

**TITLE: Wananchi Group (Kenya) Limited v Communications Commission of Kenya & another [2013]**

**VENUE: IN THE HIGH COURT OF KENYA AT NAIROBI**

**CASE ID: PETITION NO 98 OF 2012**

**AUTHORING JUDGE: MUMBI NGUGI J**

**DATE OF DECISION: 28<sup>th</sup> May 2013**

**PLAINTIFF: WANANCHI GROUP (KENYA) LIMITED**

**DEFENDANT: 1.THE COMMUNICATIONS COMMISSION OF KENYA**

**2. KENYA BROADCASTING CORPORATION**

**3. MULTICHOICE (KENYA) LTD**

**KEYWORDS: ICT, Information and communication**

## **JUDGMENT**

### **Introduction**

1. This petition pits Wananchi Group Kenya Limited (**the petitioner**), against the Communication Commission of Kenya (**CCK**), a statutory body established under the provisions of the Kenya Information and Communications Act, Cap 411A Laws of Kenya, and the Kenya Broadcasting Corporation (**KBC**), also a statutory body, established under the Kenya Broadcasting Corporation Act.

2. The petitioner, which describes itself as the leading media and telecommunications operator in East Africa, was established in 2000. It states that it provides its services under both cable and satellite platforms and enables information sharing, learning and entertainment into everyday life through internet, television and telephone services. It also offers, through its affiliates, broadcasting services on the basis of permits issued by the Minister for Information and Communication.

3. CCK is the municipal body responsible for the implementation of the international obligations that Kenya owes to the International Telecommunication Union (**ITU**), a specialized United Nations agency in the field of Information and Communications Technology to which Kenya is a member. KBC has the statutory mandate to inform, educate and entertain the general public. It is also designated, under section 46E of the Kenya Information and Communications Act 1998, as the public broadcaster to provide public broadcasting services.

4. The Interested Party, Multi Choice Kenya Limited (**Multi Choice**), which provides subscription based television services under the DSTv brand in Kenya and the rest of Africa, was joined as a party to these proceedings as the basis of the petitioner's complaint revolves around the joint venture between KBC and Multi Choice.

### **Background**

5. The facts forming the background to this petition as they appear from the parties' pleadings and submissions are not in dispute. Broadcasting in Kenya has hitherto been carried out on an analogue platform which requires one dedicated frequency in a defined area for a particular television channel. TV broadcasting services are currently offered in VHF and UHF frequency bands (46-68 MHz, 174-230 MHz and 470-862MHz) which is in

accordance with the Geneva 1989 (GE 89). However, in 2006, the ITU organized and hosted an international conference known as Regional Radio Communications Conference 2006, where it was resolved that its member states would migrate from analogue broadcasting technology to digital broadcasting technology by 17<sup>th</sup> June 2015.

6. The migration was important because it would result in efficient use of the limited frequency spectrum, more channels in one frequency as well as freeing up frequencies for other services, additional services, and higher video and audio quality. It would also lead to enhanced innovation due to competition arising from new entrants such as new broadcasters and developers of interactive applications. The intention was to ensure that consumers have a wider choice of enhanced broadcasting applications, multimedia data and entertainment services.

7. Even though the deadline set by ITU for the switchover from analogue to digital was 17<sup>th</sup> June 2015, the government of Kenya set itself a deadline of December 2012 in order to implement the recommendation made by the Task Force established by the Minister for Information and Communications known as '**Task Force on the Migration from Analogue to Digital Broadcasting**'. The Task Force also recommended that the migration be undertaken in three phases and that there be a common transmission of digital broadcasting signal which would be done by a separate entity.

8. The 1<sup>st</sup> respondent was designated as the sector regulator for broadcasting while the 2<sup>nd</sup> respondent as the public broadcaster was mandated to form an independent company to run signal distribution services in order to avoid conflict of interest. Pursuant to these recommendations, the Kenya Communications (Amendment) Act 2008 was enacted. It extended the 1<sup>st</sup> respondent's licensing responsibilities as well as other regulatory powers and duties in relation to broadcasting.

9. In February 2008, the 2<sup>nd</sup> respondent was granted conditional authority to provide broadcasting signal distribution services as the public broadcaster. It was required to form a company to offer distribution services, which it did by the incorporation of a company known as M/s Signet Limited. `

### **The Petition**

10. In the petition dated 22<sup>nd</sup> March 2012 and supported by the affidavit sworn by **Mr. Richard W. Bell**, the Chief Executive Officer of the petitioner, sworn on the same date, the petitioner seeks the following orders;

(i) **A Declaration as a consequence of selective interpretation of the Kenya Information and Communications Act, 1998 as well as failure to enforce its provisions in an even-headed (*sic*) manner, the 1<sup>st</sup> respondent has discriminated against the petitioner in breach of Article 27(1) and (2) of the Constitution.**

(ii) **A declaration that as a consequence of selective interpretation and enforcement of the provisions of the Kenya Information and communications Act, 1998 the 1<sup>st</sup> respondent has violated the petitioner's freedom of media as enshrined in Articles 34(1) and (2) of the Constitution.**

(iii) **An order requiring the 1<sup>st</sup> respondent to enforce the provisions of section 46(N) and 46(O) of the Kenya Information and Communications Act, 1998 as well as Regulations 11 and 16 of the Kenya information and communications, 2009 (*sic*) as prescribed with respect to all parties and not selectively.**

(iv) **An order restraining the 2<sup>nd</sup> respondent whether by itself or through SIGNET from providing signal distribution services until and when (*sic*) it is duly licensed under section 46N of the Kenya Information and Communications**

Act, 1998 which license should contain a condition that it has to provide the said broadcasting signal distribution services should (sic);

- (a) Be a common carrier to all broadcasting licensees and only broadcasting licensees.
- (b) Provide services promptly upon request, in an equitable, reasonable, non-preferential and non-discriminatory manner
- (c) Provide capability for diversity of broadcast services and content.
- (d) Provide an open network that is inter-operable with other signal distribution network.
- (v) Such other and/or further relief as this Honourable Court may deem fit to grant.
- (vi) An order that the costs of and occasioned by this Petition be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

#### **The Petitioner's Case**

11. The petitioner's case as presented by its Learned Counsel, Mr. Amoko, is that the respondents have treated some players more favourably in respect to access to digital broadcasting on the broadcasting signal distribution system provided by the 2<sup>nd</sup> respondent.

12. The petitioner alleges that CCK and KBC are in breach of their statutory duty because they are offering a commercial advantage to the Interested Party by allowing it to broadcast on the digital platform while denying the petitioner the opportunity to broadcast on the same platform. It alleges that by affording Multi Choice preferential treatment, the respondents are not only in breach of statutory provisions contained in the Kenya Information and Communication Act, but are also in violation of Articles 27 of the Constitution on the right of the petitioner to equal treatment before the law, Article 33 on the right to freedom of expression, Article 34(1) on freedom of the media and Article 47 on the right to fair administrative action.

13. The petitioner states that sometime in 2011, it noted that there were unfair trade practices in the Digital Terrestrial Platform (DTT) which was under the control of SIGNET, a subsidiary of KBC. In February 2011, it applied for licences to provide its services on the digital platform by letter dated 8<sup>th</sup> February 2011, but the 1<sup>st</sup> respondent, by letter dated 15<sup>th</sup> February 2011, indicated that it could not act on the petitioner's application as the issue was still the subject of discussion by the Digital Transmission Committee.

14. The petitioner, which had also approached KBC with a view to offering its service on the digital platform, a request which the 2<sup>nd</sup> respondent had not acceded to, then sent a complaint of unfair trade practices against KBC to CCK as the industry regulator, a complaint that has never been acted upon.

15. It would appear from the petitioner's pleadings and submissions that the core of its grievance is that it has not been permitted to broadcast on the digital platform while KBC has permitted, initially, SMART TV, which thereafter stopped broadcasting, and then from 2011, it allowed Multi Choice through GoTV in a joint venture with KBC.

16. The petitioner alleges that this joint venture was entered into in violation of regulation 11(6) of the Kenya Communications (Broadcasting) Regulations 2009 since there was no tender as required by the Public Procurement and Disposal Act, 2005, in particular the regulations relating to private-public partnership.

17. The petitioner avers that when it applied to be permitted to transmit on the DTT platform, it was informed that it could only apply for a broadcast licence in respect of broadcasting services that it was offering prior to the 2009

Act. It contends, however, that it had not applied for new services but for permission to provide broadcast services on the same terms as GoTV was providing on the digital platform, and that the digital platform did not exist prior to 2009. It also submits that GoTV does not have a DTT licence, and no DTT licenses have been issued.

18. The petitioner submits that CCK has failed to perform its statutory mandate and has thereby given GoTV the advantage of being the only player transmitting on the digital platform and selling set top boxes to consumers which are locked and only capable of receiving broadcast services offered by GoTV.

19. The petitioner also alleges violation of freedom of the media and freedom of expression. In this regard, it asserts that the discriminatory actions of the respondents in favour of Multi Choice and GoTV have denied it an opportunity to transmit on the digital platform; that this has violated its rights under Article 34(1); that the licensing procedure being pursued by the state is designed to favour the Interested Party; that the said procedure is not independent of the control of government and media interests; and the 2<sup>nd</sup> respondent is attempting to arm-twist the petitioner into entering into a joint venture with it.

20. The petitioner also argues that the acts of the respondents have curtailed the rights of the public under Article 33(1) to freedom of expression as Multi Choice is being allowed to provide set up boxes which are locked and can only receive content from GoTV.

21. The petitioner alleges that the respondent is failing in its responsibilities and denying the petitioner and the public equal protection of the law. It contends that there is supposed to be openness and non-discrimination in provision of signals; that its competitor is not being required to obtain a licence due to the joint venture with the 2<sup>nd</sup> respondent; and there is consequently violation of the petitioner's rights under the Constitution to non-discrimination and equal protection of the law, as well as freedom of expression and of the media.

22. The petitioner relied on the case of **Red Lion Broadcasting Co. v FCC 395 U.S 367 (1969)** to emphasise the role of the 1<sup>st</sup> respondent as a regulator of broadcasting against the constitutional provisions of freedom of expression and freedom of the media.

## **The Response**

### **The 1<sup>st</sup> Respondent's Case**

23. The case for the 1<sup>st</sup> respondent was presented by its Learned Counsel, Mr. Kilonzo, who relied on the affidavit of Mr. John Omo, the Commission Secretary of the 1<sup>st</sup> respondent, dated 22<sup>nd</sup> June 2012 and written submissions dated 16<sup>th</sup> November 2012. According to the 2<sup>nd</sup> respondent, the petitioner has a permit to provide direct to home (DTH) television services or cable services that do not require frequency resources. It concedes that prior into the amendment of the Kenya Communications Act, 1998, which came to force on 2<sup>nd</sup> January 2009, there were no regulations governing the broadcast sector; that the Minister would issue a licence and the licensee would go to the 1<sup>st</sup> respondent to obtain a frequency resource; and that for a broadcaster providing DTH or cable broadcasting, there was no need to go to the respondent to obtain a frequency resource.

24. The 1<sup>st</sup> respondent denies that there has been any discrimination against the petitioner. It submits that Section 46(1) gives the Minister power to make transitional provisions; that it had invited applications for issuance of broadcast licences under the new regulatory regime but the High Court (Warsame J, as he then was) had issued orders in **Magic Radio Ltd –vs- The Communications Commission of Kenya, Misc Civil Applic No. JR 284 of 2011**, restraining the issue of broadcast licences under the new regulatory framework; that in another suit

challenging the decision of the state to switch from analogue broadcasting, the High Court, Lenaola J, had in **Media Owners Association -vs- The Communications Commission of Kenya and 2 Others, Petition No. 244 of 2011**, issued injunctive orders restraining the Commission from interfering with licences, frequencies, spectrums and broadcasting services pending the hearing and determination of the petition. The 1<sup>st</sup> respondent submitted that the two matters which are the subject of the orders are still pending and the orders are still in force, and it could therefore not commence the process of issuing new licences while the orders were still subsisting.

25. CCK contends that the petitioner is a new entrant in the frequency distribution field and with the stay of the migration from analogue to digital, there is no framework under which the petitioner can be granted a licence under the framework, and there can therefore be no discrimination as the relevant law has been stayed by the court.

26. With regard to the signal distribution authority given to KBC, CCK contends that the authority was given much earlier, through a letter dated 28<sup>th</sup> February 1998; that the authority permitted KBC to form the company known as Signet; and consequently, the petitioner has not established a factional background to be entitled to the orders it seeks.

27. CCK also questions the jurisdiction of this court to hear this petition. It argues that the petitioner is wrongly before this court as section 102 of the Kenya Information and Communications Act establishes an Appeals Tribunal to which the petitioner should have sought redress. It relies on various decisions of this court for the proposition that if there is a dispute resolution mechanism established, parties must resort to it before coming to the High Court; and that therefore this court has no jurisdiction at this point in time as the dispute resolution mechanism set up under the relevant statute has not been invoked. It therefore urges the court to dismiss the petition with costs for two counsel.

#### **The 2<sup>nd</sup> Respondent's Case**

28. Mr. Ndambiri presented the case for KBC, the 2<sup>nd</sup> respondent. He relied on the affidavit of **Mr. Waithaka Waihenya** sworn on 4<sup>th</sup> June 2012 and written submissions dated 20<sup>th</sup> April 2012. The 2<sup>nd</sup> respondent denies that it is providing signal distributions services illegally. It submits that it had authority to provide such services before the law came into force, and the law provides that it can continue so doing.

29. KBC contends that there are no facts presented before the court to support the allegation of violation of Articles 27, 33 and 34 of the Constitution; that the petitioner has no capacity or locus to bring the petition or make the allegations it has made against the parties; and that the petitioner has not shown how KBC has participated in denying, it the opportunity to provide digital broadcasting.

30. Like CCK, KBC contends that the petitioner has never been a broadcaster on the analogue or digital platform and refers the court to the petitioner's averments in the affidavit in support of the petition. It contends that the documents presented before the court show that the petitioner has never been a broadcaster; that it has never been granted a permit to deal with analogue or digital broadcasting; that the licences it has produced were issued to a different company called Cable Vision Limited; that since the petitioner has not indicated that it is bringing the suit on behalf of others or in the public interest, it has no locus and its petition should be struck out with costs.

#### **The Interested Party's Case**

31. Mr. Ouma for the Interested Party associated himself with the submissions of the 1<sup>st</sup> and 2<sup>nd</sup> respondent and urged the court to dismiss the petition.

### **The Petitioner's Rejoinder**

32. In reply to the submissions by the respondents, Mr. Amoko submitted that KBC is allowing Multi Choice to provide public subscription services while locking out the petitioner from the market; and that CCK has ignored its clear statutory obligations as the petitioner has been applying for and been denied a chance to compete on the digital platform.

33. To the challenge to its capacity to bring this petition as the licences it has annexed are in the names of other companies, Mr. Amoko submitted that the petitioner has capacity as all the letters indicate that the applicants are all part of the Wananchi Group.

34. With regard to the letter from the Minister dated 28<sup>th</sup> of February 2008 on the basis of which KBC contends that it has authority to operate as a signal distributor, Mr. Amoko submitted that the letter was subject to a licence; that KBC is operating without a licence; that the Act did not make exceptions or permit new entrants to the broadcast market to be treated differently, and so permitting KBC to operate without a licence had led to a violation of the petitioner's rights.

35. The petitioner asserts that the cases in which there are stay orders on the basis of which CCK contends that it cannot issue licences do not apply to broadcasting signals, and if they do, KBC should not be exempt.

36. It maintains however, that the cases have nothing to do with the issues now before the court; that the petitioner's problems with CCK with regard to the digital broadcasting predate the cases which are in court, which were instituted in November, 2011; that the interim orders granted in those proceedings have nothing to do with broadcasting on the digital platform nor do they address and have anything to do with broadcasting signal distribution; that in the Media owners case, the interim orders are intended to stop interference with existing licences and frequencies of the petitioners; while the orders in the Magic Radio case are directed at a specific public notice on the licensing of new broadcasting.

37. On the question of jurisdiction and the availability of an alternative remedy, the petitioner took the position that the cases relied on by the respondents do not apply to constitutional petitions but to judicial review matters, but that in any event, the dispute in this case cannot go to the Tribunal as it is a legal issue best dealt with by the High Court.

### **Analysis and Determination**

38. From the pleadings and submissions of the parties in this matter, two main issues arise for determination:

**(i) Whether this court has jurisdiction to adjudicate the petitioner's claim.**

**(ii) Whether the petitioner's constitutional rights under Articles 27, 33 and 34(1) of the Constitution have been violated.**

### **Jurisdiction**

39. It is, I believe, well settled that when an issue with regard to the court's jurisdiction to hear and determine a matter is raised, it is incumbent on the court to deal with the question of jurisdiction first, before addressing its mind further to the matters in issue. As Nyarangi JA observed in **Owners of Motor Vessel 'Lillian S' –vs- Caltex Oil (Kenya) Limited [1989] KLR 109**;

***“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step”.***  
***(Emphasis added).***

40. The challenge to the court’s jurisdiction in this matter has been made by the 1<sup>st</sup> respondent, which submits that the court has no jurisdiction to entertain this petition because the dispute is one which ought to be determined by the Appeals Tribunal established under section 102(1) of the Kenya Communications Act, which provides as follows:

***‘There shall be established an Appeals Tribunal for the purpose of arbitrating in cases where disputes arise between the parties under this Act’.***

41. CIC has relied on several decisions of this court among them **The Speaker of National Assembly –vs- Hon. James Njenga Karume, (2008) 1 KLR (EP) 425, Kipkalya Kones –vs- Republic & Another ex-parte Kimani Wanyoike & 4 Others (2008) 3 KLR (EP) 291, Francis Gitau Parsimei & 2 Others –vs- National Alliance Party & 4 Others Petition No. 356 and 359 of 2012.** The principle enunciated in these decisions is that where there is a procedure for redress for any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

42. While recognizing the principle established in these cases, I must also bear in mind the nature of the dispute before me and the jurisdiction vested in the Appeals Tribunal under the Kenya Communication and Information Act. In this case, the petition is brought pursuant to the provisions of Articles 22, 23, 27, 33 (1), 34 and 165(3) (b) of the Constitution alleging violation of the petitioner’s constitutional rights due to the discriminatory acts of CCK and its failure to act in accordance with its statutory mandate. Under Article 22 every person has a right to institute court proceedings claiming that a right or freedom in the Bill of rights has been violated. Article 23 read with Article 165(3) (b) of the Constitution vests this court with jurisdiction to determine whether a right or fundamental freedom has been violated. In my view therefore, this court has jurisdiction to determine this petition in so far as it alleges that the rights and fundamental freedoms of the petitioner have been violated, a jurisdiction that the Appeals Tribunal under the Act does not have.

#### **Whether the Petitioner’s Constitutional Rights Have Been Violated**

43. The petitioner alleges violation of its constitutional rights under the provisions of Articles 27, 33 and 34(1). It is an established principle that where a party alleges a breach of fundamental rights and freedoms, he or she must set out the provisions violated and the manner of violation. See in this regard the decision in **Anarita Karimi Njeru -vs- Republic (supra); Trusted Society of Human Rights Alliance –vs- the Attorney General & 5 Others, Petition No. 229 of 2012,** and in **International Centre for Policy and Conflict –vs- Independent Electoral and Boundaries Commission Petition No. 398 of 2012.** Consequently, the petitioner has an obligation to show how the respondents have violated its rights under Articles 27, 33 and 34(1) of the Constitution.

44. The petitioner contends that the actions of the respondents are unfair and discriminatory as they have denied it an opportunity to transmit its broadcast services on the digital platform; that these actions have also curtailed its rights under Article 34(1) of the Constitution, and that the actions of the respondents which in effect restrict transmission of broadcasting on the digital platform to one preferred privileged broadcast services provider have curtailed the right of the public to freedom of expression as stipulated by Article 33(1) of the Constitution.

45. The petitioner contends further that the respondents have also violated Article 34(3) of the Constitution because the broadcasting signal distribution undertaken by the 2<sup>nd</sup> respondent is outside the extant licensing regime prescribed by the Kenya Information and Communications Act, and the regulations made thereunder. In addition, it also alleges that the fact that KBC has been granted authority to engage in broadcasting signal distribution services indicates that the licensing procedure is not independent of control by government.

46. The starting point in considering these allegations by the petitioner is to consider the legislative regime and history prior to its enactment. It is common ground that prior to 1998, there was no regulatory regime in broadcasting, and that broadcasting licences were granted by the Minister. It is also common ground that a decision of the ITU was made to emigrate from analogue to digital transmission by 2015, and that Kenya had put in place a Task Force on Migration to guide the migration process and make appropriate recommendations with regard to its migration by December 2012.

47. I have noted that the regulatory regime on broadcasting was set up under the Kenya Communications (Amendment) Act, (apparently now the Kenya Information and Communication Act) which came into force on 2<sup>nd</sup> January 2009. The petitioner alleges violation of its rights under the Constitution consequent upon the failure by the 1<sup>st</sup> respondent to exercise its mandate under section 46N and 46O of the Act. Section 46N is in the following terms:

***46N. (1) Subject to this Act, no person shall provide signal distribution services within Kenya or from Kenya to other countries except in accordance with a licence issued under this Part.***

***(2) Any person who contravenes subsection (1) shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or both 46O. (1) The Commission may upon an application in the prescribed manner and subject to such conditions as it may deem necessary, grant a licence authorizing any person or persons to provide signal distribution Services.***

48. Section 46O(2) sets out the conditions to which a signal distribution licence is subject to. It provides that a signal distribution licence granted under the section may require the licensee to—

***(a) provide signal distribution services as a common carrier to broadcasting licensees;***

***(b) provide services promptly upon request, in an equitable, reasonable, non-preferential and non-discriminatory manner;***

***(c) provide capability for a diversity of broadcast services and content;***

***(d) provide an open network that is interoperable with other signal distribution networks; and***

***(e) comply with any other conditions that the Commission may determine.*** (Emphasis added)

49. As I understand it, the petitioner's grievance against the respondents is in two limbs. First, it is that CCK has failed to exercise its mandate to require that KBC obtains a signal distribution licence as required under Section 46N(1) set out above, and secondly, that it should offer such signal distribution services in a non-discriminatory manner that is consistent with the requirements of section 46O. The petitioner sees the continued preferential treatment of Multi Choice and GoTV by the KBC as violating its rights under the Constitution. It also sees the fact that the KBC/Multi Choice joint venture has allowed GoTV to sell locked set-top boxes which can only receive content from GoTV as being a violation of its right and the rights of the public under Article 33.

50. The response to this by CCK is that the petitioner has never been a broadcaster on the analogue platform; that the licences in question relate to migration from the analogue to the digital platform; that priority is being given to those broadcasters which were already broadcasting on the analogue platform, and the petitioner is applying for a licence as a new entrant; and that CCK is not able to issue the licence to the petitioner as there are court orders barring it from so doing. The respondents also counter that KBC had authority issued prior to the enactment of the Kenya Information and Communication Act to provide signal distribution services and to form a company for provision of such services. The respondents have not addressed the question of the closed set-top boxes on sale to consumers by GoTV.

51. As the industry regulator, CCK under the law currently in force has a duty to implement the policy and law on broadcasting. The ICT Sector Policy Guidelines policy objectives referred to by the petitioner include ***‘encouraging the growth of a broadcasting industry that is efficient, competitive and responsive to audience needs and susceptibilities, provision of a licensing process and for the acquisition and allocation of frequencies through an equitable process.’*** The policy objectives also include ***‘promoting fair competition, innovation and investment in the broadcasting industry.’***

52. The legislative and policy provisions must be looked at and implemented in accordance with the dictates of the Constitution. As public entities, the respondents are required, in implementing their legislative and policy mandates, to be guided by the national values and principles of governance in Article 10, as well as the constitutional provisions that have a bearing on the operation of the media and access to information by the public, specifically Articles 33 and 34 of the Constitution. Article 10 of the Constitution requires that the State, all State organs and all persons observe, among others, the principles of good governance, integrity, transparency and accountability.

53. These values are echoed in the provisions of the Kenya Information and Communication Act which require signal distributors to carry out their mandate ***non-preferentially and equitably***, and in the provisions of the policy that demand responsiveness to audience needs and promotion of fair competition in the broadcasting industry.

54. The question is whether the acts of the respondents impugned in this matter have indeed failed to accord with the policy and statute concerned, and have as a consequence thereof violated the rights of the petitioner and the public to freedom of expression under Article 33 and the rights of the petitioner under Articles 27 and 34 of the Constitution.

55. According to the petitioner, the operation of KBC as a signal distributor is unlawful as it has not obtained a licence under Section 46O of the Kenya Communication and Information Act, 2009. From the evidence before me, KBC, as the national broadcaster, was authorized to operate as a signal distributor by the Minister for Information by his letter dated 28<sup>th</sup> February 2008. The grant of this authority followed the recommendation of the Task Force on Migration from the analogue to the digital platform, which all parties acknowledge has set the stage for the migration required by the ITU in 2006. This authorization predated the enactment of the Kenya Information and Communication Act, which came into force on 2<sup>nd</sup> January, 2009. The Transitional Provisions of Kenya Information and Communication Act contained in the Fifth Schedule to the Act, Section 46R, provide as follows:

**1. In this Schedule, unless the context requires otherwise, “broadcasting permits” means any authority given prior to the commencement of this Act by the Minister in charge of broadcasting authorizing any person to undertake broadcasting services.**

**2. 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.**

56. My reading of this provision is that any broadcaster which held a permit from the Minister under the unregulated regime did not have to apply for a permit under the Act until after the expiry of one year from the effective date. This implies that KBC, which had been given authority to act as a digital signal distributor in February 2008, was entitled to continue operating without applying for a licence for a year after the commencement of the Act, before the expiry of which it would be required to apply for a signal distribution licence.

57. It appears to me from the available evidence that KBC has not applied for a signal distribution licence after the expiry of one year from the commencement date, and to that extent, since there is no indication from the evidence that KBC has applied for and been granted a signal distribution licence in accordance with the provisions of section 46N of the Kenya Information and Communications Act, the petitioner is correct that the 2<sup>nd</sup> respondent is operating in breach of the law.

58. This petition, however, is a constitutional petition alleging violation of the petitioner’s constitutional rights under Articles 27, 33 and 34 of the Constitution. Does the failure of the 2<sup>nd</sup> respondent to apply for a licence as required under section 46N(1), and the failure by the 1<sup>st</sup> respondent to enforce the provisions by taking action in accordance with section 46N(2) violate the said Articles of the Constitution?

59. Article 33(1) (a) provides that;

**“every person has the right to freedom of expression, which includes;**

**(a) freedom to seek, receive or impart information or ideas**

**(b) freedom of artistic creativity; and**

**(c) academic freedom and freedom of scientific research.’**

60. In my view, there is no violation of the petitioner’s rights in non-enforcement of Section 46N(1) with regard to KBC. The failure to require that KBC applies for a licence as a signal distributor in accordance with the above section, while it may demonstrate a dereliction of duty by CCK, does not, in my view, curtail in any way the right of the petitioner or of the public to seek, receive, or impart information and ideas.

61. The petitioner is aggrieved that CCK has not licensed it to broadcast on the digital platform. The response by CCK is that the petitioner was not a broadcaster on the analogue platform, and is therefore a new entrant in the broadcasting market, an argument echoed by KBC. That may well be the case.

62. However, my perusal of the Kenya Information and Communication Act does not indicate any limitation of the right to broadcast on the digital platform to only those broadcasters who were already operating on the analogue platform. It may require, as the terms used are 'migration' from analogue to digital, that priority is given to those organizations which were already involved in the broadcast sector and who already held permits. It cannot, however, mean that no new entrants and applicants will be considered for licensing.

63. To the extent, therefore, that CCK failed to address the petitioner's application to broadcast on the digital platform, I would have found that CCK has violated the petitioner's right to impart ideas, and thus limited its freedom of expression and of the media. This would have been the case had the circumstances pertaining to the issue of licences been the same as they were at the time the petitioner had applied for a licence in February 2011.

64. CCK's answer to the petitioner's claim with regard to its application for a licence is that it has not yet started issuing licences due to the injunctions issued by the court in two cases, **Magic Radio Ltd -vs- The Communications Commission of Kenya and Media Owners Association -vs- The Communications Commission of Kenya and 2 Others** (supra). I have perused the court files and read the pleadings and the orders issued by the court in these two matters. In the **Magic Radio** case, Warsame J (as he then was) on 14<sup>th</sup> November 2011 made, inter alia, the following orders:

**1. THAT leave be and is hereby granted to the applicant to apply for Judicial Review and specifically for orders that:**

**a) AN ORDER OF CERTIORARI do issue to remove into the High Court and quash the decision of the Communications Commission of Kenya contained in the "Public Notice" appearing in the Daily Nation Newspaper dated the 11<sup>th</sup> November, 2011 "Licensing of Existing Broadcastings Under the New Regulatory Framework."**

**b) AN ORDER OF PROHIBITION do issue prohibiting the Communications commission of Kenya from inviting applications for licences for broadcasting services and/ or issuing licenses for broadcasting services on the basis that such applicants must have permits issued by the Minister for Information and Broadcasting either as it has purported to do by the said Public Notice appearing in the Daily Nation Newspaper dated the 11<sup>th</sup> November, 2011 or at all.**

**c) AN ORDER OF MANDAMUS do issue directed at the Communication Commission of Kenya to issue the broadcasting licences describes in Section 46B of the Kenya Information and Communications Act, 1998 as required by Section 46C of the said Act in strict adherence to the functions specified in Section 46A and the criteria set out in Section 46(D)(2),46(F) and 46(G) of the said Act.**

**2. THAT the said leave shall operate as a stay of the application process contained in the Respondent's "Public Notice" appearing in the Daily Nation Newspaper dated the 11<sup>th</sup> November, 2011 pending the hearing and determination of the substantive application and/ or further order.** (Emphasis added)

65. In the **Media Owners'** case, Justice Lenaola, in a petition challenging the decision of the state to switch from analogue to digital broadcasting by December, 2012, issued injunctive orders restraining the Commission from interfering with the existing licenses, frequencies, spectrums and broadcasting services pending the hearing and determination of the petition. Order 2 in the said order issued on 14<sup>th</sup> November 2011 is in the following terms:

***‘THAT a conservatory injunctive order be and is hereby issued restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents or any of them from cancelling, stopping, suspending, restricting or in any way howsoever interfering with the Petitioner’s and its members’ licences, frequencies, broadcasting spectrums and Broadcasting Services pending hearing inter partes on 16<sup>th</sup> November 2011.’***

66. Of more interest in the **Media Owners** case with regard to this petition are the orders sought in the petition dated 14<sup>th</sup> November 2011. The petitioner seeks the following orders at prayer 2 and 3 of their petition:

***2. A declaration that Article 34(3) of the Constitution contemplates and envisages an Independent Broadcasting Authority which is independent of government, political interests or commercial interests.***

***3. A declaration that the Public Notices issued on 5<sup>th</sup> August 2011 and 11<sup>th</sup> November 2011 are null and void as the 3<sup>rd</sup> respondent has no constitutional mandate to licence broadcasters under Article 34 of the Constitution.***

67. It is clear from the orders set out above that the licensing process that the petitioner in this case is seeking orders with regard to has been stopped by the court in the above orders, particularly the orders of stay issued in the **Magic Radio** case. From the pleadings in the **Media Owners** case, it is clear that the position taken by the petitioner in that matter, which pre-dates the current matter, is that there should be an independent Broadcasting Authority and amendment of the **Kenya Information and Communications Act** to provide for the licensing and allocation of Broadcasting Spectrum by such independent authority.

68. Should I issue the orders against CCK that the petitioner is urging me to issue in this case, it would lead to the absurd situation where one court has already stopped the issuance of licences under the Kenya Information and Communications Act, while the other issues orders compelling the respondent to issue licences under the same Act, a situation calculated to bring the court to disrepute. I cannot therefore, given that the court orders in the above cases are still in force, issue any orders directed at CCK with regard to the issuance of licences under the provisions of the Kenya Information and Communications Act.

#### **Claim Against the 2<sup>nd</sup> Respondent**

69. With regard to the 2<sup>nd</sup> respondent, the petitioner is aggrieved that it is providing digital signal services to the Interested Party and GoTV while denying the petitioner the same services. The response by KBC is that it has a joint venture with the Interested Party, and if the petitioner wishes to broadcast on the same terms as GoTV, it should enter into a joint venture with KBC. It appears from the averments by KBC that its entering into the joint venture with the Interested Party to provide digital transmission services through GoTV was part of a pilot project, and so it was entitled to enter into a joint venture and provide the services through GoTV. To the extent that this is the correct factual position, there is no discrimination against the petitioner by KBC.

70. However, KBC is the national broadcaster and the only entity currently authorized to provide signal distribution services. The question, then, is whether, in the provision of such signal distribution services, KBC and indeed any other entity which will be licenced under Section 46N of the Kenya Information and Communication Act, will provide such services only to those entities which enter into joint ventures with it. Put differently, on what terms and conditions will signal distribution services be provided by signal distributors?.

71. I must express some limitation, on the material before me, to adequately deal with this issue. Indeed, in my view, it is a question that can only properly be dealt with by the parties to this matter and other industry

players. Suffice to say that, in my view, it does not appear to be proper for the petitioner to be required to enter into a joint venture with KBC as a condition precedent to its being permitted to broadcast on the digital platform.

72. The petitioner is also aggrieved by the fact that not only is KBC giving preferential treatment to the Interested Party by allowing it to broadcast on the digital platform, but it is also permitting it, through GoTV, to sell locked set-top boxes which can only receive content from GoTV. The petitioner views this as a violation of the right of the public to freedom of information.

73. I have noted that none of the respondents or the Interested Party have responded to this contention by the petitioner. In the ICT Sector Policy Guidelines, it is stated that the policy objectives include ***‘encouraging the growth of a broadcasting industry that is efficient, competitive and responsive to audience needs...’*** The Kenya Information and Communication Act requires that the licence issued to a signal distributor will require, among other things, that a signal distributor:

***(d) provide an open network that is interoperable with other signal distribution networks.***

74. If it is indeed the case, as alleged by the petitioner and not denied by the respondents, that KBC and the Interested Party through their joint venture, GoTV, are providing locked set-top boxes that limit the consumer to content from only one provider, then they are not only in breach of the policy guidelines and the statutory requirements, but are also limiting the right of the public to receive information under Article 33.

75. Their actions cannot, in my view, be ***‘responsive to audience needs’***, and would limit the information available to consumers to only what the provider of the locked set-top boxes is willing to provide. This would, in turn, be a limitation of the right to freedom of expression, which CCK and KBC in accordance with the ICT Sector Policy Guidelines and the law, would be expected to foster rather than inhibit.

#### **Disposition**

76. From the foregoing, it is clear that there has been no failing by the 1<sup>st</sup> respondent as the industry regulator to adequately perform its statutory mandate given the orders of the court which are currently in force and which restrain it from issuing any licences under the Kenya Information and Communications Act, and to that extent, this petition must fail. With regard to the 2<sup>nd</sup> respondent and the issue of broadcasting on the digital platform on the same terms as the Interested Party, though I find it unjustified, I have expressed the limitation of the court with regard to this aspect of the matter, which in my view can best be resolved through consultation between the parties to this dispute and other industry players.

77. In the circumstances, I am unable to issue any of the orders sought by the petitioner. With regard to the orders that the petitioner is seeking against the CCK, such matters are already the subject of the Media Owners and Magic Radio case which are still pending before Lenaola, J, and it would be in its interest to be enjoined in the matters, if it is not yet a party, so that it can agitate its claim before the court.

78. I do find and hold, however, that the sale to consumers of locked set-top boxes limits the rights of the public under Article 33 of the Constitution, is not in conformity with the provisions of the governing law and violates the stated government policy with regard to information and communication as contained in the ICT Sector Policy Guidelines. I therefore direct that such set-top boxes as may be sold to consumers be open and operable between networks. Whatever decision will emanate from the court with regard to the issuance of broadcast licences now pending before the court, the body charged with issuance of such licences must ensure that the principles of fairness, equity and responsiveness to audience needs are respected.

79. With regard to costs, I direct that each party bears its own costs of this petition.