1) and 46(2) were within the four corners of the Kenya Communications Act, 1998. However, the court found that regulation 46 (1) (c) was ultra vires the Act, but refused to strike it down due to the fact that the appellant had not established that it had locus standi to bring the suit. The end result was that the superior court dismissed the application, and condemned the appellant to bear the costs.

The appellant, being aggrieved by the findings of the trial judge, has approached this Court by way of the memorandum of appeal dated29thSeptember 2011.In that memorandum, there were 14 grounds of appeal which the appellant grouped into submissions under three heads.

The first is that that the Kenya Communications (Amendment) Act established the standards of diversity and plurality, which were meant to dismantle the status quo. These standards of diversity and plurality are threatened since the Act requires that persons to apply for licences afresh, whereas the regulations purport to override this provision by providing for the migration of permits to licenses. The appellant submits that the effect of this will be that broadcasting will continue to be controlled by a small group of politically-connected broadcasters who will appropriate all existing frequency spectrums. In addition, all advertising revenue will continue to be appropriated by these broadcasters, which will be to the disadvantage of the general public.The appellant further submitted that the sum total of the superior court's judgment was that it is tantamount to an overthrow of both the Constitution and the legislative authority of Parliament. The appellant further urged that the respondents were not at any point disputing the illegality of the impugned provisions of the regulations, but were effectively seeking time to comply with the dictates of Parliament.

The appellant's second submission is that broadcasting is a fundamental right, from which no derogation is permitted. The appellant relies on Article 33 of the Constitution of Kenya, 2010, which provides that every person has the right to freedom of expression, which includes the freedom to seek, receive or impart information or ideas. In addition, the appellant also contends that Article 34 (3) of the Constitution provides that ***"Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that are necessary to regulate the airwaves and other forms of signal distribution; and are independent of control by government, political interests or commercial interests.***"The appellant alleges that these constitutional provisions command the 1st respondent not to enact regulations that are ultra vires the Act.

The appellant's final submission is that there is no standing required when a citizen petitions a court of law to strike down ultra vires regulation. It further submitted that locus standi is an inherent right vested in all citizens to correct an illegality, and for the superior court to contend that the appellant did not have locus standi to approach the court was wrong, especially in light of the fact that the superior court accepted that the offending regulations were ultra vires the Act. The appellant further faulted the superior court for stating that the

appellant did not exhibit its complete Memorandum of Association, and only exhibited the cover page of the said Memorandum of Association yet it had done so to dispel the notion that the appellant was not an incorporated company. The appellant further urged that in any event, the court ought to take judicial notice of the fact that all companies have an overriding omnibus object empowering a company to ***"do all such other things as may be conducive or incidental to the attainment of the above objects***."

This is a first appeal, and we bear in mind that we are enjoined to consider all the evidence adduced before the trial court and draw our own independent conclusions. See ***Lucy Mirigo& 550 others v Minister for Lands & 4 others [2014] eKLR (Civil Appeal 277 of 2011)*** and***Selle v Associated Motor Boat Company [1968] EA 123.***

We are also cognisant of the fact that judicial review orders are discretionary orders. See ***Republic v Mwangi S. Kimenyi Ex-Parte Kenya Institute for Public Policy and Research Analysis (KIPPRA) [2013] eKLR (Civil Appeal 160 of 2008)*** wherein this Court stated that:

"Judicial review remedies are discretionary and the Court has to consider whether they are the most efficacious in the circumstances of the case. Judicial review is in the purview of public law, not private law."

In that regard, we remind ourselves of our duty not to interfere with the findings of the trial judge unless we find them to be perverse and contrary to the law.

The first issue that arises for determination is whether the appellant had locus standi to bring the suit before the High Court. The legal standing of parties to bring suit challenging infringement of rights was drastically expanded after the promulgation of the Constitution of Kenya, 2010. Under the current Constitution, strictures and restrictions on locus standi were formally done away with; it means that any person can approach the court for determination as to whether or not a fundamental right has been breached or is likely to be infringed. Before the promulgationof the current Constitution however, many courts, as the superior court did in the instant matter, would peg locusstandi on the issue of sufficient interest as set out in ***R v Inland Revenue Commissioners Ex Parte National Federation of Self Employed and Small Businesses Ltd (1982) AC 617*** where sufficient interest was described in the following manner by Lord Diplock:

"the draftsmen ... avoided using the expression "a person aggrieved" although it lay ready to his hand. He choose instead ordinary English words which on the face of them leave the court an unfettered discretion to decide what in its good judgment it considers to be 'a sufficient interest' on the part of (a claimant) in the particular circumstances of the case before it. For my part, I would not strain to give them any narrow meaning."

Based on the fact that the appellant had not exhibited a complete memorandum of association, and that neither did it show that it had an interest in broadcasting, the learned judge was of the opinion that the appellant had not established any interest or standing in the matter. In part, the learned judge stated that:

"The whole Memorandum of the Applicant was not exhibited and the applicants did not avail any evidence to support their allegations that they are involved in conservation and public fundraising for the public benefit or that they have an interest in broadcasting."

The learned judge considered that even having regard to the broad test of sufficient interest set out by Lord Diplock in ***R v Inland Revenue Commissioners(supra),*** the appellant had failed to demonstrate that it had an interest in securing the orders sought. On this, with respect to the trial judge, we find that she misdirected herself. The stringent rule against locus standi had since been relaxed in ***Ruturiand Kenya Bankers Association v Minister for Finance [2001] 1 EA 253***. In that matter, the Court held that:

"as a general principle relating to this type of public interest litigation, we wish to state that what gives locus standi is a minimal personal interest and such an interest gives a person a standing even though it is quite clear that he would not be more affected than any other member of the population."

The Court further stated that:

"In our very considered opinion carefully reached during our retirement to consider this case, like in human rights cases, public interest litigation, including lawsuits challengingthe constitutionality of an Act of Parliament, the procedural trappings and restrictions, the precondition of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court, or let justice bleed on the alter of technicality. This Court has vast powers under section 60 of the Constitution of Kenya to do justice without technical restrictions and restraints, and procedures and reliefs have to be moulded according the facts and circumstances of each case and each situation. It is the fitness of things and in the interest of justice and the public good, that a litigation on constitutionality, entrenched fundamental human rights and broad public interest protection has to be viewed. Narrow pure legalism for the sake of legalism will not do."

This is now no longer the position, bearing in mind the enactment of the Constitution of Kenya, 2010. This position has been upheld in various decisions of this Court, the most notable being the decision of in ***MumoMatemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR (Civil Appeal 290 of 2012)*** wherein the Court observed that:

"It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of the Constitution in 2010 by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest."

And further that:

"It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the court for relief, any member of the public

can maintain an application for an appropriate direction, order or writ in the High Court under Articles 22 and 258 of the Constitution."

The Constitution of Kenya, 2010 had been in force for almost a year, by the time the learned judge was delivering her ruling. She therefore, with greatest respect, erred in finding that the appellant had no locus standi to sustain the suit. We think that courts had departed from the strict and stringent requirement of sufficient interest long before the current matter was instituted. As stated by other Courts before us, we cannot cling to an outdated relic of law when in actual sense there has been a remarkable development and fundamental departure from the old school of legal thinking and approach. Courts must make themselves aware of the new jurisprudential trend and avoid living in the annals of the dark legal history of this countrywhich limited judicial intervention in judicial review and constitutional litigation through narrow and strict interpretation. We are past that stage, and any court clinging to the old approach would with utmost respect, be frowned upon.

We now turn to consider the appellant's second submission, which is whether or not the impugned regulations are ultravires the Kenya Communications Act, and infringe on the freedom of the media guaranteed by the Constitution. The applicant submitted that broadcasting is a fundamental right from which no derogation is permitted. The appellant relies on Article 34 (3) of the Constitution which provides that:

(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.***

The Supreme Court of Kenya in ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR (Petitions Nos 14 A 14B & 14C of 2014)*** has stated that:

"Article 34(3)(a), … [has] the express contemplation of a procedure founded in law or some form of regulation, to govern the issuance of a signal-distribution licence,so as to advance media freedoms, and the right of establishment."

The current law providing for the regulation of broadcasting is the Kenya Information and Communications Act, 1998. Section 46K empowers the 1st respondent to make regulations with respect to broadcasting services to achieve, inter alia, the facilitation, promotion and maintenance of diversity and a plurality of views for a competitive marketplace of ideas. In order to transit to the new regime, Section 46R of the Act provides for transitional provisions with regard to broadcasting permits issued prior to the commencement of the Act. These are contained in the Fifth Schedule to the Act. Section 2 of the Fifth Schedule provides that:

"The Commission shall respect and uphold the vested rights and interests of parties holding broadcasting permits issued by the Minister prior to the commencement of this Act;

Provided that—

a. ***such parties shall be granted a period not exceeding one year during which they may continue to operate in accordance with their existing permits; and***

b. ***before the expiry of the one year period, such parties shall apply to the Commission to be licensed under this Act"***

Pursuant to section 46K of the Act, the 1st respondent thereafter published the Kenya Information and Communications (Broadcasting) Regulations, 2009. The appellant takes issue with regulation 46 (1)(2) and (3) which states that:

"46. (1) Pursuant to section 46R of the Act, all persons issued with broadcast permits prior to the commencement of the Kenya Communications(Amendment) Act, 2009 shall—

> ***(a) be required to apply for broadcast licence(s) in such a manner asmay be prescribed by the Commission;***
>
> ***(b) pay such fees as may be prescribed by the Commission for theissuance of the broadcasting licence(s) to replace the permits andfrequency licence and usage fees;***
>
> ***(c) retain such radio frequency resources already assigned under thesame terms and conditions of issuance:***

Provided that they comply with such new terms and conditions thatthe Commission may be impose;

(2) In addition to the requirements specified under section 46D (2), the Commission shall, when considering an application for a licence to replace a permit, consider—

> ***(a) the past compliance record of the applicant relating to adherence to the conditions of the broadcasting frequency licence; and***
>
> ***(b) the status of frequency fee payments.***

(3) Any person who holds a broadcasting permit and who has been assigned more than one broadcast frequency for either radio or television broadcasting services in the same broadcast coverage area, shall be required within a period not exceeding the licence term, to surrender all additional broadcasting frequencies to the Commission."

This is the regulation that is complained of as being ultra vires the Kenya Information and Communication Act, 1998. In determining the whether regulation is ultra vires the Act that

they are made under, the decision of the Supreme Court of India (which was also cited by the learned trial judge) in ***Maharashtra State Board of Secondary & Higher Secondary Education v Kurmarsheth& Others [1985] LRC (Const)*** is instructive. The court stated that:

"The validity of regulation is to be determined by reference to specific provisions of the statute conferring the power of delegated legislation and to its objects and purposes. Provided the regulations have a rational nexus with the object and purpose of the statute, the client should not concern itself with the wisdom and effectiveness… The court should not concern itself with the merits or demerits of a policy pursued by means of delegated legislation, but only with the question whether the delegated legislation falls within the scope of power conferred by statute and is consistent with the Act and the Constitution."(emphasis ours)

The appellant's contention is that regulation 46 amounts to 'migrating' existing licences of the current broadcasters and does not accord with the principle of diversity and plurality that is set out in the Act.

Having considered the evidence on record that was tendered during hearing of the application before the High Court, as well as the submissions of the appellant before this Court, we agree with the trial court's assessment that regulations 46 (1) and (2) have been made within the scope of the Act. This regulation only provides for further transitional provisions, requiring broadcasters, if they wish to continue with the business of broadcasting, to apply for licences in the manner that the 2nd respondent may require them to do, and provides for the particular procedure to be followed by parties who intend to continue with broadcasting. The fact that a party transiting is required to make an application is not an infringement or a departure from the statute or the Constitution. We find no derogation or abrogation of the requirements of Articles 33 and 34 of the Constitution. This cannot be said to be ultra vires the provisions of the Fifth Schedule to the Act which provides for the respect and upholding of vested rights and interests of broadcasters. In fact, this rule gives effect to the section 2(b) of the Fifth Schedule in that it requires those parties to apply to the 2nd respondent to be licensed under the Act.

The trial court found that regulation 46(3) was ultra vires as it amounted to maintaining the status quo, and further is contrary to the provisions of paragraph 2 of the Fifth Schedule. This regulation requires all broadcasters to surrender any additional broadcast frequency that may have been assigned to them to be surrendered to the 2nd respondent. We do not find that this rule is in conflict with section 2 of the Fifth Schedule, since the schedule only stipulates the procedure that broadcasters ought to follow in order to acquire licences under the Act. This is in contrast to regulation 46(3) which has to do with frequencies that have already been assigned to broadcasters. This regulation, in our view, appears to be giving effect to sections 16, 17 and 18 of the Act all which contain extensive and expansive provision for the assignment of frequency spectrums by the 2nd respondent. We find that this regulation as well, is properly grounded and has nexus with the objects of the Act, as well as the plurality and diversity considerations contained in section 46 D that the 2nd respondent is bound to uphold. In the premises, and for the reasons stated, we find that the trial court fell into error when it stated that:

"Regulation 46(3) tends to extend the period within which the permits issued in the old regime would remain valid. For example, if one was issued with a permit for a frequency for 10 years, in January 2007, then it means the permit will be in use till 2017. That in effect will be maintaining the status quo for a long time. It means that those who had a monopoly of the frequencies will continue to hold onto them denying other interested players from entering the market. In my view, Rule 46(3) was made contrary to the 2nd Respondent's mandate, the intent and objects of the Act and therefore made outside the scope of the 2nd Respondent's jurisdiction."

For the foregoing reasons, we hold the considered view that the application for judicial review orders was manifestly without merit. This appeal as well lacks merit, and we hereby order it dismissed, with the order that the appellant shall bear the costs of the respondents.

Dated and delivered at Nairobi this 30th day of January, 2015

M. WARSAME

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR