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 LIMITED …….. 2ND PETITIONER
STANDARD GROUP LIMITED ……..…. 3RD 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 LTD ……..... 2ND INTERESTED PARTY

JUDGMENT

Introduction

1. The subject of this decision is the nature and extent of the freedom of the media protected under **Article 34** of the Constitution and whether it has been violated by the respondents in the context of the migration of terrestrial television broadcasting from analogue

to digital platform (hereinafter "digital migration"). **Article 34** of the Constitution provides as follows;

34. (1) Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33 (2).

(2) The State shall not—

(a) 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

(b) penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.

(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) All State-owned media shall—

(a) be free to determine independently the editorial content of their broadcasts or other communications;

(b) be impartial; and

(c) afford fair opportunity for the presentation of divergent views and dissenting opinions.

(5) Parliament shall enact legislation that provides 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.

2. The petitioners are limited liability companies engaged in the provision of broadcasting and media services throughout the Republic of Kenya. Collectively they control 85% of the television coverage in the country.

3. The 2nd respondent is the Ministry charged with the executive mandate of formulating and implementing policy, together with other entities, with respect to the information, communications and technology industry. In this judgment it shall be referred to as the Ministry, Minister or Cabinet Secretary where the context admits.

4. The 3rd respondent, the Communication Commission of Kenya ("the CCK"), is a body corporate established under the provisions of ***KICA***. It is responsible for implementation of the international obligations that Kenya has to the International Telecommunication Union ("the ITU"), a specialized agency of the United Nations in the field of information and communications technology. Kenya has been a member of ITU since 11th April 1964. **Section 5** of the ***Kenya Information and Communications Act (Chapter 411A of the Laws of Kenya)*** ("***KICA")*** provides that the CCK, shall in performance of its function take into account, *"(a) any policy guidelines of a general nature relating to the provisions of this Act notified to it by the Minister and published in the Gazette (b) Kenya's obligations under any international treaty or agreement relating to the provisions of telecommunication, radio and postal services."*

5. The 4th and 6th respondents are companies carrying on business in Kenya and have been granted Broadcast Signal Distribution ("BSD") licences by the CCK. The 5th respondent is the holder of a temporary licence holder of a Broadcasting Subscription Management Service Provider. The 7th respondent is a television broadcaster carrying on business in Kenya. The 2nd interested party is a media company licensed to broadcast by the CCK.

6. The 1st interested party is an organisation whose function is protect, promote and represent consumer interests.

Petitioners' Prayers

7. The petitioner's case can be understood from the prayers sought in the petition dated 22nd November 2012 in which the petitioners seek the following reliefs;
   1) *A declaration that the Petitioners' rights as broadcasters under Articles 33 and 34 of the Constitution have been infringed and threatened with violation by the 2nd and the 3rd Respondents.*
   2) *A declaration that the Respondents in limiting the Broadcast Signal Distribution licence to five licensees has violated the freedom of establishment of the media contrary to Article 34 of the Constitution.*
   3) *A declaration that the Petitioners' right of establishment as television broadcasters protected by Article 34(3) of the Constitution is violated and rendered meaningless by the failure to issue the Petitioners with Digital Signal Distribution licenses and Digital frequencies.*
   4) *A declaration that the proposed switch off date of 13th December 2013 is punitive and against public interest and infringes on the Petitioners' right of establishment as media houses and broadcasters and will disenfranchise the public's right to receive information.*
   5) *A declaration that analogue and digital broadcasting spectrums can co-exist and the 2nd and the 3rd Respondents are under an obligation to give the public the right to choose until such time that there are adequate number of universal set top boxes in the country.*
   6) *A declaration that the Petitioners are entitled to be issued with a Broadcast Signal Distribution license and Digital*

frequencies by the Government and in default they should continue with the current analogue broadcasting services.

7) *An order compelling the Government through the 1st and the 2nd Respondents to issue the Petitioners with Digital Broadcast Signal Distribution licenses and Digital frequencies.*
8) *An Order of injunction restraining the 2nd and the 3rd Respondents from switching off the Petitioner's analogue frequencies, broadcasting spectrums and broadcasting services on 13th December 2013 or at all pending the issuance of the Broadcast Signal Distribution licenses and Digital frequencies to the Petitioners, a reasonable period to roll out digital television broadcasting services and the supply of universal set top boxes to all consumers with television sets.*
9) *An order of permanent injunction restraining the 4th, 5th, 6th and 7th Respondents by themselves, their licensees and/or agents, from broadcasting, distributing or in any way interfering with the Petitioners' programs, broadcasts, copyrighted material and productions or in any way infringing the Petitioners' intellectual property rights.*
10) *The Respondents to pay the Petitioners costs of the Petition in any event.*

Issues for Determination

8. From the prayers cited above, it is apparent that there are three broad claims which the petitioners seek to be resolved by the court and which are as follows;
   (a) Whether and to what extent the petitioners are entitled to be issued with BSD licences by the CCK and whether the issue of the licences to other licensees to the exclusion of the petitioners is a violation of **Article 33** and **34** of the Constitution.
   (b) Whether implementation of the 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 or ameliorate the petitioners fundamental rights.

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

9. These issues are to be resolved in the context of the digital migration and it is important to provide by way of background the process that led to Kenya adopting digital migration. These facts relating to the digital migration process can be gathered from the various depositions filed by the respective parties and are uncontested.

Digital Migration; the Facts

10. It is important to note that digital migration occurs within a global context. The process is implemented through a framework established by the ITU, established by ***Convention of the International Telecommunication Union ("ITU Convention')*** which Kenya ratified in 1964.

11. The ITU is composed of three sectors, Radio communication (ITU-R), Standardization (ITU-T) and Development (ITU-D) but for the purposes of the present proceedings, the relevant sector is ITU-R. It is responsible for planning and allocation of frequency spectrum resources at the global level. Member states derive and develop their individual national frequency plans from the ITU framework. ITU-R ensures the compatibility of frequency resources across states thereby reducing interference in the use of the said resources between and within the said member states.

12. The ITU-R business is conducted through its various policy organs; the World Radio Communication Conferences, Regional Radio Communication Conferences, the Radio Regulations Board, Radio Communication Assemblies, Radio Communication Study

Groups and the Radio Communication Advisory Group. For the purposes of allocation and management of frequencies at the global level, the world is divided into three ITU Regions with the Republic of Kenya belonging to ITU Region 1 which comprises of Western and Eastern Europe, Africa and the Middle East.

13. There are three technologies of TV broadcasting; terrestrial, satellite and cable digital platforms of television broadcasting. Transmission for terrestrial television is currently in either digital or analogue form and the purpose of the current migration is to ensure that the terrestrial television is solely on the digital platform. Migration to digital transmission under Regional Radio Communication Conference, 2006 ("RRC-06") only relates to digital terrestrial television transmission and does not affect satellite or cable television transmissions which do not utilize the VHF and UHF frequency bands.

14. In analogue TV broadcasting, one channel can only broadcast one program and one transmitter can only broadcast through one frequency range. In the case of analogue, the whole transmission process is in the hands of the broadcaster who develops the content and rolls out and maintains the transmission infrastructure including masts, antenna and actual works and does the actual transmission.

15. On the other hand, digital terrestrial broadcasting platform attracts several players. The signal distributor is licensed for the sole purpose of transmitting to consumers free to air TV content. The broadcaster provides the content to the signal distributor to transmit at an agreed fee. The signal distributor rolls out and maintains the use of infrastructure and only transmits the agreed content without interference.

16. Prior to the year 2006, the allocation and management of terrestrial television broadcast frequencies at the global level was governed by international treaties known as Stockholm 1961 and Geneva 1989 VHF/UHF Television Broadcasting Plans for the European and African Broadcasting Areas, respectively for Bands I, III, IV and V ("Geneva 1989"). Band III refers to 174-230 MHz, while bands IV and V refer to 470-862 MHz on which analogue terrestrial television broadcasts are presently made. These bands are also known as Very High Frequency (VHF) and Ultra High Frequency (UHF) respectively. In Kenya, analogue terrestrial television broadcasting is undertaken by broadcasters on frequencies between the 174-230 MHz band and 470-806 MHz band.

17. Following developments in technology and the need to efficiently utilize scarce frequency spectrum resources, sometime in the year 2000, some countries in ITU Region 1 and ITU Region 3 desired to introduce digital terrestrial television broadcasting in their respective areas and to this end requested the ITU to revise and update the Stockholm 1961 and Geneva 1989. Consequently, Region 1 held its first Regional Radio Communication Conference in 2004 ("RRC-04") in Geneva, Switzerland to establish the planning parameters for an all-digital broadcast environment in Region 1.

18. The result of RRC-04 was that member states agreed on the planning parameters and criteria for digital terrestrial television broadcasting in Band III and Bands IV/V for Region 1 and parts of ITU Region 1 situated to the west of Meridian 170^{o}E and to the North of parallel 40^{o}S except the territory of Mongolia and the Islamic Republic of Iran. RRC-04 also agreed to hold another Regional Radio communication Conference in the year 2006.

19. After RRC-04, member states agreed to several activities to take place before the next conference and the subsequent one. These activities included the formulation of regional and inter-regional working groups and development draft frequency plans by each member state taking account bilateral and multilateral negotiations carried out by the relevant municipal bodies of the different member states. Kenya participated in RRC-04 and all intercessional activities. The Ministry, CCK and other stakeholders in the broadcasting industry were fully involved in the preparation of the draft national frequency plans prepared by the Government of Kenya for the subsequent RRC-06.

20. RRC-06 took place in Geneva, Switzerland between May and June 2006. During RRC-06, a process of rationalizing the various national draft frequency plans presented by the member states took place through meetings held at various levels and sublevels. The rationalization process included running a number of compatibility analyses of the various draft national frequency plans using super-computers with advanced tailor-made software in order to co-ordinate and make compatible the various member states' draft national frequency plans with a view to reducing frequency interference between and within member states. Planning and negotiation groups were formed by the member states at various levels and these groups met as part of the rationalization process and thereafter all member states met at plenary and presented their agreed/negotiated plans for adoption by plenary. If for any reason compatibility was not achieved at any level by some or any of the member states, the concerned member states were required to undertake further negotiation and planning in order to arrive at a consensus and which process is a give and take one among member states.

21. RRC-06 produced the Final Acts of the Regional Radio Communication Conference for planning of the digital terrestrial

broadcasting service in parts of Region 1 and 3, in the frequency bands 174-230 and 470-862 MHz (RRC-06) ("the Final Acts of RRC-06") as well as associated Resolutions as contained in these Final Acts.

22. Among other things, RRC-06 agreed on 17th June 2015 as the switch off date for transition from analogue to digital terrestrial television broadcasting for member states present at RRC-06. In line with the Final Acts of RRC-06, and in fulfilment of its international obligations, the Government of Kenya embarked on local preparations to transit terrestrial television broadcasting from the analogue platform to the digital platform.

23. The Government of Kenya first set a transition deadline date of 1st July 2012 as the switch off date, in a phased manner, in order to have the flexibility and time to address any difficulties that would arise before the expiry of the multi-laterally agreed switch off deadline of 17th June 2015.

24. In order to implement the digital migration program locally, the Minister established a taskforce known as the Taskforce on the Migration from Analogue to Digital Broadcasting ("the Migration Taskforce "), to give recommendations that would contribute to the development of a national strategy for the switch over of broadcasting systems from analogue to digital broadcasting. The mandate of the Taskforce was to:
    a. *give recommendations to the government on the required policy and regulatory framework to address the introduction of digital broadcasting;*
    b. *develop a Kenyan approach for transition to digital broadcasting;*
    c. *establish a transition timeframe and a firm programme for analogue switch-off;*

d. Give proposals on how Kenyans can adopt digital broadcasting.

25. The Migration Taskforce gathered views from stakeholders and the members of the public in general and presented its final Report to the Minister on 4th October 2007 ("the Migration Taskforce Report"). The Migration Taskforce Report recommended that the migration from analogue to digital broadcasting be undertaken in three phases as follows:
    a) *Digital switch on: the introduction of digital broadcasting services involving the development of the digital broadcasting infrastructure including introduction of a signal distributor, availability of set-top boxes and/or integrated digital receivers.*
    b) *Simulcast Period: In order to ensure that television viewers without set top boxes are not deprived of services, analogue and digital will have to be broadcast in tandem for some period - the 'simulcast' period.*
    c) *Analogue Switch-off: Termination of analogue transmission which assumes the completion of the switchover process, so that it will not occur, before almost all households can receive digital signals and have digital receivers.*

26. The Migration Taskforce Report proposed the following milestones towards achieving the foregoing:
    - Government approval – 30th November 2007
    - Formation of Digital Migration Board – 1st March 2008
    - Licencing of signal distributors – 30th August 2008
    - Switch on of digital and commencement of Simulcast – 30th August 2009 to 30th June 2012
    - End of simulcast period and switch off date of analogue broadcasting - 1st July 2012

27. In accordance with the 2006 National ICT Sector Policy Guidelines, which outlined the framework within which national public broadcasting, private broadcasting, community broadcasting and signal distribution services would be provided, the Migration Taskforce recommended that Kenya establishes a common transmission platform for all broadcasting services to optimize usage of the available resources.

28. The Migration Taskforce Report made the following recommendations which are germane to this suit;
    i. KBC shall be required to form a separate company to run the signal distribution services in order to avoid conflict of interests or cross subsidisation.
    ii. Interested investors including current broadcasters may be licenced to offer signal distribution services.
    iii. A signal distributor will be required to provide signal distribution services as a common carrier to broadcasting licensees upon their request on an equitable, reasonable, non-preferential and non-discriminatory basis.

29. Under the digital migration regime, signal distributors would be required to provide signal distribution services on a common carrier platform to broadcasting content provider licensees, upon the latter's request, on an equitable, reasonable, non-preferential and non-discriminatory basis.

30. The Migration Taskforce also recommended that the Government, in consultation with the Commission, establish a multi-stakeholder working group known as the Digital Television Committee to implement the Migration Taskforce Report, if adopted.

31. The Government accepted the recommendations contained in the Migration Taskforce Report. The Minister, pursuant to these recommendations, established the Digital Television Committee

("the DTC") to spearhead the migration process. The DTC comprised members from Government and the media industry. The mandate of the DTC was as follows;

a) *manage the migration process within a specified timetable;*
b) *develop an appropriate switchover strategy;*
c) *identify likely bottlenecks to the uptake of digital broadcast;*
d) *make recommendations relating to fiscal measures;*
e) *develop and implement appropriate consumer awareness strategy;*
f) *monitor and evaluate the awareness, take-up and use of the new services, and adjust the campaign accordingly.*

32. In discharging its mandate, the DTC took into account several matters that had been recommended by the Migration Taskforce. It considered that under the existing analogue broadcasting framework, each broadcasting frequency can only accommodate one programme channel and each such frequency requires its own transmitter. On the other hand, under the digital broadcasting framework, a single broadcasting frequency can accommodate several programme channels.

33. Following recommendations of the Migration Taskforce, the Minister granted conditional authority to the designated public broadcaster, Kenya Broadcasting Corporation ("KBC"), a signal distribution licence by a letter dated 28th February 2008. KBC incorporated the 4th respondent, Signet, as a subsidiary company to offer signal distribution services. The other BSD were to be given to private investors by CCK through a competitive procurement process. The tendering process for the BSD license commenced in February 2011 with an advertisement for Expression of Interest. Six firms were prequalified to proceed to the tendering stage.

34. When the tender closed on 31st May 2011, four bidders submitted bids namely: African Link Agencies Ltd, Mayfox Company Ltd,

National Signal Networks, a consortium of Nation Media Group Ltd and Royal Media Services Ltd, the 1st and 2nd Petitioners, and Pan Africa Networks Group (Kenya) Co. Ltd, the 6th Respondent. After evaluation of bids, CCK's Tender Committee approved the award of the BSD license to Pan Africa Network Group (Kenya) Co. Ltd to roll out a national broadcasting signal distribution network in Kenya.

35. National Signals Network Ltd challenged the decision to award the BSD licence to Pan African Network Group (Kenya) Ltd through the procurement dispute resolution mechanism provided under the ***Public Procurement and Disposal Act, 2005*** by filing Public Procurement Administrative Review Board ("PPARB"); ***Application No. 24 of 2011***. On 19th July 2011, the PPARB dismissed the application.

36. While its appeal was pending. National Signal Networks Ltd wrote a letter dated 4th July 2011 to the Permanent Secretary, Ministry of Information and Communication seeking to be considered for the BSD licence. The Permanent Secretary responded by a letter dated 22nd July 2011 in which he noted that, *" ... in view of the fact that your organizations have substantially invested in the broadcast infrastructure, the Government has directed Communications Commission of Kenya (CCK) consider issuing you with the third Signal Distribution License."* The conditions imposed for the application to CCK for the licence were two fold; first, the proposed licencee would guarantee open access to all and second, the proposed licencee would have to prove to CCK that the other current infrastructure providers have no interest investing in National Signal Networks. National Signal Networks did not make the application to CCK as advised nor challenge the conditions imposed.

37. As a result of the delay occasioned by the decision to award the BSD licence, the Government made a decision to defer the switch off date from 1st July 2012 to 31st December 2012. The decision was also influenced by a resolution reached at the 19th Congress of the East African Communications Organisation, Bujumbura, Burundi held on 28th May 2012. According to the Report of Proceedings Annex XV 51.0, it was agreed that, *"EACO member countries should honour the analogue switch off deadline of 31st December 2012. No license for analogue broadcasting to be renewed and those still on analogue after the switch off date should not claim any protection from interference."*

38. In the meantime and in order to achieve digital migration on the new date, the DTC held multiple stakeholder consultations and public awareness campaigns. The anticipated switch off designated for 31st December 2012 did not take place as COFEK, the 1st interested party, filed ***Nairobi HC Constitutional Petition No. 563 of 2013***; ***Consumer Federation of Kenya v Minister for Information and Communication and 2 others*** and obtained injunctive orders halting the intended migration. The petition was later withdrawn by consent of the parties on 21st June 2013 thereby enabling the migration process to proceed. As part of the process of accommodation of divergent views, Mr Stephen Mutoro, the Secretary General of COFEK was appointed to DTC on 28th June 2013 but he later resigned from the DTC on 11th July 2013.

39. The DTC continued to prepare for digital migration and at its 65th meeting of the DTC held on 6th August 2013, it was agreed by all parties including Media Owners Association, to which the petitioners are all members, that the new switch off dates would be as follows:
    (a) Phase 1: 13th December 2013 - Nairobi;
    (b) Phase 2: 30th March 2013 - Mombasa, Malindi, Nyeri, Meru, Kisumu, Webuye, Kisii, Nakuru and Eldoret; and

(c) Phase 3: 30th June 2013 - All other remaining stations.

40. By ***Gazette Notice No. 13869*** dated 1st October 2013, the Cabinet Secretary gazetted the intended switch off date and the programme for implementation for the digital migration in accordance with the powers conferred upon him by **section 5A** of ***KICA***.

41. Apart from oral submissions by counsel, all parties filed comprehensive written submissions which I shall now outline. All the respondents and the 2nd interested party oppose the petition while the 1st interested party supports the petition.

The Submissions

Petitioners' submissions

42. Hon. Muite, S.C., counsel for the petitioners, submitted that the right of establishment is guaranteed by **Article 34** and is only subject to licensing procedures that are necessary to regulate the airwaves and signal distribution. He added that the right of establishment of broadcasters and other electronic media is meant to secure media freedom and buttress the freedom of expression under the Constitution and that failure to issue the petitioners with the BSD licences and frequencies is a violation of **Article 34**. Senior Counsel cited several cases, which emphasise the freedom of the media, in support of the petitioners' contentions among them ***Central Broadcasting Services Limited v Attorney General*** **[2007] 2 LRC 19**, ***Benjamin v Minister of Information and Broadcasting*** **[2001] 4 LRC 272**, ***Observer Publication v Mathew and Others*** **[2001] 288** and ***Retrofit v Posts and Telecommunications Corporation*** **[1996] 4 LRC 489**.

43. The petitioners' contend that as established broadcasters, they have collectively invested Kshs. 40 billion in broadcasting infrastructure, which is unique in nature, and as such they had a legitimate expectation that the government would not interfere in

their broadcasting business and that any licensing requirements and regulations would facilitate and not impede broadcasting services. The petitioners accuse CCK of ignoring their investments and openly discriminating against them in favour of the 4th and 5th respondents, which are foreign owned companies, with little or no infrastructure in the media sector in Kenya. The petitioners contend that there was no rationale for being denied BSD licences particularly when such licences should be independent of government, political and commercial interests. They further contend that the licences were issued in an opaque and discriminatory manner. The petitioners argue that the Ministry and CCK must demonstrate constitutionally justifiable reasons for not giving licences to established media houses and therefore the decision to deny the petitioners the licence was arbitrary and not justifiable and a violation of their rights.

44. The petitioners' case is that as established broadcasting houses, they are entitled to licences and frequencies and that the rights accrued to them by virtue of **Article 34** cannot be taken away without violating the Constitution. They maintain that they have a legitimate of expectation to be issued with BSD licences and that the direction to them to migrate to the digital broadcasting platform without granting them BSD licences is a violation of **Article 34(3)**. Hon. Muite S.C., submitted that the right and freedom of the media becomes a dead letter if established broadcasters are not awarded BSD licences and frequencies and at the same time accorded time to rollout the digital platform.

45. The petitioners' challenge the current constitution of CCK, arguing that it was not the independent body contemplated by **Article 34** to regulate the media and as such it could not superintend over the digital migration process. In support of this contention, Hon, Muite, S.C., cited the ***Principles on Freedom and Broadcast*** based on **Article 19** of the ***United Nations Declaration on Human***

Rights. **Principle 10** which provide that all public bodies which exercise power in the areas of broadcast and/or telecommunications regulation should be independent, autonomous which should be guaranteed by the law. He argued that CCK as currently constituted is not independent of government control and cannot be an independent body is not therefore entitled to issue licences or supervise the digital migration process.

46. The petitioners argue that Kenya's international obligations, are subject to the Constitution and that the 2006 agreement which is the basis of the implementation of the digital migration process is subject to **Articles 33** and **34** and does not have the force of law. Counsel relied on the case of ***Beatrice Wanjiku and Another v Attorney General and Another*** **[2012]eKLR** to argue that the although the ITU convention was ratified, the agreement reached by the ITU conferences cannot justify a violation of the Constitution.

47. Hon. Muite S.C., submitted that the petitioners anchor their case on the Constitution which imposes a positive prohibition of State control of the media and provides for freedom of broadcasting. He urged that the Constitution should reign supreme.

1st and 2nd Respondents Submissions

48. The 1st and 2nd respondents opposed the petitioners' contention on the basis that Kenya ratified the ***ITU Convention*** in 1964 and as a result of it is bound to implement all the bilateral and multilateral agreements negotiated and concluded pursuant to meetings and conferences held by member states of the ITU. That the ***ITU Convention*** forms part and parcel of the laws of Kenya by dint of **Article 2(5)** and **(6)** of the Constitution. They urge the court to enforce the results of RRC-06 by declining the orders sought.

49. The respondents asserted the both the Migration Task Force Report and the DTC recognised the benefits that would accrue from digital migration such as creation of additional number of frequencies, more programming channels accommodation in one frequency, more efficient use of radio frequency, increased competition and innovation hence wider choice for consumers, reduction of transmission costs and better technology for storing and processing content.

50. Regarding the petitioners' complaints on the issuance of digital broadcasting licenses, the respondents contended that their allegations were not based on law as the issuance of licences is competitive and that neither the court nor the 1st and 2nd respondents have power to grant such licenses.

51. The Ministry, in its Replying Affidavit sworn on 4th December 2013 by Joseph Tiampati Ole Musuni, the Principal Secretary at the Ministry, deposed that the petitioners are members of the DTC which is tasked with among other things managing the migration process.

52. Mr Njoroge, counsel for the 1st and 2nd respondents, submitted that by dint of **Article 2(5)** and **2(6)** of the Constitution, the ***ITU Convention*** and the resulting bilateral, multilateral and regional agreements negotiated under its auspices to which Kenya is party are binding. He submitted further that the public benefits that will accrue to Kenya as a State, and for Kenyans, will far outweigh the financial benefits that the petitioners are pursuing through the petition.

53. As regards **Article 34** of the Constitution, the State contended that whereas it provides for the freedom of the media, such freedom was not absolute as **Article 34(3)(b)** provides for necessary licensing and for procedures that are independent of government

control, political interest or commercial interest. The State contends that the petitioners are driven by narrow commercial interests in pursuing this matter.

3rd Respondent's Submissions

54. The CCK rejects the petitioners' arguments and relies on the affidavit sworn on 2nd December 2013 by Francis Wangusi, its Director General. Its basic contention is that it is the body mandated to regulate the airwaves and signal distribution at the national level under **Article 34**. The CCK maintains that there are huge benefits to be reaped from the migration of broadcasting transmission from the analogue to the digital platform.

55. Mr Kilonzo, counsel for the CCK, submitted that frequency spectrum is a scarce resource which must be regulated for the benefit of the public and it is for that reason that regulation through licensing is contemplated by **Article 34** of the Constitution. He cited ***Royal Media Services Limited v Attorney General and Others*** **Nairobi Petition No. 346 of 2012** and ***Royal Media Services Limited v Director of Public Prosecutions*** **Nairobi HC Misc. Appl. No. 43 of 2013** to support this contention. He added that as part of its obligation to license broadcasting and the media, the CCK has to take into account international obligation incurred by the State as a party to international treaties. Counsel pointed to **Article 2(5)** of the Constitution which provides that international law shall form part of the law of Kenya hence Kenya is bound by and obliged to implement the ***Final Acts of the Regional Radiocommunication Conference*** which set the framework for digital migration.

56. The CCK rejects the petitioners' contention that **Article 34** of the Constitution entitles the petitioners, as established broadcasters, to the grant of BSD Licences as a matter of right. It states that such an approach would lead to an absurd result that would negate the

regulation of the scarce frequency spectrum. Mr Kilonzo further argued that the Constitution merely provides for licensing procedures necessary to regulate the airwaves and other forms of digital distribution and there is no provision that entitles any person to be granted a licence for signal distribution or for frequencies. Counsel emphasised that it is implicit in meaning of the term "licence" that CCK is entitled to take regulatory action including directing the petitioners to cease analogue television broadcasts and to migrate to digital platform and that the taking of such regulatory action is an incidence of licensing procedures of airwaves and signal distribution contemplated by the Constitution.

57. The CCK also argues that the petitioners' claim that their substantial investment in the broadcast infrastructure entitles them to a BSD licence as a matter of right is not supported by the Constitution, any written law or any legal precedent. Its position is that the grant of a licence is done in accordance with a policy drawn up after a consultative process and it would be improper for the court to issue to the petitioners a licence, as prayed for in the petition, as the court is ill suited to establish as a matter of policy whether the petitioners are entitled to a licence. To support this proposition that the court is ill-suited to make policy decisions, counsel cited the case of ***Minister of Health and Other v Treatment Action Campaign and Others,*** **CCT 8/02**, **[2002] ZACC 15**.

58. According to the CCK, the issue of whether it is the body contemplated by **Article 34** of the Constitution to regulate the media was already settled in the case of ***Royal Media Services Limited v Attorney General and Others*** **(Supra)** where the court held that until the body contemplated under **Article 34** is established, the CCK was the proper body to exercise regulation. As a result of the decision, Mr Kilonzo argues that this issue is *res*-

judicata as it has already been determined by a court of competent jurisdiction in matter involving the 1st petitioner.

59. The CCK avers that the switch-off date for analogue broadcasting is not unreasonable since the petitioners have all along been aware and have indeed fully participated in post RRC-06 activities through involvement in the Migration Taskforce and the DTC.

4th Respondent's Submissions

60. The 4th Respondent, Signet Kenya Limited ("Signet") relied on a Replying Affidavit sworn by Waithaka Waihenya, a director, to oppose the petition. Signet contends that the petitioners voluntarily participated in the digital migration process including the setting of the 13th December 2013 switch-off date. It further avers that the policy shift from analogue to digital transmission, spanning over a period of several years, with the petitioners' participation cannot be the basis of founding of their claim on legitimate expectation.

61. Signet denied that it violated the petitioners' right to intellectual property protection. It submitted that the petitioners' broadcasting content was always been transmitted on a mutual agreement and that there was nothing to show active interception without consent and that the petitioners' claims are not bona fide.

62. Mr Saende, counsel for Signet, focused his submissions on the issue of legitimate expectation which the petitioners argued was a basis for the grant of a BSD licence and ultimately a basis for seeking to derailing the switch off date. Counsel submitted that the petitioners participated voluntarily in the process that led to setting of the date of the digital migration through the DTC as such there was no basis for asserting legitimate expectation. Counsel cited several cases to support his arguments; ***Joel Nyambuto Omwenga and Others v Independent Electoral and Boundaries Commission and Others*** **[2013]*e*KLR,** ***Diana Kethi Kilonzo and Another v***

Independent Electoral and Boundaries Commission and Others **Nairobi Petition No. 359 of 2013.**

5th and 6th Respondents' Submissions

63. The 5th and 6th respondents focused their arguments on issue of whether the court should grant the petitioners a licence. They reject the petitioners' position that they, as established media, are entitled to BSD licences and digital frequencies as a matter of right on their own terms.

64. Mr Imende, counsel for the 5th and 6th respondents, urged that any claim for a BSD licence is barred by the doctrine of issue estoppel and is a collateral attack on the decision of the PPARB which is not permitted as it is an abuse of the court process. Counsel continued that this is because the 1st and 2nd petitioners' participated in the tender as part of a consortium and after the bid was lost, the PPARB dismissed their appeal and what they now seek is to challenge, review or reverse the decision of PPARB through this petition. Counsel cited the case of ***Trade Bank Limited v LZ Engineering Construction Limited*** **[2000] 1 EA 266** and ***Hunter v Chief Constable of the West Midlands Police and Others*** **[1981]UKHL 13** to support his arguments.

65. As regards the petitioners plea to be granted BSD licences and in default, that they be allowed to continue with analogue broadcasting services, counsel submitted that the doctrine of separation of powers required the court to exercise restraint in granting such relief sought particularly on the facts of this case where the petitioners were merely unhappy with the policy of digital migration and could not point to any breaches of the law of the Constitution. Counsel cited the case of ***Peter Njoroge Mwangi and Others v Attorney General and Another*** **Nairobi Petition No. 73 of 2010 (Unreported)** and ***Hon. Chirau Ali Mwakwere v***

Robert Mabera and Others **Nairobi Petition No. 6 of 2012 (Unreported)**.

7th Respondent's Submissions

66. The 7th respondent, Go TV opposes the petition on the basis that the evidence, the content generated by the petitioner has been freely available to the public on the digital platform since the launch in 2009 hence the issue of violation **Article 34(3)** does not arise.

67. The 7th respondent contends that the 1st and 2nd petitioners, who were part of the consortium that bid for the BSD licence, were entitled to invoke specific public law remedies which they did and were duty bound to use that process to address their grievances regarding the public procurement process used by CCK. The respondent relied on the case of ***R v National Environment Management Authority*** **CA Civil Appeal No. 84 of 2010 [2011]eKLR** where the Court of Appeal held that where there was an available statutory appeal process, the Court's intervention should only be sought in exceptional circumstances.

68. Go TV concludes that other players in the broadcasting sector including individual traders who import the Set Top Boxes (STBs) had invested huge sums of money and time in preparing for digital migration, and that such players will be unfairly prejudiced by what they term as the petitioners' failure to timeously get their business affairs in order.

The Interested Parties

69. The 1st interested party, Consumer Federation of Kenya (COFEK) supports the petitioners' case and filed a Replying affidavit sworn on 3rd December 2013 by its Secretary General, Stephen Mutoro.

70. COFEK contends that the implementation of digital migration contravenes the provisions of **Articles 10, 27** and **35** of the Constitution by discriminating against individuals who cannot afford set-boxes at the estimated retail price of Kshs 3,500.00 to Kshs 5,500.00. They argue that the timing of the switch-off date being at the end of the year will heavily inconvenience and cause economic hardship to citizens as they will be already burdened by end of year and early year expenses.

71. Mr Kurauka, counsel representing COFEK, questioned the level of preparedness noting that there was no enabling framework to facilitate migration, and that this will facilitate unethical and corrupt practices. Counsel stated that the State must provide affordable boxes as the prices are still very high for the average Kenyan and that given the global date for digital switch off, there should be no hurry to implement the switch-off.

72. COFEK argues that the consumers' and general public right to information will be infringed as many people will not be able to access TV, advertising revenue will drop to the detriment of the economy and the broadcast media will stand to lose business as a result of reduced viewership if the digital migration proceeds as planned.

73. The 2nd Interested party, West Media Limited ("West Media") is a limited company incorporated in Kenya with investments in the media sector. It relies on the affidavit sworn by Dr. Philip Muyoti, its director, filed on 4th December 2013 to oppose the application. Its case is that the continued failure to implement the migration of television broadcast from analogue to digital due to a multiplicity of litigation has reduced competition. It contends that analogue terrestrial broadcasting favours the petitioners due to the prohibitive costs incurred in setting up infrastructure and that the

petitioners' main aim in filing this petition is to retain the status quo in the television broadcasting sector. West Media asserts that the petitioners have had time, having participated in the tendering process, to contest the decision of the PPARB as far back as 2011 and that the present petition is an afterthought calculated to achieve the ulterior collateral purpose of maintaining the analogue broadcasting which favours the petitioners.

74. West Media supports of the respondents position regarding the accruing benefits of the digital broadcasting over the analogue, stating that the transition will expand access and space for broadcasting and other media freedoms envisaged under the **Article 34** hence promoting fair competition, inclusiveness and non-discrimination owing to increased spectrum efficiency for the public.

Preliminary matters; unfounded allegations

75. Before I resolve the issues for trial, I note that the petitioners, through the depositions in support of the petition, have deponed to several matters. I shall confine the decision to the material facts pleaded in paragraphs 49 to 75 of the petition as these facts are the basis upon which relief is sought.

76. The respondents have complained that the petitioners have deponed to unsubstantiated facts. Some of the matters deposed lack sources of information or belief while some matters are clearly scandalous. As these proceedings are a matter of record, I believe that it is the interests of justice to deal with these matters so that parties are not prejudiced by the continued existence of these matters on record.

77. I will summarise and deal with these facts as follows;
    (a) Prayer 2 of the petition refers to the 2nd and 3rd respondents limiting the BSD licence to five licensees. The allegation that

there are five holders of BSD licences is unsubstantiated. According to the material before the court, only Signet and Pan Africa Network Group have BSD licences in accordance with the recommendation of the Migration Taskforce while the 5th and 7th respondents are licenced Pay TV content providers. According to the Migration Taskforce recommendations, any other BSD licences will be issued on a competitive basis when the market conditions were suitable.

(b) The petition, at paragraph 73, alleges that Star Times, the 5th respondent is insolvent. This allegation, founded on newspaper extracts, is without substantiation. It is the kind of allegation that would cause a company repute grave injury particularly when given the imprimatur of judicial proceedings. Paragraph 73 of the petition and paragraph 32 of the Affidavit of Samuel Kamau Macharia are hereby struck out.

(c) Paragraph 50 and 51 of the petition alleges that Signet was incapable of funding the cost of infrastructure roll out and therefore DStv, a South African Company stepped in to fund its roll out country wide in exchange for the right to distribute GO TV content. Its contention is that Signet is being used for commercial purposes rather than for public services. Paragraphs 16, 17 and 18 of the Supporting Affidavit of Samuel Kamau Macharia repeat the same allegation without attaching any documentary evidence or furnishing a basis for what is asserted as a fact. Paragraphs 50 and 51 of the petition are struck out as are paragraphs 16, 17 and 18 of the Supporting Affidavit of Samuel Kamau Macharia.

(d) Paragraph 19 of the Supplementary Affidavit of Linus Gitahi makes an allegation that the 5th respondent's directors and senior management in June 2013 ceded 5% of shareholding to government officials to facilitate and procure the award of the BSD licence. This allegation is unsubstantiated and is so far at it alleges corrupt practice without full particulars

thereof and a basis for making it, paragraph 19 is struck out as scandalous.

Determination

Petitioners' right to Licence and Freedom of the Broadcast Media

78. Prior to the promulgation the Constitution, the former Constitution did not protect the freedom of the media as a free standing freedom under the Bill of Rights. Such a freedom could only be grafted on the freedom of expression. In ***Central Broadcasting Services Ltd v Attorney General (Supra)***, the Privy Council discussed the relationship between freedom of expression and licencing of the media where it stated, *"Where there has been a failure to ensure the efficient, objective and non-discriminatory handling of licences applications securing the speedy grant of licenses where appropriate and thereby also securing the constitutional right to freedom of expression, an applicant's freedom of expression could be said to have been infringed."*

79. **Article 34** embodies a free standing freedom of the media. This freedom is intended to buttress the freedom of expression guaranteed under **Article 33** and support the democratic nature of our state by enhancing the national values and principles embodied in **Article 10** including among others participation of the people, good governance, integrity and accountability.

80. The petitioners anchor their case on the right of establishment and the fact that as established broadcasting houses, their substantial investment entitles them to the grant of digital broadcasting licences. The petitioner relied on the case of ***Benjamin v Minister of Information and Broadcasting*** **(Supra)** where the Privy Council held that although no one has the absolute right to establish a broadcasting station, the effect of the constitutional provisions on the protection of freedom of expression implied that

the licence could only be denied on constitutionally justifiable grounds.

81. Before I deal with the right to licence, I will deal with the argument that the CCK is not the independent body contemplated under **Article 34** of the Constitution and cannot issue licences or regulate the media and broadcasting. Under ***KICA,*** CCK is the body mandated to regulate broadcasting and other electronic media by way of licensing. Under **section 5** of ***KICA***, the CCK is established "*... to licence and regulate postal, information and communication services in accordance with the provisions of this Act."*

82. **Article 34(5)** as read with **Article 261(1)** and the **Fifth Schedule** to the Constitution requires Parliament to enact legislation establishing an independent body to regulate the media within three years of promulgation of the Constitution. 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.

83. The issue whether CCK is the body contemplated under **Article 34(5)** was considered in ***Royal Media Services Limited v Attorney General*** (Supra). The court stated as follows; "*[38] The legality of the impugned notices and letters depends foremost on whether the CCK is the regulatory authority contemplated under **Article 34 (5)**. Dr Kuria argued forcefully that the CCK, as constituted fell by the wayside on the effective date therefore the CCK cannot purport to exercise licensing authority by issuing the notice and demand. [39] I think this view ignores the proper reading of the entire Constitution. 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 of Uganda [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. [40] 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 the effective 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 (see **Dennis Mogambi Mong'are v Attorney General Nairobi Petition No. 146 of 2011 (Unreported) [2011] eKLR**). [41] 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, licence and regulate postal, information and communication services."*

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 existing law. In considering applications for broadcasting licences, the CCK is mandated under **Part IVA** of ***KICA*** to take into consideration various factors among them availability of radio frequency spectrum including the availability of such spectrum for future use; efficiency and economy in the provision of broadcasting services and expected technical quality of the proposed service, having regard to developments in broadcasting technology. Under **section 46O**, the CCK is the body charged with granting licences to any person(s) to provide signal distribution services. The signal distribution licence may carry with it certain conditions as set out under **subsection (2)** of the section. **Section 46N** makes it an offence for any person to provide signal distribution services within Kenya or from Kenya to other countries except in accordance with a licence issued under **Part IV** of ***KICA***. Indeed, the CCK is empowered to revoke the licences where the licensee flouts the conditions attached to the licence or acts contrary to the Act or its regulations. Under **Part VII** of the ***KICA***, the CCK is the body charged with licensing and enforcement function under the Act. I did not hear the petitioners to challenge the constitutionality of these or any of the ***KICA*** provisions. The Constitution provides the general framework of principles and values within which the broadcasting and media operations are to operate. These are given effect through the various laws which regulate the information and communication sector in the country including ***KICA***. The petitioner's contention that CCK cannot manage the digital migration process including issuing of BSD or other licences lacks merit and is dismissed.

85. Are the petitioners entitled to BSD licences and frequencies as established media broadcasters? The starting point for this inquiry is to recognise the nature of the frequency spectrum as a public resource. In ***Royal Media Services Limited v Attorney General***

(Supra), *"[49] [F]requency spectrum is a scarce public resource allocated by the CCK in order to ensure utilization in a co-ordinated manner so as to benefit the public as a whole. In Observer Publications Limited v Campbell "Mickey" Mathew et. al (Supra), the Privy Council noted, at p. 49, "The airwaves are public property whose use has to be regulated and rationed in the general interest." The basis for regulation of airwaves was clearly enunciated in Red Lion Broadcasting Co. v FCC 395 US 367 (1969) where the Supreme Court stated, "Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalised only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably be heard. Consequently, the Federal Radio Commission was established to allocate frequencies among competing applicants in a manner responsive to public 'convenience, interest and necessity.'"*

86. **Article 34** does not exclude regulation of electronic media and in fact contemplates licencing procedures that, ***"are necessary to regulate the airwaves and other forms of signal distribution."*** There is nothing in **Article 34** that excludes the petitioners or any other media house from the purview of regulation that is necessary. Moreover, the fact that the petitioners were established prior to the promulgation of the Constitution did not grandfather their established rights and privileges into the Constitution. Existing licences are still subject to the regulation that is applicable to all other broadcasting media companies. Such regulation is subject to the Constitution and the values of democracy, human rights, human dignity, non-discrimination, public participation and all the other values set out in **Article 10**.

87. Whether the petitioners are entitled to have or have been denied digital broadcasting licences must be examined in light of the facts of the case and the statutory framework governing licensing. The determination whether the petitioners are entitled to licence rights is to be assessed in light of the digital migration policy set by the Ministry and implemented by CCK. Apart from issuing a BSD licence to KBC as the public broadcaster, the policy decision accepted by the Government upon recommendation of the Migration Taskforce was to offer one licence through a competitive process is governed by the ***Public Procurement and Disposal Act***. Any other licences were to be issued depending on market requirements. The 1st and 2nd petitioner, through their consortium, National Signal Network, bid for the licence and lost. They appealed to the PPARB and lost the appeal.

88. The petitioners claim that the bid by National Signal Networks was disqualified at the technical evaluation stage on the ground that the bid bond security of Kshs. 500,000 did not meet the tender security validity period. They also claim that the process was flawed, lacked transparency and accountability. They aver that Pan Africa Network did not have the required 20% Kenyan equity participation nor have the necessary broadcasting infrastructure to effectively provide digital signal broadcasting services throughout the country as required.

89. These claims, though appealing, cannot be entertained in these proceedings. The 1st and 2nd petitioners, through a consortium, having participated in the tender for the BSD licence cannot challenge the same through a petition seeking to enforce fundamental rights and freedoms. In my view, their right to a licence has already been determined through the proceedings before the PPARB and this case constitutes a collateral challenge on the decision of the PPARB dismissing their claim. These were raised or ought to have been raised in the proceedings before the

PPARB and I would do no better than quote the case of ***Hunter v Chief Constable of the West Midlands Police and Others (Supra)*** where it was held as follows *"The court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shown that the identical question sought to be realised has been already decided by a competent court …… I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of proceedings to set up the same case again."* [emphasis mine]

90. Even though the petitioners, as separate companies were not party to the tender process, litigation of the issue of the tender is barred by the doctrine of issue estoppel. In ***Trade Bank Ltd v LZ Engineering Construction Ltd*** **[2001] EA 266, 272**, the Court of appeal adopted the definition of issue estoppel in ***Halsbury's Laws of England (4th Ed.) at p. 861,*** where it was stated that, *'An Estoppel which has come to be known as an Issue Estoppel may arise where a plea of res-judicata could not be established because the causes of action are not the same. A party is precluded from contending the contrary of any precise point which having once already been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue on the first action, provided it is embodied in a judicial decision is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law.'* The validity or otherwise of the tender of the BSD licence is now embodied in a solemn decision of a lawfully constituted tribunal, PPARB. It is now beyond contest, at least in the circumstances of this case.

91. The process adopted by the CCK to competitively source for the second BSD licence through the ***Public Procurement and Disposal Act*** finds its pedigree in **Article 227(1)** of the Constitution which provides that, *"When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective."* (See Justice Ojwang' in ***Kenya Transport Association v The Municipal Council of Mombasa and Another*** **Msa Petition No. 6 of 2011 [2011]eKLR**). In enacting the ***Public Procurement and Disposal Act***, Parliament acted in accordance with the mandate donated to it under **Article 227(2)** which requires Parliament to enact legislation to provide a framework within which policies relating to procurement and asset disposal shall be implemented.

92. Furthermore, under **section 100** of the ***Public Procurement and Disposal Act***, the National Signal Networks had an opportunity to challenge the PPARB decision in the High Court. It did not utilise this opportunity. The petitioners, either individually or through consortia, had the full opportunity to bid for the licence. The tender took place within the process contemplated by the ***Public Procurement and Disposal Act***. As a result I find and hold that the claim by the petitioners to review the process in which the BSD licence was issued is an abuse of the court process.

93. The issue of the BSD licence issue did not end with the PPARB decision. National Signal Networks applied to the Permanent Secretary of the Ministry, by the letter dated 22nd July 2011, requesting it to reconsider its application for a BSD licence. The Ministry, through the letter dated 22nd July 2011 granted the application subject to the conditions I have outlined in paragraph 36 above. The petitioners, at paragraph 60 of the petition, aver that, *"The issuance of the said licence was pegged on a number of*

unreasonable conditions set out in the letter that were not only impractical but negated the recommendations of the Taskforce. The BSD license has not been issued to date." Despite this assertion, National Signals Network did not avail itself of the opportunity to apply to CCK for the licence upon the terms that were imposed or otherwise challenge the terms upon which the licence was issued.

94. Furthermore, as I have already pointed, the issuance of licences under ***KICA*** is not a blank cheque affair and just like any other licensing regime, the Act contemplates that licences will be issued upon fulfilment of certain conditions to be met and observed by the licensees at the time the licence is issued and indeed throughout the operation period. Therefore, the Ministry was within its mandate, as the policy maker, to impose a threshold for grant of licences by the CCK to interested applicants. Such conditions cannot be faulted especially given that the petitioners did not legally challenge the *'unreasonable conditions set out in the letter'* complained of under paragraph 60 of the petition. The 1st and 2nd petitioners cannot turn to this Court for relief having failed to apply to the CCK for a licence once they were given an opportunity.

95. In light of the aforesaid, I find and hold that the petitioners claim that they were denied a BSD licence or discriminated against cannot lie as the opportunity to apply for a licence was open to them either individually or as part of a consortium. Secondly, even when special consideration was given to the consortium, they declined to take advantage of the opportunity or challenge the terms imposed on the licence by the Ministry.

96. From the facts I have recited and the specific findings I have made, it follows that the petitioners cannot ground their case on the basis that they had a legitimate expectation to be granted the relevant licences. The doctrine of legitimate expectation was considered in

Diana Kethi Kilonzo and Another v Independent Electoral and Boundaries Commission and Others **(Supra)**, where the Court stated that, *"[133] At its core, and in its broad sense, the doctrine of legitimate expectation is said to arise out of a promise made by a public body or official which the person relying on anticipates will be fulfilled. It is also said to arise out of the existence of a repeated or regular practice of the public body or official which could reasonably be expected to continue. Essentially, once made, the promise or practice creates an estoppel against the public body or official, so that the person benefitting from the promise or practice would continue to so benefit, and that the promise or practice would not be withdrawn without due process or consultation."*

97. Nothing in the Constitution or law entitles the petitioners, as established media houses, to BSD licences as of right. Licensing is a process that is subject to certain conditions governed by the relevant statutory framework underpinned by the Constitution. Further, no such entitlement is anchored in the National Communication Policy and Ministry Task Force Report which formed the basis for the digital migration programme. A finding that the petitioners had a legitimate expectation to a licence would be inconsistent with the petitioners participation in the Migration Taskforce and the DTC, the fact that 1st and 2nd petitioners, as a consortium, bid for the licence when the same was put up by CCK and the fact they were given a further opportunity to apply for a licence on the basis of affirmative action which opportunity they did not avail themselves. A finding in favour of the petitioners that the nature and extent of investment in broadcasting infrastructure established a legitimate expectation that they would be granted a broadcasting licence of another kind in the future as of right would be inconsistent with constitutional principles and values under **Article 10** of the Constitution.

98. I have digested the contents and relevant recommendations at *para. 4.6* of the Ministry Taskforce Report which I have highlighted at paragraph 28 above. The policy articulated in the report is that content service provision and signal distribution would be separated and that interested investors including existing broadcasters would be licensed to offer signal distribution services. The position negatives the petitioners' contention that they are entitled to BSD licences on the basis of their considerable investment. Such licences are, in accordance with the law, to be obtained in an open, transparent, competitive and non-discriminative manner. I find and hold that there is no basis upon which the petitioners can claim BSD licences and frequencies on the basis of legitimate expectation. Conversely, if legitimate expectation argument is to be claimed, it would be used in favour of the 4th, 5th, 6th and 7th respondents and the 2nd interested party and other investors who, based on the publicised government's digital migration policy have strived to align their business accordingly and have invested heavily to take advantage of the anticipated changes. These players have also acquired rights which cannot be glossed over.

99. I further hold that granting the petitioners a favourable position based on their substantial previous investment would, without more, violate the right to equality and freedom from discrimination from prospective players in the media and broadcasting industry and would amount to a breach of **Article 27**. Such an approach would injure the spirit of competition by giving the petitioners an unjustified and unfair advantage over other media players, and hence undermine the values and principles of national governance by entrenching the privilege of incumbency. This point was emphasised by Mumbi Ngugi J., in ***Wananchi Group (Kenya) Limited v Communication Commission of Kenya and Another*** where she stated, "*[51] As the industry regulator, CCK under the law currently in force has a duty to implement the policy and law*

on broadcasting. The ICT Sector Policy Guidelines policy objectives referred to by the petitioner include ***'encouraging the growth of a broadcasting industry that is efficient, competitive and responsive to audience needs and susceptibilities, provision of a licensing process and for the acquisition and allocation of frequencies through an equitable process.'*** *The policy objectives also include* ***'promoting fair competition, innovation and investment in the broadcasting industry****.' [52] The legislative and policy provisions must be looked at and implemented in accordance with the dictates of the Constitution. As public entities, the respondents are required, in implementing their legislative and policy mandates, to be guided by the national values and principles of governance in Article 10, as well as the constitutional provisions that have a bearing on the operation of the media and access to information by the public, specifically Articles 33 and 34 of the Constitution. Article 10 of the Constitution requires that the State, all State organs and all persons observe, arming others, the principles of good governance, integrity, transparency and accountability. [53] These values are echoed in the provisions of the Kenya Information and Communication Act which require signal distributors to carry out their mandate* ***non-preferentially and equitably,*** *and in the provisions of the policy that demand responsiveness to audience needs and promotion of fair competition in the broadcasting industry.*"

100. **Article 34** of the Constitution does not entitle any broadcaster or any person to a BSD licence or any other licence as a matter of right. It does not give preference to any person or group on the basis of historical and substantial investment in the broadcasting sector. No doubt the petitioners, as many other investors, have made huge contributions to the economic wellbeing of the country. This, however, cannot be used to secure a licence as of right. It would be unsettling to accept such a proposition and absent a constitutional provision or a justifiable statutory

requirement grounding such a venture, the Court cannot be used to advance such a course.

101. **Article 34(3)** of the Constitution expressly states that broadcasting and other electronic media are subject to licensing procedures. The licence procedures must accord with the standards and values prescribed in **Article 10** of the Constitution. The prescribed procedures cannot be applied in a manner that would negate transparency, non-discrimination, good governance and optimum utilization of the frequency spectrum for the benefit of all Kenyans.

102. The answer to the first issue framed is that I find and hold that the petitioners are not entitled, on the basis of the status as established media and broadcasting companies, to be issued with BSD licences as of right and the failure to issue them with BSD licences and frequencies does not constitute a violation of **Articles 33** and **34** of the Constitution.

Digital Migration; whether it violates petitioners rights and freedoms

103. I have set out the facts relating to the process of digital migration earlier in the judgment and before I consider the second issue, two facts underlie the digital migration process. First, digital migration is part of an international process implemented through the framework provided by ITU. Second, the local or national process was participatory and involved several stakeholders including representatives of the media and broadcasting industry. The petitioners were involved in this process through their umbrella organisation, the Media Owners Association.

104. The migration of broadcasting from the analogue to the digital platform was commenced under the auspices of the ***ITU Convention*** which Kenya ratified in 1964. This means that its

provisions form part of the law of Kenya by virtue of **Article 2(6)** of the Constitution which provides that, *"Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."*

105. Hon Muite, S.C., argued that the convention had not been ratified by the legislature hence the ITU Treaty and accompanying acts of the ITU were not applicable in Kenya. This view is inconsistent with a plain reading of **Article 2(6)** which applies to treaties or convention duly ratified by Kenya. Once the treaty or convention or ratified there is now no need for Parliament to enact it into local legislation to give it legal effect. The requirement for legislative approval before ratification applies to treaties concluded post December 2012 when the ***Treaty Making and Ratification Act (Act No. 45 of 2012)*** came into force. In any event legislative sanction is given effect to Kenya's international obligation under **section 5(b)** of ***KICA***, which provides that CCK in performance of its function is obliged to have regard to, *"Kenya's obligations under any international treaty or agreement relating to the provisions of telecommunication, radio and postal services."* These obligations include the ***ITU Convention*** and instruments canvassed and concluded under the auspices of the ITU.

106. As I have outlined earlier in this judgment, the process of digital migration was a deliberate Government of Kenya policy. The petitioners actively participated in the formulation and implementation of the digital migration policy. They were represented on the Migration Taskforce which developed the policy agenda for digital migration and the DTC which was the implementing body.

107. The switch-off date was agreed upon at the 65th DTC meeting held on 6th August 2013. It order to dispel any debate about the

fact that the dated was not suitable I quote ***MIN 04/6TH August 2013*** of the said meeting which records as follows; *"A member from the Technical and Regulatory Subcommittee presented a paper on the proposed phased Analogue Switch-off dates/strategy starting on 1st December 2013 and ending on 30th June 2014. The paper proposed a three phase ASO targeting Nairobi in the 1st phase, other major towns in second phase and final phase targeting the rest of the country. The Chairman informed the meeting that they had a proposal to commence Analogue switch-off for Nairobi on December 1st 2013 as agreed in the last DTC meeting. However, members from the MOA expressed their concerns on why the date was not suitable in view of the fact that their advertising business which peaks in early December may be affected and also due to the fact that many Kenyans who may not have acquired set top boxes may miss out watching on TV the 50th Anniversary Jubilee Celebrations slated for 12th December 2013.*

The member from MOA indicated that shifting the first ASO date to 13th December 2013 would give consumers an opportunity to purchase Set Top Boxes while not being left out of the national celebrations commemorating 50 years of independence. Further, the MOA members indicated that they were agreeable with the phase 2 and phase 3 switch off dates.

MOA representatives also informed the meeting that their members will support consumer awareness campaigns using their media outlets as their contribution in addition to the awareness that will be funded by the CCK.

Members unanimously agreed to delay the ASO for Nairobi until the Jubilee Celebrations, proposing that the Ministry needs to find ways in which the presidential speech needs to include a statement informing Kenyans of the imminent switch-off the following day and that that was the last day broadcast were being done on analogue TV platform.

Following protracted deliberations on the roadmap proposals and the comments by stakeholders, the DTC approved the ASO

road map deadlines as follows; ***Phase 1:*** *13th December 2013 – Nairobi ,* ***Phase 2:*** *30th March 2014 – Mombasa, Malindi, Nyeri, Meru, Kisumu, Webuye, Kisii, Nakuru and Eldoret.* ***Phase 3:*** *30th June 2013 – All other remaining sites."* [Emphasis mine]

108. The petitioners' case for impugning the migration process is outlined in several paragraphs of the petition as follows;

[66] The government, through the 2nd and the 3rd Respondents, has to date not instituted proper and adequate measures to ensure the availability of set top boxes for receiving digital transmissions countrywide.

[67]The 4th and 5th Respondents have to-date only distributed 170,000 set top boxes, 90% of which are for pay television services while the number of television sets is estimated at 8,000,000 countrywide.

[68] If the switchover date scheduled for 13th December 2013 is not extended, over 90% of the citizens will not be able to receive any television broadcasts on their television sets as was experienced in Tanzania when the switch off of analogue broadcasting was effected on 31st December 2012.

[69] The government has ignored a crucial component of the 2006 Regional Radio Communications Conference (RRC-06) resolution that allows an additional 5 years beyond the 2015 cut-off point.

[70] The Petitioners therefore aver that although the government has committed itself to the 2015 migration deadline, the government could extend the digital migration in Kenya to 2020 and therefore the gazetted switch off date is unreasonable. There is ample time to ensure the digital migration is effected without violating the Constitution.

[71]The set top boxes currently in the market are not universal and can only receive the individual re-broadcast signals of the different licensees. The effect is that consumers will be forced to invest in more than one set top box to receive the free to air

signals they are currently receiving from the Petitioners and other broadcasters.

[74] Currently a set top box retails at between Kshs. 5,000.00 and Kshs. 6,000.00. Most Kenyans are not able to afford the set top boxes and there is a real likelihood of broadcasting services collapsing on the switch over date that will lock the majority of Kenyans out of receiving television-broadcasting services.

[75] The Petitioners aver that apart from a majority of Kenyans being locked out from viewing television, the Petitioners' television broadcasting businesses will suffer irreparable damage, with their investment in television broadcasting worth billions going to waste and thousands of employees losing their jobs.

109. The digital migration policy commenced in 2006. The issues raised by the petitioners regarding the cost, availability and accessibility of STBs to Kenyans and the loss on investment arising out of digital migration were considered by the Migration Task Force and the DTC. The Migration Task Force concluded that the benefits of digital migration would be immense. These benefits include higher video and audio quality, creation of greater spectrum efficiency due to associated digital coding techniques resulting in freeing of addition spectrum frequency for other uses like radio, mobile telephony, fixed wireless access and mobile data-casting, more efficient use of frequency spectrum and accommodating more programming channels in one frequency. It further noted that digital broadcasting offers specific benefits for market players by reducing transmission costs and providing better technology for storage and processing of content. It is also expected that as broadcasting companies invest less in infrastructure, this will release more resources for developing content. Competition and innovation in the broadcasting sector are expected to increase due to new entrants and development of interactive applications. The Taskforce also concluded that

overall consumers are expected to have a wider choice of enhanced broadcasting applications, multimedia data and entertainment services.

110. Apart from dealing with the benefits of digital broadcasting, the Migration Taskforce also considered the effect of the migration on the consumers. The Taskforce concluded that for the public to exact benefits from the migration there would be need for consumer awareness as public understanding and acceptance would be crucial to the success of the migration. It was also concerned about the cost of STBs which consumers would have to purchase in order to access digital content. It recommended that STBs be zero-rated to reduce the cost.

111. The petitioners contend that the migration to digital broadcasting being implemented by the Government contravenes the rights of the citizens as the consumer will not receive free quality broadcasting services as guaranteed by the Constitution. As a matter of fact once the switch off from analogue broadcasting is effected, every free to air broadcaster will be required to broadcast its content through Signet or Pan Africa. Failure to obtain the BSD licence will not hinder the petitioners' ability to broadcast. All they will be required to do is to enter into a contract with signal distributors to distribute their content. There is no reason why the petitioners cannot broadcast their signal either through Signet or Pan Africa as they did during the simulcast period. This requirement is not an unreasonable imposition on the petitioners as it is intended to meet the policy objectives in the Migration Taskforce Report.

112. In order to receive the digital signal from the BSD licence holders, each consumer will be required to purchase a Digital Set Top Box ("STB"). For the consumer, the purchase of the STB will be a one off purchase. They will not be required to pay any

periodical subscriptions in order to continue to receive free to air content from the petitioners as long as they continue to broadcast.

113. COFEK also raised issues concerning consumers. Its case was similar to the petitioners regarding the cost of STBs which it claimed would be beyond the reach of a majority of average Kenyans. It took issue with the timing noting that the transition would cause economic hardship to Kenyans at a period when they would be burdened with expenses including school fees which are usually due at the beginning of the year.

114. In ***COFEK v Minister for Information and Communications and Others*** **Nairobi Petition No. 563 of 2013 (Unreported),** Lenaola J., granted a conservatory order on 11th January 2013 to restrain the implementation of the digital migration pending the hearing of the petition. In considering the issues now raised by the petitioners and COFEK the learned judge stated as follows; "*[22] The petitioners have clearly demonstrated that the citizens freedom of information will be limited by the digital migration. In my view, it is not enough for the respondents to contend that they have fully sensitized the public on the import and created awareness of this digital immigration. It is equally not sufficient for them to allege that they have cushioned the consumers by subsidizing the costs of the set –top boxes to affordable amounts in order to make them accessible to a common Kenyan. The respondent has not availed such evidence before this court. I am satisfied at this stage that the petitioner has clearly demonstrated that the consumers who have not acquired the required set-tops to receive the digital transmission will be heavily prejudiced by this migration which harm cannot reasonably can never be compensated in damages. [23] Even though the Respondents have proven the extensive measures they have undertaken to create public awareness of this digital migration since 2006, I am in agreement with the petitioner that he timing of the switch is not*

proper. As a country we are in a crucial stage of the electioneering period. Accordingly, the consumers have the right to benefit from the information available in the broadcast media as well as the information available in other media forums to enable them make informed decisions. In any event, I do not see the hurry for the migration. I am fully aware that the respondents and the government has everything set and is prepared for the digital migration especially in Nairobi and its environs. The rest of the country is unaffected. [24] However, as stated elsewhere above, I am not satisfied that the citizens are prepared for this migration. I say so because it is unconverted that the required set tops are available at an estimated costs of between Kshs.2,500/= to Kshs.5,000/= which amounts the petitioner claims is way above the reach of many ordinary Kenyans. This are the citizens who would be heavily prejudiced if they would be without access to the television in this election period. [25] In any event, I am compelled to grant the order because the respondents have failed to demonstrate the harm they would suffer if the digital migration would be held in abeyance until the final determination of the petition herein. I also note that the global deadline for the switch off is in 2015 and I believe that the digital migration can and should await the determination of all the issues raised in the petition."

115. I agree with the concerns raised by the learned judge in granting the conservatory order. However, it is to be noted that the order in that case was issued on an interim basis pending the hearing and determination of the petition which was ultimately withdrawn. Unlike, in that case, I have now had the opportunity to consider the evidence and material after a full hearing.

116. CCK has demonstrated that steps have been taken to deal with the issue of availability of STBs. The East African Community by ***Legal Notice No. EAC/30/2012*** by dated 30th June 2013 reduced

import duty on STBs from 10% to 0%. CCK has also licenced STB vendors free of charge while at the same time reducing fees paid for approval of the types of STBs to be imported. It is expected that once the switch off is effected, increased competition and increased demand will lower the cost of STBs.

117. Digital migration will cause some hardship to the petitioners' business and other inconvenience to Kenyans. But this is not the kind of hardship or inconvenience that should be put on hold indefinitely. No date for the switch-off will be convenient and perfect either now or in the future. What remains a constant is that technology continues to evolve and the framework for adapting to that change has been developed by the 2nd and 3rd respondents with the participation of the petitioners. This cannot hold back the clock for three reasons; first, the date of switch off as earlier noted was not one that was arrived at unilaterally but was one in which the petitioners' representatives had a say in. Second, the migration process is a being implemented in phases, beginning with Nairobi and then gradually spreading throughout the country. Third, although the issue of availability and affordability of STBs is a valid concern which the respondents would do well to consider mitigating as the process is implemented. The resolution of teething problems can be done once the problems are identified and this can only be done once the switch-off is implemented. I find no reason to step in and forestall the digital migration process merely on the basis of the anticipated challenges, whether real or perceived.

118. Many investors like West Media have been waiting for the digital migration to be concluded so that they can realise their investment. Other investors have invested in digital transmission through importing and selling STBs while others are preparing to begin investment in broadcasting content. Digital migration has been implemented on the basis of a programme rolled out by the

DTC. All the activities undertaken are dependent on a certain and predictable policy environment which the Ministry and CCK are expected to engender and maintain.

119. In supporting their case for delaying digital migration, the petitioners referred to the Court the digital migration experience in the United States and Tanzania. The fact is that each country has unique challenges yet each country took the step to implement digital broadcasting technology. The very purpose of the Migration Taskforce and the DTC was to consult stakeholders, absorb these international experiences with a view to coming up with Kenyan specific recommendations to be implemented. The petitioners cannot call upon the court to review policy decisions that have been taken on a consultative basis by applying specific experiences from other countries.

120. The power to make the policy decisions regarding information and communication technology is reposed in the Ministry and CCK by the legislature. The Ministry and CCK are given the responsibility to weigh, balance and take into account commercial, consumer and technical considerations, through a participatory process to come up with an optimum policy suitable to the Kenyan circumstances. This policy is also grounded on Kenya's endeavour to uphold her international undertakings under the ITU and her regional commitments. The Migration Taskforce Report exemplifies this process and it is for this reason the petitioners have relied on some of its recommendations to buttress their case.

121. The petitioners have asserted that they are not opposed to digital migration per se. I agree with the respondents that what is apparent from the prayers sought in the petition, is that the petitioners would like to delay the migration process to enable them secure a BSD licence. The DTC was mandated to come up

with the new switch off date and the petitioners representatives were present at all the meetings and participated actively deliberations and decisions which led to the switch off date of 13th December 2013. They cannot feign ignorance of this fact and allege that the DTC did not consider all the factors that they now bring to court for adjudication.

122. In my view, the petition to the Cabinet Secretary dated 22nd October 2013 from the Media Owners Association seeking to postpone the switch off date is self-serving particularly given that the Media Owners Association were involved in the implementation of the digital migration through the DTC. All their concerns were considered and answered and I would do no better than quote the Cabinet Secretary in his response by the letter dated 6th November 2013, where he stated in part, "*There has been a limited number of TV stations in the analogue world due to the scarcity of TV broadcasting frequencies. This has effectively put the entire advertising revenue in the hands of a few media houses. Digital migration has the effect of opening up both the broadcasting and the advertising space for more and new players hence introduces new competition that will translate into more consumer choice and access to information and thereby lowering advertising costs for consumers. The advertising revenue will be distributed amongst the many players and the issue of loss of jobs/taxes cannot be used as a reason to try to block migration. Overall, the benefits will far outweigh the challenges in the long run. We believe that indeed the change that comes with digital migration is inevitable. It would however be more strategic for us as a country to focus on the long run benefits that will accrue from the migration. There is nowhere in the world where digital migration process was perfect. Even developed economies like USA and the UK had their own share of challenges. So the Tanzanian case cannot be used as an example to oppose digital migration. In any case 10 months down the line*

and despite the exaggeration of the Tanzanian experience, the country has never reverted back to analogue broadcasting.

While the Government is trying to promote the sharing of ICT infrastructure by licensing more players in the sector, it is unfortunate to note that the MOA, instead of supporting this best practice, wants to develop its own parallel broadcasting network when the existing two signal distributors have sufficient capacity to accommodate the existing MOA members. In addition, as far as the Ministry of ICT is concerned, MOA do not have a signal distribution license hence it would be illegal to operate a communication network without a license issued under clear circumstances. However, the proposal of MOA to facilitate the importation of FTA boxes is welcome considering the demand in the whole country and the fact that this is left for the open market. More investors are encouraged to import set top boxes for as long as they have determined the business case for the same.

In conclusion, I wish to urge the MOA to work together with the Government to ensure that the benefits of digital technology in broadcasting are enjoyed by Kenyans at the earliest opportunity."

123. The review of public policy necessarily implicates the doctrine of separation of powers which is one of the pillars of the Constitution. The Supreme Court ***In the matter of Interim Independent Electoral Commission*** **Application No. 2 of 2011 [2011]eKLR**, declared that, *"[54] The effect of the Constitution's detailed provision for the rule of law in the processes of governance, is that the legality of executive or administrative actions is to be determined by the Courts, which are independent of the Executive branch. The essence of separation of powers, in this context, is that the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be*

recognized that none of the several governmental organs functions in splendid isolation."

124. The Court of Appeal in ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others,*** **Civil Appeal No. 290 of 2012 of 2012 [2013] *e*KLR**, had this to say on separation of powers: *"[49] It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function." [Emphasis added]*.

125. Under the doctrine of separation of powers, public bodies have a wide latitude in developing and implementing policy and the Court is neither expected nor required to micro-manage these processes. However, when policies violate the Constitution or the law, the Court is expected to speak loudly and clearly to settle the boundaries of legality. In ***Minister of Health v Treatment Action Campaign*** **(Supra at para. 99)**, the Constitutional Court of South Africa emphasised that the primary duty of courts is to the Constitution and the law and where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so and in so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.

126. In the recent case of ***Nairobi Metropolitan PSV Saccos United Ltd and Others v County of Nairobi Government and Others*** **Nairobi Petition No. 486 of 2013 (Unreported)**, Lenaola J., while rejecting a petition seeking of review parking fees implemented by the County Government, stated as follows, *"[66] I must state that this Court cannot direct the 1st respondent [County of Nairobi Government] on how to exercise its duty to of levying parking fees. The 1st Respondent has the option of legislating on the calculation of parking fees and in its wisdom it has done that having taken into consideration public views, its policies as well as the revenue it ought to raise."*

127. The petitioners have not established a violation of the Constitution or the law to enable the Court correct the course of digital migration. The petitioners request is for the Court to substitute the Government policy crystallised through an open, transparent and participatory process with their own policy of migration. This entreaty is rejected.

128. The petitioners argue that the Ministry's directives and decisions to implement digital migration unreasonably limit and restrict the public's right to choose between analogue and digital broadcasting in contravention of the Constitution. While I agree with the petitioners television is an important medium of communication, the Constitution does not prescribe the kind of technology to be used in broadcasting. The manner, in which broadcasting carried out, whether on an analogue or digital platform, is a matter of policy. As I have held, the frequency spectrum is not an infinite resource and policy makers have the obligation to adopt, through licencing procedures, technologies that lead to optimum utilization of the frequency spectrum.

129. The migration of broadcasting from digital to analogue platform will no doubt cause dislocation and disruption of petitioners and their business models. Such disruption is a function technological change and not necessarily an interference of the petitioners independence contemplated by **Article 34** of the Constitution. The bodies charged with formulating and implementing policies have examined the challenges and opportunities and have concluded that on the whole the benefits of digital migration outweigh any difficulties in implementing such a policy. The petitioners, as broadcasters, were involved in the entire process and as a result they had the opportunity to align their businesses to anticipated policy and technology changes. Businesses have to adapt to changes in technology or risk extinction. Digital migration as a policy has been established since 2006. Neither the Constitution nor the Court can insure the petitioners' business against the changes in technology which has been embraced and implemented through a participatory, open and transparent process.

Violation of the petitioners intellectual property rights

130. The petitioners allege at paragraph 72 of the petition that, *"In breach of the Petitioners' intellectual property rights, the 3rd Respondent has by a letter dated 19th August 2013 unlawfully authorized the 4th, 5th, 6th, 7th and 8th Respondents to intercept and transmit the Petitioners' broadcasts, the Petitioners' locally produced programs and third party licensed programs without their authorization or consent."* As a result they seek a permanent injunction against the 4th, 5th, 6th and 7th respondents to restrain the violation.

131. I have read the supporting affidavits of Supporting Affidavits of Samuel Kamau Macharia, Linus Gitahi, and Sam Shollei and I find and hold that they have not demonstrated how the petitioners' intellectual property rights have been violated.

132. The allegations made against the respondents betray a misunderstanding by the petitioners of the process of digital broadcasting transmission. The petitioners, who are content providers, hence intellectual property holders, only deal with signal distributors on a contractual basis. The content is transmitted digitally as it is delivered without interference from the signal distributor.

133. According to the deposition of Waithaka Waihenya, Signet has been carrying the petitioners' signal since 2009 and there has been no allegation that their intellectual property rights have been violated by the fact of transmission. The petitioners have not exhibited any demand or notice to the respondents to cease any violation, if indeed there was such violation. No complaint made to CCK has been exhibited alleging that the respondents are violating the petitioners' intellectual property rights.

134. In any case a violation of intellectual property rights is not a matter to 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. This court has on several occasions emphasized that where there is a specific mechanism of dispute resolution established by ordinary law, then such a process ought to be pursued and that not every wrong attracts constitutional relief. In ***Sanitam Services (EA) Ltd v Tamia Ltd and Others*** **Nairobi Petition No. 305 of 2012 [2012]eKLR** the court noted that, *"[10] [A]ny breach of the intellectual property rights against the respondents can be enforced through the legal mechanisms provided by statute or common law, where applicable, hence it is unnecessary to invoke the provisions of* ***Article 22*** *to enforce what are ordinary rights*."

135. I find and hold that the allegations against the 4th, 5th, 6th and 7th respondents concerning intellectual property rights violation are frivolous.

Summary of findings

136. Having considered the petition, my findings on the three issues framed for determination are as follows;

*(a) Whether and to what extent the petitioners are entitled to be issued with BSD licences by the CCK and whether the issue of the licences to other licensees to the exclusion of the petitioners is a violation of **Article 33** and **34** of the Constitution.*

The petitioners are not entitled to be issued with BSD licences by the CCK on the basis of their established status or on the basis of any legitimate expectation. Licensing is subject to statutory provisions which allow the CCK in exercise of its mandate to make certain considerations and impose conditions that are necessary for the achievement of the objects and purposes of the Constitution and the law. The issuing of BSD licence to other licensees to the exclusion of the petitioners as alleged in the petition is not a violation of **Articles 33** and **34** of the Constitution.

(b) Whether implementation of the 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 vindicate or ameliorate the petitioner's fundamental rights.

The implementation of the digital migration is not a violation of the petitioners' fundamental rights and freedoms and no basis has been made by the petitioner to stop, delay or vary the digital migration process. The process of migration of the broadcasting platform from

analogue to digital was consultative and participatory and in line with Kenya's international obligations.

(c) *Finally, as regards the 4th, 5th, 6th and 7th respondents whether they have breached and or violated the petitioners' intellectual property rights.*
The petitioners have not established that their intellectual property rights were violated by the 4th, 5th, 6th and 7th respondents.

137. The result of this determination is that the petition is dismissed. I now turn to consider the issue of whether the petitioners should be mulcted with costs.

Costs

138. The general principle is that costs are at the discretion of the court. In cases of enforcement of fundamental rights and freedoms, the court will be reluctant to award costs against a person who has lost as this would hinder the free access to the Court provided under **Article 22** of the Constitution (see ***John Harun Mwau & Others v The Attorney General & Others*** **Nairobi Petition No. 65 of 2011 (Unreported)** ***paras. 179 -182***).

139. However, in this case the respondents are deserving of costs. Several factors have influenced my decision in this respect. First as I have outlined in the judgement the process of digital migration process was long drawn and the petitioners participated in its development and implementation. The switch-off date of 13th December 2013 was reached with the participation and consent of the petitioners and despite having so participated filed the application very late in the day.

140. I also find and hold that the petitioners' substantial interest in filing this petition as evidenced by the prayers in the petition is to

secure BSD licences. I am convinced that these proceedings were intended to protect the petitioners' commercial interests as evidenced by the minutes of the 65th DTC meeting I have set out in paragraph 107 above. These proceeding were not in the nature of public interest litigation and any concern for the public by the petitioners was a by-product or a collateral benefit of their agitation for BSD licences.

141. It is in these circumstances that I award costs of this petition to the respondents and 2nd interested party.

Disposition

142. The petition be and is hereby dismissed with costs to the respondents and 2nd interested party.

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

D. S. MAJANJA
JUDGE

Hon Muite, S.C., with him Mr Issa instructed by Issa and Company for the petitioners.

Mr Njoroge, Deputy Chief Litigation Counsel, instructed by the State Law Officer for the 1st and 2nd respondents.

Mr Kilonzo instructed by Sisule, Munyi and Kilonzo Advocates for the 3rd respondent.

Mr Saende instructed by Soita Saende and Company Advocates for the 4th respondent.

Mr Imende instructed by Mohammed Muigai Advocates for the 5th and 6th respondents.

Mr Njogu instructed by Daly and Figgis Advocates for the 7th respondent.

Mr Kurauka instructed by Kurauka and Company Advocates for the 1st interested party.

Mr Wekesa with him Mr Malebe instructed by Wekesa and Company Advocates for the 2nd interested party.