

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 59 OF 2013

BETWEEN

ROYAL MEDIA SERVICES LTD PETITIONER

AND

THE HON ATTORNEY GENERAL1ST RESPONDENT

THE MINISTER OF INFORMATION

AND BROADCASTING 2ND RESPONDENT

THE COMMUNICATION

COMMISSION OF KENYA.....3RD RESPONDENT

RULING NO.2

1. On Sunday, 3rd February 2013, I directed that the parties appear before me today, 4th February 2013 for further orders and or directions. The 3rd respondent, the Communications Commission of Kenya (“CCK”), has now filed a replying affidavit sworn by its Commission Secretary, Mr John Omo setting out the basis of its actions in shutting down the petitioner’s transmitters.
2. According to the CCK, it had commenced regulatory action in respect of the other frequencies that were not subject to the proceedings in the *High Court Petition No. 346 of 2012 Royal Media Services Limited v Attorney General and Others*. In deference to the Court, it forbore taking any action until judgment was delivered in that case on 18th January 2012 and conservatory orders pending appeal were issued.

3. Mr Omo depones that after the petition was heard and determined, CCK applied for warrants of search and seizure under the provisions of **section 118** of the *Criminal Procedure Code* to seize illegal transmitters which were subject to notices issued on 30th November 2012 and 3rd December 2012. On 30th January 2013, the Chief Magistrate Court did grant orders of search and seizure as follows;
- (a) *Misc. No. 152 of 2013* – Migori, Enchoro Hill in Borabu and Narok Transmitter site.
 - (b) *Misc. No. 153 of 2013* – Menengai Hill in Nakuru , Nanyuki and Gatare in Murang'a Transmitters.
 - (c) *Misc. No. 154 of 2013* – Mukuyuni, Mwingi and Karue Hill in Embu Transmitter sites.
 - (d) *Misc. No. 155 of 2013* – Mambrui in Malindi and Vuria in Taita Transmitter sites.

It is pursuant to these warrants of search and seizure that the CCK states that it proceeded to search the petitioner's transmitter premises and seize equipment. Under the terms of the warrants issued by the court, the equipment seized is to be taken before the court.

4. By the time, the petitioner came to court yesterday, all this information was unknown to it and that is why I stated at paragraph 7 of my decision of 3rd February 2013 that I would like to give the other side an opportunity to the other side to hear its case before issuing a drastic order. I consequently declined to grant mandatory orders.
5. It is not in dispute that the exercise of disabling the petitioner's transmitter stations has been completed as 17 of the petitioner's transmitters having been shut down. The conservatory orders left

for determination in the Amended Chamber Summons dated 4th February 2013 are in the nature of mandatory orders whose effect would be to restore to the petitioners the premises and the seized equipment.

6. The petitioner now seeks to invoke the supervisory jurisdiction under **Article 165(6) and (7)** which provides as follows;

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

7. According to the submission by Dr Kamau Kuria, S.C., counsel for the petitioner, the evidence before the court when taken as a whole shows that CCK was intent on undermining the judgment in **Petition No. 346 of 2012** and it is appropriate for the court to call for the records of the subordinate court in order to conduct an inquiry into the matter so as to prevent an abuse of the court process. The petitioner's case is that this conduct is evidenced by the fact that parallel enforcement proceedings were began when **Petition No. 346 of 2012** was on-going and that the action was taken during the weekend when the petitioner has no opportunity to apply for conservatory orders. Counsel submitted that the conduct by CCK constitutes an abuse of the court process and amounts to contempt of court and the court should exercise its inherent jurisdiction to investigate the matter.

8. Mr Kilonzo, appearing for the CCK, opposes the adoption of such a course. He submitted that the action taken by CCK was in consonance with the decision in *Petition No. 346 of 2012* where the Court held that CCK is entitled to take regulatory action. Furthermore, that petition in that case did not involve at all any of the frequencies that were the subject of the searches and seizures and that CCK is entitled to proceed with regulatory action in light of the clear declaration of the court regarding the regulatory authority of the CCK. Counsel also submitted that the warrants were issued pursuant to **section 118** of the *Criminal Procedure Code* and if any relief is to be given, it is provided for under the said statute.
9. I have considered the parties arguments and I must warn myself that I am not hearing or making a determination of this case. What is before me is an informal interlocutory application where the petitioner seeks orders necessary to enable the court adjudicate the case fairly and effectively.
10. In order to deal with the issues raised by the petitioner, it is important to put the judgment I delivered on 18th January 2013 in *Petition No. 346 of 2012* in perspective as the reason given by the petitioner for impugning the search and seizure warrants is that the action undermines the judgment and proceedings thereon. That judgment dealt with specific letters and notices and at paragraph 63 of the judgment I stated as follows, *“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.”

11. The matter did not deal with any other notices or other frequencies and cannot be construed to restrain CCK from taking regulatory action in any other case concerning frequencies that were not the subject of the petition. A similar argument was also dealt with at paragraphs 46 and 47 of the judgment which dealt with the effect of other cases where conservatory orders were in force; *Petition No. 244 of 2011, Media Owners Association v Attorney General, the Ministry of Information and Communication and the Communication Commission of Kenya* and *Nairobi HC Misc. Appl. No. JR 284 of 2011 Magic Radio Ltd v The Communications Commission of Kenya*.
12. The petitioner is right and indeed entitled to bring this case against CCK to impugn its action but if the argument is that the warrants of search and seizure are connected to the case I determined, then I must make it very clear that the proposed inquiry or course suggested by the petitioner cannot proceed on that basis as the licences and frequencies that were not subject to the previous proceedings.
13. Both parties concede that I have wide jurisdiction under **Article 165**. Indeed, the hallmark of our jurisprudence particularly as it pertains to enforcement of fundamental rights and freedoms is that the court must be able to fashion appropriate reliefs that deal with the exigencies of each case.

14. I am now called upon to call for the records of the subordinate court to examine the legality of the process. Warrants of search and seizure are issued by the subordinate court pursuant to specific provisions of the *Criminal Procedure Code*. A party who is dissatisfied by the issue of warrants has a right to apply to set it aside or in any case apply for revision of the Court orders to the High Court under **Part XI** of the *Criminal Procedure Code*. The High Court power of revision under the Code is merely a statutory codification of the Court's jurisdiction under **Article 165(6) and (7)** and unless there is a good reason to bypass the subordinate court or the High Court procedure established by law, the Court should resist such a temptation. I am aware that in exercising jurisdiction to enforce fundamental rights and freedoms, the High Court is unshackled by statutory and common law procedures and reliefs. But it must not be lost to the parties that fundamental rights and freedoms are protected and realised through ordinary procedures enacted by statute.
15. As I stated, at least concerning the frequencies subject of the enforcement action, there is no nexus between this case and *Petition No. 346 of 2012* apart from the fact that my judgment enunciated broad principles that would apply when CCK is exercising its statutory authority to regulate the airwaves. The Chief Magistrates Court has now acted on what appears on its face a regular process and the petitioner has right to pursue the reliefs I have alluded to independently of this cause.
16. Though I firmly believe that I have jurisdiction to call for the records of the subordinate court, I am not persuaded that these are proper proceedings to call for those records at this stage particularly where I am clear that *Petition No. 346 of 2012* dealt

with a different subject matter. I therefore decline the request by the petitioner.

17. As this matter must be disposed of urgently, I now invite the parties to address the Court on such directions as are necessary to dispose of the matter expeditiously.

DATED and DELIVERED in NAIROBI this 3rd day of February 2013.

D.S. MAJANJA
JUDGE

DIRECTIONS AND FURTHER ORDERS

Having heard the parties on the form and nature of directions, the parties agree that the issue remaining is whether the court should grant mandatory injunctions. In my view this would mean that the entire case should be heard and a conclusive decision given. I therefore direct as follows;

- (1) The 3rd respondent agrees that the Replying Affidavit of John Omo shown on 4th February 2013 shall be deemed to be the affidavit in response to the petition and it is so ordered.
- (2) The petitioner shall be at liberty to file and serve the supplementary affidavit within four days of today.
- (3) Thereafter parties to file and exchange written submissions.
- (4) Hearing of the Petition shall be on **14th February 2013** before Hon. Justice E. Ogola.

DATED and DELIVERED in NAIROBI this 3rd day of February 2013.

D.S. MAJANJA
JUDGE

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

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

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