REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mutunga, CJ & P; Ibrahim, SCJ)

PETITION NO. 14 OF 2014

AS CONSOLIDATED WITH PETITION NO. 14 A OF 2014;

PETITION NO. 14B OF 2014;

AND

PETITION NO. 14C OF 2014

BETWEEN

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

APPELLANTS

AND

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

RESPONDENTS

RULING

[1] On the date set for the *inter partes* hearing of the application by the 1st, 2nd and 3rd respondents filed on 30th December, 2014, the 1st Appellant, the

Communications Commission of Kenya (CAK) filed a preliminary objection to the hearing of the said application in the following terms:

> *"....TAKE NOTICE that the COMMUNICATIONS COMMISSION OF KENYA, the 1st Appellant/Respondent herein, shall raise a preliminary objection to the hearing of the 1st to 3rd Respondents' Notice of Motion Application lodged in this Honourable Court on 30th December 2014 ("the Application") by a 2-Judge Bench of this Honourable Court on the ground that the Application seeks final substantive Orders that would determine the proceedings and/or dispose of questions or issues before the Court and, as such, it falls outside the purview of Section 24(1) of the Supreme Court Act, 2011 and cannot therefore be heard and determined by a 2-Judge Bench as presently constituted."*

[2] We have considered the said preliminary objection, the submissions by all counsel and have carefully perused the application by the 1st, 2nd and 3rd Respondents and the prayers sought.

[3] In our Judgment dated 9th September, 2014, we gave *inter alia,* the following Orders:

> *(d) The 1st Appellant shall, in exercise of its statutory powers, and within 90 days of the date hereof, consider the merits of applications for a BSD licence by the 1st, 2nd and 3rd respondents, and of any other*

local private sector actors in the broadcast industry, whether singularly or jointly.

(e) The 1st Appellant (CAK) shall, in exercise of its statutory powers, ensure that the BSD licence issued to the 5th Appellant herein, is duly aligned to constitutional and statutory imperatives.

(f) The 1st Appellant (CAK), in exercise of its statutory authority, shall, in consultation with all the parties to this suit, set the time-lines for the digital migration, pending the international Analogue Switch-off Date of 17th June, 2015.

(g) Upon the course of action directed in the foregoing Orders (d & e) being concluded, the 1st Appellant (CAK) shall notify the Court through the Registry; and the Registrar shall schedule this matter for mention, on the basis of priority, before a full Bench.

[4] It is our view that the Court as constituted by the 2-Judges herein must protect the integrity of the decision of the 7-Judge Bench delivered on 29th September, 2014. Our interpretation of our decision of 29th September, 2014 when we gave the parties 90 days subsequent mention on priority basis before a full Bench implied that there was to be subsequent finality to the compliance of all consequential Orders. There was to be a "Returnable Date" through a mention after the 90 days. It is on this basis that the 1st Appellant (CAK) through its letter dated 19th December 2014 wrote to the Registrar of this Court requesting a mention date.

[5] It is clear from the application herein and annexed affidavits that there has been much progress towards compliance with the Orders contained in the said Judgment. However, it clearly appears there has been subsequent disagreement regarding the question of the analogue switch off date of 31st December 2014 which was declared by the 1st Appellant (CAK). This has resulted in the application by the 1st, 2nd and 3rd Respondents reasons of which are on record.

[6] In the preliminary objection the 1st Appellant has invoked the provisions of Section 24(1) of the Supreme Court Act, 2011. We are of the view that the principles set out in the ***Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board Petition No. 5 of 2012 (the Erad Case)*** *a*re still in force. But we have to distinguish the facts of ***Erad*** and the instant case. Section 24 usually contemplates interlocutory matters filed simultaneously with a petition or shortly after seeking interlocutory orders or directions at the onset of the proceedings. In this case, Judgement had been rendered and all questions and issues conclusively disposed. The only remaining aspect is the enforcement and compliance of the Orders of the Court.

[7] It is our view, that in terms of Orders (d), (e), (f), and (g) this Court retained a residual jurisdiction to monitor and ensure compliance with the Orders in the Judgment through a mention on the basis of priority to be heard by the full Bench which initially heard the appeal.

[8] In view of the foregoing, and in exercise of our discretion we are of the view that this matter should be scheduled for mention through the office of the Registrar as contemplated by the Orders of this Court.

[9] In view of the nature and terms of the Orders sought in the Application, we are apprehensive that any Orders we may give could lead to inconsistency and even interference with the Judgement of the Court. In the circumstances, the right bench to hear this application would be the full bench of 7-Judges who heard the case in the first place.

[10] We hereby adjourn the hearing of this matter to a date to be fixed before the Registrar of the Court, to be heard by the full bench of 7-Judges.

[11] In the meantime, at the *ex parte* stage, the Rawal, DCJ & VP, granted some interim Orders to be in force until today. These are on record and counsels have made observations on the same. As a natural consequence, the said Orders shall be extended until further directions of the Court.

[12] Mr. Kilonzo was of the view that the 1st Appellant (CAK) has not switched off the analogue frequencies of the 1st, 2nd and 3rd Respondents and that a switch off only takes place upon the compliance of the directions of CAK to switch off by the broadcasters.

[13] At this stage, the Court does not have the full facts as to how the technology of switch-off takes place and who triggers it. For the avoidance of

doubt and to avoid an embarrassing situation, threatening the respect and the dignity of this Court, lest the fears of the 1st, 2nd, and 3rd Respondents are justified we hereby give an Order of stay of switch off of the analogue frequencies of the 1st, 2nd and 3rd Respondents until further Orders.

[14] Costs in the application.

DATED and **DELIVERED** at **NAIROBI** this 5th day of January, 2015.

.....	.....
W. M. MUTUNGA	**M.K. IBRAHIM**
CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYAg