REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mutunga, CJ & P; Rawal, DCJ & V-P; Tunoi, Ibrahim, Ojwang, Wanjala, Njoki, SCJJ.)

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. THE 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

(Being an appeal from the Judgment of the Court of Appeal sitting at Nairobi (Nambuye, Maraga and Musinga JJ.A)delivered on 28th March, 2014 in Nairobi Civil Appeal No.4 of 2014)

JUDGMENT

A. INTRODUCTION

[1]This is an appeal from the Judgment of the Court of Appeal sitting in Nairobi dated 28th March, 2014 in *Civil Appeal No.4 of 2014*, which overturned the decision of the High Court *(Majanja, J)* in Nairobi High Court *Constitutional Petition No. 557 of 2014*. Subsequent to the determination by the Court of Appeal, four Petitions were filed:

(i) Petition No.14 of 2014,by Communications Commission of Kenya;

(ii) Petition No. 14A of 2014,by Pan African Network Group Kenya Limited, and Startimes Media Kenya Limited;

(iii) Petition No. 14B of 2014, by Signet Kenya Limited; and

(iv) Petition No. 14C of 2014,by the Attorney-General and the Ministry of Information and Technology.

B. BACKGROUND

[2]On the 22nd of November 2013,the 1st,2nd and 3rd respondents filed in the High Court Petition No.557 of 2013,***Royal Media Services Limited and Others v. Attorney-General and Others,***seeking*inter alia,* an order compelling the 1stappellant to issue them with Broadcasting Signal Distribution (BSD)licences and frequencies; and an order restraining the 1st appellant herein from switching off their analogue frequencies, broadcasting spectrums and broadcasting services pending the issuance of a BSD licence.The learned trial Judge delivered Judgment on the 23rd December, 2013 dismissing the petition with costs.

[3]The following three issues were framed for determination by the trial Court:

(a) *whether, and to what extent, the petitioners are entitled to be issued with BSD licences by the CCK; and whether issuance of such licences to other licensees, to the exclusion of the petitioners, is a violation of* ***Articles 33 and 34 of the Constitution;***

(b) *whether the implementation of digital migration constitutes a violation of the petitioners' fundamental rights and freedoms and, if so, whether the process should be stopped, delayed or varied, in order to vindicate the petitioners' fundamental rights;*

(c) *whether, as regards the 4th, 5th, 6th and 7th respondents, they have breached and/or violated the petitioners' intellectual property rights.*

[4]The outcome of the decision was that the petitioners at the High Court were not *entitled* to be issued with BSD licencesmerely on the basis of their established status, or on the basis of *legitimate expectation*on their part; and further, that the implementation of the digital migration was not a violation of the petitioners' fundamental rights and freedoms. Finally, the Court held that thepetitioners had not established that their *intellectual property rights* had been infringed.

[5]Being aggrieved by the decision, the 1st,2nd and 3rd respondents herein filed Nairobi Civil Appeal No.4 of 2014:***Royal Media Services Limited and Others v. Attorney-General and Others.***

[6]The learned Judges of the Court of Appeal delivered separate, but largely concurring Judgments on the 28th of March, 2014 setting aside the Judgment of the High Court.

[7]*Maraga, J.A* allowed the appeal,and set aside the Judgment of the High Court,with orders in concurrence with those set out in the Judgment of *Nambuye, J.A*. Similarly, *Musinga, J.A* allowed the appeal,holding that the Communications Commission of Kenya was*"not the independent body contemplated by Article 34(3)(b) and 34(5) of the Constitution,"*and could therefore not grant BSD licences.

[8]*Nambuye, J.A*made the following detailed Orders, expressing the position of the Court:

(i) in view of the violation of the Constitution in failing to reconstitute CCK in tandem with the requirements of Article 34(3)(b), the appellants were entitled to seek relief by way of a constitutional petition;

(ii) the 3rd respondent's direction to the 4th, 5th, 6th and 7th respondents to air the appellants' Free to Air (FTA) programmes without their consent, is a violation of the appellants' intellectual property rights and is hereby declared null and void;

(iii) in its composition at the material time, CCK was not the independent body envisaged by Article 34(3)(b) to regulate airwaves in Kenya, after the promulgation of the Constitution of Kenya, 2010; consequently the public procurement process of determining applications for the BSD licences which it conducted in connection with this matter, was null and void;

(iv) an independent body or authority constituted strictly in accordance with Article 34(3)(b), shall conduct the tendering process afresh;

(v) in view of the appellants' massive investment in the broadcasting industry, we direct that the independent regulator constituted as stated above do issue a BSD licence to the appellants, without going through the tendering process, upon meeting the terms and conditions set out in the appropriate law and applicable to other licensees;

(vi) the issuance of a BSD licence to the 6th respondent is hereby declared null and void; the 3rd respondent shall refund to the 6th respondent whatever fees it paid for that licence;

(vii) pending compliance with the above orders as regards BSD licensing, the 2nd and 3rd respondents are hereby restrained from switching off the appellants' analogue frequencies, broadcast spectrums and broadcasting services; and

(viii) in order to comply with these orders, the new switch-off date shall not be later than 30th September, 2014.

[9]The foregoing orders, as well as consequential orders, prompted the appellants to file appeals to this Court. An application under certificate of urgency was filed by the 1st and the 5th appellants herein,seeking interim stay orders as against the Court of Appeal decision. The 2nd appellant also filed an application for stay orders on 8th April, 2014. On 10th April, 2014 when the interlocutory application came up before *Ojwang* and *Wanjala, SCJJ*,the Court noted the public-interest implications in the matter, and directed that the appeal be disposed of on a priority basis. After hearing the parties on 11th April, 2014 the Court made the following orders:

(i) Signet Kenya Limited, Star Times Media Limited, Pan Africa Network Group Kenya Limited and GOtv Kenya Limited are hereby prohibited from broadcasting any content from Royal Media Services Limited, Nation Media Group Limited, and Standard Group Limited without their consent, pending the hearing and determination of the intended appeal;

(ii) the Communications Commission of Kenya is prohibited from switching off any frequencies, broadcast spectrums or broadcasting services pending the hearing and determination of the intended appeal;

(iii) the legal effect of the Court of Appeal's declaration that the Communications Commission of Kenya was not the independent body envisaged under Article 34(3)(b) of the Constitution, as a regulator of airwaves, is held in abeyance pending the hearing and determination of the intended appeal;

(iv) the declaration by the Court of Appeal that the BSD licence issued to Pan Africa Network Group Kenya Limited is null and void, shall rest in abeyance, pending the hearing and determination of the intended Appeal;

(v) the Court of Appeal's Order setting the new switch-off date to a date not later than 30th September, 2014 shall remain valid, pending the hearing and determination of the appeal;

(vi) the main Petition(s)and Record(s) of Appeal, and the written submissions in support thereof, shall be filed and served within 14 days from the date hereof, or as this Court may from time-to-time direct;

(vii) the respondents shall file and serve their written responses within 7 days after service;

(viii) the appellant(s) shall thereafter, file and serve any written responses within 7 days from the date of service;

(ix) authorities filed together with written submissions shall conform to the requirements of Rule 16(2) of the Supreme Court Rules;

(x) this matter is to be mentioned on 27th May, 2014 before the Deputy Registrar of the Supreme Court, to confirm compliance and to fix hearing dates on a priority basis.

[10]For purposes of this appeal,*Petition No. 14 of 2014,* was treated as the lead file. Parties were represented by counsel as follows: learned Senior Counsel Mr. Muite appeared for the 1st, 2nd and 3rdrespondents, withlearned counsel,Messrs. Oduol, Kimani, Mansur and Murgor.For the 4th respondent,learned counsel Mr. Kurauka, Mr. Monari for the 5th respondent,and learned counsel, Mr. Wekesa for the 6th respondent. For the 1st appellant, learned Senior Counsel, Mr Ojiambo appeared with learned counsel, Mr. Kilonzo.The 2nd and 3rd appellants were represented by learned counsel, Mr. Njoroge and Ms. Sekwe.Learned counsel, Mr. Saende appeared for the 4th appellant; while learned counsel, Mr. Imende appeared for the 5th and 6th appellants.

C. PARTIES' RESPECTIVE SUBMISSIONS

(i) 1st Appellant's Case

[11]Learned counsel, Mr. Kilonzo for the 1st appellant submitted that the Court has jurisdiction to hear this matter, by virtue of Article 163(4)(a) of the Constitution. He highlighted the following issues,raised in the 1st appellant's petition of appeal,for determination:

(i) the constitutionality of the 1st appellant's status, as from the date of promulgation of the Constitution of Kenya, 2010;

(ii) the validity of entertainmentof legitimate expectation, under Articles 33 and 34 of the Constitution, by the 1st appellant, as regards the grant of BSD licence;

(iii) the tenability of judicial powers under Articles 33 and 34 to grant any form of licence to a licensee in the broadcast industry; and

(iv) the interplay between the exercise of judicial powers, and the doctrine of separation of powers,as well as the applicability of the concept of judicial restraint, in the adjudication of disputes such as the instant one.

[12] It was counsel's submission that the Court of Appeal, as a first appellate Court,had misapprehended, and wrongly reappraised the evidence tendered before the High Court, thereby arriving at an erroneous decision. He submitted that unlike the Court of Appeal which can re-evaluate and re-appraise evidence from the trial Court, this Court, as a second appellate Court and an apex Court, is duty-bound, in law and practice, like in other common law jurisdictions, to consider only questions of law, and to assess only the issue whether the Court of Appeal properly reappraised the evidence.

[13]To buttressthis submission, counsel relied on the Court of Appeal decision in ***Peter Obara Ondari v. Kenya Revenue Authority*** Civil Appeal No. 208 of 2010,[2013]eKLR, where reliance was placed inthe Ugandan Court of Appeal decision in ***Mutazindwa v. Aguba &Others*** (2008) 2 EA 265, as follows:

> ***"...the duty of a second appellate Court is not to re-evaluate the evidence but to consider whether the first appellate Court properly carried out the functions of re-appraisal of evidence***."

[14] Counsel also relied on the statement by *Chesoni Ag. JA* in ***Stephen Muriungi & Anor v. Republic*** [1982-88] 1 KAR 360,that a second appellate Court should not interfere with the decision of the first appellate Court, unless it is apparent that upon the evidence, no reasonable tribunal could have reached the

conclusion in question. Counsel thus urged that this Court had jurisdiction to establish whether the Court of Appeal properly reappraised the evidence that had been laid before the High Court.

[15] Learned counsel addressed the Court on the technical terms relevant to the case, such as:*radio spectrum, airwaves, radio broadcasting, radio communication, broadcast frequencies, and broadcast signal distribution*. Counsel contested the Court of Appeal finding that the Communications Commission of Kenya (CCK) (1st appellant) was not the body contemplated by the Constitution, 2010as the regulator of airwaves and licensing. He submitted that airwaves, as conceived in Article 34, are not to be restricted to *broadcasters* only, as there is a wide range of others who, though not broadcasters, make use of airwaves, and are subject to regulation by the Communications Authority of Kenya(successor to the 1st appellant).

[16] Counsel drew parallels between the three distinct modes of television broadcast: *satellite, cable and terrestrial broadcasts;* and urged that this case is concerned with terrestrial television broadcast, which uses two forms of transmission:*Analogue Terrestrial Television (ATT), and Digital Terrestrial Television (DTT).* He urged that the object of the intended migration is to *move the country from Analogue Terrestrial Television broadcast* to*Digital Terrestrial Television broadcast,* which migration will have no effect on satellite or cable TV broadcast.

[17] Distinguishing analogue from digital broadcast, counsel submitted that in *analogue terrestrial television,* the broadcaster develops *content*, such as news; rolls out transmission infrastructure; maintains the infrastructure; owns the transmission infrastructure; and transmits the content that the broadcaster has developed.However, in*digital terrestrial television*,the equation changes, as the broadcaster is now *restricted to developing content*, while *a different market*

player,namely the signal distributor, is licensed to carry and distribute the content so developed. Under the digital terrestrial television, the signal distributor owns the transmission infrastructure, and only transmits the content as developed by the broadcaster, to the end-users. In this scheme, frequencies are given to the *signal distributor* and not the *broadcaster,*and the broadcaster, or content developer, pays a fee for the transmission effected by the signal distributor.

[18] Counsel submitted that, unlikewith analogue terrestrial television, the broadcasters, in digital terrestrial television would not need a nationwide reach on the basis of allocated frequencies and transmitters,as the signal distributor would be licensed in that regard. The nationwide reach of a broadcaster would no longer be dependent on the transmission capacity, or number of allocated frequencies. The effect of these changes,counsel urged, would be to level the field for all players in the industry, and to enhance efficiency in the utilization of frequencies—a scarce public resource essential for other technological uses; and this would herald other resultant economic benefits, for all. A signal distributor, counsel submitted, operated as a mere conveyor-belt.

[19]Responding to apprehensions that the digital system would facilitate the interception of signals by the signal distributor,counsel submitted that the signal distributor gets the signal in final-content format, and therefore, cannot make any alteration to what is given for transmission.The signal distributor earns profitby levying tariffs on the broadcaster, for the distribution ofsignals to the end-user, subject to an agreement, made on the basis of willing-giver-willing- distributor. As regards the chargeable-tariffs regulation, counsel urged that the 1st appellant takes control,as a formula for avoiding any possibility of exploitative tendencies by the signal distributor.

[20]Counsel submitted that the broadcaster would still enjoy the advertising revenue, the signal distributor being merely a channel for conveying final-format

content, at an agreed fee, and having no capacity to interfere with broadcast-content;the Commission, however, could instruct a distributor to switch off a broadcaster on account of unsuitable content, or during a state of emergency—by law.

[21] Mr. Kilonzo made submissions on the resulting expense to end-users, upon digital migration. On account of global technological advances, the current analogue television sets could not decipher digital signals, and Set Top Boxes (STB) are necessary to decode the signals into consumable analogue format;and this was the basis for the 1st appellant licensing vendors, and appraising STBs for the Kenyan market.

[22]Counselsubmitted that there were two STB-types:the first was the Pay TV STB, with a one-off purchase price, and a monthly subscription fee payable to the Pay TV provider.The second was the Free To Air (FTA) STB,with a one-off payment upon purchase of the device, after which a person could enjoy the Free To Air channels such as KTN, NTV, K24, and Citizen. All these Free to Air Channels would receive their signals from the licensed signal distributors.

[23] Counsel cited the "Must-Carry-Rule", provided for in Regulation 14(2)(b) of the Kenya Communications(Broadcasting) Regulations, 2009,which*compels a signal distributor to carry a prescribed minimum number of Kenyan broadcasting channels, as a precondition to retaining the licence.* He submitted that the rule was not unique to Kenya, but obtains in the US, Belgium and other countries of Europe. He submitted that the Must-Carry-Rule eliminates the need for multiple STBs to receive local channels, and ensures universal reach of mandatory FTA channels in all parts of the country.

[24]Learned counsel commended *digital migration* as a best practice which Kenya has to adopt, in keeping with international developments.He submitted that

frequencies are a scarce public resource, the use of which must be regulated, to optimize the public benefit. This, he submitted,was the initial justification for the formation of International Telecommunications Union (ITU) in 1865 as a specialized UN agency, to *co-ordinate the shared global use of radio spectrum* among nation states; and *Kenya ratified the ITU Convention in 1964.*

[25]Counsel submitted that a Regional Radio Communication Conference under the auspices of ITU, to discuss the efficient use of spectrum, was held in Geneva in 2004 (RRC-04),and this culminated in the decision on digital migration. The parameters for collective migration were laid out, at this Conference. Subsequently, a follow-up Regional Radio Communication Conference (RRC-06) was held, in 2006,culminating in aFinal Agreementon switch-off date, for migration from analogue to digital terrestrial television broadcasting.The switch-off date was set for*17th June 2015,* for member-States present at RRC-06; and the Government of Kenya was represented.

[26]Learned counsel submitted that RRC-06 had produced the Final Acts and attendantResolutions, binding on Kenya and other member-States.Towards this end, the17thJune2015 deadline for switch-off from analogue to digital television broadcast, under Article 11 of the Final Acts, could not be varied,save with the approval of a further RRC.

[27]Counsel submitted that the transition period runs from 17th June, 2006 to*17th June, 2015 at 00100hrs*;and by Article 12.1 of the Final Acts, the agreement enters into force on 17th June, 2007, remaining in force by virtue of Article 12.4, until revised in accordance with Article 11 of the Agreement.

[28] Counsel submitted that the domestication of ITU commitments by 1st appellanthad taken place, in the period after 2006, and that the propriety of such action was not contested by the 1st, 2nd and 3rd respondents;and in that context, the

Government formulated an *ICT Policy dated 31st May, 2006,*vesting in 1st appellant the mantle of regulator of the ICT sector.

[29]Counsel urged that within the framework of this ICT policy, other developments followed: for instance,the enactment of the Kenya Communications (Amendment) Act, 2009(Act No. 1 of 2009) which had the effect of incorporating the broadcasting sector within the scope of the 1st appellant's powers, to regulate the telecommunication sector, and to allocate frequencies to broadcasters.

[30]Counsel submitted that on the basis of the said ICT Policy, a Task Force to steer the digital migration programme was appointed by the Ministry of Information, on 14th March, 2007, and it presented its report to the Minister in September, 2007(Report of the Taskforce on the Migration from Analogue to Digital Broadcasting in Kenya). This Digital Migration Taskforce made several recommendations, *inter alia*: recognizing the need for digital signal distribution to comply with prescribed international standards; the need to create a reliable market-sector for a signal distributor,independentof the broadcaster;recognizing the importance of the investments that current broadcasters had made in the sector; settingtime-frames, standards, policy and regulatory issues for the transition.

[31]The Digital Migration Taskforce recommended that *a public broadcaster,* KBC was *to incorporate a subsidiary company to run signal distribution, so as to avoid conflict of interests*. The subsidiary company(4th appellant) was required to provide access to all; and to offer signal distribution,charging equitable, reasonable and non-preferential, non-discriminatory, subsidized rates for transmission.

[32]Learned counsel submitted that the content of the said policy had not been contested before the High Court; that the 1st, 2nd and 3rd respondents had not contested the time-lines set by the Taskforce; and that they did not questionthe

Government's policy decision to separate *broadcasting*from*signal distribution*. He submitted that the Minister for Communication had appointed a Digital Television Committee (DTC),with representation from the 2nd and 3rd respondents, to lead the process and preparation for switch-over to digital television broadcast, as had been recommended. Counsel urged that digital migration should be conceived of as *a process, conducted over a period of time,* within defined procedures: and thus it was inapposite for a party to raise a sudden challenge to the outcome of the process and in particular, to the set date for migration.

[33]Learned counsel urged that the *promulgation of the Constitution* on 27th August, 2010 coincided with on-going digital-migration process; the 1st appellant already had a range of functions to perform under the Kenya Information and Communications Act,1998,the Kenya Communications (Amendment) Act, 2008, the Kenya Communications (Broadcasting) Regulations, 2009 and the Kenya Information and Communications(Broadcasting Communications and Frequency Spectrum) Regulations, 2010—functions that included regulating telephone providers, postal providers, courier providers, allocating frequencies to the military, to the Police, to the National Intelligence Service, and to people other than broadcasters who use radio communication.

[34]Learned counsel contested the Court of Appeal's finding that the Communications Commission of Kenya was *not the body contemplated by Article 34* of the Constitution to regulate and license broadcasters. He submitted that the Constitution provides a *transition period*(under Article 261) within which pertinent legislation may be enacted by Parliament; and 1st appellant could not be unconstitutional, since the transition period had not lapsed. He urged that the practicalities of the situation could not countenance a void in the regulation of frequencies, and that *as long as the period provided for transition in the Constitution had not lapsed, it was lawful for the 1st appellant to discharge its mandate as provided in existing statute law.*

[35] Regarding the procurement process for the licensing of signal distributors, counsel submitted that the bid by National Signals Network(a consortium between the Nation Media Group and the Royal Media Services)had been unsuccessful on account of a technical issue: failing to conform to tender requirements. He submitted that there had been four bidders,and two bids were successful at the technical-evaluation stage,withthe Pan African Group Network obtaining the highest score at the financial stage,and thus winning the second signal distributor licence. The National Signals Network had moved to the Public Procurement Appeals and Review Board,(an entity serving as a Tribunal), with *Review Application No. 24 of 2011* challenging the decision to deny it a licence; but *the application was dismissed by the Board on 14th July, 2011.*Consequently, two digital signal distributors, the 4th and 5th appellants, were awarded licences.

[36]Counselsubmitted that while the requested review was pending, National Signals Network wrote to the *Permanent Secretary for Information,* to be recognised as a third signal distributor, and issued with a licence.The Permanent Secretary responded affirmatively, noting that their substantial investments in broadcasting was a proper basis for such consideration,but subject to fulfilling certain conditions. Such conditions, according to counsel, were not fulfilled by the 1st, 2nd and 3rd respondents; and it was counsel's contention that the three parties did not complain of any unfair treatment.

[37]Learned Senior Counsel, Mr. Ojiambo alsocontested the Court of Appeal's findings and final orders.He urged that the Court of Appeal's reasoning did not take into account the transitional provisions in Article 261, in the 5th Schedule, and in Section 7(1) of the 6th Schedule of the Constitution; and that such reasoning also failed to view the Constitution as an integral whole. Counselurged that the Appellate Court had come to a wrong conclusion, by the terms of that Court's decision *(Githinji JA.)* in ***Centre for Human Rights and Awareness v. John Harun Mwau & 6 Others*** Civil Appeal No. 74 & 82 of 2012;[2012]eKLR,that:

"the Constitution should be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms and permits the development of the law and contributes to good governance;

that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion;

that the Constitution must be interpreted broadly, liberally and purposively so as to avoid the austerity of tabulated legalism;

that the entire Constitution has to be read as an integral whole and no one particular provisions destroying the other but each sustaining the other as to effectuate the great purpose of the instrument(harmonization principle)."

[38]Counsel submitted that under Article 261, Parliament had a duty to enact legislation required by the Constitution within a given time, which time could be varied with the approval of a two-thirds majority of Parliament; that under Article 34(3)(b), a law had to be enacted to give effect to this provision, underthe 5th schedule,within three years from effective date. Counsel also cited Section 7(1) of the 6th schedule which provides that:*all laws in force before the effective date shall continue to be in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the Constitution.* He urged that the Kenya Information and Communications Act, 1998 had to remain in force until 27th August, 2013 or a later date, as may be determined by Parliament within the terms of Article 34(3)(b) of the Constitution.

[39] Counsel submitted that the Court of Appeal had not appreciated the foregoing point and by its order for immediate reconstitution of the 1st appellant, undermined Article 261(1) and (2); and that the 1st appellant could not have ceased to be a regulator of the communication sector, as the 5th Schedule provides a period of *three years from the date of promulgation of the Constitution,* for Parliament to enact the requisite legislation giving effect to Article 34—and which period was extended by Parliament for a *further four months from 2nd August, 2013.*

[40]Mr. Ojiambourged that the Court of Appeal had failed to appreciate the intent of the Constitution, which is to ensure that there is *no void in the enforcement of the law after the effective date.* It was also counsel's submission that the 1st appellant had to exist till such a time as Parliament had enacted legislation to give effect to Article 34 of the Constitution.Counsel took issuewiththe holding of *Musinga JA,* that the Government was under strict obligation to alter the composition of the 1stappellant, so as to align it with Article 34(3)(b) of the Constitution, before the requisite legislation was passed.

[41] To hold that the 1st appellant was an unconstitutional entity, counsel contended, would render all its previous decisions and actions null and illegal, thus occasioning an absurdity; for all the previously issued licences, and frequencies allocated to other agencies, would be of no effect. Counsel submitted that the Appellate Court had failed to appreciate that not all legislation will lend itself to new meaning drawn from sheer construction, without legislative intervention by Parliament—and of relevance in this regard is the prescription of the composition of the 1st appellant.

[42]Counselurged that the reconstitution of the 1st appellant could not happen immediately after the promulgation of the Constitution, as the period for the same was clearly spelt out under the transitional provisions; and that the Constitution

recognizes peculiar attributes of the legislative process, and on this account provided in the Fifth Schedule a priority-list of legislation to be sequentially enacted, in compliance with certain constitutional principles.

[43] Regarding the Court of Appeal's holding that the 1st, 2nd and 3rd respondents were entitled to a BSD licence on account of their large-scale investments, counsel doubted whether there could be legitimate expectation, based upon such a position, against the clear provisions of the law. Counsel invoked the decision of this Court in the matter of***The Principle of Gender Representation in the National Assembly and the Senate (2012)*** eKLR, where it was recognised that the enactment of a law in fulfilment of a constitutional objective cannot be an instantaneous activity, but a process that takes time, entailing necessary measures and actions by responsible agencies.

[44] Counsel submitted that the reconstitution of the 1st appellant could not be done except with the enactment of a new law. He urged that the Constitution envisages licensing procedures free of Government, political or commercial interests, and that the Court of Appeal erred by ordering that the 1st to 3rd respondents, on the basis of their infrastructural investment, be issued with a BSD licence—a commercial factor—thus offending Article 34(3)(b) which requires that licensing procedures be free of commercial interests, and 34(5) which mandates Parliament to *enact a law to provide for a body independent of commercial interests.*

[45] Learned counsel highlighted the policy justification for a separation between signal distributors, and content providers, as the need to achieve optimal utilization of scarce frequency resources, to enhance the pace of growth of new value-added services, and to ensure a levelplaying-field for broadcasters. This was the basis for counsel's conclusion that the Appellate Court's finding violates Article 10 of the Constitution, which requires *interpretation of the Constitution in accordance with*

the principles of good governance, transparency, accountability, sustainable development and non-discrimination.

[46]Expressing agreement with the reasoning by *Musinga JA*, learned Senior Counsel urged that there could not be a legitimate expectation against the clear provisions of the Constitution and the law, as a basis for an award of BSD licence to the respondents; and that Articles 33 and 34 do not envisage a licensing role for the Judiciary.

[47]It was urged for the 1st appellant that the role of the Court was to ascertain whether the process of issuance of a licence was right or wrong, but not to issue one in favour of a party, issuance of a licence being within the province of the Executive: thus,the Appellate Court exceeded its mandate, in ordering that a BSD licence be issued to 1st, 2nd and 3rd respondents,outside the framework of the procurement process. Counsel submitted that this was an instance of violation of the doctrine of the separation of powers. He made reference to the authority of ***Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others (2013)*** eKLR,the South African case of ***Democratic Alliance v. The President of the Republic of South Africa & 3 Others:*** CCT 122/11(2012) ZACC 24, and the Indian case of ***Asif Hameed & Others v. State of Jammu & Kashmir & Others Etc 1989 AIR,*** 1989 SCR (3) 19, in which the principle has been defined.

[48]Learned counsel submitted that there had been no evidence before the High Court to show that the 1st appellant had in any way transgressed its constitutional limits, or acted wrongly, in issuing or declining to issue licences. Counsel urged that the Courts did not have the tools to determine readiness of the market for a third signal distributor, especially in the light of the depositions of Mr. Wangusi, that licensing a third signal distributor at the moment would not make efficient use of spectrum, as it would result in infrastructure-duplication, without maximum exploitation of existing capacity.

[49]Counsel submitted that, to issue a licence without any information, or proper technical tools before the Court, was a wrongful usurpation of the authority and responsibility of the Executive, and was in violation of the doctrine of separation of powers. He further urged that, in granting orders rendering void all the regulatory action undertaken by the 1st appellant since the promulgation of the Constitution in 2010, the Court of Appeal did not act with due restraint. He apprehended an imminent danger in the Court of Appeal's decision: it was likely to show Kenya as a country in breach of international obligations under the ITU Convention.

[50] Counsel urged that the Appellate Court should have pursued a more pragmatic course; for instance, where a Court finds part of a statute to be invalid, or a statutory body to be unconstitutional, the remedy of "structural interdict", by which Courts require a body to rectify a fundamental-rights breach under the Court's supervision, or the suspension of declaration of invalidity of a statute— by which a Court suspends the declaration of nullity pending enactment by Parliament of another law so as to avoid a regulatory lacuna—would be applicable.

[51] Counsel urged the Court to consider whether the Court of Appeal's orders exceeded its jurisdiction and mandate as provided by the Constitution.Mr. Ojiambo submitted that the proper function of the Court of Appeal is to correct an error in the proceedings of the HighCourt, and not to adjudicate upon matters that had not been in issue at first instance; he urged the Court to find that the Court of Appeal exceeded its jurisdiction and accordingly, set aside the Appellate Court's Judgment and reinstate that of the High Court. He asked the Court to hold that the 1st appellant is free to set the timeline for digital migration. Counsel also prayed for costs to be awarded to the 1st appellant.

(ii) 2nd and 3rd Appellants' Submissions

[52] Learned counsel, Mr. Njoroge submitted that the Court of Appeal erred in its interpretation of Article 33 of the Constitution, by extending the scope of "freedom of expression" beyond the prescribed terms, to include *digital broadcast signal distribution*. He urged that parties would be entitled to freedom of expression only in respect of broadcast material from their stations.

[53]Mr. Njoroge urged that there was no basis for a claim to *legitimate expectation,* by the 1st, 2nd and 3rdrespondentsto be granted BSD licences,without adherence to procurement procedures. He submitted that the Court of Appeal had not takencognizance of relevant factors, such as the National ICT policy and its broader objectives. It was counsel's submission that statements by Government officials, or otherpublic authority,would not override the ICT policy, andthat no claim to legitimate expectation could be premised on a speech by a Government official bearing no consistency with the law or the Constitution.

[54]Learned counsel urged that since digital broadcasting was a new technological process in this country, it is not to be expected, in the very nature of things, to have already crystallized a right to licence in favour of the 1st, 2nd and 3rd respondents.

[55] Counsel urged, on the basis of the foregoing principle, that this Court should regard the issuance of a BSD licenceas falling under the "structural- regulation theme" in the National ICT Policy; and should consider that Government officials are ordinarily bound by national policies.

[56]Of the order that the 1st,2nd and 3rd respondents be granted a BSD licence on the basis of their investment in broadcasting infrastructure, learned counsel submitted that this was contrary to the national value of equality in Article 10, and to the procurement principles set out in Article 227 of the Constitution.Counsel

urged that such an order sets a bad precedent, as it overlooksthenational ICT policy considerations that arise in the process of licensing: for instance, capacity; market-saturation;maximization of infrastructure; and sector- wide national strategies, and policy objectives. Counsel submitted that the Court of Appeal had not been seized of all the relevant information regarding proper choice of a regulator; and that the Court had relied on depositions of general content, regarding the value of investment made by the 1st, 2nd and 3rd respondents in broadcasting infrastructure. It was counsel's argument too, that no proper link between current infrastructural expense and the objective purpose of digital migration, had been made before the Appellate Court.

[57]Counsel submitted that whereas the sphere of policy-making was the preserve of the executive arm of Government,the Appellate Court had acted in excess of its jurisdiction, in breach of the doctrine of separation of powers,by its order granting a licence, and staying the process ofdigital migration.

[58]Learned counsel submitted that the unanimous holding of the Court of Appeal had disregarded Kenya's commitment to the digital-migration timetable,by ordering a change in the dateof switch-off, and issuance of a licence contrary to theprescribed procedures.

[59]Learned counsel urged the Court to draw a distinction between "broadcast content" and "signal distribution", and submitted that freedom of expression, in the terms of the Constitution, is about *content regulation,* whereas *broadcast distribution* is concerned with *structural regulation*.

[60]Counsel took issue with the finding by the Court of Appeal that denial of a BSD licence constituted breach of the rights to freedom of the media,on the basis that no television broadcast would fail to secure an avenue to distribute signals.Counsel invoked the comparative experience to show that it would not be perverse, in an

appropriate case, to limit the freedom of the media: the European Court of Human Rightscase of ***Handyside v. The United Kingdom, Application no 5493/72*** [1976] ECHR 5.

[61] As to whether the Communications Commission of Kenya as then constituted was independent,counsel urged that no evidence showed the Commissionto have been subservient to the Government,even though appointments were made by the Government, in accordance with the law; and there was nothing in the mode of appointment by itself, to constitute an appearance of inconsistency with the terms of the Constitution.

[62] Learned counsel submitted that the independence contemplated is an operational one: the day-to-day decision-making of the Commission; he urged, in this regard, that the Commission was not influenced externally.

[63] Counsel characterized the 1st appellant as a proper agency in law, considering especially that evenParliament, by amending statute—the Kenya Information and Communications Act, 2009—did not find it necessary to effect a change in name; and the later renaming to Communications Authority of Kenya under Sections 3 and 6 of the Kenya Information Communications (Amendment) Act, 2013 (Act No. 41A of 2013),no more than signified the continuity of the 1st appellant, as the proper body to regulate airwaves in Kenya, since the promulgation of the Constitution on 27th August, 2010.

[64]Learned counsel questioned theCourt of Appeal's interpretation on the status of the 1st appellant,on the basis that the Constitution envisaged a body that would be constituted after enactment oflegislation. He submitted that the Executive could not have constituted such a body in the absence of enabling legislation;and the

Court of Appeal ought to have, in these circumstances, considered that under the Fifth Schedule, law-making as a function of Parliament,was not an instantaneous act.

[65]Learned counsel submitted that the Executive is empowered to enter into agreements on behalf of the Republic;and by Article 2(5) and (6) of the Constitution, all international agreements, and the general principles of international law, are incorporated into the corpus of municipal law of Kenya: and consequently,the provisions of the Final Acts of the RRC-06imposed on the Executive a duty to implement the international agreements.

[66]Learned counsel urged that the 1st,2nd and 3rd respondents had failed to abide by a lawful procedure for contesting an administrative action, as provided inSection 100 of the Public Procurement and Disposal Act(Cap 412, Laws of Kenya). The said legislation, he submitted, laid out a clear procedure for the redress of particular grievances prescribed by the Constitution or statute,and in this instance, recourse should have been tojudicial review, or appeal in the High Court***(The Speaker of The National Assembly v. Karume,***Civil Application No. NAI 92 OF 1992,and ***Harrikissoon v. Attorney-General of Trinidad and Tobago***[1980] A.C 265)**.**

[67]Learned counsel submitted that the question, at the High Court stage, was a matterlimited to the BSD licence-tendering process; no question of breach of fundamental rights and freedomswas involved; but the respondents' claim, led to a re-formulation of issues, and a re-litigation of a matter concluded by the Public Procurement Administrative Review Board.

[68]Learned counsel urged that the 1st,2nd and 3rd respondents should bear the costs of the proceedings in the High Court,Court of Appeal and this Court, given that this dispute was not one of public interest but a commercial one.

(iii) 4th Appellant's Submissions

[69]Learned counsel, Mr.Saende contested the claimthat the 4th appellant had breached the 1st,2nd and 3rdrespondents' intellectual property rights by transmitting their FTA programs. The relevant claim had been that the 4th appellant had carried the 1st,2nd and 3rd respondents' signals without their consent. Counsel referred to the affidavit of Waithaka Waihenya filed at the High Court, which outlined the manner in which content belonging to the 1st,2nd and 3rd respondents was being transmitted and it was on the basis of a mutual agreement.

[70]Learned counsel submitted that there had been no violation of intellectual property rights, because the content distributed by the 4th appellant was neither converted nor passed off as belonging to the 4th appellant;and any grievances ought to have been pursued under the Copyright Act (Cap 130,Laws of Kenya)—as a normal civil matter. In cases in which a remedy was provided for in a statute, counsel urged, the party aggrieved ought to follow the laid downprocedure —a principle which was overlooked by the learned Judges of Appeal. Further, he submitted that the Court of Appeal had overlooked the principle that, not every question in dispute raises a constitutional issue ***(Republic v. National Environmental Management Authority*** [2011]eKLR;and ***Wananchi Group v. Communication Commission of Kenya and 2 Others,***High Court Petition No. 98 of 2012).

[71] With regard to the freedom of the media, learned counsel submitted that Article 34 of the Constitution does not confer unlimited rights;it upholds licensing procedures which are necessary to regulate the airwaves and other forms of signal distribution. Counsel urged that this case had the clear intention of advancing commercial interests, at the expense of the general public, in contravention of Article 34(3)(b). He relied on the case,***Kwacha Group of Companies & Another v. Tom Mshindi & 2 Others*** [2011] eKLR, where the High Court of

Kenya considered the issue of media freedom, and observed that it was not an unlimited right; and the case,***Royal Media Services Ltd v. Director of Public Prosecutions***[2013] eKLR, in which the Court remarked that the media has freedom, but within the context of licensing procedures.

[72] On the issue of legitimate expectation, learned counsel,relying on the book,***Administrative Law*** by H.W.R Wade(2009)(p. 449) urgedthat a statement by a Minister provides no basis for legitimate expectation, and where there wereclear statutory provisions, then such provisions will override any expectations howsoever founded. He urged thatthere had been a tender process, where the 1st and 2nd respondents were disqualified and so their desires, in the face of the statutory provisions,could not become legitimate expectations.

[73] On the issues of licensing and the switch-off date, Mr. Saende submitted that these were separate issues; and the digital-migration process ought to have been allowed to run its course,as the 1st,2nd,and 3rd respondents pursued their claim for a licence. Counsel urged that while the Global switch-off date is *15th June 2015,*Kenya had chosen an earlier date andthe continued delay in effecting the move to digital broadcasting hadadverse financial impacts on the operations of the 4th appellant.

[74] Learned counsel, Mr.Saende urged the Court to find that the learned Judges of Appeal acted contrary to Article 259 of the Constitution, in declaring that the 1st appellant's board was not properly constituted:a decision destined to occasion a crisis within the communicationand information sectors.

[75] Learned counsel submitted that Article 261 as read together with the Fifth Schedule, contemplated that Parliament would enact relevant legislation to give effect to Article 34 of the Constitution within a given time-frame; and in the interim period,the existing legislation was valid:therefore,on that basis, the Communications Commission of Kenya Board *was*the legitimate body to carry out the licensing process.

[76]On the Appellate Court's issuance of a BSD licence to the 1st, 2nd and 3rd respondents, counsel agreed with the earlier submissions, that the Court had exceeded its powersby issuing a licence,in disregard of the conditions set by the Act and the Regulations.

(iv) 5th and 6th Appellants Submissions

[77] Learned counsel,Mr. Imende submitted that the petition filed in the High Court by the 1st,2nd and 3rdrespondents had one object: to obtain a BSD licence.

[78]Counsel submitted that the 1st,2nd,and 3rdrespondents had previously engaged the 1st appellant for purpose of securing a licence, and had not raised any apprehensions of unconstitutionality. Therefore, this was a collateral attack on the judgment of the Public Procurement Administrative Review Board, which had acted within its jurisdiction.

[79]Learned counsel had a different view as to the proper licensing authority for the broadcasting sector. He submitted that the body contemplated under Article 34(5) of the Constitution was limited to setting standards, regulating the media, and monitoring compliance, and had nothing to do with licensing of broadcasters.

[80]Learned counsel submitted that the Appellate Court had no jurisdiction to decide on the issue of nullification of BSD licences, as the issue had not been raised by the 1st,2nd and 3rdrespondents either in the Petition at the High Court or in their Memorandum of Appeal, nor was this question canvassed by the parties at the Court of Appeal. On this point,counsel relied on two authorities,***Nairobi City Council v. Thabiti Enterprises Ltd*** [1995-98]2 E.A 231,and***Galaxy Paints Co. Ltd v. Falcon Guards Ltd*** [2000]2 E.A385,for the principlethat a Judge has no power or jurisdiction to decide an issue that has not been pleaded, unless the pleadings are substantially amended.

[81]Learned counsel invoked the case of***Said Bin Seif v. Shariff Mohammed Shatry***(1940)19 (1) KLR 9, and urgedthat the effect of an order made without jurisdiction is nullity; that such an order,however precisely formulated or technically correct, is a mere nullity, and not only voidable but void with no effect, either as estoppel or otherwise, and should not only be set aside at any time by the Court in which it is rendered, but declared void by every Court in which it may be presented.

[82] Counsel submitted that the order nullifying the 5th appellants BSD licence was made in violation of the rules of natural justice.He invoked relevant case law***(De Souza v. Tanga Town Council***(1961)E.A 377)and urged that the BSD licence for the 5th appellant had been issued under a valid and existing law—the Kenya Information and Communications Act,1998 and the Public Procurement and Disposal Act.

[83] In support of the argument on non-retroactivity of the provisions of the Constitution of Kenya, counsel relied on decisions of this Court:***Samuel Kamau Macharia v. Madhupaper International Limited and Others,***Sup.Ct. Application No.2 of 2011; [2012] eKLR;and***Mary Wambui Munene v. Peter Gichuki King'ara and 2 Others,***Sup.Ct.Petition No.7 of 2014; [2014] eKLR. He submitted that the supremacy oftheConstitutionclause is not to be read as nullifying the operation ofall laws enacted before the promulgation of the Constitution in 2010. He urged that a declaration of nullity was not the appropriate relief for the Court of Appeal to grant.

[84]Learned counsel submitted that had the Court of Appeal come to a conclusion that the Kenya Information and Communications Act, 1998 was invalid,then theCourt would have been under duty to *regulate the impact of the declaration of invalidity*,because it was a pre-constitutional statute (on the basis of the lesson fromthe South African Constitutional Court, in ***Executive Council of Western***

Cape Legislature v. President of the Republic of South Africa1995(4) SA 877(CC)).

[85] It was counsel's submission thata Court ought to be hesitant to disturb the results of cases or transactions finalized before it declares invalidity and still more hesitant to prejudice parties who had acted in good faith, undervalid legislative authority. Counsel urged that the Court of Appeal had failed to appreciate the dangers of a legal vacuum in the telecommunication sector. Herelied on the persuasive authority of theSupreme Court of Canada in, ***Re Manitoba Language Rights***(1985)1 R.CS 721**,** onthe principle that the '*rule of law requires creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of the normative order'*.

[86] Counsel submitted that the 1st,2nd, and 3rd respondents had failed to show any errors of procedure in the procurement process that resulted in the decision of the Board, or any failure on the part of the Public Procurement Administrative Review Board to observe a fundamental rule of natural justiceso as to attract the High Court's enforcement jurisdiction. He urged that once a party invokes its right to seek administrative review under Section 93(1) of the Public Procurement and Disposal Act,then under Section 100 thereof,the High Court cannot entertain any cause of action arising from the said procurement proceedings.

[87] As to whether the 1st,2nd and 3rd respondents' intellectual property rights had been infringed, learned counsel submitted that the appropriate remedies are set out under the Copyright Act (Cap130, Laws of Kenya) and the Court of Appeal's first recourse should have been to the provisions of that statute. It was learned counsel's position that no *prima facie* violation of the 1st,2nd and 3rd respondents' rights under Article 40 of the Constitution was disclosed in their pleadings at the High Court as the Petition did not set out the gravamen of the cause.

[88] Counsel submitted that the Court of Appeal failed to appreciate that the freedom of establishment of mediaunder Article 34(3) is *qualified* by Article 34(3)(b), which stipulates that the right is subject to *licensing procedures* that are independent of control by Government, political or commercial interests. Counsel urged that the Appellate Court failed to appreciate that the 1st,2nd and 3rd respondents could only invoke freedom of establishment under Article 34(3) if they could demonstrate that the licensing procedures were either, not necessary to regulate the airwaves or were not independent of control by Government, political interests, or commercial interests. The effect of this argument was that the Appellate Court failed to appreciate that the licensing procedures contemplated under Article 34(3) were to be found in the Public Procurement and Disposal Act(Cap. 412 A, Laws of Kenya) and not in the Kenya Information and Communications Act, 1998.

[89]Counsel contested the 1st, 2nd and 3rd respondents' claim of legitimate expectation founded on promises made by Government officers. He submitted that this was a misdirection in law.

[90]Counsel relied on the persuasive authority from Britain,***Council of Civil Service Union v. Minister for Civil Service***[1985] 1 A.C.374 (at pages 408-409),where Lord Diplockheld that for legitimate expectation to arise, the contested decision must have the effect of depriving one some benefit or advantage, which he had been permitted in the past by the decision-maker to enjoyand which he can legitimately expect to be permitted to continue to enjoy, or he has received assurances from the decision- maker that it will not be withdrawn without giving him an opportunity toadvance reasons for non-withdrawal.

[91]Mr. Imende submitted that the Court of Appeal failed to appreciate the overriding public interest set out in Article 227 (1) of the Constitution,which enjoined the 1st appellant to contract for goods and services in accordance with a

system that is fair, equitable, transparent, competitive and cost-effective: and this was the basis of the denial of BSD licences to the 1st, 2nd and 3rd respondents.

[92]Learned counsel submitted that the Appellate Court was in error, in failing to take notice of the corporate status of the Commission: a body corporate with perpetual succession, established under Section 3(2) of the Kenya Information and Communications Act, 1998 and capable of suing and being sued in its corporate name;this was an independent legal entity, and could not be said to be a department, organ or agent of Government. Counsel found persuasive authority for this proposition in***Wijetunga v. Insurance Corporation of Sri Lanka*** (1985) LRC 335;and ***Wijeratne and Another v. People's Bank and Another*** (1985) LRC (Const) 349.

[93] Learned counsel submitted that the Appellate Court had failed to appreciate that the rights,obligations and other effects linked to the conduct of the 1st appellant,were impressed with validity under the *de facto* doctrine which recognizes the existence of public or private corporate bodieswhich, though irregularly or improperly organized, openly exercise the powers and functions of regularly-created bodies. He invoked the persuasive authority from the Canadian Supreme Court,***Re Manitoba Language Rights*** (1985) 1 R.C.S 721.

(v) 1st, 2nd and 3rd Respondents' Submissions

[94]The 1st, 2nd and 3rdrespondents commenced their submissions from an historical background on broadcasting in this country, highlighting the shut-downs, armed raids and acts of vandalism upon broadcasting studiosperpetrated by the Government, between the year 2000 and 2006. They urged this to be the context of their quest for a BSD licence.

[95]The 1st, 2nd and 3rd respondents' case was advanced on three main grounds, namely:

(i) the 1st appellant is not the independent broadcast-regulator contemplated by Article 34 of the Constitution;

(ii) the 1st appellant has departed materially from the ICT policy and the Digital Migration Taskforce report, both of which were intended asthe basis for digital migration;

(iii) in both the ICT policy and in the recorded commitment by the then Permanent Secretary in the Ministry of Information and Communications, the 1st, 2nd and 3rd respondents were explicitly promised a BSD carrier-license; and

(iv) in breach of the Constitution, and rescinding from their earlier policy undertakings, the appellants caused the 1st, 2nd and 3rdrespondents constitutionally-actionable harm which was the basis of the findings and orders of the Court of Appeal.

[96]Learned counsel, Mr. Mansur submitted that the 1st appellant had taken a biased stand in favour of Pay-TV over FTA-TV contrary to international best practices and foreigners had been accorded preferential treatment in the issuance of BSD licences. Counsel urged that the Constitution contemplates that citizens' right to receive information shall not be burdened by poverty or lack of financial capability. He submitted that the 1st appellant's actions portend a reversal of this constitutional guarantee, given that FTA broadcasting is what brings Kenya closestto a universal, relatively-affordable system of receiving news and information, and it holds a central place in the political, cultural and economic life of this country. FTA-TV, counsel urged, has the potential for achieving the

constitutional vision of widening the right of the public to communicate and to receive ideas.

[97]Counsel submitted that, two months to the original switch-off date, only 26,000 FTASet Top Boxes were in the market, against an estimated 8 million TV sets in use within the country; the rest of the STBs which constituted 90% in the market, were for Pay-TV. Counsel urged that a comparative analysis of the United States of America, the United Kingdom and South Africa showed thatduring digital migration, measures were adopted to subsidize or distribute FTA STBs free of charge to the people.He cited the Zimbabwean case of ***Retrofit v. Posts and Telecommunications Corporation,*** LRC [1994] 4 489, in support of the contention that a constitutional issue is involved, when communication services are priced beyond the capacity of ordinary people, and when subscription TV serves only a narrow elite market.

[98]Learned Senior Counsel, Mr. Muite submitted that Article 34 of the Constitution is not meant to regulate the communication sector, but rather, it seeks to secure broadcasting from political and commercial interference, to safeguard the integrity of Kenya as a constitutional democracy. He submitted that the holding of the Court of Appeal that the 1st appellant is not the body contemplated by Article 34 of the Constitution, did not vitiateall the decisions made by the 1st appellant,but it affected "broadcasting decisions"after the effective date, rendering them void. Counsel submitted that the"broadcasting function" can be de-linked from other facets of communicationfalling withinthe 1st appellant's mandate.

[99]Counselmade comparisons with foreign case law, theSouth African Constitutional Court case,***Ferreira, Clive v. Levin, Allan and Others***(No. 5 of 1995), and ***MacFoy v. United Africa Co. Ltd*** [1961] 3 All ER 1169,and urgedthat any legislation that is inconsistent with the Constitution is void to the extent of the inconsistency as from the time of enactment of that legislation, or as

from the time of the promulgation of the Constitution —whichever is the later. In effect, it was being urged that the procurement process conducted by the 1st appellant was null and void.

[100]It was argued for the 1st, 2nd and 3rd respondents that the line of interpretation proposed by the 1st appellant would excuse the regulator from compliance with the requirements of the Constitution within the set time-lines, and that this would destroy the very essence of lawful government intended by the Constitution. It wasurged that the 1st appellant had misconceived the legal aspect of the duty imposed by the Fifth Schedule to the Constitution;and that the said Schedule, when properly interpreted, does not countenance legislative delays, merely because Parliament had powers to extend time-lines. Counsel submitted that the three-year limit in that Schedule,to create an independent broadcast-regulator pursuant to Article 34, is a "sunset clause" specifying the time-frame within which the relevant law must be enacted.

[101]The "sunset clause", counsel urged, was a Roman law conceptwhich presupposes that "what is admitted for a period will be refused after the period": and a law required to be enacted within three years, ought to be enacted any time within the three years,and not after the lapse of the three-year period.The authority charged with the responsibility of enacting that law, counsel urged, cannot excuse its failure to comply with the time-lines, on the basis that Parliament had the power to extend those time-lines.

[102] On the question of separation of powers, the 1st, 2nd and 3rd respondents urged that this is a device for promoting checks-and-balances, and not a means by which arms of Government evade accountability. This line of argument was extended to the issue of "judicial restraint", with the objection that the appellants had invoked it so as to persuade the Courts to overlook executive excesses.

[103] It was urged for the respondents that the Government had failed to align the digital migration policy with constitutional values and principles; and that as a result, the criteria for allotment of BSD licences was opaque, lacked public participation, and was arbitrary in its implementation.

[104] It was urged that the 1st, 2nd and 3rd respondents had a legitimate expectation to the grant of a BSD licence, based on aGovernment promise in the 2006 ICT Policy, and in the Report of the Taskforce on the Migration of Terrestrial Television from Analogue to Digital Broadcasting in Kenya of September 2007. It was contended that the Taskforce had recommended thatthe respondents, as "*broadcasters will be allowed to form an independent company to run the signal distribution services in order to utilize their existing infrastructure*", and would be given preference.

[105] The 1st, 2nd and 3rd respondents sought to rely on "the right to expect that the Government will not implement laws and policies in a manner that destroys their vested rights".Learned counsel urged that the two documents – the Policy, and the Report of the Task Force—which are the cornerstone of the digital-migration strategy, had not been applied equitably as required by the Constitution.

[106]Learned Senior Counsel, Mr. Muite submitted that the 1st, 2nd and 3rd respondents had satisfied the Court of Appeal that due to their high investment in broadcasting infrastructure, the Government had to treat them equally, as they were not in the same category as the new entrants. He relied on the United States Supreme Court case, ***New York City Transit Authority v. Beazer,*** 444 U.S. 568 (1979) in which Justice White observed that *"a law or policy that assigns* "*burdens among classes that are not similarly situated … is the type of invidious choice forbidden by the equal protection clause."* Counsel urged that the purpose of restricting the grant of BSD licence to two licensees was unclear, and unjustified bythe terms of Article 34 of the Constitution.

[107]Counsel urged that under Article 34 of the Constitution, the Government had a duty to protect the respondents from harmful actions by third parties, but it had defaulted in this regard by denying them a BSD licence, leaving their content to be carried by their competitors under a "must-carry-rule" prescribed in Regulation 14(2)(b) of the Kenya Information and Communications (Broadcasting) Regulations, 2009.Such a rule, counsel submitted, had no constitutional basis in Kenya. Counsel urged that on comparative practices, in the United States of America, 60 percent of viewership is on cable TV,and 40 percent on FTA-TV, while in Kenya a greater percentage of viewership is on FTA-TV, with a negligible proportionon subscription TV. Therefore, in Kenya a subscription TV company cannot demand a right to carry FTA signals against a broadcaster's consent.

[108]Learned counsel submitted that the 1st appellant is not the independent regulator contemplated by Article 34 of the Constitution, since the majority of the members of the board of the 1stappellant were appointees, or representatives of the Government.This argument was anchored on the "Principles on Freedom of Expression and Broadcast Regulations" (Article 19), which require that broadcast regulators be protected against political and commercial interference.Counsel also invoked Principle 13, which requires that members of the regulatory body be appointed in a manner that lessens the risk of political or commercial interference, and that the members should serve in their individual capacity and be reasonably representative of society.

[109] Learned counselurged that the 1st appellant is not an independent constitutional body,but rather, an executive agency; and for proof, they citedthe letter from the Permanent Secretary in the Ministry of Information dated 22nd July, 2011 requesting the 1st appellant to consider issuing the respondents with a BSD licence.

[110]Learned counsel, while admitting the binding effect upon Kenya of the ITU Convention,submitted that the burden of such commitments of the country must be consistent with the obligations of the Government under the Constitution, and that international law cannot occasion breach of the Constitution, as the power to commit the country to international agreements is to be exercised with fidelity to the Constitution. This argument sought to justify Kenya shifting its digital-migration date from 17th June, 2015 to *17th June, 2020*.

[111] Learned counsel submitted that the tendering process under which their clients were denied a BSD licence was a defective one, as its only justification was that they had a bond of 60 days instead of 120 days. Counsel urged that this was not sufficient reason to bar their clients from the process;and they objected to the grant of licence to a foreign company,perceiving this as a control strategy adopted by the Government.

(vi) 4th Respondent's Submissions

[112]The 4th respondent opposed the appeal. He contended that it was imperative for the appellants to address the issues raised by the respondents, in order to avoid prejudice, unfairness and hardship to the Kenyan consumer. He submitted that the actions of the appellants constituted an infringement on the rights of the consumers.

[113]Counsel for the 4th respondent submitted that, while his client did not oppose the migration from the analogue to the digital platform, it opposed the process of digital migration, for it disregardedthe rights of the consumers; that digital migration should proceed as a process, but not as an event;and constitutional safeguards must prevail over government policies. Counselurged that in place of the proposed digital migration scheme, the simulcast system should be preferred; and Kenya was not ready for digital migration at the moment. Counsel submitted that

there were no compelling circumstances, other than business interests,dictating an early switch-off date.

[114]Learned counsel restated the apprehensions of the 1st, 2nd and 3rd respondents, that the accuracy and integrity of information and data transmitted might be subject to manipulation and alteration, hence prejudicing the rights of the consumers.Counsel also urged that the high prices of STBs was a basis for concern, since the Government had not offered to supply or subsidize them.

[115]Learned counsel submitted that, whereas Article 10 of the Constitution safeguards public-participation rights, there was no evidence that citizens were adequately consulted,just as there was no evidence of civic education on the process of digital migration.

(vii) 6th Respondent's Submissions

[116]Learned counsel for the6th respondent,Mr. Wekesa associated himself with the submissionsof the appellants.He contested the holding of the Appellate Court that the 1st appellant is not the independent body contemplated by Article 34 of the Constitution—as such a position would create a vacuum; promote lawlessness; and negate good governance.

[117]Learned counsel submitted that the Appellate Court had erred in holding that the 1st, 2nd and 3rd respondents were entitled to rely on legitimate expectation to a BSD licence. He urged that the Court failed to subject the claim of legitimate expectation to countervailing constitutional provisions (Article 227), which require a State organ to procure goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective; and to the provisions of the Public Procurement and Disposal Act, 2005.

[118] Counsel relied on several persuasive authorities:***R v. Devon County Council, ex parte Baker and Another; R v. Durham County, ex parte Curtis and Another*** [1995] 1 All ER 73,in which it was held that a claim of legitimate expectation can only be established when there is a clear representation, upon which it was reasonable for the claimant to rely; and if this condition is fulfilled, then the public body will be bound by the representation, unless its promise is inconsistent with its statutory obligations. Mr. Wekesa submitted that the expectation of the 1st, 2nd and 3rd respondents was illegitimate, as it was contrary to Articles 10, 27 and 227 of the Constitution.

[119]Urging that a BSD licence can be operated by any enterprise,be it a media practitioner or not, learned counsel submitted that a licence was not a right vested in anybody prior to the promulgation of the Constitution, and the Court of Appeal ought not to have assigned the relevant set of constitutional rights by distinguishing between those broadcasters who were in the market earlier, and the new entrants.Counsel submitted that it was an error for the Court of Appeal to hold that the 1st, 2nd and 3rd respondents were entitled to a BSD licence without going through the tendering process.

[120]Learned counsel submitted that the Appellate Court, by postponing the date of digital migration to 30th September, 2014, infringed its fundamental rights and freedoms under Article 34(3), in view of its investment in digital-television broadcasting. He contended that the 1st, 2nd and 3rd respondents were at all times represented in the deliberations of the Digital Television Committee, which set the deadline for migration; and that during the said period of deliberations, these respondents had raised no objection to the proposed date of migration.

D. ISSUES FOR DETERMINATION

[121]From the pleadings and the written and oral submissions of the parties, the following issues arise for determination.

(a) *whether the Communications Commission of Kenya was the body contemplated under Article 34 of the Constitution;*

(b) *whether the 1st, 2nd and 3rd respondents had a legitimate expectation to be issued with a Broadcast Signal Distribution (BSD)licence;*

(c) *whether the 1st, 2nd and 3rdrespondents' intellectual property rights were infringed by the appellants;*

(d) *whether the petition filed at the High Court was barred by "issue estoppel", and amounted to an abuse of the Court process,for being a collateral attack against the decision by the Public Procurement Administrative Review Board [Tribunal];*

(e) *whether the final orders of the Court of Appeal were in excess of the powers and jurisdiction conferred by the Constitution.*

E. ANALYSIS

(a) Status of CCK: Is this the Body contemplated under Article 34 of the Constitution?

[122] The petitioners in the High Court submitted that the CCK, *as it was then constituted,* was not independent of Government control, and hence lacked a basis in law for issuing a BSD licence. The learned trial Judge had takennote of the fact that Article 34(5) of the Constitution, as read together with Article 261(1) of the Constitution, and the Fifth Schedule to the Constitution, requires *Parliament to*

enact legislation establishing an independent body to regulate the media,*within three years* of the promulgation of the Constitution. The Court held as follows[paragraph 82]:

> ***"I take judicial notice of the fact that the National Assembly has passed the Kenya Information and Communications (Amendment) Bill, 2013 pursuant to the provisions of Article 34(5) of the Constitution and the same is awaiting assent by the President."***

[123] The learned Judge, relying on the case of ***Royal Media Services Ltd v. A.G,***Petition No. 346 of 2012overwhich he had previously presided, held as follows [paragraph 84]:

> ***"The circumstances of CCK have not changed and until the transition is completed by implementation of the Kenya Information and Communications (Amendment) Bill, 2013, CCK as currently established remains the body entitled under the Constitution and the law to continue to regulate the media and airwaves in accordance with the Constitution and [the] existing law."***

[124]The case of ***Royal Media Services Ltd v. A.G*** had held thus [paragraphs 39-41]:

"It is now well established that the Constitution must be read as a whole and to accede to the petitioner's position would be akin to legislating a vacuum in the regulation of the airwaves (see Olum & Another v Attorney-General ofUganda [2002] 2 EA 508). ***Law, like nature, abhors a vacuum and the promulgation of the Constitution did not***

happen in a vacuum, it was superimposed on an existing legal framework.I therefore agree with the respondents' argument that the framers of the Constitution intended that over time this framework would be transformed by legislative acts to accord with the Constitution. It is for this reason that by dint of Article 261(1) Parliament is required to enact the legislation contemplated under Article 34(5) within 3 years as set out in the Fifth Schedule to the Constitution.

*"The transformation of the existing law was also underpinned by the provisions of section 7(1) of the Sixth Schedule to the Constitution which provides that,**"All law in force immediately before theeffective date continues in force and shall be construed with the alterations, adaptations,qualifications and exceptions necessary to bring it into conformity with this Constitution."** The provisions of the Schedule to the Constitution are a part of the Constitution and must be read with it so that Article 34 must be read together with the provisions of the schedules to the Constitution **(seeDennis Mogambi Mong'are v Attorney General,**Nairobi Petition No. 146 of 2011 (Unreported)[2011] eKLR).

*"These provisions mean that the statutes in force governing media regulation remain in force subject to such modifications as are necessary to bring it in conformity with the Constitution. It follows that the**Kenya Information and Communications Act,** 1998 and all the regulations made thereunder remain in force subject to the Constitution and the transitional provision I have cited above. CCK is established by legislation currently in force and is empowered to, inter alia, license and regulate postal, information and communication services***"** [emphasis supplied].

[125] The learned Judge based his finding on the fact that the Fifth Schedule of the Constitution gave a *time limit of 3 years* within which to enact the necessary legislation in compliance with Article 34. The learned Judge further held that the Kenya Information and Communication Act, 1998 and all the regulations made thereunder*, would remain in force* subject to such modifications as are necessary to bring it into conformity with the Constitution.

[126] In the Court of Appeal,*Nambuye J.A* in analyzing the issue whether CCK as then constituted, was the body envisaged under Article 34(5) of the Constitution, considered the composition of CCK under the 1998 and 2009 Acts, and held that the CCK was *controlled by Government;* she thus held [paragraph 149]:

> *"[I] find that the key operative words in Article 34(5) [are] 'independent of the government'.* ***CCK as at the time of execution of its mandate in relation to litigation giving rise to this appeal was not independent of the Government. It therefore had no legitimacy to do what it did."***[emphasis supplied].

[127] As to the standing of the existing law before the expiry of the time-frame for legislating on the relevant laws, and as to whether Courts should continue applying the existing law until the period specified under the Fifth Schedule expired, *Maraga JA* held as follows [paragraphs 85-86]:

> *"In my view, if that were the case, Section 7(1) of the Sixth Schedule to the Constitution would be otiose. In its place, there would have been a provision suspending conformity [to] the Constitution until after the expiry of the period of 3 years in the Fifth Schedule. But as I have said, that is not the case. The operation of the entire Constitution, including Section 7(1) of the Sixth Schedule, commenced on the effective date, that is 27th August, 2010. Article 262 of the Constitution makes that very*

clear. It directs that ***'the transitional and consequential provisions set out in the Sixth Schedule shall take effect on the effective date.'***

"It therefore follows that from the word go, as required by Article 10 of the Constitution, all State organs, State officers, public officers and all persons are to interpret, apply, enact and implement all laws as well as public policy in accordance with the values and principles of good governance which include national unity, the rule of law, democracy and public participation, human dignity, equity, social justice, equality, human rights, non-discrimination, good governance transparency, accountability and sustainable development."

[128] *Maraga JA* relied on the persuasive authority of the Jamaican case,***Director of Public Prosecutions v. Mollison*** UKPC 6 (22nd January 2003) which interpreted a provision in the Jamaican Constitution similar to Section 7(1) of the Sixth Schedule, and concluded as follows (paragraph 89):

"[I] hold that in this case, immediately after the commencement of the 2010 Constitution and at least before making any major decisions like the implementation of the RRC-06 Agreement with far-reaching implications, the Government was obliged to strictly comply with the letter of the Constitution by altering the composition of CCK to align it with Article 34(3)(b) of the 2010 Constitution even before the requisite legislation was passed. What we see instead is a *modus operandi* ***as though the Constitution did not exist."***

[129] We would state an evident fact: whilethe new Constitution repealed the old Constitution,it did not extinguish all existing legislation. This is the import of Article 264 of the Constitution which thus provides:

> ***"Subject to the Sixth Schedule, for the avoidance of doubt, the Constitution in force immediately before the effective date shall stand repealed on the effective date."***

[130] Our apprehension is that on the effective date, it is only the old Constitution that fell into disuse, save for the various sections saved by the Sixth Schedule. The existing legislative regime, on the other hand, remained in force, as decreed by Section 7 of the Sixth Schedule in the following terms:

> ***"(1) All law in force immediately before the effective date continue in force****and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution"*[emphasis supplied].

[131] The inevitable inference resolves into the principle that the new Constitution did not envisage or create a legal vacuum,and all processes regulated by law were to continue in progress, as signalled by the Constitution.

[132] *Musinga J.A*held that CCK as then constituted, was not the body contemplated by Article 34 of the Constitution, since its members are *appointed* either by the President or the relevant Minister. In his example of the symbol of Government control over CCK, the Judge referred to the letter by the then Minister for Communications and Technology,"directing" the CCK to consider issuing a BSD licence to National Signal Networks. The learned Judge thus held [paragraphs 131-132]:

"The Constitution, having stipulated the nature of the body that was to undertake the task of licensing signal distributors among other duties, it was incumbent upon the Attorney-General and the Minister for Communications and Technology to ensure that the constitutional requirements were met. Had the trial Judge correctly interpreted the relevant transitional provisions, that is, ***Section 7(1) of the Sixth Schedule to the Constitution, he would have come to the conclusion that CCK, as constituted then, did not meet the constitutional threshold to regulate airwaves and undertake licensing of signal distribution. Section 7(2) of the Sixth Schedule clarifies how the law should be interpreted where the Constitution assigns responsibility for actualizing a constitutional provision to a different state organ or officer,*** *for example, where an Act of Parliament that is supposed to operationalize a provision of the Constitution is not yet in place. In such instances the provisions of the Constitution prevail, to the extent of the conflict"* [emphasis supplied].

[133] The question of the constitutionality or otherwise, of the CCK has remained central to this dispute, due to three basic assumptions which appear to have influenced the reasoning by both counsel and learned Judges at the two superior Courts.These are:

(i) that either Article 34(3) or (5) of the Constitution envisages the establishment of an independent body, whose mandate is to regulate the airwaves and other forms of signal distribution, through licensing;

(ii) that the body so established was to be the successor to the CCK, either immediately after the promulgation of the Constitution on 27th

August,2010 or within three years after the promulgation, in conformity with Section 7(1) of the Sixth Schedule;

(iii) that the attribute "independent", signified a body whose composition either did not include Government representation, or if it did, then such representation wasinsignificant.

[134] We will evaluate the merits of such assumptions by addressing certain specific questions, as follows:

(a) does Article 34(3) envisage the establishment of an "independent body?";and what is the nature of the body contemplated under Article 34(5) of the Constitution?

(b) what is the proper interpretation to be given to the transition clauses in the Constitution?; did the Constitution envisage a void?; and what is the effect of Section 7 of the Sixth Schedule to the Constitution?

(c) assuming that the CCK was not the body contemplated under Article 34 of the Constitution, what are the consequences?

[135] Learned counsel for the 5th appellant, Mr. Imende submitted that the body contemplated under Article 34(5) was the *Media Council of Kenya*, and not the CCK. He urged that Article 34(5) made reference to the institution established under the Media Council Act No. 46 of 2013, which according to *Article 34(5)(c)* is to set media standards, and regulate and monitor compliance with those standards in the media industry. Counsel invoked the preamble to the Media Council Act, which signals that it was enacted to give effect to *Article 34(5)* of the Constitution.

[136] Learned counselfor the 1st, 2nd and 3rd respondents, Mr. Mansur submitted that *Article 34(3)* cannot be realized without the existence of an "independent body"; and thus, once the Constitution came into effect, Parliament was obliged to enact relevant legislation, or legislative amendments, to ensure that the body contemplated under Article 34(3) was independent of control by Government, political or commercial interests.

[137] This, in our perception, is an interpretive conundrum, that is best resolved by the application of principle. This Court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit. In the ***Matter of the Kenya National Human Rights Commission,*** Sup. Ct. Advisory Opinion Reference No. 1 of 2012;[2014] eKLR, this Court [paragraph 26] had thus remarked:

> *"...But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context.**It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances**. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result"* [emphasis supplied].

[138] In ***Speaker of the Senate & Another v. Attorney-General & 4 Others***, Sup. Ct. Advisory Opinion No. 2 of 2013; [2013] eKLR, [paragraph 156], this Court further explicated the relevant principle:

"The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower Courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the Court must be seized upon as an opportunity to providehigh-yielding interpretative guidance on the Constitution; ***and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents.*** *The Court must alsoremain conscious of the fact that constitution-making requires compromise,whichcan occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitutions borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly [capture] express the minds of the framers, and the minds and hands of the framers may also fail to properly mind the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras"*[emphasis supplied].

[139] These principles have recurred in this Court's later decisions:***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others***, Sup.Ct. Petition No. 2B of 2014; [2014] eKLR;***In the Matter of the Principle of Gender Representation in the National Assembly and Senate,*** Sup. Ct.

Application. No. 2 of 2012; [2012] eKLRand ***Jasbir Singh Rai and 3 Others v. Tarlochan Singh Rai and 4 Others***Sup. Ct. Petition No. 4 of 2012; [2013] eKLR.

[140] In the present case, the issue before us is the correct interpretation to be accorded to Article 34(3) of the Constitution. The said Article thus provides:

> **"(1)...**
>
> **(2)...**
>
> **(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.*
>
> **(4) ...**
>
> *(5) Parliament****shall enact legislation thatprovides for the establishment of a body****, which shall—*
>
> *(a) be independent of control by government, political interests or commercial interests;*
>
> *(b) reflect the interests of all sections of the society; and*
>
> *(c) set media standards and regulate and monitor compliance with those standards"*[emphasis supplied].

[141] It is clear that *Article 34(5)* obliges Parliament to enact legislation establishing the body contemplated therein. Can the same be said,as regards*Article 34(3)?*

[142] It is to be taken as a manifest fact, that, where the drafters of the Constitution intended particular legislation to be enacted by Parliament, they specifically provided for that. This position is clear from the Fifth Schedule,which signals the legislation to be enacted by Parliament. Tabulated below aresome of the several Articles of the Constitution indicated in the Fifth Schedule, as requiring a targeted legislative course by Parliament:

Article as specified in the Fifth Schedule	***The Constitution's Requirement in Specific Terms***
11(3)	*11(3)-Parliament shall enact legislation to—*
18	*18-Parliament shall enact legislation—*
34	*34(5)-Parliament shall enact legislation that provides for the establishment of a body, which shall—*
45	*45(4)-Parliament shall enact legislation that recognizes—*
46	*46(2)-Parliament shall enact legislation to provide for…*
47	*47(3)-Parliament shall enact legislation to give effect to the rights in clause(1) ….*
50	*50-Parliament shall enact legislation providing for the…*
59	*59(4)-Parliament shall enact legislation to give full effect to this Part, and any such legislation may …*
63	*63(5)-Parliament shall enact legislation to give effect to this Article…*

[143] Certain inferences may be drawn from the foregoing catalogue.First, the Fifth Schedule refers to particular Articles of the Constitution in general terms. One has to keep reverting to the specific provision in the Constitution, in order to ascertain first, the nature of the legislation envisaged, and secondly, the extent of the legislative mandate accorded to Parliament. Secondly, where the drafters intended that two different sets of legislation be enacted with respect to the same Article, they specifically provided so. For example, Article 68 provides:

"*Parliament shall—*

(a) revise, consolidate and rationalize existing land laws;
(b) revise sectoral land-use laws in accordance with the principles set out in Article 60(1); and

(c) enact legislation—

(i) to prescribe minimum and maximum land holding acreages in respect of private land;
(ii) ...."

[144] From a plain reading of Article 34(3) of the Constitution, we draw the inference that the Article guarantees the freedom of establishment of broadcasting and other electronic media,but *subject to licensing procedures that are necessary to regulate the airwaves, and other forms of signal distribution.* Such licensing procedures are to be independent of control by Government, political interests, or commercial interests. This is a normative prescription in the Constitution that guarantees a particular freedom. On its face, therefore, Article 34 is an embodiment of a fundamental freedom.

[145]A cover story in **AWAAZ**magazine (Issue 2-2002) profiles one of Kenya's radical journalists and printers, Girdhari Lal Vidyarthi. It was written by his

grandson Shravan Vidyarthi and provides an insight into media independence and freedom during the colonial era. Girdhari Lal Vidyarthi was the first Kenyan to be convicted for sedition. He founded his Press, **Times Printing Works**, and a newspaper, the **Colonial Times** in 1933. Shravan Vidyarthi observes:

> ***"Under the motto "Frank, Free and Fearless," Vidyarthi and his team of young writers spearheaded the politics of journalism in Kenya and provided a pivotal channel of expression for emerging freedom fighters like Tom Mboya and the future first President Jomo Kenyatta. Vidyarthi's radical and unwavering fight saw him convicted and sentenced to prison on three separate occasions. Indeed, it signified a campaign for press freedom and unrestricted national expression that was to last not only throughout the independence struggle but also well into the contemporary period."***

[146]G.L. Vidyarthi also published two newspapers in African languages that followed the "radical standpoint" of the **Colonial Times**. These were **Habari za Dunia/News of the World** edited by F. M. Ruhinda and a weekly paper in the Dholuo language, **Ramogi**, which was edited by Ramogi Achieng Oneko.

[147] Colonial printing works, like the journalists, were not spared. As part of colonial control and oppression of the independent media, cannibalizing printing works was always a preferred strategy of subverting freedom of expression. This strategy also subverted the economic and property interests of the owners of the printing works.

[148] Media independence and freedom was not explicitly provided for in Kenya's independence Constitution. It was subsumed under the generic provision of freedom of expression. Beyond the law, the State had made several muscular

attempts to control the media through direct State participation. It established and tightly controlled sound and vision (radio and television) broadcasting through its monopoly in the Kenya Broadcasting Corporation (which later became the Voice of Kenya before reverting back to its earlier name). Hand in glove with this control was the establishment of regional newspapers in each of the country's eight provinces, and later active participation in the media market by the ruling political party, Kenya Africa National Union (KANU), in *Kenya Times*. (*See* Ochieng' Philip, 2000, *I Accuse the Press*, Inter Africa Press, Nairobi).

[149] Private and community interests in the media were restricted to newspapers, magazines, and book publishing, perhaps because of their periodic, rather than continuous nature. Still, these media were circumscribed by at least fifteen prohibitive laws focused on controlling, restraining, and punishing the media practice rather than facilitating it. (*See*, **Makokha, Kwamchetsi**, '*The Dynamics and Politics of Media in Kenya: The Role and Impact of Media in Kenya's 2007 General Election,'* in **Karuti Kanyinga and Duncan Okello *(eds)***Tensions and Reversals in Democratic Transitions: The 2007 General Elections, Institute for Development Society &Studies for International Development, University of Nairobi; 2010). An example of this era was the proscription of publications, such as the Church-owned *Target Magazine* (and its Kiswahili twin, *Lengo*), and *Beyond*, and later, *The Nairobi Law Monthly* and *The Weekly Post*. Numerous journalists and publishers were arrested, detained and jailed because of their work.

[150] The State often identified the media as power tools in the hands of those engaged in political processes and sought to counter their influence through a legal and regulatory licensing regime that sought to diminish the influence of economic, religious, social, political and other interests that the State could control, manipulate, or co-exist with its material interests. The refusal to license other operators in the broadcast sector emanated from the desire to limit avenues and revenues of expression for political and economic interests outside the

Government. The first licence to be issued for television broadcasting was to Kenya Television Network (KTN), which was owned by the ruling political party, KANU. Subsequently, other licensing for sound broadcasting was through the state-centric-granting of a commercial radio frequency to KBC's Metro FM- or arbitrarily (as was the case in the licensing of Capital FM to a foreign investor).

[151] The licensing of Citizen Radio and Television appeared to be conditional upon political cooperation between its owners and the ruling political party, KANU. When it was not forthcoming or assured, the operator was switched off the air and their equipment vandalized. This sort of State interference with the media also occurred in 2005 when State agents raided the Standard Media Group, which was then also operating the KTN TV station, set the newspapers on fire and disrupted program transmission on TV.

[152] This Court takes judicial notice of the corruption, cronyism and State patronage that attended the licensing of frequencies for radio and TV broadcasting. One stark example, of which we take judicial notice, is the patronage of the ruling party KANU in the issuance of licenses. It is these acts that formed the past status quo that the Kenyan people wanted eliminated when they voted for the new Constitution. Indeed, Article 10 of the Constitution is a commitment to that project.

[153] The official end of monopolies at the onset of the liberalization of the economy, which was attended by the structural adjustment programs, did not affect the communications sector – telephony and other communication for at least another 10 years on the premise that telecommunications – including radio and television broadcasting – was too sensitive to be released into private (local) hands. Liberalization of the airwaves came in hiccups, characterized by a flat refusal to license any radio operators until 1995, even though the first private license for television broadcasting had been issued in 1990 to KTN, which was owned by the ruling party, KANU. No known licensing regime existed, thus allowing for the granting of licences on a State-centric basis – which granted commercial radio

frequencies to KBC's Metro FM – or granting of licences for unknown considerations (as was the case in the licensing of Capital FM to a foreign investor).

[154]As previously mentioned, the licensing of Citizen Radio and Television appeared to be conditional upon political cooperation between its ownership and the ruling party. Some of the beneficiaries of this skewed and arbitrary allocation of frequencies subsequently attempted to sell them off to private operators but the State intervened and ensured that they remained unused. The unbundling of the Kenya Posts and Telecommunications into a regulator (the Communications Commission of Kenya), a telephony service (the mobile Safaricom and landline Telkom Kenya) and the Postal Corporation of Kenya was the first step in creating a predictable licensing regime. Still, there were some 60 frequencies in use by operators in 2005 that were not operational (See eXpression Today, 2005a).

[155] In this uncertain regulatory environment, radio and television was operated at the mercy of the regime in power, conditional on political cooperation and support. The 2010 Constitution seeks to end this corruption in public affairs, this opaqueness in the licensing of a natural resource, and the operation of a "banditry" economy in the name of a liberalized economy.

[156] As the historical, economic, social, and political background to these fundamental Articles 4(2), 33, 34, and 35of the Constitution is narrated and analyzed the reasons behind their content must become very clear. That background also illuminates the fundamental rights in Article 34 of *freedom of establishment,*and*independence*of the media. It has also demystified and deconstructed the words ***independent of control*** *by Government, political interests, or commercial interests* in Article 34 within their historical, socio-economic contexts of Kenya.

[157] There is no doubt that this history of egregious favouritism, official interference and arbitrary licensing regimes, coupled with low State tolerance for

dissent, informed the constitutional guarantee for freedom and independence of the media. The blatant violation of the right to the private property of the owners of media printing works and newspapers is a path the Constitution did not want to continue.

[158] The flip side of the coin of State control is the power and control of the media by powerful commercial interests. One of the leading scholars on this subject, the eminent American Professor of Linguistics, Noam Chomsky in his book *Media Control: The Spectacular Achievements of Propaganda* (New York: Seven Stories Press; 2002) said this about media control[at page 9]:

> ***"The role of the media in contemporary politics forces us to ask what kind of a world and what kind of a society we want to live in, and in particular in what sense of democracy do we want this to be a democratic society."***

[159] Close to home, Franceschi and Mwita (Quoted in PLO Lumumba, The Constitution of Kenya,2010, Strathmore University Press, 2014) argue that[at page 172]:

> ***"The media is like a giant beast: Its teeth are persuasion, its eyes information, and its hands formation of public opinion. The media wins and loses elections. The media impeaches politicians and, on its own, the media watchdogs Government decisions and uncovers corrupt malpractices. The media is power we cannot and do not want to control; it is the neo-doctor of our current sick society. When the media watches, stake-holders tremble, suffer anxiety and run away if they can. But it is precisely that power that can save democracy."***

[160]We should not however put the media upon a pedestal. The media does not exist in a vacuum. The power of the media is a double-edged sword which can save or destroy democracy; and Kenya's history is witness to this truth. It would be erroneous to fail to see the integration of State interests, those of political parties, and that of the media and its commercial interests. Contradictions among these interests may occur, but all these interests could constitute the collective State and become a mortal danger to the citizens' right to a free and independent media.

[161] It is also instructive that Article 4(2) of the Constitution decrees that Kenya shall be a multi-party democracy founded on values and principles of governance outlined in Article 10. The vision of the Constitution is that one-party dictatorships of the past were unacceptable and that the nurturing of many political parties would entrench democracy in Kenya. The Constitution also realizes that democracy flourishes where information is freely available, and open to debate and persuasion, rather than coercion, so as to help citizens to decide the direction which society needs to take.

[162] Freedom of expression and the right to information, therefore, guarantee debate and provide an opportunity for citizens to know what their Government is doing, but also to contribute to it by voicing support or opposition. Support and dissent are essential because they indicate levels of public involvement and participation in how societies are run (*See*, Fourie, Pieter, , '*The role and functions of media society'* in Pieter Fourie (ed), *Media Studies: Volume 1-Media History, Media, and Society,* Juta & Co Ltd, Cape Town; 2008:8).

[163]Recent new legislation has sought to align the old Communications legislation to the dictates of Article 34 of the Constitution. The Communications Act, 2013 was assented to by the President on 11thDecember, 2013. Its date of commencement was 2nd January, 2014. CCK has been renamed under this new Act as the Communications Authority of Kenya (CAK). The Media Council Act was

similarly assented to on 24th December, 2013 and came into operation on 10th January, 2014.

It is the licensing procedures that are subject to the constitutional safeguard of independence from control of Governmental, political or commercial interests.

[164] We agree with learned counsel, Mr. Mansur in his argument that licensing procedures cannot attain independence from external control *without other policy and legislative interventions*. We understand counsel to be saying that "independence" in this context cannot be realized in a vacuum. However, we have not appreciated that the broad-based scheme for establishing such independence, within the terms of Article 34(3), necessarily entails the "creation of a body"—a novel act.

[165] It differs from the terms of Article 34(5) of the Constitution,which provides thus:

> ***"Parliament shall enact legislation that provides for the establishment of a body, which shall—***
>
> ***(i) be independent of control by Government, political interests or commercial interests;***
> ***(ii) reflect the interests of all sections of the society; and***
> ***(iii) set media standards and regulate and monitor compliance with those standards."***

[166] It is clear to us that as opposed to Article 34(3), which is a normative prescription guaranteeing the freedom of establishment of broadcasting and other electronic media, Article 34(5) commands Parliament to enact legislation for the

establishment of a "body". This brings us to the next task of determining the nature of the "body" contemplated by the foregoing provision.

[167] It is to be noted that Article 34 (5)(a) decrees that the body to be so established must be independent of governmental, political and commercial control. Sub-Article (b) on the other hand relates to the composition of the said body. The body in question has to be constituted in such a manner as to be reflective of *all sections of society*. Most critically for our purposes, sub-Article (c)makes provision for the functions of the body to be established. This body is to be established for the main, or even sole purpose of *setting media standards, regulating the said standards and monitoring compliance with the standards*.

[168] Thus far, sub-Articles (a) and (b) of Article 34(5) do not present much of a problem, in terms of their meaning. The envisaged body is to carry out its functions free from the influence and direction of Government, the political class, and commercial interests. It is clear to us that, what is apprehended in this regard, is the pervasive power and influence possessed by these three sectors,making them a threat to the operations of the media. Their intrusive nature, if not checked, can distort the operations of a body which is meant to set standards and regulate the operations of the media. *Independence,* therefore, is crucial; and of this concept we had thus remarked, in ***Re the matter of the Interim Independent Electoral Commission (IEBC);*** Sup. Ct.Advisory Opinion No. 2 of 2011; [2011] eKLR at (paragraphs 59 and 60):

> *"It is a matter of which we take judicial notice,that the real purpose of the "independence clause", with regard to Commissions and independent offices established under the Constitution,****was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government...***

Theseveral independent Commissions and offices are intended to serve as "people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour:this, indeed, is the purpose of the 'independence clause".

"For due operation in the matrix, "independence"does not mean "detachment", "isolation" or "disengagement" from other players in public governance. *Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest…"*[emphasis supplied].

[169] Therefore,"independence" is a shield against influence or interference from external forces. In this case, such forces are the Government, political interests, and commercial interests. The body in question must be seen to be carrying out its functions free of orders, instructions, or any other intrusions from those forces. However, such a body cannot disengage from other players in public governance.

[170] How is the shield of independence to be attained? In a number of ways.The main safeguard is the Constitution and the law. Once the law, more so the Constitution, decrees that such a body shall operate independently, then any attempt by other forces to interfere must be resisted on the basis of what the law says. Operationally however, it may be necessary to put other safeguards in place, in order to attain "independence" in reality. Such safeguards could range from the manner in which members of the said body are appointed, to the operational procedures of the body, and even the composition of the body. However, none of these "other safeguards" can singly guarantee "independence". It takes a

combination of these, and the fortitude of the men and women who occupy office in the said body, to attain independence.

[171] A statutory body such as the one contemplated by Article 34(5) of the Constitution may be said to reflect "all sections of society" in terms of its composition. But this condition can only be achieved in the broadest of senses. In this regard, the body should include representation across gender lines, the marginalized, the youth, the professional bodies, the private sector, the religious sector and civil society.

[172] Sub-Article (c) of Article 34(5) of the Constitution provides for the functions of the body to be established. It is to *set media standards, and regulate and monitor compliance with those standards*. What do the words "media standards" mean, in the context of the media sector and its operations? It is apparent from the wording of this Article that the Constitution requires Parliament to establish a standards-compliance watchdog, some kind of media -oversight authority. This same watchdog is expected to set those standards, and regulate them.

[173] In conventional parlance, the phrase "media standards" is used to convey the sense of the professional qualifications, and codes of conduct and ethics, for media practitioners. The standards denote not only *who qualifies* to practice, for example, as a journalist or correspondent, but also how media practitioners and media houses should *conduct themselves* in the course of their functions.

[174] The freedom of the media, while guaranteed by the Constitution, is subject to certain professional and ethical standards. This is in keeping with criteria of integrity, also found in other professions, such as medicine, law, engineering, or architecture.In many jurisdictions, the standardization and monitoring of media practice, takes the form of either a "self-regulating" or a "governmental- regulating" mechanism.Self-regulation can be statutory or non-statutory. Governmental

regulation is rarely the preferred option, given the intrusive nature of Government-interest in media activities.

[175] Againstsuch a background, we will consider certain relevant statutes,beginning with the Media Council Act. This Act is established: *"to give effect to Article 34(5) of the Constitution; to establish the Media Council of Kenya; to establish the Complaints Commission, and for connected purposes."* Under Section 6 of the Act, one of the listed functions of the Council is the *setting of journalistic standards, ethical and professional standards, and the regulation and monitoring of compliance with those standards*. On the composition and membership of the Council, Section 7 requires that the nominees reflect the interests of all sections of society. Section 11 of the Act provides that the Council shall be independent of control by Government, political or commercial interests.

[176] Now the CCK was established under the Kenya Information and Communications Act (Cap 411A, Laws of Kenya) —

> ***"to provide for the establishment of the Communications Commission of Kenya, to facilitate the development of the information and communications sector (including broadcasting, multimedia, telecommunications and postal services) and electronic commerce, to provide for the transfer of the functions, powers, assets and liabilities of the Kenya Posts and Telecommunication Corporation to the Commission, the Telcom Kenya Limited and the Postal Corporation of Kenya, and for connected purposes."***

[177] Section 5 of the Act describes the CCK as a *licensing and regulatory body*, but makes no mention of a *"standard setting"* function, in the context of the foregoing analysis.

[178] It is clear from the two statutes that *the body contemplated by Article 34(5) of the Constitution is the Media Council of Kenya,*and *not* the successor to the CCK. The legislation passed by Parliament leaves no doubt as to what CCK's successor understood its remit to be, under the Constitution. Learned counsel, Mr. Imende has urged, with real plausibility, that such media-centred legislation would have made no progress to its conclusion, without the active participation and contribution of the members of the media organizations.

[179] A contrary argument would be that the legislation passed by Parliament is not what the Constitution envisaged—a position that would mean, technically, that the Media Council Act is unconstitutional, to the extent that it purports to make provision for what was not envisaged by the Constitution. As such a possibility was not canvassed before the Court, its plausibility must remain in the abstract. But it is clear to us that for any form of media to be subjected to a professional standard, *it must already be in existence*. It must *already have been licensed* to operate as such. *This includes broadcast and other forms of electronic media.*

[180] However,notwithstanding the conclusions we have arrived at, regarding the import of Articles 34(3) and 34(5) of the Constitution, we appreciate the factors of merit weighing in the minds of the learned Judges of the two superior Courts,when they proceeded on the three assumptions — especially in view of the tentative language employed by the drafters in Article 34(3). It is quite logical to assume that licensing procedures cannot be independent, unless the licensing organ is itself independent. Indeed, this was the gist of learned counsel, Mr. Mansur's submission on this issue. It is also not illogical to assume that licensing is itself not just a process, but a "standard". Indeed, a licence such as the one for broadcasting and signal distribution, comes with certain conditions, which may well embody certain "standards". What is clear to us, however, *is that neither Article 34(3) nor Article 34(5) can be the basis for declaring the CCK unconstitutional.*

[181] This finding should dispose of the question regarding the constitutionality or otherwise of the CCK. But,in view of the several provisions of the Constitution that fall short of full clarity in meaning, we will give further consideration to the legal standing of the CCK,following the promulgation of the Constitution on 27th August, 2010. At the time the Constitution came into force, CCK *was* the body mandated to license broadcasting and other electronic media.

[182] Counsel for the 1st appellant has submitted that the three-year implementation period provided under the Fifth Schedule justified the continued existence of CCK; and that the Appellate Court had not appreciated a fundamental principleof constitutional interpretation, namely, that the Constitution does not envisage a vacuum in the flow of matters of legal consequences.

[183] Counsel for the Attorney-General concurred with the submissions of the 1st appellant, and urged this Court to find that it would have been in the public interest for the Appellate Court to find that, in the absence of the legislation envisaged under Article 34 of the Constitution, CCK was the only body with the power to regulate the communications sector.

[184] Counsel for the 1st, 2nd and 3rd respondents, by contrast, submittedthat the 1st appellant had misapprehended the duty imposed by the Fifth Schedule of the Constitution, construing it as permitting legislative delays, just by dint of Parliament being able to extend time-lines for a period not more than a year. Counsel were of the opinion that the three-year time limit within which to create an independent broadcast-regulator, pursuant to Article 34, was a "sunset clause",prescribing the time-frame for the enactment of the relevant law.

[185] Counsel submitted that Article 261(2) of the Constitution prescribed strict terms for extension of time, while Article 261(4) imposed the obligation of preparing relevant bills by the 2nd appellant in consultation with the Commission

for the Implementation of the Constitution. Counsel urged that the 2nd appellant had delayed the process of legislation, and without any justification.

[186] The bone of contention in this case is the proper interpretation that ought to be accorded to Section 7(1) of the Sixth Schedule,*vis-à-vis* the legislative time-frame provided in the Fifth Schedule of the Constitution. We would shed light on the relevant considerations by making reference to the comparative experience.

[187] Sections 21 and 134 of the Belize Constitution of 1981 provide as follows:

> *"21. Nothing contained in any law in force immediately before Independence Day nor anything done under the authority of any such law shall, for a period of five years after Independence Day, be held to be inconsistent with or done in contravention of any of the provisions of this Chapter."*
>
> *"134. (1) Subject to the provision of this Chapter,**the existing laws shall notwithstanding the revocation of the Letters Patent and the Constitution Ordinance continue in force on and after**Independence Day and shall then have effect as if they had been made in pursuance of this Constitution but they**shall be construed with such modifications, adaptations, qualifications, and exceptions as may be necessary to bring them into conformity with this Constitution"*** [emphasis supplied].

[188] The Court of Appeal of Belize, in the case of ***San José Farmers' Co-operative Society Ltd v. Attorney-General***(1991) 43 WIR 63,hadthe task of ascertaining the meaning of the foregoingprovisions;and *Henry P J.A* held as follows:

"In my view,the object of section 21 was to ensure that during the five years following Independence no attacks were to be launched against the constitutionality of existing laws...*In others, such existing laws become instantly unconstitutional when the Constitution of the territory came into force because they were afforded no such protection. Both provisions created problems and section 21 of the Belize Constitution was designed to overcome both problems by providing a breathing space during which the Governor-General and Parliament could effect the necessary legislative changes.* ***The section does not, however, in my view, detract in any way from the power of a court either during the five-year period or afterwards to construe an existing law 'with such modifications, adaptations, qualifications, and exceptions as may be necessary' to bring it into conformity with the Constitution. At the same time the modifications, etc must be such only as are necessary and a court must be wary of usurping the functions of Parliament by introducing new and possibly controversial legislation in the guise of a modification necessary to bring a particular law into conformity with the Constitution"*** [emphasis supplied].

[189] This Belize case concerned the validity of Sections 3, 8, 17, 18, 19(a), 22, 32 of the Land Acquisition (Public Purposes) Act(Cap 150), with regard to the right of property, and the application of compulsory acquisition as provided for in the Constitution.

[190] Under the Belize Constitution, Parliament was given a five-year period within which to enact legislation to give effect to the constitutional changes. The Court, in interpreting the effects of Section 134(1) of the Constitution (which is in *parimateria*with Section 7(1) of Sixth Schedule to Kenya's Constitution) stated that

the *five year grace period provided by the Constitution does not take away the powers of the Court to construe the existing laws with necessary modifications to bring it into conformity with the Constitution.*

[191] Consequently, the Court in exercising its powers under Section 134(1) of the Constitution effected minor textual amendments to Sections 3(1), 19(*a*) and 22 of the Act, and struck out Section 32 which empowered the Minister to pay compensation over a period of ten years. The Court held that Section 32 would have to be deleted in its entirety,as it would not be possible to effect the necessary modification without usurping the powers of Parliament. *Henry P. J.A*thus stated this position:

> ***"In my view a distinction must be drawn between on the one hand, construing existing provisions in an Act with such modifications, adaptations, qualifications, and exceptions, as may be necessary to bring them into conformity with the Constitution, and on the other hand, introducing entirely new and unrelated or contradictory provisions into the Act. The former is the function of the court, the latter the function of Parliament which the court ought not to usurp."***

[192] The learned Judge was of the opinion that the grace period within which Parliament ought to have enacted relevant laws, was meant to save those laws which though inconsistent with the Constitution, could be applied with relevant modifications or alterations. The relevant passage in the Judgment thus reads:

> ***"It seems to me that Section 21 of the Constitution contains an implicit recognition that some of those laws could not be saved by being 'construed' pursuant to Section 134(1) but would in the absence of parliamentary action be held to be***

inconsistent with the Constitution; hence the five-year breathing space for such action."

[193] In ***Attorney-General of St Christopher, Nevis and Anguilla v Reynolds***(1979) 43 WIR 108,**(*Attorney-General of St Christopher, Nevis and Anguilla case)*** the Judicial Committee of the Privy Council had to interpret similar constitutional provisions.In this case,the respondent was a retired Police Inspector who was arrested and detained during a state of emergency, pursuant to Section 3(1) of the Emergency Powers Regulations, 1967 which gave powers of detention to the Governor if satisfied that any person had done acts prejudicial to public safety or order. The respondent was arrested on 11th June, 1967 and released on 10th August, 1967 before Parliament prescribed the mode of detaining a person during the state of emergency, in line with the Constitution. Consequently, the respondent sued for deprivation of his right to liberty.

[194] Sections 103 and 108 of the Constitution of St Christopher, Nevis and Anguilla provides:

"103 (1) The existing laws shall, as from the commencement of this Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with … this Constitution….

(2) Where any matter that falls to be prescribed or otherwise provided for under this Constitution by the legislature or by any other authority or person is prescribed or provided for by or under an existing law … that prescription or provision shall, as from the commencement of this Constitution, have effect (with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into

conformity with … this Constitution …) as if it had been made under this Constitution by the legislature or, as the case may require, by the other authority or person."

"108The Leeward Islands (Emergency Powers) Order in Council 1959 shall cease to have effect as part of the law of [the State] on 1st September 1967, or such earlier date as the legislature may prescribe."

It is to be noted that the Constitution came into operation on 27th February, 1967; and Parliament was allowed six months within which to enact the requisite laws.

In determining the issue, the Court held thus:

*"The purpose of Section 108 was a limited one: to ensure that powers existed to deal with an emergency, should one arise (as, indeed, happened) before the legislature had enacted appropriate (and constitutional) legislation for dealing with such an event. Their lordships cannot read the section as limiting the generality of Section 103 or protecting the Order in Council from any modifications or adaptations necessary to bring it into line with the Constitution. It seems plain that Section 108 intended to give the legislature six months within which to pass an Act replacing the Leeward Islands (Emergency Powers) Order in Council 1959. This gave the legislatureample time; and they would surely have passed such an Act within the specified period. Otherwise, in a state of emergency, there would have been no law giving the Governor or any other authority the right to arrest and detain anyone, however reasonably justifiable and urgently necessary it may have been to do so. …**Until 1 September 1967, however, but only until such date, the Leeward Islands (Emergency Powers) Order in Council 1959, construed with such***

modifications, adaptations, qualifications and exceptions as were necessary to bring it into conformity with the Constitution, would be available to preserve the safety of the State if and when a period of emergency came into existence"[emphasis supplied].

[195] The comparative lesson is this: there ought to be no vacuum occasioned by failure or delay on the part of the legislature. This is why all existing laws were given the *leeway to continue operating*, on condition that they would be *construed with necessary alterations, adaptations, qualifications and exceptions* to bring them into conformity with the Constitution.

[196] Thus, in the ***Attorney-General of St Christopher, Nevis and Anguilla***case, the Judicial Committee of the Privy Council thus remarked:

> *"If the Court of Appeal was right in concluding that no modification or adaptation or qualification or exception could bring the Order in Council into line with the Constitution, then they would have been plainly right in holding that the Order in Council was nugatory and the Emergency Powers Regulations 1967 invalid.****Their lordships cannot, however, accept that the Constitution would have preserved the life of the Order in Council of 1959 for any period if the Order in Council could not be construed under section 103 of the Constitution so as to bring it into conformity with the Constitution***" [emphasis supplied].

[197] We do, thus, have a reliable jurisprudential basis for proposing the principles to serve as a guide, in interpreting constitutional provisions in the transitional framework, especially as regards the Fifth Schedule, and Section 7 of the Sixth Schedule to the Constitution of Kenya. Our perception is set out in specific terms as follows:

(i) *The Constitution of 2010 came into operation being cognizant of existing legislation. Flowing from the Constitution's supremacy clause,it was imperative to provide a formula by which old legislationwould transit into the new constitutional dispensation, without creating a vacuum. Section 7(1) of the Sixth Schedule, therefore,is vital as a medium for ensuring harmonious transition.*

(ii) *The Fifth Schedule gives a time-frame within which Parliament ought to act by amending or repealing old legislation, or enacting new law, so as to give effect to particular Articles of the Constitution.*

(iii) *All laws in force immediately before the promulgation of the Constitution remain in force, but subject to Section 7(1) of the Sixth Schedule.*

(iv) *In construing any pre-Constitution legislation, a Court of law must do so taking into account necessary alterations, adaptations, qualifications and exceptions, to bring it into conformity with the Constitution.*

(v) *Where it is not possible to construe an existing law in accordance with (iv) above, so as to bring it into conformity with the Constitution,that is to say, where a law cannot be conditioned through judicial intervention without usurping the role of Parliament, such a law is invalid for all purposes.*

[198] At the time the Constitution came into force, the Kenya Information and Communications Act had established the CCK as the body mandated to licence broadcasting and other electronic media. The contest to the constitutionality of CCK is based on the perceived *lack of independence in its composition.* The 1st and 2nd appellants contended that since the Fifth Schedule provided a time-frame of three years, within which to enact the legislation contemplated under Article 34,

CCK was *legally mandated to continue operating pending the necessary legislative amendments*.

[199] The Fifth Schedule stipulates that legislation in respect of the "freedom of the media" is to be enacted "within three years", after the effective date. It is to be noted that the Schedule makes reference to Article 34 in general,without specifics of asub-Article. This mode of drafting is not unique to Article 34, as it applies to all other areas of the Constitution in which specific legislation is required to be enacted. This is the position too with all the Articles named in the Schedule, with the exception of Article 11 where a specific sub-Article (3) iscited. One,thus, has to revert to the Article in the Constitution, and endeavor to identify the sub-Article which points to the legislation required to be enacted. In the case of Article 34, the specific sub-Article in this regard is (5). We have already concluded that the legislation required to be enacted by this sub-Article is the *Media Council Act* (or whichever other designation Parliament could have given it). Before the enactment of this statute, there existed a Media Council, under a different statute which had to be repealed by the current Act. Before its repeal, Courts of law were required to construe the old Act, with the necessary alterations, adaptations, qualifications and exceptions, to bring it into conformity with Article 34(5) of the Constitution.

[200] But in keeping with the principle of interpreting the Constitution holistically and purposively, the theme "freedom of the media" is notto be limited to just *licensing and the regulation of airwaves*. Indeed, Article 34 of the Constitution addresses other aspects of media freedom, such as the freedom to broadcast and receive information, and the freedom and impartiality of *State media*. All these freedoms can only be fully realized if Parliament takes further legislative measures, by way of *amending* or *repealing* existing legislation, or enacting *new* legislation. By the same token, there is nothing to prevent Parliament from amending existing *licensing legislation*,to ensure that licensing procedures are independent of Government control, or of the influences of political and commercial interests, in

keeping with the spirit of Article 34(3) of the Constitution. Such amendments can target the existing *procedures,* if they are considered not independent enough; or even *the body itself in terms of its composition.*

[201] Such legislative interventions would, in our view, further consolidate the freedom of the media, in the broad sense as envisaged by Article 34 of the Constitution. The Kenya Information and Communications Act has already come into focus, in this regard.

[202] Indeed, we take judicial notice of the existence of ***Nation Media Group Ltd, Standard Group Ltd, and Royal Media Services Ltd v. A.G, Speaker of the National Assembly, Speaker of the Senate, Cabinet Secretary Ministry of Information Communications and Technology and Communications Authority of Kenya*** High Court Petition No. 30 of 2014: ***and Kenya Editors Guild, Kenya Union of Journalists and Kenya Correspondents Association v. Republic*** High Court Petition No. 31 of 2014.Some of the issues for determination in Petition No. 30 of 2014,include: *Whether CAK, as established by the Kenya Information and Communications (Amendment) Act, 2013 is independent of Government control and if not, whether it has been established in violation of the Constitution.*

[203] The petitioners have alleged that Section 6(1) which provides that CAK is to be governed by a Board, violates the Constitution and negates the independence referred to in Section 5A of the Act because the Chairman of the Board is appointed by the President and the Board further comprises of four Principal Secretaries and seven persons appointed by the Cabinet Secretary, thus they urge, the Government wholly controls the CAK.

[204] In our considered view, such court challenges will continue until a balance that aligns the legislation to the Constitution is found. In the meantime, there is no

legal vacuum as we have upheld,the constitutionality of the CCK and its independence to consider and issue licences under Article 34(3)of the Constitutioncontinues.

[205] In such context, can it be concluded that the promulgation of the Constitution, on the 27th of August, 2010 *immediately* rendered CCK and all its actions thereafter unconstitutional? Such is the conclusion the Appellate Court arrived at,and which occasionedthe nullification of the licence that had already been issued to the 5thappellant herein. It is clear to us that this conclusion was based on the assumption that Article 34(3) and (5) had somehow envisaged the reconstitution of CCK. However, this assumption, although not devoid of logic, is not supported by the tentative cast of the two sub-Articles. The three-year time-frame within which legislation was required to be enacted, pursuant to the Fifth Schedule as read with Section 7(1) of the Sixth Schedule,should be understood to mean that the Constitution *did not contemplate a vacuum* in the licensing of airwaves.

[206] CCK had been established and mandated to,*inter alia,*license and regulate the airwaves and signal distribution, before the promulgation of the new Constitution (by the Kenya Information and Communications Act, 1998). Hence, having been in existence before the date of promulgation, CCK had a *lawful existence,* and its actions were not unconstitutional. The transition Chapter and clauses in the Constitution aremeant not only to ensure harmonious flow from the old to the new order, but also to preserve the Constitution itself, by ensuring that the rule of law does not collapse owing to disruptions arising from a vacuum in the juridical order. Unless it is demonstrated that the legislation establishing CCK was *incapable of being construed with the necessary alterations and exceptions*, so as to bring it into conformity with the Constitution, pending the three-year legislative intervention, it would be *improper in law and in principle,* to declare CCK unconstitutional.

[207]Such a perception is aptly foreshadowed at the trial stage, in the following passage in the Judgment of *Majanja, J* [at paragraph 84]:

> ***"The circumstances of CCK have not changed and until the transition is completed by implementation of the Kenya Information and Communications (Amendment) Bill, 2013, CCK as currently established remains the body entitled under the Constitution and the law to continue to regulate the media and airways in accordance with the Constitution and existing law."***

[208] It was not in vain that the time-lines within which Parliament was to enact the various statutes were set out in the Fifth Schedule to the Constitution. To this day, Parliament is *still enacting legislation* to operationalize the Constitution—a fact that merits judicial notice.

[209] Hence it is our conclusion that, CCK was not only legally mandated to regulate airwaves and licensing under the 1998 and 2009 Acts, but also, the promulgation of the Constitution of 2010 did not render its actions immediately unconstitutional.

(b) BSD Licensing and Intellectual Property Rights: Have Certain Parties been Prejudiced?

[210] The 1st, 2nd and 3rd respondents contended that the appellants were transmitting their broadcast content in violation of their *intellectual propertyrights,*and they represented this complaint as tantamount to a violation of their *fundamental rights and freedoms*. Two questions arise,*vis-à-vis* the intellectual property rights of the three respondents: *(i) did the CCK violate the intellectual property rights of Royal Media, Nation Media, and Standard Group*

by authorizing PANG, Signet, StarTimes, GOtv and West Media to transmit their broadcasts without their consent?; and (ii) was the issue of infringement of intellectual property rights properly before the High Court, in the petition filed by the 1st, 2nd and 3rd respondents for the enforcement of their fundamental rights and freedoms?

[211] Counsel for the 1st, 2nd and 3rd respondents (Nation Media Group, Royal Media Services and Standard Media Group) contended that GOtv (5th respondent), Star Times (6th appellant), and SIGNET (4th appellant) did not have an agreement with the 1st, 2nd and 3rd respondents to broadcast their contents. He submitted that the only agreements (Channel Distribution Agreements) that existed were between MultiChoice Africa Company Ltd and the 1st, 2nd and 3rd respondents.

[212] The 5th respondent (GOtv) on the other hand,urged that as an affiliate of MultiChoice, it is covered by the binding contracts between MultiChoice and the 1st, 2nd and 3rd respondents. The 5th respondent and the 6th appellant urged further that they did not intercept the 1st, 2nd and 3rd respondents' content for transmission, because that content is accessible by virtue of the viewers possessing a digital set-top box (STB) with free-to-air (FTA) capabilities. They submitted that Regulations 14(2)(b) and 16(2)(a) of the Kenya Information and Communications (Broadcasting) Regulations, 2009 granted them authorization to provide a prescribed minimum number of Kenyan broadcasting channels, i.e. they were obligated to carry those channels. Counsel for the 1st, 2nd and 3rd respondents, on the other hand, submitted that the CCK regulations cannot override the provisions of the Copyright Act(Cap. 130,Laws of Kenya), and that Section 29 of this Act is not subject to Regulation 14(2)(b). He submitted that under the new constitutional dispensation, their consent is required under the Copyright Act.

[213] In the High Court, *Majanja J* found that the petitioners (the 1st, 2nd and 3rd respondents herein) had not established that their intellectual property rights had

been violated, and that their claim was frivolous (paragraphs 131 and 135). He further found that a case involving the violation of intellectual property rights could not be addressed by a petition to enforce fundamental rights and freedoms, "because there is a specific legal regime established by law to address intellectual property rights" (paragraph 134).

[214] In the Court of Appeal, *Nambuye J.A* found that the CCK's letter dated 19th August 2013 which was addressed to the CEO of Wananchi Group (Kenya) Limited and copied to the 1st, 2nd and 3rd respondents among others, and required the 1st, 2nd and 3rd respondents to make their free-to-air (FTA) channels available to the subscription broadcasting service providers, was an infringement of the 1st, 2nd and 3rd respondents rights (paragraph 90). The learned Judge of Appeal found that under Article 40(5) of the Constitution, the State has a duty to protect the intellectual property of individuals (paragraph 91).

[215] *Maraga J.A* found that under the contracts signed by the 1st, 2nd and 3rd respondents, MultiChoice was authorized to assign any of its obligations to its affiliates, thus the contention that GOtv was transmitting their contents without their consent was without merit (paragraph 59). He however found that based on the 19th August 2013 letter, the CCK had authorized Wananchi Group which comprised Signet, StarTimes, PANG and GOtv to broadcast the 1st, 2nd and 3rd respondent's programmes without their consent (paragraph 60). He held that neither Regulation 14(2)(b) nor 16(2)(a) gave the CCK authority to direct Wananchi Group (Signet, StarTimes, PANG and GOtv) to air the 1st, 2nd and 3rd respondents programs without their consent and this action amounted to an infringement of the intellectual property rights of the broadcasters (paragraph 64).

[216] *Musinga J.A,* however, found that the letter dated 19th August 2013 did not amount to an authorization to intercept the 1st, 2nd and 3rd respondents broadcasts. He termed it a letter emphasizing the provisions of Regulation 14(2)(b) (paragraph

136). He further held that there were contractual agreements between the parties as regards carrying the channels.

[217] The myriad agreements and communications between the parties concerning the transmission of programme-content, may be summarized as follows:

(i) *Channel Distribution Agreement Royal Media Services, Ltd (Vol. 2, page1004)*

- *Dated 23rd February 2009 between MultiChoice and Royal Media Services for the distribution of the 24-hour general programming television and radio services …currently known as "Citizen TV".*

  - *Citizen TV Second Channel Amendment Agreement (Vol. 2, page 1021); Dated 27th November 2012 between MultiChoice and Royal Media Services.*

- *Chanel Distribution Agreement (Vol. 2, page 1024) - Dated 28th January 2006 between Multi Choice and Nation Media Group*

- *NTV Channel Continuation and Amendment Agreement (Vol. 2, page 1035) - Dated 20th March 2012 between MultiChoice and Nation Media Group (Broadcasting Division).*

  - *Channel Distribution Agreement (Vol. 2, page 1040) - Dated 15th June 2007 between MultiChoice and Baraza Ltd. for the distribution of the television programme service currently known as KTN.*

  - *KTN Channel Distribution Continuation and Amendment Agreement (Vol. 2, page 1050) – Dated 26th November, 2013 between Multichoice and Baraza Ltd. for the distribution and KTN.*

[218] All of these agreements included a "Miscellaneous" section that stated in relevant part:

> *"...provided that MCA [Multichoice Africa] shall be entitled to assign, transfer and sublicense any of its rights and obligations hereunder to any of its associates, affiliates or related entities. In addition, MCA shall be entitled to appoint affiliate and/or third party sub-contractors to perform any of its rights or obligations set out herein."*

[219] From these Channel Distribution Agreements, it is proper to conclude that the 1st, 2nd and 3rd respondents had established a framework that allowed for the distribution of their channels.

[220] Further, the 1st, 2nd and 3rd respondents were clearly aware that the appellants, Signet, and GOtv were distributing their content. The record reveals that the 1st, 2nd and 3rd respondents had given permission to Signet and KBC to carry their content during the pilot phase of the digital migration. They, however, withdrew their consent twice, but later requested the two to continue carrying their broadcast content.

[221] The 1st appellant(CCK) sent letters dated 26th August, 2006 to the 1st, 2nd and 3rd respondents asking them to deliver their content to the KBC multiplex during the pilot phase of the digital migration program. The respondents complied with the request.

[222] The 1st, 2nd and 3rd respondents then decided to suspend their participation in the digital migration in December 2010. However, between June and July 2012 the 1st, 2nd and 3rd respondents decided to continue participation in the digital migration program.

[223] From the record it is abundantly clear that the 1st, 2nd and 3rd respondents gave their consent to Signet and GOtv to distribute their channels. Further, the decoders used by StarTimes for the purposes of digital broadcasting are configured so as to transmit the FTA content carried by Signet. Therefore, there is no factual basis, to the 1st, 2nd and 3rd respondents claim that the 1st appellant violated their intellectual property rights, by authorizing PANG, Signet, StarTimes, GOtv and West Media to transmit their broadcasts without their consent.

[224] Having determined, from the various agreements and letters between the parties, that the 1st, 2nd and 3rd respondents had given the 4th and the 5th appellants (Signet and PANG) consent to transmit their content, the next question is whether a *'must-carry'rule* infringes upon the intellectual property rights of a content-producer.

[225] The genesis and basis of the 1st, 2nd and 3rd respondents contention is a letter from the 1st appellant dated 19th August 2013. In that letter, CCK wrote to Wananchi Group informing them that under the provisions of Regulation 14(2)(b) they were required to provide local FTA channels from their platform, even in situations where their subscribers had failed to make payment for their subscriptions. This letter was copied to the 1st, 2nd and 3rd respondents. The 1st, 2nd and 3rd respondents argued that this letter, in effect, gave the Wananchi Group permission to re-broadcast their content without their permission— which was an infringement of their intellectual property rights.

[226]Article 40 of the Constitution protects property rights. It provides as follows:

> ***"(1) Subject to Article 65, every person has the right either individually or in association with others, to acquire and own property—***
> ***(a) of any description;***

(b) and in any part of Kenya."

[227]Sub-Article (2) of Article 40 prohibits Parliament from enacting a law that permits the State or any other person to arbitrarily deprive a person of property of any description.

[228] Under Article 260 property includes any vested or contingent right to, or interest in or arising from intellectual property.

[229] The right to property as provided in Article 40 is, however, not absolute. It can be limited because it is not one of the non-derogable rights enshrined in Article 25 of the Constitution.

[230]Section 25(3)(e) of the Kenya Information and Communications Act(Cap. 411A),provides that:

> ***"A licence granted under this section may include conditions requiring the licensee to fulfil such other conditions as the Commission may prescribe."***

[231] Regulations 14(2)(b) and 16(2)(a) of the Kenya Information and Communications (Broadcasting) Regulations 2009 provide:

> ***"14(2)(b) The Commission may require a licensee granted a licence under paragraph (1) to provide a prescribed minimum number of Kenyan Broadcasting channels."***
>
> ***"16(2)(a) The Commission may require a person granted a licence under paragraph (1) to distribute on its digital***

platform free to air and subscription broadcasting services and related data on behalf of other licensed broadcasters."

[232] The Copyright Act defines "infringement" as *any act which violates a right protected by this Act.*

[233]*Black's Law Dictionary*, 9th edition, at page 851 defines: "infringement" as –*"an act that interferes with one of the exclusive rights of a patent, copyright or trademark owner"*; "copyright infringement" is defined as:*"the act of violating any of a copyright owner's exclusive rights…A copyright owner has several exclusive rights in copyrighted works, including the rights (1) to reproduce the work, (2) to prepare derivative works based on the work, (3) to distribute copies of the work, (4) for certain kinds of works, to perform the work publicly, (5) for sound recordings, to perform the work publicly."*

[234] The letter from CCK to the Wananchi Group essentially required the Wananchi Group to comply with Regulation 14(2)(b). This type of regulation has been characterized as a "must-carry" rule. It originated in North America, with the advent of cable television. The regulation required cable television companies to carry locally-licensed television stations on their cable system. Such regulations are found in many European and non-European countries. A distinct feature of the European "must-carry" rules is that the obligation can only be imposed if the respective networks are the principal means of receiving radio and television channels for a significant number of end-users of these networks. The rationale for this rule has been described as a way to preserve the free circulation of information through access to the most important television channels, such as national public television channels, as well as the principal private television channels—such as the channels owned by the 1st, 2nd and 3rd respondents in this case.

[235] Under the "must-carry" rule, transmission frequencies for radio or television broadcasting and telecommunication are considered national resources for the public interest. The 1st, 2nd and 3rd respondents argued that any rebroadcasting without their approval constitutes a copyright-infringement, regardless of the existence of a "must-carry" rule.

[236] The appellants relied on the reasoning of the U.S. Supreme Court in ***Turner Broadcasting System, Inc. v. FCC***, 512 U.S. 622 (1994) ***(Turner 1)***and ***Turner Broadcasting System, Inc. v. FCC***, 520 U.S. 180 (1997)***(Turner 2)***to argue that the "must-carry" rule is not an infringement on copyrights. In both cases Turner Broadcasting System, Inc., challenged the constitutionality of the "must-carry" provisions under the First Amendment of the U.S. Constitution. The Court held that although "must-carry" rules were prone to interference in freedom of speech guaranteed by the First Amendment, the rules were not excessively restrictive, since they were neutral in their context, were narrowly formulated, and served a significant interest of the State(***Turner 2***, at 180-190, 214.)

[237] In a case similar to the one before this Court, the Supreme Court of the Philippines in ***ABS-CBN Broadcasting Corporation v. Philippine Multi-Media System, Inc. & 6 Others***, G.R. No. 175769-70 (2009) ***(ABS-CBN)*** had occasion to address a "must-carry" rule that was contained in a Memorandum written by the National Telecommunications Commission (NTC), a body akin to the 1st appellant herein, the CCK. That case involved ABS-CBN, an FTA broadcaster and Philippine Multi-Media System, Inc. (PMSI), a direct-to-home (DTH) pay-satellite service operator that delivered digital television via satellite to its subscribers. ABS-CBN filed a complaint against PMSI claiming that they (PMSI) were re-broadcasting ABS-CBN's broadcast content without their consent. PMSI replied that they were broadcasting ABS-CBN's content in accordance with the "must-carry" rule as required of them by the NTC.

[238] The Court in ***ABS-CBN*** considered the definition of the terms 'broadcasting' and 'rebroadcasting'. Under the Intellectual Property Code Republic Act No. 8293 of 1997 (IP Code) of the Philippines, broadcasting is defined in Section 202.7 as:

> ***"the transmission by wireless means for the public reception of sounds or of images or of representations thereof; such transmission by satellite is also 'broadcasting' where the means for decrypting are provided to the public by the broadcasting organization or with its consent."***

[239] The Court then looked at the import of 'rebroadcasting' as defined in Article 3(g) of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations(also known as the 1961 Rome Convention), of which the Philippines is a signatory. The 1961 Rome Convention defines rebroadcasting as:

> *"the simultaneous broadcasting by one broadcasting organization of the broadcast of another****broadcasting organization.****"*[emphasis supplied].

[240] The Court found that PMSI did not qualify as a 'broadcasting organization', because it did not meet the definition of the Working Paper (Eighth Session, Geneva, November 4-8, 2002) (8th SCCR Working Document) prepared by the Secretariat of the Standing Committee on Copyright and Related Rights, which defines broadcasting organizations as *"entities that take the financial and editorial responsibility for the selection and arrangement of, and investment in, the transmitted content"* (page 12, paragraph 58). The Court thus held:

> ***"ABS-CBN creates and transmits its own signals; PMSI merely carries such signals which viewers receive in its***

unfiltered form. PMSI does not produce, select, or determine the programs to be shown in Channels 2 and 23 (ABS-CBN channels). Likewise it does not pass itself off as the origin or author of such programs. Insofar as Channels 2 and 23 are concerned, PMSI merely retransmits the same in accordance with Memorandum Circular 04-08-88.

"Clearly PMSI does not perform the functions of a broadcasting organization; thus it cannot be said to be engaged in rebroadcasting Channels 2 and 23."

[241] By this reasoning, the Court held that making programs available in compliance with a "must-carry" rule was not "rebroadcasting" and, therefore,did not infringe on the intellectual property rights of broadcasters. The Court further found that the respondent did not pass itself off as the origin, or author of the programs broadcast, but merely retransmitted them in accordance with the "must-carry" rule. The Court endorsed the line of thinking that the must-carry rule *"falls under the category of limitations on copyright."*

[242]Taking into account the specific facts and context of the instant matter, and further persuaded by the reasoning of the Supreme Court of the Philippines in ***ABS-CBN,***we find that the 'rebroadcasting' of the 1st, 2nd and 3rd respondents channels,by the provisions of Regulations 14(2)(b) and 16(2)(a),*was not an infringement of their intellectual property rights.* Although the IP Code of the Philippines is not applicable in Kenya, and Kenya is not a signatory to the 1961 Rome Convention, the language used in both, in defining 'broadcasting' and 'rebroadcasting', is almost identical to the definitions set out in the Copyright Act (Cap. 130, Laws of Kenya). Section 2 of the Copyright Act defines 'broadcast' as:

> ***"the transmission, by wire or wireless means of sounds or images or both or the representations thereof, in such a manner as to cause such images or sounds to be received by the public and includes transmission by satellite."***

And'rebroadcasting' is defined as:

> ***"simultaneous or subsequent broadcasting by one or more broadcasting authorities of the broadcast of another broadcasting authority."***

The two definitions bear close resemblance, respectively, to the Philippines IP Code, and the 1961 Rome Convention.Finally, the Copyright Act defines 'Broadcast authority' as follows:

> ***"the Kenya Broadcasting Corporation established by the Kenya Broadcasting Corporation Act, or any other broadcaster authorized by or under any written law."***

[243]It is of relevance that Kenya participated in the 8th SCCR Working Document meeting where the term 'broadcasting organization' was defined. In this context, it emerges that the appellants were not 're-broadcasting' the content of the 1st, 2nd and 3rd respondents, because *they are not broadcasting organizations*, since they do not take "financial and editorial responsibility for the selection and arrangement of, and investment in, *the transmitted content*." That is to say, the appellants did not interfere with the broadcast-content of the 1st, 2nd and 3rd respondents. The content was delivered digitally without any interference from the signal distributors. Asthey were not rebroadcasting the content, we find that the appellants did not infringe on the intellectual property rights of the 1st, 2nd and 3rd respondents.

[244] The law on copyright is not set in absolute terms, but is subject to exceptions and limitations catering for certain interests. These exceptions are conventionally referred to as *fair dealing*(in Kenya and in the United Kingdom) and *fair use*(in the United States of America). Although these terms are not coterminous, the distinction is disappearing. "Fair dealing" is said to be more explicit and less flexible, whereas "fair use", which was first developed in the United States, is more flexible. "Fair dealing" and "fair use" defences to copyright claims, are part of broader limitations and exceptions integrated into the copyright system,*to safeguard public interests*. The two concepts operate as limitations to exclusive rights.

[245] In ***ABS-CBN***,the Supreme Court of the Philippines found that the "must-carry" rule fell under the category of limitations on copyright, because Section 184(1)(h) of the IP Code of that country provides that *"The use made of a work by or under the direction or control of the Government, the National Library or by educational, scientific or professional institutions where such use is in the public interest and is compatible with* ***fair use*** *shall not constitute infringement of copyright."In Kenya*, the exception is found in *Sections 26(1) and 29(a) of the Copyright Act*, which relates to the nature of *copyright in broadcasts*. These sections provide as follows:

> ***"26. (1) Copyright in a literary, musical or artistic work or audio-visual work shall be the exclusive right to control the doing in Kenya...but copyright in any such work shall not include the right to control—***
>
> ***(a) the doing of any of those acts by way of*** *fair dealing* ***for the purpose of scientific research, private use, criticism or review, or the reporting of current events subject to acknowledgement of the source..."***

"29. Copyright in a broadcast shall be the exclusive right to control the doing in Kenya of any of the following acts, namely, the fixation and the rebroadcasting of the whole or a substantial part of the broadcast and the communication to the public of the whole or a substantial part of a television broadcast either in its original form or in any form recognizably derived from the original, but—

(a) paragraphs (a)...of section 26(1) shall apply *mutatismutandis****to the copyright in a broadcast..."***

[246] Fair dealing is thus a defence against copyright infringement. The Copyright Act does not define what is 'fair', and it is something that depends on *the facts of each case*. As Lord Denning remarked in ***Hubbard v. Vosper***[1972] 1 All ER. 1023, at. P. 1027 (C.A.),

"It is impossible to define what is 'fair dealing'. It must be a question of degree."

[247] The Supreme Court of Canada,in ***CCH Canadian Ltd. v. Law Society of Upper Canada*** [2004] 1 S.C.R. 339, 366; 2004 SCC13 ***(CCH),***adopted criteria of fairness that had been established by the lower Court; these were:*(1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work;* and *(6) the effect of the dealing on the work.* The Court considered that although all these factors were unlikely to arise in every case, they were a dependable basis for determining "fairness" in future cases.

[248] Although the Canadian case dealt with copyright infringement *vis-à-vis* print media, its yardsticks are relevant and can be applied in the instant case, to

determine whether the actions of the appellants fall within the copyright exception. We would apply these yardsticks in this case, as follows:

(i) ***The purpose of the dealing*** – in this case, the purpose of the "must-carry" rule is to ensure that the public has access to information.

(ii) ***The character of the dealing*** – in assessing the character of the dealing, Courts must examine how the works were dealt with. It would be relevant to consider the custom or practice in a particular trade or industry, to determine whether or not the character of the dealing is fair. In the instant case, the programs carried by the broadcasters were merely rebroadcast or retransmitted by the appellants.

(iii) ***The amount of the dealing*** – the amount of the dealing and the importance of the work should be considered in assessing fairness,even though the quantity of the work taken should not be determinative of fairness. The amount taken may well be fair, depending on the purpose for which it is taken. In the instant case, the quantity would not be determinative, thus the Court should look at the *purpose* of the must-carry rule. Here, the carrying of the broadcast content of the 1st, 2nd and 3rd respondents channels served a *public interest purpose*.

(iv) ***Alternatives to the dealing*** –if there were other alternatives that could be used instead of the copyrighted work, such would merit consideration. It is not, in this case, apparent that there are alternatives to the must-carry rule. The ultimate purpose of the must-carry rule is to guarantee access to information.

(v) ***Nature of the work*** –whether the work is published or unpublished was a relevant consideration. In this case, the broadcasts are meant for public consumption, and broadcasters are in the business of transmitting their work.

(vi) ***Effect of the dealing on the work*** – where the reproduced work is likely to compete with the market for the original work, this bears a potential for unfair dealing. But in the instant case, the retransmission/rebroadcast was not competing with the original broadcasts disseminated by the 1st, 2nd and 3rd respondents. Besides, no evidence was tendered to show that the actions of the appellants decreased the market for the 1st, 2nd and 3rd respondents' work.

[249]From the foregoing consideration of relevant principles, in the context of the comparative lesson, we would hold that the "must-carry" rule which required the appellants to carry the signals of the 1st, 2nd and 3rd respondents, is by no means inconsistent with the requirement of fairness.Indeed, it is clear to us that the appellants' dealings with the 1st, 2nd and 3rd respondents, do satisfy the "fair dealing" defence, and therefore did not infringe upon the copyrights of the 1st, 2nd and 3rd respondents.

[250]Is it a tenable proposition, that the "must-carry" rule stands in conflict with the rights-guarantees of the Constitution? The Philippines Supreme Court, in ***ABS-CBN,*** held that the NTC memorandum which embodied the "must-carry" rule did not violate Section 9 of Article III of the Constitution, which prohibits *the taking of property for public use without payment of just compensation.* That Court found that the NTC was vested with exclusive jurisdiction to *supervise, regulate and control broadcast and telecommunications services and facilities* in the Philippines. Thus, the imposition of the "must-carry" rule was within the NTC's

power to promulgate rules and regulations, as public interest may require, to encourage a larger-scale and more effective use of communications, of radio and television broadcasting facilities, and to maintain effective competition among private entities.

[251] The Philippines Court held that the "must-carry" rule was in consonance with the objectives of the public interest at stake,namely, the public's right to access news and information in order to be a well-informed, and culturally refined citizenry. The Court held the "must-carry" rule to be a copyright exception.

[252]Such, in our perception, is the proper judicial approach, in view of the transformative setting of Kenya's socio-political ordering, marked by progressive constitutional beacons, that affirm priority for the enhancement and consolidation of fundamental rights and freedoms. In that context, we find that the 1st appellant did not infringe upon the 1st, 2nd and 3rd respondents' intellectual property rights, in effecting the "must-carry" rule. And in view of the clear public-interest dimension, we hold that this rule is essentially consistent with the terms of Article 7 of the Constitution, which requires the State to protect and promote the diversity of language in Kenya; and Article 10 which lists sustainable development as one of the national values and principles that binds persons and entities interpreting the Constitution; as well as Article 11, which requires the State to promote all forms of national and cultural expression through communication, information and mass media;and also Article 35, which gives citizens access to information; and Article 46, which protects the rights of consumers.

[253]It was the trial Court's finding that the content generated by the 1st, 2nd and 3rd respondents had been freely available to the public on the digital platform, since its launch in 2009 (paragraph 66 of the Judgment). The learned Judge observed that a case of violation of intellectual property rights is not a matter to be addressed by a petition to enforce fundamental rights (paragraph 134). He relied on***Sanitam***

Services (EA) Ltd. v. Tamia Ltd.&16 Others, Nairobi Petition No. 305 of 2012; [2012] eKLR, in which the Court held that a breach of intellectual property rights can be enforced through the legal mechanisms provided by statute or the common law, and that the invocation of the Constitution, particularly Article 22, was not necessary to enforce ordinary rights (paragraph 10).

[254]The Appellate Court *(Musinga J.A)* agreed with *Majanja J.*,that if indeed the appellants had violated the intellectual property rights of the broadcasters, a petition to enforce fundamental rights and freedoms was not the proper recourse, as there exists a definite legal regime for the resolution of such complaint (paragraph 136).

[255] Section 35(4) of the Copyright Act provides an avenue for redress, in the event of an infringement. It thus provides:

> ***"Infringement of any right protected under this Act shall be actionable at the suit of the owner of the right and in any action for the infringement the following reliefs shall be available to the plaintiff—***
>
> ***(a) relief by way of damages, injunctions, accounts or otherwise that is available in any corresponding proceedings in respect of infringement of their proprietary rights;***
>
> ***(b) delivery-up of any article in possession of the defendant which appears to the court to be an infringing copy; or any article used or intended to be used for making infringing copies…"***

[256] The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided *on another basis*. In South Africa, in ***S v. Mhlungu***, 1995 (3) SA 867 (CC) the Constitutional Court*Kentridge AJ,* articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

> ***"I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue,that is the course which should be followed."***

[257] Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (***Ashwander v. Tennessee Valley Authority***, 297 U.S. 288, 347 (1936)).

[258]From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim,and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.

(c) BSD Licensing, Independent decision-making, Government Promise: Is there a basis for Legitimate Expectations?

[259] Counsel for the1st,2nd and 3rdrespondents submitted that they had been promised a BSD carrier licence in both the ICT Policy, and in the recorded

commitment of the Permanent Secretary in the Ministry of Information and Communications, and therefore had a *legitimate expectation* that such licence would be issued to them.

[260] Counsel for the 6threspondent, by contrast, submitted that the Appellate Court *(Maraga & Nambuye JJ.A)*had erroneously applied the principle of legitimate expectation,in favour of 1st- 3rd respondents, and on that basis granted them public resources, contrary to the letter and spirit of the Constitution.

[261] The 6threspondent urged that the Appellate Courthad erroneously interpreted the law, as to who could claim "legitimate expectation". Learned counsel submitted thatsuch an entitlement was not due to the 1st- 3rd respondents, but rather, to all the television broadcasters who had their infrastructure in place, at the commencement of the process of digital migration.

[262] The appellants disputed the 1-3rdrespondents' argument that underArticles 33 and 34 of the Constitution,they had a legitimate expectation entitling them to a BSD licence, as a matter of right,attributable solely to their substantial investment in the broadcasting industry. The Appellate Court's determination in this regard, the appellants urged, was contrary to the provisions of Article 10 and 34 of the Constitution.

[263]"Legitimate expectation" is a doctrine well recognized within the realm of *administrative law,* as is clear from the English case,***In re Westminster City Council,***[1986] A.C. 668 at 692(Lord Bridge):

> ***"...the courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation".***

[264]In proceedings forjudicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.

[265]Aninstance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is*within its power to fulfil*. A party that seeks to rely on the doctrine of legitimate expectation,has to show that it has *locus standi* to make a claim on the basis of legitimate expectation.

[266]Wade and Forsyth in their work, ***Administrative Law***, 10th ed (pages 446-448), discuss the relevant legal principles onlegitimacy of an expectation. *For an expectation to be legitimate, it must be founded upon a promise or practice by the public authority, that is said to be bound to fulfil the expectation*. Citing the House of Lord's decision in ***R. v. DPP ex p. Kebilene*** [1999] 3 WLR 972(HL), the learned authors observe thata statement made by a Minister cannot found *an expectation that an independent officer will act in a particular way*. They cited the case,***R. v. Secretary of State for Education and Employment, ex p. Begbie*** [2000] 1 WLR 1115 (CA),where the Court of Appeal held that an election promise made by a Shadow Minister did not bind the responsible Minister after a change of government. The authors cite the House of Lord's decision in ***R. v. DPP ex p. Kebilene,***for the principle that *clear statutory words override any expectation howsoever founded*.

[267]The principle is well reflected in judicial practice in Kenya. A relevant excerpt from ***Republicv. Nairobi City County & Another ex parte Wainaina Kigathi Mungai,***High CourtJudicial Review Misc. case No. 356 of 2013; [2014] eKLRthus reads[paragraph 33]:

"...the legal position is that legitimate expectation cannot override the law. This was the position in Republic vs. Kenya Revenue Authority, ex parte Aberdare Freight Services Limited [2004] 2 eKLR 530 where it was held:

'...a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Judicial resort to estoppel in these circumstances may prejudice the interests of third parties. Purported authorisation, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims... Legitimate expectation is founded upon a basic principle of fairness that legitimate expectation ought not be thwarted – that in judging a case a judge should achieve justice, weigh the relative 'strength of expectation'..."

[268]An illuminating consideration of the concept of "legitimate expectation" is found in the South African case,***South African Veterinary Council v. Szymanski*** 2003(4) S.A. 42 (SCA) at [paragraph 28]: the Court held as follows:

"***The law does not protect every expectation but only those which are 'legitimate'. The requirements for legitimacy of the expectation include the following:***

(i) The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification': De Smith, Woolf and Jowell (op cit

[Judicial Review of Administrative Action 5th ed] at 425 para 8-055). The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.

(ii) The expectation must be reasonable: Administrator, Transvaal v. Traub (supra [1989 (4) SA 731 (A)] at 756I - 757B); De Smith, Woolf and Jowell (supra at 417 para 8-037).

(ii) The representation must have been induced by the decision- maker: De Smith, Woolf and Jowell (op cit at 422 para 8-050); Attorney- General of Hong Kong v. Ng Yuen Shiu [1983] 2 All ER 346 (PC) at 350h - j.

(iii) The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate: Hauptfleisch v. Caledon Divisional Council 1963 (4) SA 53 (C) at 59E - G."

This was also referred to with approval in ***Walele v. City of Cape Townand Others;*** 2008 (6) S.A 129 (C.C.) paragraph 41.

[269] The emerging principles may be succinctly set out as follows:

> *(a) there must be an express, clear and unambiguous promise given by a public authority;*
>
> *(b) the expectation itself must be reasonable;*
>
> *(c) the representation must be one which it was competent and lawful for the decision-maker to make;and*
>
> *(d) there cannot be a legitimate expectation against clear provisions of the law or the Constitution.*

[270]*Nambuye* and *Maraga JJ.A.*, in their Judgment, found that the 1st and 2nd respondent's through their consortium, National Signals Networks, were entitled to a BSD licence on account of "massive infrastructural investment" in the broadcast industry. In particular,*Nambuye J.A.* stated as follows [paragraph 103]:

> "***There has been no mention in the paperwork before me to show that they are disentitled to a licence otherwise than by reason of what was put before me as a reason for excluding them from the tendering process. Since Article 40 stipulates protection of intellectual property, appellants have a right to protect what they own. As Senior [Counsel Mr.] Muite put it, they want to continue doing what they know best. They are willing to migrate as they are. There is no mention in any of the policy documents assessed that it is impossible to consider application for licensing other than through tendering process. As such there is nothing wrong in appellants***

asking to be licensed as they are. Considering that they already have infrastructure in place and are holding onto convertible frequencies."

[271] The learned Judge also held that the 1st and 2ndrespondents' legitimate expectation that they would be subjected to a fair tendering process for a BSD licence was not met. It was the Judge's view that the disqualification of the 1st and 2nd respondents from the tendering process for failure to provide the requisite security-bond took them by surprise—and was not fair.

[272]*Maraga J.A* also held that the 1st and 2nd respondents had a legitimate expectation that, given their investment in broadcasting infrastructure over the last 15 years,they would be given a BSD licence to continue developing and transmitting their broadcast-content to viewers. The learned Judge cited the ICT policy (clause 4.6), which stated that the licensing of signal distribution services had the object of maximizing the utilization of the broadcasting infrastructure. He also based his finding on assurances by the then Permanent Secretary,Mr. Bitange Ndemo to the broadcasters' forum held on 24th August 2011, that the 1st and 2nd respondents or their nominees would be granted a BSD licence, to transmit their programmes and those of other broadcasters.

[273] *Musinga J.A* on the other hand, took a different view. The learned Judge of Appeal was categorical that the doctrine of legitimate expectation cannot prevail against a statute, leave alone the Constitution. In his words [paragraph 142]:

" ***...legitimate expectation, however strong it may be, cannot prevail against express provisions of the Constitution. If a person or statutory body promises a certain relief or benefit to a claimant or undertakes to do something in favour of a***

claimant but in a way that offends the Constitution, the claimant cannot purport to rely on the doctrine of legitimate expectation to pursue the claim or promise."

[274]The Court of Appeal in its orders, directed that the 1st-3rd respondents be issued with a BSD licence *by an independent regulator, without undergoing the tendering process, upon meeting the terms and conditions set out in law, and applicable to other licensees*.

[275] The 1st appellant has powers under Section 5(1) of the Kenya Information and Communications Act, 1998 (*as amended by the Kenya Communications (Amendment) Act, 2008)*to issue broadcast licences. The provision thus reads:

"(1)The object and purpose for which the Commission is established shall be to license and regulate postal, information and communication services in accordance with the provisions of this Act."

[276]Section 5B of the Act guarantees the independence of the 1st appellant,stipulating that it shall perform its functions independent of any person or body, except as may be otherwise provided in the Act. Under Section 5A(1), the relevant minister may issue to the 1st appellant policy guidelines of a general nature, relating to the provisions of the Act as may be appropriate.

[277] As regards issuance of a BSD licence, this is a function reposed exclusively in the 1st appellant.As an independent body discharging a public function, the 1st appellant is not subject to control or direction by any person or authority,as regardsissuance of a licence. Issuance of licences is subject to conditions such as the 1st appellant, on its own accord, may prescribe.

[278]What would have been the reference-points, in a proper finding of "legitimate expectation" by the Appellate Court? That the 1st appellant had made clear, unambiguous representations to the 1st and 2nd respondents, such as to lead to a reasonable expectation that a BSD licence would be issued to them; that the 1st appellant had, in law, the authority to make the promises; and that the promises made did not contravene the law or the Constitution.

[279]Upon a review of the record, it becomes apparent that the promises made to the respondents had emanated from the *Ministry of Information, Communications and Technology,* especially from the then Permanent Secretary thereof. There is the letter of 22nd July, 2011 informing the 1st and 2nd respondents that the Government had directed the 1st appellant to consider issuing them with BSD licences, on account of their substantial investment in broadcast infrastructure; and there is a record of a speech by the same Permanent Secretary, giving assurance of issuance of a third licence to Media Owners Association.

[280]No doubt these are clear and uncontroverted statements of promise from a Government representative, the Permanent Secretary.To constitute a promise into a signal capable of giving rise to a right founded on legitimate expectation, it must be demonstrated that the Permanent Secretary had *lawful capacity to make such representations* to the 1st and 2nd respondents, or to their consortium. It falls to this Court to consider whether such representations were predicated upon the relevant law.

[281] Under the Kenya Information and Communications Act,Cap. 411A, the Permanent Secretary has no role in the granting or cancellation of a BSD licence or any other broadcast licences,apart from being a member of the Board of Directors of the Commission. The Permanent Secretary, under the Act,is not a decision-maker on matters of licensing, and thus, he had no capacity to give any promises. Such promises, assurances or confirmations as the Permanent Secretary may have

made, for or on behalf of the Government, or otherwise, would have no lawful imprimatur, and would not bind the 1st appellant in the exercise of its responsibilities. It was, therefore, not competent or lawful for the Permanent Secretary to make such promises to the 1st and 2nd respondents.

[282]It was also urged on behalf of the 1-3rd respondents', that they had been promised a BSD licence in the National Information and Communication Technology(ICT) Policy of 2006, by the Ministry of Information and Communications. This contention had been accommodated by *Maraga J.A,* holding that clause 4.6 was a policy affirmation to the 1st and 2nd respondents that a BSD licence would be granted,so as to maximize the utilization of existing broadcast infrastructure. Clause 4.6 of the ICT Policy reads as follows:

> ***"4.6 SIGNAL DISTRIBUTION***
> ***The Government will license signal distribution services to ensure that the use of broadcasting infrastructure is maximized. A signal distributor will be required to provide services to licensees on a non-discriminatory basis."***

[283] The ICT Policy is the handiwork of the Ministry of Information and Communications; and its specific objects are thus stated (page 2):

> ***"To facilitate sustained economic growth and poverty reduction; promote social justice and equity; mainstream gender in national development; empower the youth and disadvantaged groups; stimulate investment and innovation in ICT; and achieve universal access. It is based on internationally accepted standards and best practices, particularly the COMESA Model adopted by the COMESA Council of Ministers in March 2003."***

[284] This policy scheme was a precursor to, and a foundation for a raft of reforms and changes that were subsequently deployed within the ICT sector, including the enactment and amendment of various statutes and regulations,for giving effect to the stipulated policy objectives. It was a framework policy document that guided the Government in its resolve to '*enhance the role of ICT in the social and economic development of the country'*.

[285] The policy document is a general statement of aspirations which the Government wished to commit, or had committed itself to. Judicial notice has to be taken of the fact that the Government, in the normal discharge of its duties, does churn out policy statements, guidelines, and sessional papers as frameworks within which to conduct public affairs, and to deliver goods and services to the people.

[286] Indeed even within the ICT sector, the KenyaInformation and Communications Act, Cap. 411A, (Section 5A) extends to the minister powers to issue to the Commission policy guidelines of a general nature, relating to the provisions of the Act. On this account, it is clear to us that the ICT policy was lawfully issued, within the minister's powers to proffer policy prescriptions, in line with Section 5A of the Act.

[287]However, it admits of no doubt, that the said Act conceives of CCK as an *independentbody,* with the capacity to transact its own business. By virtue of Section 5B, save where provided in the Act, CCK is *not subject to any direction or control by any person or authority*.

[288] What is the legal effect of such general policy statements, in relation to the Commission,or to the public? Are they capable of being a basis for a legitimate expectation, that the 1st appellant ought not to abrogate? The proper question for consideration, in our view, is the possible implication which this clear statutory provision may have on the *independence of CCK*. Clause 4.6 was a policy

specification prescribed to the Commission by the Government, as an*objective* to guide signal distribution licensing. It was a *direction* to the 1st appellant, and not a *promise* to the public at large, that certain benefits shall accrue to any particular entity or individual, in the course of granting signal-distribution licences.

[289] For clause 4.6 in the ICT Policy to constitute a promise upon which the respondents could legitimately expect to found their claim for a grant of a BSD licence, it ought to have been a categorical statement of policy made by the *1st appellant,* as the decision-maker, the issuer of BSD licence, and the institution with the lawful mandate to prescribe conditions for the granting of all manner of broadcast licences,by virtue of Sections 5(1) and 460(1) of the Kenya Information and Communications Act, 1998.

[290]It was not possible, in our view, for a general statement of policy by the Government, however clear or unambiguous,to be attributed to, or construed as a promise by CCK to the media-fraternity, that the grant of licences would take a particular course. Policy statements by the Government cannot confer or assure a promise of a specific benefit to third parties,so as to be enforceable against a particular public institution even where that institution is vested with the mandate to perform the task in respect of which the Government has given a clear promise. This is because under the Kenya Information and Communications Act, 1998, the Government is not a decision maker on issues of BSD licensing and, by extension, had no competence, or lawful basis to make a binding promise that such licensing would ensure *a 'maximization of use of broadcast infrastructure'*.

[291] The statute divests the Government or any other authority of licensing mandate, or any telecommunication, postal or radio-communication regulatory powers. More particularly, granting of licenses for broadcasting is a statutory function vested in CCK by law, subject to the fulfilment of conditional requirements such as it may impose on intending licensees. To suppose that the Government may

direct its operation with regard to any of its functional responsibilities, would be a usurpation of the role of CCK, in contravention of the law.

[292] We must also take note of the fact that broadcast licences and broadcasting are technically different from signal licences and signal distribution. The broadcaster develops content and broadcasts it through the allocated frequencies. The holder of a BSD licence on the other hand only carries and distributes content as developed by the broadcaster. The 1st, 2nd and 3rd respondents cannot therefore claim to have made investments in broadcasting infrastructure in anticipation of a BSD licence.

[293] In this regard, we are in agreement with the sentiments expressed by *Musinga, J.A*. In dismissing the appellants' (respondents herein) claim of entitlement to a BSD licence on the basis of legitimate expectation, the learned Judge of appeal aptly stated as follows:

> ***"The ICT Policy guidelines that were cited by the appellants speak of****"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."* ***That cannot be achieved if a Government functionary is allowed to issue an executive fiat to CCK as to who should get a BSD licence because of their massive investment in broadcasting industry or because a certain Government official promised that they would get a licence. That would be unconstitutional and cannot therefore be a basis for grant of a BSD licence. That expectation cannot be legitimate. What this Court must insist on is a proper and transparent licensing procedure that***

is conducted by an independent body that is not subject to control by Government, political or commercial interests. That is what the Constitution dictates..."

[294] It follows that, for the reasons already given, we do not agree with the conclusions by *Nambuye* and *Maraga JJ.A* to the effect that the 1st , 2nd and 3rd respondents are entitled to a grant of a BSD licence on the basis of a legitimate expectation.

[295]We will now consider the issue raised as to the fairness or otherwise of the procurement process. Samuel Kamau Macharia deponed that in May 2011, the 1st appellant invited expression of interests from parties interested in obtaining a licence for national broadcast-signal distribution. The 1st and 2nd respondents expressed interest, and submitted relevant documentation through Nation Signal Networks. This application/bid was rejected at the mandatory-evaluation stage, for failing to meet the bid/bond-security validity period of 120 days. The bond-security was a precondition in the tender process [see paragraphs 18 to 20].

[296] Does the 1st appellant have powers in law to impose such conditions in the procurement process in respect of a BSD licence? Section 46O(1) grants the 1st appellant powers to restrict conditions as it may deem necessary, for granting of a BSD licence. The 1st appellant, therefore, properly exercised a power within its province, to prescribe conditions for the grant of a BSD licence.

[297]The tender notice invited interested persons to show expression of interest, so as to be considered for a licence to provide national signal distribution and transmission infrastructure for digital television broadcasts.

[298] The 1st appellant was conscious of the mandatory requirements of the Public Procurement and Disposals Act (No. 3 of 2005), the object of which is thus specified (Section 2):

> ***"(a) to maximise economy and efficiency;***
>
> ***(b) to promote competition and ensure that competitors are treated fairly;***
>
> ***(c) to promote the integrity and fairness of those procedures;***
>
> ***(d) to increase transparency and accountability in those procedures;***
>
> ***(e) to increase public confidence in those procedures; and***
>
> ***(f) to facilitate the promotion of local industry and economic development."***

[299] Section 4(1) outlines instances when the provisions of the Act must apply to a public entity, as follows:

> ***"This Act applies with respect to—***
>
> ***(a) procurement by a public entity;***
>
> ***(b) contract management;***
>
> ***(c) supply chain management, including inventory and distribution; and***
>
> ***(d) Disposal by a public entity of stores and equipment that are unserviceable, obsolete or surplus."***

[300] As provided in Section 27(1) of the Public Procurement and Disposal Act, the 1st appellant had a duty in law to adhere to the procurement regulations, before granting a licence to a third party to provide the service of signal distribution. The procurement of signal distribution services was, therefore, a venture sanctioned by law. Further the 1st appellant's tender committee processes were in consonance with the constitutional stipulation in Article 227, that goods and services be contracted for in a system that is *fair, equitable, transparent, competitive and cost-effective.*

[301] In this context, it is clear that the Court of Appeal's order, that the 1st, 2nd and 3rd respondents be granted a BSD licence without undergoing the procurement process, lacks a foundation in law. *There cannot be a legitimate expectation for a grant of a licence by the 1st appellant without adherence to statutory or constitutional provisions.*It has been held in several persuasive authorities, ***R. v. Devon County Council, ex parte Baker & Another***[1995] 1 All. E.R. 73*;* ***R. v. Durham County Council, ex parte Curtis & Another***[1992] 158 LGRev R 241 (CA) and***R. v. DPP ex p. Kebilene***[1993] 3 WLR 972,that *no legitimate expectation can override clear statutory provisions*. The Appellate Court's decision, thus, stood in contradiction to Article 227 of the Constitution, and Section 27(1) of the Public Procurement and Disposal Act. With due respect, there was no lawful basis for the orders that the 1st, 2nd and 3rd respondents be granted a BSD licence as a matter of right.

[302] The procurement conditions prescribed by the 1st appellant should also be perceived in light of Article 34(3)(a) of the Constitution, which provides that broadcast and electronic-media freedoms are subject to *licensing procedures that are necessary to regulate the airwaves and other forms of signal distribution*. In our perception, the procedure for contracting between the 1st appellant and a BSD service-provider could not be done in a legal vacuum. Article 34(3)(a), in our opinion, had 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.

[303] The 1st, 2nd and 3rd respondents sought to provide, on behalf of the government, digital-signals distribution alongside other interested participants. However, their consortium was unsuccessful, having been disqualified for failing to meet the conditions set by the 1st appellant. Being aggrieved, the 1st and 2nd respondents preferred a review before the Public Procurement Administrative Review Board, which on 19th July, 2011 dismissed their application for review, and directed that the procurement process proceeds. They elected not to appeal this decision to the High Court as provided under the Public Procurement and DisposalAct. However, rather belatedly, and as the reality of switch-over to the digital platform became imminent, the said respondents lodged a petition in the High Court.

[304] There was in these circumstances, and with respect, no valid basis to the Appellate Court's finding that the 1st, 2nd and 3rd respondents had a legitimate expectation to be issued with a Broadcast Signal Distribution licence, on account of their considerable broadcast infrastructural-investment. We take judicial notice that all media practitioners have undertaken some measure of financial and infrastructural investments, with a view to sharing in the profits of the media industry. Thus, if infrastructural investment is thesole criterion for an expectation by media practitioners to be granted BSD licences, then the policy objectives identified in the Taskforce Report, and reinforced in the ICT Policy, would be rendered nugatory.

[305]It is plain to us that the legal concept of "legitimate expectation" is inapplicable in favour of the 1st, 2nd and 3rd respondents.

(d) From Public Procurement Administrative Review Tribunal to High Court Petition: Tenable Cause, or Abuse of Process?

[306] The 1st and 2nd respondents, had formed a consortium, National Signal Networks, to conduct their bid for a BSD licence. After this bid failed on 17th June, 2011, these respondents, on 22nd June, 2011 sought a review of the decision by 1st appellant, pursuant to Section 93 of the Public Procurement and Disposal Act, and Rule 73 of the Public Procurement and Disposal Regulations, 2006. The Public Procurement Administrative Review Tribunal dismissed their appeal, on 19th July, 2011. They *did not appeal* against the Tribunal's decision to the High Court, despite the fact that they were entitled to do so, under Section 100(1) and (2) of the Public Procurement and Disposal Act.

[307] Instead, National Signal Networks wrote a letter to the Ministry of Information and Communications, challenging the decision of the Tribunal. The Ministry responded with a letter dated 22nd July, 2011 stating that it would ask the CCK to consider granting a BSD licence to National Signal Networks, provided that National Signal Networks met certain conditions including: (i) open-access,enabling other parties to access channels; and (ii) proof to CCK that other current infrastructure-providers have no interest in investing in National Signal Networks. National Signal Networks did not pursue the matter any further.

[308] More than two years later, on 22nd November, 2013 Royal Media Services, Nation Media Group (National Signal Networks) and Standard Media Group, the 1st, 2nd and 3rd respondents respectively, filed a petition in the High Court (Petition No. 557 of 2013), contending that the 1st and 2nd respondents were entitled to a BSD licence, and that the issuance of a licence to other licensees was in violation of *Articles 33 and 34 of the Constitution*. They also contended that their intellectual property rights as well as their human rights and fundamental freedoms had been violated, making reference to the rights-safeguards of *the Constitution*.

[309] In the High Court, *Majanja J*, found the petition to be without merit, and dismissed it. The Court found the claims that the said parties were entitled to digital broadcasting licences, or were wrongfully denied licences,to have no basis in law; for the 1st and 2nd respondents having participated in the tender for the BSD-licence, could not challenge the tender-process through a petition seeking to enforce *fundamental rights and freedoms* (paragraph 89).The learned trial Judge perceived the petition as a collateral challenge to the Tribunal'sdecision, and held that even though the 1st, 2nd and 3rd respondents did not come to the tender process as separate companies, litigation of the tender-issue was barred by the doctrine of *issue estoppel* (paragraph 90).

[310] The 1st, 2nd and 3rd respondents appealed to the Court of Appeal, which overturned the High Court's decision. The Appellate Court held that the High Court was the proper forum for the 1st, 2nd and 3rd respondents'cause, and that they were not estopped from filing their petition there. *Nambuye J.A,* in her Judgment, found that:

> ***"there was sufficient material to link the appellants' claim to constitutional issues capable of being adjudicated upon by the High Court, such as infringement of Article 34(3) of the Constitution, in connection with denial of licence to the applicants; issues as to whether CCK... was the body contemplated in Article 34(5); whether own content, or that acquired from 3rd parties fell into the category of intellectual property, and was capable of being protected as such"***(paragraph 116).

[311]*Maraga J.A* found that although the 1st, 2nd and 3rd respondents herein could have challenged the legality of the CCK's action in a judicial review

application (pursuant to Section 100 of the Public Procurement and Disposal Act), the entire procurement process was flawed, and thus did not bar the 1st, 2nd and 3rd respondents from filing a petition in the High Court (paragraph 114). *Musinga J.A* found that the High Court was the proper forum for the 1st, 2nd and 3rd respondents, because they had raised the issue of the constitutionality of the licensing process, in light of the composition of the CCK (paragraph 134).

[312] On the question whether the 1st, 2nd and 3rd respondents were barred by issue estoppel from filing their petition in the High Court, *Nambuye J.A* held that this concept did not apply because: the tendering process was not fair as CCK had acted outside the law; the 1st and 2nd respondents herein did not acquiesce in the tendering decision and challenged it immediately; and the conditions for licence given by the Permanent Secretary of the Ministry were also without a basis, as it was contrary to the relevant law and regulations (paragraph 115). *Musinga J.A* held that if the appellants were questioning only the merits of the decisions of the CCK Tender Committee, or the Tribunal regarding issuance of the BSD licence, they would be estopped from doing so,as it would amount to a collateral attack on the decision of the Tribunal [paragraph 134].

[313] The fundamental plank of the Court of Appeal's decision was that, since the failure to reconstitute the CCK violated the requirements of Article 34(3)(b) of the Constitution, the 1st, 2nd and 3rd respondents were not estopped from filing a *constitutional petition*.

[314] In their appeal to this Court, the 1st, 2nd and 3rd respondents urged that the petition they filed in the High Court was a petition seeking the *enforcement of their rights and fundamental freedoms*, and was therefore filed in the right forum,by the terms of Article 22 and 23 of the Constitution. They argued, for effect, that (i) the Tribunal has no jurisdiction to enforce rights in the Bill of Rights; (ii) their challenge of the procurement process at the Tribunal did not preclude them from

filing a constitutional claim at the High Court, to enforce their rights under the Constitution; and (iii) the Tribunal lacks jurisdiction to determine the constitutional issues raised in the petition.

[315] The gravamen of the appellants' claim at the Supreme Court is that the petition filed in the High Court by the 1st, 2nd and 3rd respondents was a collateral attack on the decision of the Tribunal, and that they are estopped from relitigating the issue.

[316] The 1st, 2nd and 3rd respondents argued that there was no identical issue between their appeal to the Tribunal, and the cause they filed in the High Court. They submitted that they had asked neither the High Court nor the Court of Appeal to sit on appeal over the decision of the Tribunal; and that they didnot ask those Courts to determine questions that the Tribunal had determined.

[317]The concept of *res judicata* operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both *issues* and *claims,* and the issues that may be raised in subsequent proceedings. In this case, the High Court relied on "issue estoppel", to bar the 1st, 2nd and 3rd respondents' claims. Issue estoppel prevents a party who previously litigated a claim (and lost), from taking a second bite at the cherry. This is a long-standing common law doctrine for bringing finality to the process of litigation; for avoiding multiplicities of proceedings; and for the protection of the integrity of the administration of justice — all in the cause of fairness in the settlement of disputes.

[318] This concept is incorporated in Section 7 of the Civil Procedure Act (Cap. 21, Laws of Kenya) which prohibits a Court from trying any issue which has been substantially in issue in an earlier suit. It thus provides:

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."***

[319]There are conditions to the application of the doctrine of *res judicata:* (i) the issue in the first suit must have been decided by a competent Court; (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title***Karia and Another v. The Attorney General and Others***, [2005] 1 EA 83, 89.

[320] So, in the instant case, the argument concerning *res judicata* can only succeed when it is established that the issue brought before a Court is *essentially the same as another one already satisfactorily decided, before a competent court.*

[321] In ***Trade Bank Limited v. LZ Engineering Construction Limited***, [2000] 1 EA 266, the Court of Appeal heldthat *"issue estoppel bars a party from relitigating matters already ruled on by the Court. It only arises regarding determination of fact."*The basic principle underlying the rule of "issue estoppel" is that the same issue of fact, and not law, must have been determined in the previous litigation.

[322] The Supreme Court of Canada, in ***Angle v. Minister of National Revenue***, [1975] 2 S.C.R. 248, 254 proposed three conditions to the operation of

issue estoppel: (i) whether the same question has been decided; (ii) whether the earlier decision was final; and (iii) whether the parties, or their privies, were the same in both proceedings.

[323] Thus, a Court faced with an assertion of issue estoppel,on account of an earlier adjudication, has to consider a number of factors before it can rule on the matter: (i) whether the issues involved are the same; (ii) whether the decision of the previous adjudicating body is final; and (iii) whether the parties involved in the two suits are the same.

[324] Now, were the issues raised in the High Court petition the same as the issues raised before the Public Procurement Administrative Review Tribunal?

[325]Comparative judicial practice shows that some jurisdictions have taken a strict approach to issue-identity,requiring clear precision in the coincidence of issues, before determining that"issue estoppel" should be applied. In ***Craddock Transport Ltd. v. Stuart***, [1970] NZLR 499, 520, the New Zealand Court of Appeal held that:

> ***"Issue estoppel depends entirely on the validity of the proposition that the same question has been decided between the same parties, as fundamental to the decision of earlier litigation between them. If the question now being litigated is not necessarily precisely the same question as the one previously decided, it cannot be enough. It is not enough that questions are similar, or very similar, or almost the same; or that they may be the same. They must necessarily be precisely the same."***

[326]A more broadly-based approach, founded on lines of principle, is reflected in the English case,***North West Water Authority v. Binnie & Partners***, [1990] 3 All ER 547, in which *Drake J* thus stated (at page 561):

> ***"In my judgment, this broader approach to a plea of issue estoppel is to be preferred. I find it unreal to hold that the issues raised in two actions arising from identical facts are different*** *soley* ***because the parties are different…I think great caution must be exercised before shutting out a party from putting forward his case on the grounds of issue estoppel or abuse of process. Before doing so the court should be quite satisfied that there is a real or practical difference between the issues to be litigated in the new action and that already decided and the evidence may properly be called on the issues in the new action."***

[327] A review of the record shows that the grounds of appeal to the Public Procurement Administrative Review Tribunal included: (i) that the decision by the procuring entity (CCK) was erroneous, because it was based on documents that were contradictory and ambiguous; (ii) that the CCK did not treat the applicant fairly; (iii) that the CCK's decision was unreasonable, and did not promote public confidence in the procurement process; (iv) that, in disqualifying the applicant, the only remaining bidder was a wholly foreign-owned entity, in breach of Section 2(f) of the Public Procurement and Disposal Act; and that, (v) it was not in the public interest to assign the role of allocating national transmission signals to a foreign company. The appellants before the Tribunal were, in effect, asking the Tribunal to reconsider the denial of a BSD licence.

[328] At the High Court, the 1st, 2nd and 3rd respondents sought a constitutional interpretation of the following questions:

(i) whether the switch from analogue to digital broadcasting as being implemented by the CCK violates the petitioners' (1st, 2nd and 3rd respondents herein) rights as broadcasters, as guaranteed by Article 34(2) of the Constitution;

(ii) whether the failure by the Ministry of Information, Communications and Technology and the CCK to issue the petitioners with BSD licences is discriminatory, and contravenes the petitioners' fundamental rights as guaranteed under Article 34(2) of the Constitution;

(iii) whether the failure by the Attorney-General and the Ministry to establish an authority independent of Government control, to be in charge of licensing of broadcasters and the regulation of airwaves and other signal distribution is a violation of Article 34(2) of the Constitution;

(iv) whether the decision to issue only four BSD licences, excluding the current broadcasters who have invested billions of shillings, is in contravention of Article 34(3) of the Constitution;

(v) whether the policy decisions of the Ministry being implemented by the CCK will unreasonably interfere with the petitioners' broadcasting services in violation of the Constitution;

(vi) whether the Ministry's directives and decisions to limit and restrict the public's right to choose between analogue and digital broadcasting services, is in contravention of the Constitution; and

(vii) whether the migration to digital broadcasting as being implemented by the Government, contravenes the rights of the citizens to freely receive quality broadcasting services as guaranteed by the Constitution.

[329]It is apparent from the record that, in the appeal lodged at the Tribunal, National Signal Networks was seeking the annulment of the decision made by the procuring entity, the CKK. This clearly emerges from the fact that at the High Court, two issues framed by the 1st, 2nd and 3rd respondent (namely, issues No. (ii) and No. (iv)),*questioned the decision of the CCK to deny National Signal Networks a BSD licence.*

[330] An examination of the relief requested by the 1st, 2nd and 3rd respondents reveals that they were *seeking to have the CCK compelled to issue them with a BSD licence.* Before the Tribunal, the relief sought was framed as *"(a) The decision of the Procuring Entity contained in the letter dated 17th June 2011 be annulled and set aside";* whereas before the High Court, it was framed as: *"(7) An order compelling the Government through the 1st and 2nd Respondents to issue the Petitioners with Digital Broadcast Signal Distribution licences and Digital Frequencies."* It is, therefore, clear that the relief claimed by National Signal Networks before the Tribunal was the *same as the relief claimed by the 1st, 2nd and 3rd respondents at the High Court.*

[331]Of the differing approaches to the application of "issue estoppel", we find more merit with the broader one, for its unconstrained scheme of principle; and on this basis we find no practical difference between the issues lodged before the Tribunal and before the High Court. We thus conclude that *issue estoppel is applicable to this case,* with regard to the question as to whether the 1st, 2nd and 3rd respondents should have been issued with a BSD licence.

[332] It follows, in our opinion, that the High Court ought to have dismissed the part of the 1st, 2nd and 3rd respondent's claim that had already been decided by the Tribunal, i.e, as to the issuance of the BSD licence. The learned Judge,however, declined to do so,perceiving the entire petition as one seeking to relitigate the process in which the BSD licence was denied, while disguised as a constitutional claim.

[333] We find that the petition at the High Court had sought to relitigate an issue already determined by the Public Procurement Administrative Review Tribunal.Instead of contesting the Tribunal's decision through the prescribed route of *judicial review* at the High Court, the 1st, 2nd and 3rd respondents instituted fresh proceedings, two years later, to challenge a decision on *facts and issues finally determined.* This strategy, we would observe, constitutes the very mischief that the common law doctrine of "issue estoppel" is meant to forestall. Issue estoppel *"prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route" (**Workers' Compensation Board v. Figliola*** [2011] 3 S.C.R. 422, 438 (paragraph 28)).

[334]Whatever mode the 1st, 2nd and 3rd respondents adopted in couching their prayers, it is plain to us, they were *challenging the decision of the Tribunal,* in the High Court. It is a typical case that puts the Courts on guard, against litigants attempting to sidestep the doctrine of "issue estoppel", by appending new causes of action to their grievance, while pursuing the very same case they lost previously. In ***Omondi v. National Bank of Kenya Ltd. & Others***, [2001] EA 177 the Court held that *"parties cannot evade the doctrine of **res judicata** by merely adding other parties or causes of action in a subsequent suit."*

[335]It remains to determine, however, the question whether the process before the Tribunal was a "judicial proceeding". Although there are differences of

substance and of form, between judicial and administrative forums, traditionally, when a non-judicial tribunal acts in a quasi-judicial capacity, its determinations are entitled to the same effect as a duly-rendered judicial determination.

[336] Although the Public Procurement Administrative Review Tribunal is not a Court of law, the administrative proceeding (ie, the appeal by the National Signal Networks) that took place before it was *judicial in nature*. The parties were represented by counsel,who presented their case on the basis of the evidence before the panel. In other words, the parties were in attendance, and were involved in the conduct of the proceedings. Section 93 of the Public Procurement and Disposal Act, provides that a party may request the Tribunal to review an order. Section 112 provides that a party may seek a review of the Tribunal's decision at the High Court within *14 days* of the decision having been rendered. Thus, under the law, there is a procedure for a party to seek redress.

[337] In this case, National Signal Networks chose not to exercise its right to appeal against the Tribunal's decision, at the High Court. The Tribunal had no capacity to alter or rescind its own decision and, therefore,its decision was final,having been conclusively rendered. It is eminently fair,therefore, to hold that the 1st and 2nd respondents were *bound by the decision of the Tribunal,* regarding the BSD licence. Thus, in normal judicial practice that finality would give rise to estoppel.

[338]In the Canadian case, ***Workers' Compensation Board v. Figliola***[2011] 3 S.C.R. 422, 468 it was the Supreme Court's position that the most important consideration,as regards a prior decision in relation to estoppel, is whether giving the earlier proceeding final and binding effect would result in an injustice. The Court held that, in principle, parties should be able to rely on the conclusive nature of administrative decisions, since administrative regimes are designed to facilitate

the expeditious resolutions of disputes; and that the concept of "issue estoppel" is "*doctrine of public policy that is designed to advance the interests of justice.*"

[339] We are in agreement, as regards the finality of a judicial or administrative decision,that it enhances fairness, and upholds the integrity of the Courts, administrative tribunals, and the administration of justice.It is also our view that, the relitigation of issues that have previously been decided in an appropriate forum, may undermine confidence in proceduresotherwise fair, and of integrity —by creating inconsistent results,or unnecessarily duplicative proceedings.

[340] In this context, we would hold that, as the 1st and 2nd respondents herein had elected not to seek a review of the Tribunal decision in the High Court, by virtue of Section 112 of the relevant Act, the Tribunal's decision became final, in relation to these parties.

[341] Although the1st, 2nd and 3rdrespondents have argued that a party cannot reasonably be expected to raise constitutional claims before the Public Procurement Administrative Review Tribunal, and therefore a petition in the High Court regarding their constitutional rights was in order, we find nothing to suggest that the matters raised in the High Court could not have accompanied the fundamentals of the grievance—the very item before the Tribunal. The Public Procurement and Disposal Act,indeed, does not preclude parties from raising constitutional issues touching on their complaint. We note, besides, that administrative bodies, such as the Tribunal in question, are bound by the Constitution.

[342] In the leading case in New Zealand on this question,***Shields v. Blakeley***, [1986] 2 NZLR 262, 268, the Court stated:

> ***"We conclude that there must be shown such a union or nexus, such a community or mutuality of interest, such an***

identity between a party to the first proceeding, and the person claimed to be estopped in the subsequent proceeding, that to estop the latter will produce a fair and just result having regard to the purpose of the doctrine of estoppel and its effect on the party estopped."

[343]And in other common law jurisdictions, the same-person requirement has not been taken literally, to refer to identical individuals in both sets of proceedings.

[344]In the South African case of ***Caesarstone Sdot-Yam Ltd. v. World of Marble and Granite 2000 CC & Others***, 2013 (6) SA 499 (SCA), the Supreme Court of Appeal observed that it was not clear that the 'same-person' requirement was narrowly confined to those "who derived their rights from a party to the original litigation." The Court thus remarked:

"[I]t may be that the requirement of the "same person" is not confined to cases where there is an identity of persons, or where one of the litigants is a privy of a party to the other litigation, deriving rights from that other person. Subject to the person concerned having had a fair opportunity to participate in the initial litigation, where the relevant issue was litigated and decided, there seems to me to be something odd in permitting that person to demand that the issue be litigated all over again with the same witnesses and the same evidence in the hope of a different outcome, ***merely because there is some difference in the identity of the other litigating"*** [emphasis supplied]**.**

[345] Courts in the United States, on the other hand, have over the decades developed issue (or collateral) estoppel (also referred to as 'issue preclusion') to such a point that it is arguable, they have altogether abandoned the doctrine of

privity. The Supreme Court has stated that it would not be bound by rules of mutuality, or of mutuality of estoppel, but rather, by the principle that trial Courts ought to have a broad discretion to determine whether issue-estoppel should be applied***(Blonder-Tongue Laboratories Inc. v. Univ. of Illinois Foundation***, 402 U.S. 313 (1971); and ***Parklane Hosiery Co. Inc. v. Shore***, 439 U.S. 322 (1979)). In the ***Parklane Hosiery*** case, the Court allowed "issue estoppel" which was sought by a party against a non-party.

[346] In Canada, in ***Saskatoon Credit Union Ltd. v. Central Park Ent. Ltd.***, (1988) 22 B.C.L.R. (2d) 89 (S.C.), (at page 96) the Judge thus held, on the relationship between privity and "issue-estoppel":

> *"...it is my conclusion that, subject to the exceptions I shall mention in a moment, no one can relitigate a cause of action or an issue that has previously been decided against him in the same court or in any equivalent court having jurisdiction in the matter****where he has or could have participated in the previous proceedings****unless some overriding question of fairness requires a rehearing"* (emphasis supplied).

The Court found that exceptions to this principle included fraud, or other misconduct in the earlier proceedings, or the discovery of decisive fresh evidence which could not have been adduced at the earlier proceeding by the exercise of reasonable diligence.

[347]The existence of such differences of approach would commend to this Court the merits of broad principle, as the basis for determining, essentially on a case-by-case assessment, the scope of privity applicable in relation to "issue estoppel".

[348]From our assessment of the instant case, we would hold that the requirements of privity and mutuality have been met,as regards the *1st and the 2nd respondents*.They did participate, as National Signal Networks, in the proceeding before the Public Procurement Administrative Review Tribunal. And they were also the same parties who initiated the petition in the High Court.

[349]But as regards the 3rd respondent, we are in agreement with the finding by *Nambuye J.A* in the Court of Appeal, that this party is in a different category in relation to "issue estoppel". However, the 3rd respondent, in our opinion, would have no*locus standi* to challenge the procuring entity's (CCK) decision to deny a BSD licence to the 1st and 2nd respondents. Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in ***Annarita Karimi Njeru v. Republic***, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement. The 3rd respondent has not shown how it was affected by the decision of CCK to deny National Signal Networks a BSD licence,just as it has also not shown how it was affected by the decision of the Public Procurement Administrative Review Tribunal.

[350]We have to consider the question whether *res judicata* is applicable, where the fundamental rights and freedoms theme informsthe cause of action before the High Court. In that Court, the 1st, 2nd and 3rd respondents were seeking an interpretation as to whether the 1st appellant's (CCK) failure to issue them with a BSD licence contravened their fundamental rights, as guaranteed under Article 34(2) of the Constitution. They relied on certain persuasive authorities: ***Tellis***

&Others v. Bombay Municipal Corporation & Others, [1987] LRC 351;***Bafokeng Tribe v. Impala Platinum Ltd. & Others***, [1998] 11 BCLR 1373; and ***Transnet Ltd. v. Goodman Brothers (Pty) Ltd.,*** 2001 (2) BCLR 176 (SCA),as a basis for the argument that the doctrines of "issue estoppel" and *res judicata* do not apply to petitions for the enforcement of fundamental rights and freedoms under the Constitution.

[351] Counsel for the 5th and 6th appellants relied on the authority of ***Kenya Bus Service Ltd and Others v. Attorney General and Others***, (2005) 1 E.A 111which stated that Judgments of competent Courts cannot be challenged in a Constitutional Court, except on grounds of lack of due process, or unconstitutionality.

[352] The Judicial Committee of the Privy Council, in ***Thomas v. The Attorney-General of Trinidad and Tobago***, [1991] LRC (Const.) 1001 held that *"when a plaintiff seeks to litigate the same issue a second time relying on fresh propositions in law he can only do so if he can demonstrate that special circumstances exist for displacing the normal rules."* That court relied on a case decided by the Supreme Court of India, ***Daryao & Others v. The State of UP & Others***, (1961) 1 SCR 574 to find that the existence of a constitutional remedy does not affect the application of the principle of *res judicata*. The Indian Court also rejected the notion that *res judicata* could not apply to petitions seeking redress with respect to an infringement of fundamental rights. *Gajendragadkar J* stated:

> ***"But is the rule of*** *res judicata* ***merely a technical rule or is it based on high public policy? If the rule of*** *res judicata* ***itself embodies a principle of public policy which in turn is an essential part of the rule of law then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now the rule of*** *res*

judicata...***has no doubt some technical aspects...but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of*** *res judicata* ***they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32."***

[353]Kenya's High Court recently pronounced itself on the issue of the applicability of *res judicata* in constitutional claims. In ***Okiya Omtatah Okoiti & Another v. Attorney General & 6 Others***, High Court Const. and Human Rights Division, Petition No. 593 of 2013 [2014] eKLR,*Lenaola J.*(at paragraph 64) thus stated:

"Whereas these principles have generally been applied liberally in *civil suits,* ***the same cannot be said of their application in*** *constitutional matters****. I say so because, in my view, the principle of*** *res judicata* ***can and should only be invoked in constitutional matters in the clearest of cases and where a party is*** *relitigating* ***the same matter before the Constitutional Court and where the Court is called upon to*** *redetermine* ***an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious."***

[354] On the basis of such principles evolved in case law, it is plain to us that the 1st, 2nd and 3rd respondents were relitigating the denial to them of a BSD licence, and were asking the High Court to redetermine this issue.

[355] However, notwithstanding our findings based on the common law principles of estoppel and *res- judicata*, we remain keenly aware that the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing their grievance as a constitutional question, the 1st, 2nd and 3rd respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to approach the Court and have their grievance resolved on the basis of Articles 22 and 23 of the Constitution.

(d) Interpreting the Constitution and Human Rights Jurisprudence

[356] We revisit once again the critical theory of constitutional-interpretation and relate it to the emerging human rights jurisprudence based on Chapter Four – *The Bill of Rights* – of our Constitution. The fundamental right in question in this case is the freedom and the independence of the media. We have taken this opportunity to illustrate how *historical, economic, social, cultural,* and *political content* is fundamentally critical in discerning the various provisions of the Constitution that pronounce on its theory of interpretation. A brief narrative of the historical, economic, social, cultural, and political background to **Articles 4(2), 33, 34,** and **35**of our Constitution has been given above in paragraphs 145-163.

[357] We begin with the concurring opinion of the CJ and President in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others,*** Supreme Court Petition No. 2B of 2014left off (see paragraphs 227-232). In paragraphs 232 and 233 he stated thus:

> ***"[232]...References to Black's Law Dictionary will not, therefore, always be enough, and references to foreign cases will have to take into account these peculiar Kenyan needs and contexts.***
>
> ***"[233] It is possible to set out the ingredients of the theory of the interpretation of the Constitution: the theory is derived from the Constitution through conceptions that my dissenting and concurring opinions have signaled, as examples of interpretative coordinates; it is also derived from the provisions of Section 3 of the Supreme Court Act, that introduce non-legal phenomena into the interpretation of the Constitution, so as to enrich the jurisprudence evolved while interpreting all its provisions; and the strands emerging from the various chapters also crystallize this theory. Ultimately, therefore, this Court as the custodian of the norm of the Constitution has to oversee the coherence, certainty, harmony, predictability, uniformity, and stability of various interpretative frameworks dully authorized. The overall objective of the interpretative theory, in the terms of the Supreme Court Act, is to "facilitate the social, economic and political growth" of Kenya."***

[358] The words in **Article 10(1)(b)***"applies or interprets any law"* in our view includes the application and interpretation of rules of common law and indeed, any statute. There is always the danger that unthinking deference to cannons of interpreting rules of common law, statutes, and foreign cases, can subvert the theory of interpreting the Constitution. An example of this follows.

[359] The famous United States Supreme Court case of ***Marbury v. Madison***, 5 U.S. 137 (1803) established the principle of the possibility of judicial review of legislation, and at the same time the key place of the courts in the upholding of the

U.S. Constitution. This principle is enshrined in our Constitution (**Articles 23(3)(d)** and **165(3)(d)**). A close examination of these provisions shows that our Constitution requires us to go even further than the U.S. Supreme Court did in***Marbury v. Madison***(***Marbury***). In ***Marbury***, the U.S. Supreme Court declared its power to review the constitutionality of laws passed by Congress. By contrast, the power of judicial review in Kenya is found in the Constitution. **Article 23(3)** grants the High Court powers to grant appropriate relief 'including' meaning that this is not an exhaustive list:

- A declaration of rights;
- An injunction;
- A conservatory order;
- A declaration of invalidity of any law that denies violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights;
- An order for compensation;
- An order for judicial review.

[360]Article 165(3)(d) makes it clear that that power extends well beyond the Bill of Rights when it provides that the High Court has jurisdiction to hear any matter relating to any question with respect to interpretation of the Constitution *"including the determination of (i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention, of this Constitution; (iii) any matter relating . . . to the constitutional relationship between the levels of government."* These provisions make clear that Kenyan courts have a far-reaching constitutional mandate to ensure the rule of law in the governance of the country.

[361] The eminent Kenyan Professor James Thuo Gathii in "The Incomplete Transformation of Judicial Review," A Paper presented at the Annual Judges'

Conference 2014: Judicial Review in Transformative Constitutions: The Case of the Kenya Constitution, 2010, Safari Park Hotel, August 19, 2014 warns that:

> ***"The Kenyan judiciary must guard against the development of a two-tracked system of judicial review. One that looks like the old cases influenced by the common law, on the one hand, and cases that are decided under the 2010 Constitution's principles of judicial review [on the other]. Those two tracks are likely to undermine the establishment of a vibrant tradition of judicial review as required by the 2010 Constitution."***

[362] Kenya's distinguished constitutional lawyer, Professor Yash Pal Ghai in one of his unpublished reflections has stated that:*"Perhaps realizing its own ambitious project, and hence its vulnerability and fragility, the Kenyan Constitution sets, through the judiciary, its barricades against the destruction of its values and weakening of its institutions by forces external to itself. Such is the responsibility of Kenya's judiciary."*

[363] It is clear from the facts and the legal argumentation in this case that it is a complex one. Besides, this is an important case in terms of the Constitution's principles and institutions of governance, as it involves the modernizing information and communications sector. It behoves this Court to focus its attention not only on the progressive development of such institutions, but also on the evolving,parallel course of fundamental-rights claims. The task transcends the conventional framework of interpretation of law as a plain forensic engagement.

(e) The Centrality of Article 10 of the Constitution in the Establishment and Licensing of the Media

[364] This appeal has also highlighted, for analysis, some of the cardinal values in our Constitution, particularly those of *equity, integrity, non-discrimination, participation of the people, patriotism, inclusiveness,* and *sustainable development* as they relate to media independence and freedom. The deconstruction and demystification of these values and their alignment to the vision of the Constitution is important. Such analysis will clarify the constitutional and legal obligations of the state, government, state organs, commercial and political interests, national and international, implicated in media freedom and independence. Issues of independence of the national regulator that licences broadcasters and signals, the independence and freedom of the national broadcaster, and the responsibilities of both to the state, political and commercial interests, and above all to the national interest, that collective interest of all the citizens of Kenya, will be clarified.

[365] Under Article 10 of the Constitution national values and principles of governance bind "***all State organs, State officers, public officers, and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions***."

[366] It is very clear to us that in this appeal the values of *equity, inclusiveness, integrity, participation of the people, non-discrimination, patriotism, and sustainable development*are intrinsically integrated to establishment, licensing, and consequent promotion and protection of media independence and freedom. Constitutional obligations and responsibilities of the State organs, State officers, and public officers implicated in this appeal are also clearly stated. For the avoidance of doubt these State organs are: Parliament, the Kenya Broadcasting

Corporation (KBC), the CCK (now CAK), the Media Council, and SIGNET, the commercial arm of the KBC that was awarded the first BSD licence. In this appeal State officers, public officers and others have been implicated in the preparation and implementation of both the ICT policy and the Task Force Report.

[367]Article 34 guarantees the *freedom*and*independence* of electronic, print and all other types of media (subject to the provisions of **Article 33(2)**). The mandatory obligations of the State not ***to exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or penalize any person for any opinion or view or content of any broadcast, publication, or dissemination***are clearly decreed.

[368] The Constitution itself has reconstituted or reconfigured the Kenyan state from its former vertical, imperial, authoritative, non-accountable content under the former Constitution to a state that is accountable, horizontal, decentralized, democratized, and responsive to the principles and values enshrined inArticle 10 and the transformative vision of the Constitution. The new Kenyan state is commanded by the Constitution to promote and protect values and principles under Article 10 and media independence and freedom.

[369]Sub-Article 3 of Article 34 provides for the ***licensing*** of broadcasting and other electronic media, subject to licensing procedures that ***are necessary to regulate airwaves and other forms of signal distribution; and are*** *independent* ***of control of government, political interests or commercial interests***. This sub-article refers to the licensing procedures that are to be carried out by CAK.

[370]Sub-Article 4 of Article 34 decrees that all state-owned media shall ***be free to determine independently the editorial content of their broadcasts or other communications; be impartial; and afford fair opportunity for***

the presentation of the divergent views and dissenting opinions. This sub-article refers to both KBC and SIGNET. Since the State is invariably controlled by vested interests this provision makes sense in a democratic society. Read within the word and spirit of Article 4(2), the whole gamut of human rights, and citizens' participation in affairs of their country, divergent views and dissenting opinions nurture democracy.

[371]Sub-Article 5 of Article 34 mandates Parliament to enact legislation that provides for the establishment of a body which shall ***be <u>independent of control</u> by Government, political interests or commercial interests; reflect the interests of all sections of all sections of the society; and set media standards and regulate and monitor compliance with those standards***. This sub-Article refers to the Media Council.

[372] Professor Arturo Escobar in his book *Encountering Development: The Making and Unmaking of the Third World* (Princeton: Princeton University Press, 1995) at page 192 states thus:

> **"...Report prepared by the World Commission on Environment and Development in 1987 entitled** *Our Common Future* **launched to the world the strategy of sustainable development as the great alternative for the end of the century and the beginning of the next. Sustainable development would make possible the eradication of poverty and the protection of the environment in one single feat of Western rationality."**

[373] Sustainable development, which is one of the national values enumerated in Article 10 of our Constitution, as an economic, political and ideological concept and vision has its critics including Professor Escobar (pages 194-211). On page 196 he argues that sustainable development "affirms and contributes to the spread of the dominant economic worldview." When it comes to biotechnology, biodiversity, and

intellectual property, and protection of environmental rights in promoting sustainable environment our Constitution provides all these rights under Articles 42, 69, and 70.

[374] Professor Escobar on page 198 is also critical of this vision of sustainable environment and expresses himself thus:

> ***"[Shiv] Visvanathan is particularly concerned with the potential of sustainable development for colonizing the last areas of Third World social life that are not completely ruled by the logic of the individual and the market, such as water rights, forests, and sacred groves. What used to be called the commons is now halfway between the market and the community, even if economics cannot understand the language of the commons because the commons have no individuality and do not follow the rules of the scarcity and efficiency. Storytelling and analysis must be generated around the commons in order to replace the language of efficiency with that of sufficiency, the cultural visibility of the individual with that of the community."***

[375] The use of sustainable development as a vision and a concept in the Constitution requires that we at least link it to the vision of the Constitution which is transformative and mitigating.

[376] Sustainable development is associated with the transformative potential of social, economic, political and cultural rights. This vision is in part linked to Amartya Sen's work which embraces the view that long-term sustainable development requires an autonomous, active, and participatory democratic citizenship, endowed with minimum levels of social economic welfare best

articulated in the form of rights. (*See Development as Freedom*, Anchor Books, 2000).

[377]Sustainable development has found stable constitutional and legal frameworks in what we have come to call transformative constitutions.Transformative constitutions are new social contracts that are committed to fundamental transformations in societies. They provide a legal framework for the fundamental transformation required that expects a solid commitment from the society's ruling classes. The Judiciary becomes pivotal in midwifing transformative constitutionalism and the new rule of law. As Karl Klare states, *"Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law."* Such transformative constitutions as the ones of India, South Africa, Colombia, Kenya and others reflect this vision of transformation.

[378]As already stated the Kenyan Constitution under Article 10provides that sustainable development is a national value and principle to be taken into account when the Constitution is interpreted as well as a guide to governance.

[379] It is clear that sustainable development under the Constitution has the following *collective*pillars: the sovereignty of the Kenyan people; gender equity and equality; nationhood; unity in diversity; equitable distribution of political power and **resources**; the whole gamut of rights; social justice; political leadership and civil service that has integrity; electoral system that has integrity; strong institutions rather than individuals; an independent Judiciary, and fundamental changes in land. Public participation is the cornerstone of sustainable development and it is so provided in the Constitution.

[380] It is clear to us that the national resources to be equitably shared in this appeal are the spectrum, the airwaves and other forms of signal distribution. We agree with Professor Escobar that *"The capitalization of nature is greatly mediated*

by the state; indeed, the state must be seen as interface between capital and nature, human beings and space."(at page 200).

[381]*Public participation* calls for the appreciation by State, Government and all stakeholders implicated in this appeal that the Kenyan citizenry is adult enough to understand what its rights are under Article 34. In the cases of establishment, licensing, promotion and protection of media freedom, public participation ensures that private "sweet heart" deals, secret contracting processes, skewed sharing of benefits-generally a contract and investment regime enveloped in non-disclosure, do not happen. Thus, threats to both political stability and sustainable development are nipped in the bud by public participation. Indeed, if they did the word and spirit of the Constitution would both be subverted.

[382]*Patriotism* means the love of ones country. The regulator, the State, the Government, the national broadcaster and national private broadcasters have a national obligation, decreed by the Constitution to love this country and to not act against its interests. The values of *equity, inclusiveness*and *participation of the people* are similarly anchors of patriotism. *Integrity*too means we are patriotic when we do not take bribes and commissions thereby compromising the national interests of the Motherland. The values of *inclusiveness* and *non-discrimination*demand that State, Government, and State organs do not discriminate against any stakeholder. The regulator in particular must seek to protect the interests of the national and international investors in an equal measure. Indeed, there cannot be sustainable development in the country if the State, State organs, and Government fail to protect and promote the public interest in all its projects.

[383] The only cogent grievance of 1st, 2nd and 3rd respondents resolves into an issue that may be formulated as follows:

What return, if any, should they receive on account of their prolonged and substantial contribution to the development of the broadcast industry in Kenya?Should any advantage attach to their investment in infrastructure,and if so, what would be the legal parameters of such benefit?

[384] To such questions, the proper entity to provide a precise mode of resolution is the 1st appellant. This Court can only, in that context, recall broad directions of governance such as are signalled in Article 10 of the Constitution. The Constitution, by Article 10, is to be interpreted and applied in such a manner as gives fulfilment to national values and principles of governance; and these include patriotism, participation of the people, equity, inclusiveness, non-discrimination and sustainable development. The purpose and intent of the Constitution is, clearly, to improve the well-being of all Kenyans, and to nurture the social and economic growth of the country. In this context, the protection of local investment, will clearly be a relevant object. Although the comparative experience shows that existing broadcasters in different countries have been beneficiaries of technological advances within the broadcasting sector, including signal distribution, it would be imprudent to limit the enjoyment of this technological advancement to prior occupants of this space, to the exclusion of new actors and investors. For, enhanced competition ultimately redounds to the people's welfare, by lowering costs to the consumer, and improving the quality and reliability of services to the public. This is one of the rights guaranteed in the Constitution (Article 46): providing for the protection and promotion of the rights of the consumer.

[385] The 1st, 2nd and 3rd respondents' quest, therefore, as a matter of law, falls to be resolved within the regular operations of the 1st appellant, being guided by the declared values and principles of governance, and by the operative law of procurement as set out in the Constitution and the statute law.

[386]Although CCK (now CAK) deployed the procurement procedure in the Public Procurement and Disposal Act, in granting a BSD licence to the 5thappellant and denying the same to the 1st, 2nd and 3rd respondents; this Court takes judicial notice of the fact that this was no ordinary procurement of goods and services. This was a licensing process for an extremely important and yet finite public resource-SPECTRUM. The licensing was preceded by years of planning and international engagement. Significant amounts of public funds were expended in policy formulation to prepare the country for migration from analogue to digital transmission of broadcast content.

[387] Yet the decision by CCK to deny a licence to the 1st, 2nd and 3rd respondents appears in our view not to have been informed by the imperatives of the values of our Constitution as decreed in Article 10. We have read the extensive affidavits sworn by Messrs, Wangusi and Macharia for the appellants and respondents respectively. We note from the contents of the said affidavit that the respondents were eliminated from the bidding process on the basis of a technicality. The respondents are said to have submitted a bid security with a validity period of 53 days instead of 120 days (see paragraph 63 of Mr. Wangusi's affidavit). Given the fact that the subject matter of the licence was a critical public resource and whose capitalization the Kenyan public had an interest in; CCK was bound to conduct its affairs more responsibly and transparently in tune with our constitutional values. Instead, the agency chose to be hamstrung by the technicalities of procedure as if this was an ordinary procurement of goods and services. It is in this regard that we agree with *Maraga J.A*'s observation that CCK was operating as if the Constitution did not exist.

[388] In resolving this dispute, account must be taken of the nature of the resource (Spectrum) being contested, the economic fundamentals under-guarding its capitalization, the country's obligations under international law, and the values

decreed in our Constitution. At the end of the day the people of Kenya, local investors, international investors all have a stake. Of course care must be taken so as not to leave this resource to "the tragedy of the commons". At this stage, we recall the words of Mr. Kimani Kiragu when he urged thus:

> ***"I started by taking you on a flight to the Caribbean and referring to, or quoting Mr. Robert Marley. Let me come back home with regard to the three principles...If I could refer to our very own Ken Wa Maria, 'these things, these are my things, these are your things, these are our things, these are the fundamentals'."***

[389] The vision of sustainable development requires that when considering applications of signal distribution licences, CAK must balance several interests, including a three-prong investment opportunity for the public sector, the local private sector and the international sector; each being a separate and distinct interest group. To this end, we are perturbed by the contents of Mr. Wangusi's affidavit, which appears to suggest that SIGNET has ceded its licensed operations to external corporate entities belonging to groups, other than those in the public sector domain. Such a move is sure to defeat the public interest upon which the incorporation of SIGNET was founded in the first place. We would urge CAK to initiate consultations with the Government so as to ring-fence this public space, and ensure protection from encroachment by non-public sector actors, through adequate legal, financial and technical support.

[390] By the same token, the interests of local investors in the broadcast industry should neither be ignored nor be dismissed out of hand. The recognition of local private sector investment and indigenous commercial interests also encourages competition, plurality of players and stimulates economic growth within the domestic sphere, all to the benefit of the ordinary consumer.

[391] Such a broad-based responsibility falls to this Court, especially as underlined by the Supreme Court Act No. 7 of 2011 which requires the Court to "provide authoritative and impartial interpretation of the Constitution" [Section 3(b)] and to "develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth" [Section 3(c)].

F. THE CONCURRING JUDGMENT OF RAWAL DCJ AND VICE PRESIDENT

[392] Upon careful consideration of the main judgment, I hereby put forth my humble opinion on certain pertinent issues in the appeal, as seen through different eyes. These views shall not change the observations made in the main judgment, which is to say that the conclusion will remain unchanged.

[393] Based on the historical account by counsel for the 1st appellant, Mr. Wambua Kilonzo, there were several preparatory steps leading to Kenya's participation at the Regional Radio Communication Conference in Geneva in the year 2006 (the ***RRC-06***). This history has been addressed in the majority opinion and therefore I need not delve further into it.

[394]It is beyond dispute that almost all jurisdictions whose governance is based on democratic principles have keenly developed the concept of freedom of the media. This has been done mostly through the vision and independence of their Judiciary and not from the express provisions in their respective Constitutions.It cannot be challenged that the freedom of media is borne from the most valued and universally accepted freedom of speech or expression. The only addition or distinguishing element of the freedom of the media from that of speech or expression is that it flourishes the right to information.

[395] At the heart of the freedom of the media is the ability to express oneself by receiving and imparting information to others. Media establishments just like individualshave the right to receive any information or ideas and to communicate them to the widest possible audience. It is this freedom of expression through the media that is put to use by the media industry in the conduct of its business of production of electronic and print media for circulation to the public. Quoting the observations of Frank C. Newman and Karel Vasak(ed) – "Civil and Political Rights" in The International Dimension of Human Rights(Paris, 1982)at page 156:

> ***"When freedom of expression is put to use by mass media, it acquires an additional dimension and becomes freedom of information."***

[396]The freedom of expression gives boost or impetus to the public right to information.Due to the complex nature of the freedom of the media *vis- à-vis* the necessity of supervision on its responsibilities, many countries have avoided its inclusion in their Constitutions. I shall only take the example of the Indian Constitution which providesfor the freedom of expression in the Constitution as opposed to including that of the media among the fundamental rights.As to why press freedom was not included as a distinct right in the Indian Constitution, the Chairman of the Drafting Committee, Dr. Ambedkar during the debate on the Constituent Assembly for the adoption of the Constitution of India expressed that:

> ***"The press has no special rights which are not to be given or which are not to be exercised by the citizen in his individual capacity. The editor of a press or the manager are all citizens and therefore when they choose to write in newspapers, they are merely exercising their right of***

expression and in my judgment therefore no special mention is necessary of the freedom of the press at all."

[397] Despite the fact that the Indian Constitution did not make special provision for the freedom of the media, the Indian Supreme Court in the case of ***Indian Express Newspapers v. Union of India & Others***, (1986) AIR 515, summed up the role of the media, reading this role into the freedom of speech as follows:

"Freedom of speech presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. It rests on the assumption that the widest possible dissemination of information from as many diverse and antagonistic sources as possible is essential to the welfare of the public. It is the function of the Press to disseminate news from as many different sources and with as many different facts and colours as possible. A citizen is entirely dependent on the Press for the quality, proportion and extent of his news supply....The assumption in a democratic set-up is that the freedom of the press will produce a sufficiently diverse Press not only to satisfy the public interest by throwing up a broad spectrum of views but also to fulfill the individual interest by enabling virtually everyone with a distinctive opinion to find some place to express it."

[398]The Constitution of Kenya, unlike other jurisdictions, provides for the freedom of the media under Article 34 of the Constitution, as part of *an institutional freedom*. The media holds an important place in the Kenyan society. It has played a very vital role in shaping democracy and the rule of law in Kenya and is

often regarded as the voice of the voiceless. The freedom of the media was not a contentious issue at the time of drafting the Kenyan Constitution. As such it was incorporated into the new Constitution as it substantially appeared in former drafts including the *Wako Draft* which had already been subjected to a referendum in the year 2005. The Final Report of the Constitution of Kenya Review Commission (CKRC), at page 118, provided the following justification for the inclusion of freedom of the media in the Constitution:

> ***"Free expression and democracy thrive on a free exchange of ideas, not ideas from only one source. On the other hand, the power of the Press is great and not all media are responsible. So it should be clear that freedom of expression is accompanied by responsibility."***

[399] Thus it is clear that the guiding force behind the inclusion of the freedom of the media in the Constitution, as cited in the main Judgment, was to safeguard the media against government interference which was identified as one of the greatest threats to the existence of free media. The Constitution and digital media has broadened the space for media establishment and engagement to more Kenyans, potentially and progressively breaking the bourgeois themed-capitalist model of the industry. Furthermore, one can discern that Article 34(2) and (4) guarantees the freedom of the media and prescribes responsibilities and restrictions.

[400]In my view, the Constitution of Kenya has provided the pre-requisite process to acquire freedom of establishment by media houses by way of acquisition of requisite licenses. Moreover, in order for that freedom to be properly regulated, Parliament is ordained under Article 34(5), to enact legislation requiring that the media be properly protected and regulated by an independent body.In sum, Article 34 is a whole package of rights, obligations and, most importantly, protection against undue intervention by the government in respect of the freedom of media.

In reality, it guarantees*institutional freedom* as against other individual freedoms enshrined in the Constitution.

[401] With the above background, I distinctly observe that,from the provisions of Article 34(3) of the Constitution,the relevant laws and facts before the Court, content provision and signal distribution were designed to be separate market segments. The separation of broadcasting and signal distribution by law and policy, can be understood in the history of media development in Kenya. This history of the struggle for an independent media and its chronic endemics has been aptly recounted at paragraphs 145-162 of the main Judgment. During the analogue system, broadcasting and signal distribution were diagrammed into a single entity thus allowing only those of substantial means to share and disseminate ideas; introducing the complex politics of the mass media into the country. While the media, even in its monopolistic analogue nature, has shaped the democratic evolution of this country; the strides of the future and the nurturing of our constitutional maturity requires that we develop the media sector sustainably; both in ideas, innovation, utilization and reachability. The media is now open to all sections of the Kenyan public and ought to be utilized and monitored as to actualize the values and principles under Article 10 of the Constitution. Therefore, this separation allows other broadcasting entities capable of content development to distribute it through the medium of a common indiscriminate entity; that is to say, Broadcast Signal Distributor(s).

What therefore is the nature of a Broadcasting Signal Distribution Licence?

[402] The migration from Analogue to Digital Terrestrial Television introduces the signal distributor whose only mandate is to provide a channel for the transmission of the broadcasters' content to the public. The distributor does not develop but only distributes the content. As such, the signal distributor's imperative is to carry the content as provided by the broadcaster without any alterations. The

signal distributor requires a Broadcasting Signal Distribution (BSD) licence to carry the content. Under the Kenya Information and Communications Act, 1998 and the Kenya Information and Communications (Broadcasting) Regulations of 2009, the CCK was mandated to issue the required licences, including the BSD licence. After the promulgation of the Constitution, the licensing procedures by CCK derived their legitimacy from Article 34(3) of the Constitution. The issuance of licences under Article 34(3), in this context, is an administrative action that should adhere to the prerequisites of Article 47 of the Constitution. This Article calls for adherence to all the principles of fairness and administrative propriety. As such, the issuance of the licenses by CCK must satisfy the requirements under Article 47. However, issuance of a licence is not itself a right under Article 34 but a process to actualize this right and whose conduct is sanctioned by Article 47 to the benefit of all who are subject to the process, including the 1st, 2nd and 3rd respondents.

[403]Although I do not wish to go into great depths in my analysis on the issue of legitimate expectation, it is proper to contextualize the basis upon which a claim of legitimate expectation may occasion with specific reference to the Constitution of Kenya, 2010. Although this doctrine emanates from common law, the Constitution has entrenched the right of fair administrative action under Article 47 of the Constitution as follows:

> ***47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

***(b) promote efficient administration*. [Emphasis added]**

[404] The concept of legitimate expectation has been admirably captured in the main Judgment (paragraphs 256-291) and my intention is to capture its essence while considering its implication within ourconstitutional purpose, and the concept of its remedies through the administrative process stipulated under Article 47 of the Constitution. A State under the rule of law is obliged to balance administrative action and the claims of legitimate expectation as has been claimed by the 1st, 2nd and 3rd respondents in this case. Article 47 in the circumstances is a deliberate step towards the attainment of a fair and dependable government advancing expeditious, efficient, lawful, reasonable and procedurally fair public policies. The doctrine of legitimate expectation requires the entrenchment of a duty to act fairly. A breach of Article 47 attracts remedies in Judicial Review especially where an aggrieved person had cause to expect that the attendant aspects of fair administrative action would be adhered to. It is clear that the essence of Article 47 is to protect a party's legitimate claim of entitlement that is, procedural solidity and not a mere promise of consideration. As such, the court can quash any decision arrived at un-procedurally or unfairly but reserves itself no right to engage in the administrative duties of the body in question. The court must remain a court.

[405]The position stated above is upheld in the United Kingdom and many illustrations to this effect have been cited in the main Judgment. I do not deem it fit to repeat the same. Suffice it to say that the intention of the Constitution, through Article 47 was to strengthen the procedural fairness expected when dealing

with public administrative processes. These processes ought to be conducted in the sanctity of imperative principles such as; expedition, efficiency, the rule of law, reason and procedural fairness. In this regard, it can be stated that the growth of the media in Kenya is pegged upon the requirement of sound policies and a comprehensive legislative regime as I have earlierelaborated earlier.I may add here, for the purpose of completing the issue of this process, that it is a trite principle of administrative law that when an administrative process makes a decision on a substantive issue of a legal or constitutional nature, it exercises quasi-judicial powers.

[406] Based on this background, my examination of the question of legitimate expectation is drawn from a primary constitutional consideration and its intercept with the principles of fairness. My approach will be to balance the duty of CCK to grant the BSD licence and the interest of the 1st, 2nd and 3rd respondents in the licence. I adopt the approach propounded by P. Cane:

> ***"a legitimate expectation will arise only if the court thinks that there is no good reason of public policy why it should not. This is why the word 'legitimate' is used rather than the word 'reasonable': the matter is not to be judged just from the claimant's point of view. The interest of the claimant in being treated in the way expected has to be balanced against the public interest in the unfettered exercise of the decision-maker's discretion; and it is the court which must ultimately do this balancing."*** **[Emphasis added](See: P. Caine, Administrative Law, 4th Edn (OUP, 2004), pp. 205-206 and Chris Hilson, *Policies, the Non-Fetter Principle and The Principle of Substantive Legitimate Expectations: Between***

a Rock and a Hard Place? **11 Judicial Review 289 2006 at p. 290).**

[407] Due to the specified cause before the Court that was focused mainly on the 1st, 2nd and 3rd respondents' claim to Article 34 rights violations, the intricacies of the process were not material before the Court. However, one discerns from the record that the intention to have a licensed signal distributor arose as early as the year 2006 during the preparation of the ICT policy and in the run-up to the RRC-06. This was followed by the firming up of this intention in the Taskforce Report of 2007 that recommended SIGNET as one of the signal distributors and the licensing of other (even existing) broadcasters, subject to the requisite processes having been recommended by the Taskforce that signal distribution service providers ***would be licenCed*** to ensure optimal use of broadcasting infrastructure, and minimize negative environmental impact such as aviation hazards and constraints to physical planning.

[408] On 16th February, 2011, the CCK issued a Tender Notice calling for the expression of interest for the provision of broadcasting signal distribution services to undertake a countrywide digital television signal roll-out in preparation for migration from analogue to digital broadcasting in Kenya. In the Tender Notice, the CCK encouraged existing broadcasting networks to participate in the tender in order to optimize the utilization of the existing broadcasting infrastructure. Following this initial process, CCK selected six pre-qualified firms who were requested to submit proposals. The proposals listed the processes for the mandatory, financial and technical evaluation. The Commission in an email to all the pre-qualified firms indicated that a bid bond valid for 120 days from the date of opening of the bids (31st May, 2011) would be required. National Signals Network (the consortium of the 1st and 2nd respondents) submitted a bid bond valid for 53 days and was therefore declared non-responsive to proceed to the technical stage. This decision was communicated to the consortium.

[409] Based on the record, a dissatisfaction with the tender process that CCK had undertaken entitled the aggrieved parties to approach the High Court for remedies under Article 23(3) of the Constitution which included an order of judicial review. This avenue was however not pursued. The primary issue before the High Court was the nature and extent of the freedom of the media protected under Article 34of the Constitution and whether it had been violated by CCK in the context of the migration of terrestrial television broadcasting from analogue to digital platform.

[410] A glance at the Judgment of the High Court reveals, at paragraphs 43 and 44, that the 1st, 2nd and 3rd respondents' claim of legitimate expectation was pegged on their investment in the industry and their assertion of their rights under Article 34(1) of the Constitution. The said respondents mistook the evolved nature of the doctrine of legitimate expectation in Kenya and their assertions went beyond the challenge of the CCK's authority to issue BSD licences to the realm of fundamental rights. It was the 1st, 2nd and 3rd respondents'misconceived argument that their guaranteed freedom of the media had been violated by being subjected to the licensing processconducted by a body, other than that contemplated under Article 34(3) of the Constitution. I reiterate that the concerned respondents in my view mistakenly asserted a guaranteed entitlement to a BSD license ignoring the required procedural processes to vindicate their grievances as provided under the Constitution and the Act.

[411] I have strived to consider this matter from a different legal and constitutional perspective as well as make it palatable for the general public. As this Judgment aligns with the final proposals and conclusions given in the main Judgment, I have nothing more useful to add.

G. CONCLUSION, PROPOSALS AND ORDERS

[412] It is emerging already, in this Court's path of jurisprudential development, that we have endeavoured to enhance and, as far as possible, stabilize the objective normative yardsticks that assure certainty and predictability in the application of the Constitution and the law to the merits of particular cases.

[413] It is in this context that we have, in the instant case, conducted an analysis of the findings at the other superior Courts, while taking advantage of the comparative lesson in the development of the law; and in this way we have come to the determination which we now set out, firstly, as a set of ***proposals,*** and secondly, as the ***Orders*** of this Court.

[414]The Court signals certain directions necessitated by the special circumstances of this case, which will have a bearing on appropriate constitutional initiatives by other agencies of governance. These are as follows:

(a) On account of requisite adaptations to the supporting infrastructure accompanying the imminent shift from Analogue Terrestrial Broadcasting to Digital Terrestrial Broadcasting, the Kenya Parliament should consider the content of the Kenya Communications Act, 1998 for appropriate review.

(b) Alongside the foregoing indication, Parliament should consider such appropriate environmental measures as should guide signal distributors, in complying with the terms of Articles 10(2) (d) and 42 of the Constitution.

(c) In that same context, Parliament should consider an appropriate course of legislation to govern the disposal of waste-material resulting from the transition from analogue television transmission to digital television transmission.

(d) On the question of Set Top Boxes (STBs), we would urge CAK to ensure that their sale is open to competition to avoid creating a monopoly or duopoly. At the centre of the sale of these STBs, should be the interest of the consumer, i.e. the Kenyan public. Towards this end, CAK could consider incorporating into the licensing conditions, the requirement on the part of signal distribution licensees to subsidize the cost of STBs. We make this suggestion in the belief that it reflects good corporate social responsibility.

(e) Most importantly, CAK must re-align its operations and licensing procedures so as to be in tune with Articles 10, 34 and 227 of the Constitution.

[415] With regard to the claims of the parties in this case, the Court makes the following Orders:

(a) The Orders of the Court of Appeal made on the 28th of March, 2014 are hereby set aside. For the avoidance of doubt,

(b) The declaration of the Appellate Court of 28th March 2014 annulling the issuance of a BSD licence by the 1st appellant herein (CCK as it then was) ***to the 5th appellant herein*** (PAN

AFRICAN NETWORK GROUP KENYA LIMITED) ***is hereby set aside.***

(c) The Order by the Court of Appeal directing the independent regulator to issue a BSD licence to the 1st 2nd and 3rd respondents herein (NATIONAL SIGNAL NETWORKS) ***is hereby set aside.***

(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.

(h) Each Party shall bear its own costs at the High Court, Court of Appeal and the Supreme Court.

(i) This Judgment shall be transmitted to the Clerks of the National Assembly and Senate by the Registrar of the Court.

DATED and **DELIVERED** at **NAIROBI** this **29thDay of September, 2014.**

.....	.....
W. M. MUTUNGA **CHIEF JUSTICE & PRESIDENT** **OF THE SUPREME COURT**	**K.H. RAWAL** **DEPUTY CHIEF JUSTICE &** **VICE-PRESIDENT** **OF THE SUPREME COURT**
.....	.....
P. K. TUNOI **JUSTICE OF THE SUPREME COURT**	**M. K. IBRAHIM** **JUSTICE OF THE SUPREME COURT**
.....	.....
J.B. OJWANG **JUSTICE OF THE SUPREME COURT**	**S. C. WANJALA** **JUSTICE OF THE SUPREME COURT**

.....

S. N. NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA