



IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 557 OF 2013

BETWEEN

ROYAL MEDIA SERVICES LTD.....1ST PETITIONER
NATION MEDIA GROUP LIMITED2ND PETITIONER
STANDARD GROUP LIMITED3RD PETITIONER

AND

ATTORNEY GENERAL.....1ST RESPONDENT
THE MINISTRY OF INFORMATION
COMMUNICATIONS AND TECHNOLOGY.....2ND RESPONDENT
COMMUNICATIONS COMMISSION OF KENYA.....3RD RESPONDENT
SIGNET KENYA LTD.....4TH RESPONDENT
STAR TIMES MEDIA LTD.....5TH RESPONDENT
PAN AFRICAN NETWORK GROUP KENYA LTD.....6TH RESPONDENT
GO TV KENYA LTD.....7TH RESPONDENT

AND

CONSUMER FEDERATION OF
KENYA (COFEK).....1ST INTERESTED PARTY
WEST MEDIA LTD2ND INTERESTED PARTY

RULING

1. After hearing the parties on the petition, I dismissed the petitioners' claim. The petitioners have now made an informal application for conservatory orders pending the filing of a formal application in the Court of Appeal.
2. Under **Article 23**, the court is entitled to issue conservatory orders of any kind including conservatory orders pending appeal as is necessary to protect fundamental rights and freedoms. Thus I am satisfied that this court has the jurisdiction to grant appropriate orders pending appeal.

3. The issue for consideration is whether I should issue orders suspending the switch-off date pending the filing of a formal application to the Court of Appeal. I agree with the petitioners that they have an undoubted right of appeal and indeed the Court of Appeal may take a different view of the issue from that which I have taken. But that fact alone cannot entitle the petitioners to a conservatory orders pending appeal. The Court is obliged to have regard to all the facts and circumstances of the case including whether in fact the intended appeal will be rendered nugatory.
4. I have considered the arguments by all the counsel before me and I take the following view of the matter. The petitioners' case was that digital migration should not take place as they are entitled to Broadcast Signal Distribution ("BSD") licences and that their rights have been violated by the implementation of digital migration policy hence the switch off date should be postponed.
5. In the event, the digital migration proceeds by implementation of the Switch-off date, a successful appeal would only mean that (a) the petitioners would be entitled to a BSD Licence and (b) they would be entitled to broadcast in analogue format while other broadcasters broadcast on digital. In my view therefore, the appeal would not be rendered nugatory.
6. The petitioners contend that the switch off if carried out, will be a death sentence. I hold that it will only be a death sentence, if the petitioners walk to the gallows or scaffold. The petitioners' own evidence is clear that they have been able to broadcast their content via the digital platform throughout the simulcast period through Signet and are able to do so if required. The 65th Meeting of the Digital Television Committee ("DTC"), which I cannot ignore is that they are ready and able to switch over when the decision was made to have 13th December 2013 as the switch-off date. If the consumers are kept in a blackout it is only because the petitioners want the television blackout.

7. What loss will the petitioners suffer if the switch off date is not postponed? Again I quote the minutes of the 65th DTC Minutes “*MOA expressed their concerns on why the date (i.e, 13th December 2013) was not suitable in view of the fact that their advertising business picks in early December ...*” Thus the loss will be in terms of advertising revenue but this would not be lost as they would be able to broadcast over the digital platform if they so wish. As to their concerns about consumers, the minutes reflect that, “*shifting the Date would give consumer an opportunity to purchase Set Top Boxes ...*” such was the concern for the consumers that it was limited to the opportunity for purchase of Set Top Boxes.
8. On the whole, I find and hold no that no substantial or other loss will be occasioned to the petitioners should digital migration proceed as scheduled. If any loss is incurred, it will be because the petitioners refuse, on their own violation to participate in the migration.
9. On the other hand, digital migration is not about petitioners alone. It has been a deliberate Government policy. As the respondents and 2nd interested party have pointed out, the court needs to balance the interests of all the parties bearing in mind that the Digital Migration process has been in place since 2006, the policy and implementation has been consensual and the switch off date agreed with the petitioners.
10. Other parties who have invested in the completion of the digital process will suffer substantial loss which may not be compensated. Kenya’s international obligation agreed upon and her international reputation will suffer.
11. In summary, the hardship to the petitioners and their business is far outweighed the hardship imposed on the body politic by issuing a further conservatory order in light of the history and development of digital migration.

12. Granting the orders sought would negate the very clear commitment the petitioners made in the implementation process as evidenced by the consensus reached at the 65th DTC Meeting.
13. The application for conservatory orders pending filing of an application for conservatory orders in the Court of Appeal is dismissed with costs.

DATED and DELIVERED at NAIROBI this 23rd day of December 2013

D.S. MAJANJA
JUDGE

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