



REPUBLIC OF KENYA
High Court at Nairobi (Nairobi Law Courts)
Petition 563 of 2012

CONSUMER FEDERATION OF KENYA (COFEK)

Suing through its officials namely

STEPHEN MUTORO, EPHRAIM GITHINJI KANAKE

and HENRY MESHACK OCHIENG.....PETITIONERS

VERSUS

MINISTER FOR INFORMATION & COMMUNICATIONS.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

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

RULING

1. The Petitioner, **CONSUMER FEDERATION OF KENYA(COFEK)** has styled itself as a registered society and has instituted the proceedings herein whilst acting in the public interest. In its Notice of Motion application expressed to be premised under Article 23(3) (f) of the Constitution and dated 10th December, 2012, it seeks the following Orders;

(a)

(b) *THAT this Honourable Court do and hereby grants conservatory orders to prevent the Respondents from switching off analogue Television signal transmission in Nairobi*

and/or any other part of the country on 31st December 2012, until 2015 in line with the global deadline pending the hearing and determination of this Application.

*(c) **THAT** this Honourable Court do and hereby grants conservatory orders to prevent the Respondents from switching off analogue Television signal transmission in Nairobi and/or any other part of the country on 31st December 2012, until 2015 in line with the global deadline pending the hearing and determination of this Petition.*

*(d) **THAT** The costs of this application be provided for.*

2. The application is supported by an affidavit sworn by the Secretary General of the Petitioner, Mr. Stephen Mutoro on 10th December 2012.

3. In opposing the Application, the 1st Respondent filed a replying affidavit sworn by Hon. Samuel L. Poghio, (the Minister for Information and Communications) on 19th December 2012 while the 3rd Respondent filed a replying affidavit sworn by Eng. Leo Borueti, the Acting Director, Multimedia Services of the 3rd Respondent. The 2nd Respondent failed to file any responses.

4. To put the matters into perspective, this Motion was argued before me on 20th December, 2012 wherein I granted an interim order in terms of prayer '(b)' of the application pending the determination of this Application. For avoidance of doubt, this order stated thus;

“THAT this Honourable Court do and hereby grants conservatory orders to prevent the Respondents from switching off analogue Television signal transmission in Nairobi and/or any other part of the country on 31st December 2012, ... pending the hearing and determination of this Application.”

I must now determine prayer (c) and (d) of the Application.

Petitioner's case

5. The Petitioner's case as set out in the grounds of the application and in the supporting affidavit sworn by Stephen Muhoro on 10th December, 2012 is straight forward.

6. It is the Petitioner's contention that *vide* advertisements in sections of the media on diverse dates and particularly on 7th December 2012, the 1st Respondent had threatened to switch off analogue Television signal transmission in Nairobi on 31st December 2012 contrary to the set global deadline of 2015. The Petitioner is aggrieved by this notice which it terms as too short.

7. The Petitioner also claims that the move to switch off is inappropriate, unreasonable and expensive to consumers, most of whom do not have sufficient funds to purchase the required set-boxes required to shift to the digital television frequency signal at an estimated cost of between Kshs.2,500.00 to Kshs.5,000.00.

8. It is their further contention that the Petitioner's move contravenes one of the key values spelt out under **Article 10** of the **Constitution** being the doctrine of Public participation in policy formulation and implementation processes particularly because consumers remain unrepresented on the Digital Television Committee which is spearheading the switch off. The Petitioner contends that the Respondents' decision to switch off will in

effect hinder millions of Kenyans from following civic education and other important matters that are related to the general elections such as voter registration, legislations, government policies and other matters of national interest.

9. It was the Petitioner's position that the broadcast media stands to lose business because many people will be locked out of access to TV and that advertising revenue will drop to the detriment of the economy as well as the broadcasters because they will not have revenue to improve the quality of their services not to mention the issue of resultant unemployment within the broadcast media industry.

10. While agreeing that the eventual switch off is necessary, Mr Kurauka advocate for the Petitioner, submitted that there is no urgency for the intended action at the moment since the global deadline switch off for digital migration is in the year 2015 and in that case there is no legal, economic and moral basis for the Respondents to impose on the Kenyan consumers an earlier deadline. In any event, the Petitioner contends that the Respondents have failed to offer sufficient public information, education and a structured campaign to raise awareness on digital migration so as to allow consumers the freedom of choice guaranteed by **Article 46** of the **Constitution**.

1st and 2nd Respondents case

11. In his affidavit, Hon. Samuel Poghio states that Kenya is a signatory to the Geneva Regional Radio Communication Conference Agreement of 2006 (hereinafter RRC-06) wherein it committed to itself migrate all analogue broadcasting services to digital broadcasting services by 2015 which is the global switch off date. However, the East African Community set the 2012 as its target year for the completion of the digital migration.

12. It was in compliance of the provisions of the Geneva Regional Radio Communication Conference Agreement of 2006 requiring digital migration that the Government has undertaken to promote the introduction and uptake of digital broadcasting in the country by managing the transition from analogue to digital broadcast which is done in accordance with the National Information and Communication Technology Policy, 2006. This digital migration is thus geared towards increasing Kenya's competitiveness in the global Information Communication Technology arena and in the furtherance of the achievement of Millennium Development Goals as well as Vision 2030. Indeed, this migration process was launched by His Excellency the President on 9th December, 2009 and has been progressive over the years.

13. It was the position of the 1st and 2nd Respondent as presented by Mr. Wamosa that this application is late in the day and has been brought *mala fides* because there is ample evidence that there has been public participation in the process and public awareness has been conducted since 2006. In any event, no one would be denied access to information and participation in important matters through the broadcast media as Nairobi and its environs has already received the digital signal. As to the issue of the costs of the set-top boxes, the 1st and 2nd Respondents contends that the Government has already zero-rated the said set-top boxes thus making them affordable to all citizens.

14. While urging me to dismiss this application, the 1st and 2nd Respondents submitted that their actions are justified, lawful, reasonable and are in good faith for the overall benefit of all Kenyans.

3rd Respondent's case

15. In his affidavit, Eng. Leo Boruett takes the same position as the 1st and 2nd Respondents but adds that in line with the RRC-06, Kenya had set its deadline for initial migration for June 2012 and towards that end, the government postponed the intended migration to December 2012 after the recommendations made by the Task Force Committee which had been set up to look into Kenya's migration to digital transmissions. He claims that the challenges that had hindered the migration in June 2012 have now been addressed and Nairobi and its environs are ready for migration from analogue to digital transmissions.

16. The 3rd Respondent submits that the decision to migrate is not abrupt, malicious or irrational and has been in the public domain since 2006 after the move was conceived through the RRC-06. That actually, between June and July 2012, the 3rd Respondent submitted evidence of how the decision to migrate from analogue to digital has been widely publicized in print and electronic media to include *inter alia* 198 advertisements on various television stations, 141 advertisements on radio channels, 5 on print media, 6 on digital screen in various parts of Nairobi and a 7 day road show was also organised wherein consumers were allowed to share their views, and where they were informed sensitized and alerted on the intended migration. It was thus the position of Mr. Nyaoga for the 3rd Respondent that sufficient public information, education and communication has been offered to consumers to raise their awareness on digital migration. He relied on the decision in **Consumer Federation of Kenya v Attorney General and 2 Others, Petition No. 11 of 2012** to the effect that what matters in such instances is that the public has knowledge of the issues.

17. In response to the allegation that the the digital migration switch will curtail the freedom of information, the 3rd Respondent submitted that it will in fact enhance the realization of this right in various ways. For example, the switch to digital will enable the consuming public to access more channels with a wider variety and better quality content using a single aerial at minimal costs. Mr. Nyaoga argued that the issue before the court is not one of the freedom of information but one on mere deadlines. And in any event, there are other multiple sources of information readily available to the consuming public such as radio, newspapers and internet from which consumers may profit from during the period of transition. Accordingly, it cannot be true that millions of Kenyans will be locked out from following civic education and other important matters relating to the General Elections.

18. In the end, the 3rd Respondent, like the 1st and 2nd Respondents, contends that it is in the wider interest of the public that Kenya migrates from analogue to digital migration which is in the wider goal of achieving Vision 2030. And it was also Mr. Nyaoga's submission that it would not be justifiable to wait until the last minute in 2015 in order to allow the switch off. According to him, the migration can be done so long as the country is prepared and there are resources to enable the switch off.

19. While urging me to dismiss the application, Mr. Nyaoga contends that the orders sought herein are prejudicial to the Respondents and also to the broadcasters since the switch

off has economic benefits. And further that since there are only six signatures in support of the application, the same cannot be said to be a Kenyan problem.

Findings

20. I have considered the application and rival submissions before me and I am conscious of the fact that at this stage, I am being called upon to exercise discretion at an interlocutory stage and without going to the merits of the Petition. In considering whether to grant the conservatory order sought, I will address my mind to the conditions for granting an interlocutory injunction which are now well settled in **Giella v Cassman Brown & Co Ltd (1973) EA 358** as follows; first an applicant must show a *prima facie* case with probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages and thirdly that if the court is in doubt it will decide the application on a balance of convenience.

21. I now turn to applying these principles in the present case. On the face of it, I am satisfied that the Petitioner has established that the citizens will be prejudiced by the digital migration and they will suffer irreparable injury which would never be adequately compensated in damages. I say so, for reasons that will be seen shortly.

22. The Petitioners have clearly demonstrated that the citizens freedom of information will be limited by the digital migration. In my view, it is not enough for the Respondents to contend that they have fully sensitized the public on the import and created awareness of this digital immigration. It is equally not sufficient for them to allege that they have cushioned the consumers by subsidizing the costs of the set-top boxes to affordable amounts in order to make them accessible to a common Kenyan. The Respondents has not availed such evidence before this Court. I am satisfied that the Petitioner has clearly demonstrated that the consumers who have not acquired the required set-tops to receive the digital transmission will be heavily prejudiced by this migration which harm cannot reasonably can never be compensated in damages.

23. Even though the Respondents have proven the extensive measures they have undertaken to create public awareness of this digital migration since 2006, I am in agreement with the Petitioner that the timing of the switch is not proper. As a country, we are in a crucial stage of the electioneering period. Accordingly, the consumers have the right to benefit from the information available in the broadcast media as well as the information available in other media forums to enable them make informed decisions. In any event, I do not see the hurry for the migration. I am fully aware that the Respondents and the government has everything set and is prepared for the digital migration especially in Nairobi and its environs. The rest of the country is unaffected.

24. However, as stated elsewhere above, I am not satisfied that the citizens are prepared for this migration. I say so because it is unconverted that the required set-tops are available at an estimated cost of between Kshs.2,500/= to Kshs.5,000/= which amounts the Petitioner claims is way above the reach of many ordinary Kenyans. This are the citizens who would be heavily prejudiced if they would be without access to the television in the election year. In any event, I am compelled to grant the order because the Respondents have failed to

demonstrate the harm they would suffer if the digital migration would be held in abeyance until the final determination of the Petition herein. I also note that the global deadline for the switch off is in 2015 and I believe that the digital migration can and should await the determination of all the issues raised in the Petition.

25. While doing so, I am in total agreement with Mr. Nyaoga that the issue of the deadline can be easily negotiated between the parties and in line with **Article 159(2)(c) of the Constitution**, I shall grant parties the opportunity to negotiate on agreeable deadline even as I proceed to fix the petition for hearing on a priority basis.

26. For these reasons, I allow the Application in terms of prayer (c). For avoidance of doubt the final orders are that;

(i) *A conservatory order is hereby issued preventing the Respondents from switching off analogue television signal transmission in Nairobi and/or any other part of the country pending the hearing and determination of this Petition.*

(ii) *The costs of this Petition shall be in the cause.*

27. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11TH DAY OF JANUARY,
2013**

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Nyaoga for 3rd Respondent

No appearance for Applicant

Mr. Wambua for Attorney General

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE

Further Order

Petition shall be heard on 20/2/2013

Parties to file Submissions

Notice to issue

ISAAC LENAOLA

JUDGE



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