

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
(CONSTITUTIONAL & JUDICIAL REVIEW DIVISION)
PETITION NO. OF 2015

IN THE MATTER OF: THE PREAMBLE AND ARTICLES 1, 2, 3, 4, 10, 12(1)(a), 19, 20, 21, 22, 23, 24, 27, 33(1)(a), 34, 35, 46,47, 48, 50, 56, 73, 75, 232, 258, AND 259 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE VIOLATION OF ARTICLES 3(1), 10, 12(1), 19, 20, 21, 24, 33(1)(a), 34, 35,46, 47, 56, 73, 75, AND 232 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE VIOLATION OF THE RIGHTS OF KENYANS TO FREE-TO-AIR DIGITAL TV THOUGH THE IMPOSITION OF DIGITAL PAY TV

IN THE MATTER OF: THE CONSTITUTIONAL OBLIGATION ON THE COMMUNICATION AUTHORITY OF KENYA TO ENSURE A SMOOTH AND SEAMLESS MIGRATION FROM ANALOGUE TO DIGITAL TV BROADCASTING

IN THE MATTER OF: THE CONSTITUTIONAL VALIDITY OF IMPLEMENTING COURT ORDERS IN VIOLATION OF THE CONSTITUTION

IN THE MATTER OF: THE INCOMPETENCE OF AND THE DERELICTION OF DUTY BY THE MINISTER FOR INFORMATION AND THE MANAGEMENT AND BOARD OF THE COMMUNICATION AUTHORITY OF KENYA

IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATION

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

~VERSUS~

COMMUNICATIONS AUTHORITY OF KENYA	1ST RESPONDENT
FRED MATIANG'I.....	2ND RESPONDENT
BEN NGENE GITUKU	3RD RESPONDENT
FRANCIS WANGUSI	4TH RESPONDENT
PETER MUTIE	5TH RESPONDENT
KENNEDY NYAUNDI	6TH RESPONDENT
WILBERT CHOGE,.....	7TH RESPONDENT
GRACE MUNJURI,.....	8TH RESPONDENT
HELLEN KINOTI	9TH RESPONDENT
BEATRICE OPEE.....	10TH RESPONDENT
MONICA JUMA.....	11TH RESPONDENT
KAMAU THUGGE.....	12TH RESPONDENT
LEVI OBONYO.....	13TH RESPONDENT
JOSEPH TIAMPATI ole MUSUNI	14TH RESPONDENT
HON. ATTORNEY GENERAL.....	15TH RESPONDENT

PETITION

TO: The High Court of Kenya

THE HUMBLE PETITION OF OKIYA OMTATAH OKOITI BEING AN ADULT CITIZEN OF KENYA AND A RESIDENT OF NAIROBI CITY COUNTY, WHOSE ADDRESS OF SERVICE FOR PURPOSES OF THIS PETITION IS CARE OF ROOM 4, FLOOR B1, BLOCK A, WESTERN WING, NSSF BUILDING, BISHOPS ROAD, P. O. BOX 60286-00200, NAIROBI, IS AS FOLLOWS:

THE PETITIONER

1. The Petitioner, a resident of Nairobi City County who, as a consumer of free-to-air TV, has personally been profoundly affected by the switch off of the analogue TV broadcasting platform without providing an alternative digital free-to-air TV broadcasting. He is a law abiding citizen of Kenya, a public spirited individual, and a human rights defender. He is the Executive Director of Kenyans for Justice and Development Trust, which is a legal trust, incorporated in Kenya and founded on republican principles and was set up with the purpose of promoting democratic governance, and economic development and prosperity. His address of service for purposes of this Petition is care of **Room 4, Floor B1, Block A, Western Wing, NSSF Building, Bishops Road, P. O. Box 60286-00200, NAIROBI**.

THERESPONDENT

2. The 1st Respondent – **THE COMMUNICATIONS AUTHORITY OF KENYA** – is the regulatory authority (converged regulator) for the communications sector in Kenya, established by both the Kenya Information and Communications Act (KICA) No. 2 of 1998 and the Kenya Information and Communications (Amendment) Act 2009. Among others, its responsibilities entail protecting consumer rights within the communications environment, and monitoring the activities of licensees to enforce compliance with the licence terms and conditions as well as the law. The Authority's address of service for purposes of this Petition is care of **the Communications Authority of Kenya Building, Waiyaki Way, Westlands, P.O. Box 14448 – 00800, NAIROBI**.
3. The 2nd Respondent – **FRED MATIANG'I** – is the Cabinet Secretary for Ministry of Information Communications and Technology. His address of service for purposes of this

Petition is care of **Telposta Towers, Kenyatta Avenue/Koinange Street, P. O. Box 30025-00100, NAIROBI**.

4. The 3rd Respondent – **BEN NGENE GITUKU** – is the Chairman of the Board of Directors of the Communications Authority of Kenya. The management of the Authority vests in its Board of Directors. His address of service for purposes of this Petition is care of the **Communications Authority of Kenya Building, Waiyaki Way, Westlands, P. O. Box 14448 – 00800, NAIROBI**
5. The 4th Respondent – **FRANCIS WANGUSI**– is the Director-General and CEO of the Communications Commission of Kenya. His address of service for purposes of this Petition is care of the **Communications Authority of Kenya Building, Waiyaki Way, Westlands, P. O. Box 14448 – 00800, NAIROBI**
6. The 5th to 14th Respondents – **JOSEPH TIAMPATI ole MUSUNI, MONICA JUMA, KAMAU THUGGE, LEVI OBONYO, PETER MUTIE, KENNEDY NYAUNDI, WILBERT CHOGE, GRACE MUNJURI, HELLEN KINOTI, and BEATRICE OPEE** – are members of the Board of Directors of the Communications Authority of Kenya. The Authority’s Board of Directors is responsible for the supervision of overall affairs of the Authority. Their address of service for purposes of this Petition is care of the **Communications Authority of Kenya Building, Waiyaki Way, Westlands, P. O. Box 14448 – 00800, NAIROBI**.
7. The 15th Respondent – **THE HON. ATTORNEY GENERAL** – has been sued in this Petition as the Legal Adviser and Representative of the Government of Kenya, who shall promote, protect and uphold the rule of law and defend the public interest, within the meaning of Article 156 of the Constitution. The Hon. Attorney General’s address of service for the purposes of this Petition is care of **The Attorney General’s Chambers, 7th Floor, Sheria House, Harambee Avenue, NAIROBI**.

SUMMARY OF THE PETITIONER’S CASE

8. The Petitioner who depends on free-to-air analogue TV has been inconvenienced by the 1st - 14th Respondents’ unreasonable decision to pull the plug on analogue broadcasting and plunge over 80% of Kenya’s TV viewers into a total blackout, leaving only the less than 20% elite with pay TV decoders (i.e., equipment needed to pick up the digital signal) connected.

9. The Petitioner urges that it is reckless, unreasonable, and inconsiderate of the 1st – 14th Respondents to hastily shut down the free-to-air analogue platform which serves the masses, especially the poor who can't afford subscriptions to pay TV, in circumstances where the Respondents have over the years done nothing to ensure the continued provision of free-to-air TV broadcasting on the digital platform.
10. In circumstances where the Nation Media Group, Royal Media Services, and The Standard Group through their African Digital Network consortium (hereinafter, the ADN) have publicly stated that they are willing and require only three months to provide free-to-air digital TV by May 30, 2015, well ahead of the June 17, 2015 international switch off deadline, it is incomprehensible and unacceptable for the Respondent to switch off the analogue signals and force all Kenyans to either subscribe to pay TV or watch no TV at all.
11. It is also both wrong and unacceptable that the 1st – 14th Respondents have unilaterally morphed Kenya's migration from analogue to digital TV broadcasting into a forced relocation of everybody from free-to-air TV to pay TV.
12. The said administrative action which has resulted in the gross violation of the rights and fundamental freedoms of Kenyans amounts to the gross dereliction of duty, and underscores the gross incompetence on the part of the 1st -14th Respondents.
13. For purposes of ensuring that all Kenyans enjoy their right to access information through television, irrespective of their economic status; to preserve their right to choose between free-to-air TV and pay TV; and to protect the rights of Kenyan businesses, the Petitioner is inviting the Honourable Court to intervene and ensure that, during the digital migration, the Respondent will protect the rights of Kenyans by strictly adhering to the clear and elaborate provision in Articles 47 of the Constitution that administrative action must be lawful, reasonable and procedurally fair.
14. The Petitioner also wants the Honourable Court to declare the 2nd – 14th Respondents, who are collectively and severally responsible for the impugned administrative actions, incompetent for public office.
15. So as to facilitate a seamless digital migration, the Petitioner is also praying for declarations of the Honourable Court declaring the February 14, 2015 switch off of the analogue broadcast platform to be irregular, irresponsible, unreasonable and without consideration and in violation of the rights of Kenyans enshrined in the Bill of Rights and other provisions

of the Constitution and, therefore, to be unconstitutional, invalid, null and void; and orders of the Court ordering the Respondent to immediately commence a credible, lawful, and constitutionally valid process for implementing the digital migration without violating the rights of Kenyans to receive TV content through digital free-to-air TV.

THE PETITIONERS' LOCUS AND THE HONOURABLE COURT'S JURISDICTION

16. As stated in the Preamble to the Constitution, the Petitioner, alongside all the people of Kenya, aspires for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law
17. Under Article 3(1) of the Constitution of Kenya, the Petitioner has an obligation to respect, uphold and defend the Constitution.
18. Article 22 of the Constitution of Kenya vests the *locus standi* for the enforcement of the Bill of Rights, *inter alia*, in the Petitioner herein.
19. Article 50(1) recognises the Petitioner's right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before the Honourable Court.
20. Article 258 of the Constitution of Kenya vests the *locus standi*, *inter alia*, in the Petitioner herein to institute court proceedings to defend the values and principles in the Constitution whenever the Constitution is contravened or is threatened with contravention.
21. Articles 1(c), 22, 23, 50(1), 159, 165 and 258 of the Constitution of Kenya, vest jurisdiction in the High Court, *inter alia*, to hear any question regarding the violation of rights; determining if acts or omissions are constitutional; and the interpretation of the Constitution, including questions of contradiction between any law and the Constitution, and to protect the Constitution from any threats or violations.

THE FACTS RELIED UPON

22. The Petitioner supports digital migration, given its very many advantages. However, the Petitioner demands that the migration must be implemented in a manner that accords with the Constitution and other laws of Kenya, and that protects the public interest.

23. On Friday, 13th February, 2015, in complete disregard of the implications of their administrative action to millions of analogue free-to-air TV viewers, advertisers and investors in the industry, the 1st – 14th Respondents, terminated the analogue TV broadcast signals which NTV, KTN, Citizen TV, and QTV rely upon to offer free-to-air TV, and plunged the country into a total blackout on local TV, save for those few privileged viewers (less than half a million) who had installed DSTV, Zuku, GOTV, Signet, and StarTimes decoders to receive the pay TV digital signal.
24. The reckless and highhanded decision of the 1st – 14th Respondents to switch off the analogue broadcast signals of KTN, NTV, Citizen TV, and QTV, plunging Kenyans who rely on free-to-air TV into a total blackout from TV content, constitutes a major violation of the Constitution which this Honourable Court must quash in defence of the Constitution, and also for which the said Respondents must take full responsibility for the consequences of their unreasonable and irresponsible action.
25. In enjoyment of the constitutional rights and fundamental freedoms to access and impart information free of charge, the Petitioner and millions of other Kenyans depend on local free-to-air TV stations, namely KTN, QTV, Citizen TV, and NTV, for news, entertainment, and general education.
26. After the digital migration, Kenyans ought to have continued enjoying both free-to-air terrestrial TV broadcasting and Pay TVs but, because of the incompetence of the 2nd to the 14th Respondents, that is not to be.
27. The main reason for the world's migration to digital is to release space on the very limited but valuable spectrum, which can be used for other services; it is not to promote pay TV. The market, not policy or the regulator, ought to determine whether it's free-to-air TV broadcasting or pay TVs system that is suitable for the individual operator and consumer.
28. The 1st to 14th Respondents decided to shut out audiences even though the country has practically transmitters for free-to-air broadcasting, and virtually no decoders to receive digital transmissions for free-to-air channels. Currently, the decoders being sold by pay TV service providers only allow viewers who have paid subscription fees to access television channels.
29. The 1st – 14th Respondents discharged their mandate of midwifing the digital migration incompetently and in total violation of Articles 10(b) and 56 of the Constitution, to the extent that they did not consider the interests of the marginalised poor who could not afford

digital pay TV, and who depend entirely on free-to-air TV. A disgusting phenomenon is that the majority of decoders sold so far comprise more than 90% pay TV. That means that less than 10% of the decoders are free-to-air. This has huge implications on promoting universal access for the poor whose only access to TV has been through free-to-air broadcasting.

30. The 1st – 14th Respondents ought to have acted equitably by balancing the needs of those who depend on free-to-air broadcasting (who are mainly the millions of poor Kenyan masses) and the elite who can afford pay TV.
31. The applicant/petitioner reasonably suspects that the 2nd – 14th Respondents are promoting pay TV for improper motive, contrary to Articles 73 and 75 of the Constitution.
32. The 1st to 14th Respondents have done **NOTHING** to ensure that those who cannot afford to pay subscription fees can continue watching their favourite free-to-air channels, and that those who would like to impart information via free-to-air .
33. Kenyans depend heavily on the free-to-air footprint to impart and to receive information. If care is not taken to ensure Kenyans continue to enjoy watching free-to-air television, the digital migration will wipe out a huge chunk of the advertising market, and plunge the country into a TV blackout.
34. The free-to-air TV business model depends on revenue from advertises who are attracted to the large audiences who depend on the medium. It follows that it is suicidal for the media houses that provide free-to-air TV not to migrate to the digital platform with their mass viewership.
35. The free-to-air TV providers require the time to set up their infrastructure (both on the broadcast side and on the viewership side), including installing transmitters and getting set-top boxes into the hands of viewers.
36. The following are among the facts concerning digital migration in Sub-Sahara African countries:
 - 36.1. Mauritius which has a small wealthy population who have no qualms affording the decoders has migrated away from analogue terrestrial television.
 - 36.2. Rwanda, which is a tiny country, smaller than some counties in Kenya, and which required only one transmitter in Kigali to reach the entire Rwandese population, has migrated away from analogue terrestrial television. Digital Migration in

Rwanda has not been without challenges in a country with only 7% TV viewership (estimated at 192,800 as per the 2010 population Census) and limited capacity in local content production. The country was also forced to migrate using a digital network based on the older DVB-T technology. A significant cost will be incurred when upgrading to the agreed DVB-T2/MPEG4 system. Seven free to air TV channels are currently being broadcasted by Rwanda Broadcasting Agency (RBA)

- 36.3. In Tanzania, licences were awarded in 2010 to Star Media Tanzania, Agape Media, and Basic Transmissions. **The latter two companies are Tanzanian-owned and related to existing TV channels**, while Star Media is a joint venture between China's StarTimes (which owns 65%) and TBC. TV viewership collapsed when it migrated away from analogue terrestrial television due to inability by the general population to purchase decoders.
 - 36.4. South Africa hasn't even started commercial digital services. The South Africa Broadcasting Corporation has been reluctant to migrate even with government offers to subsidise the process.
 - 36.5. Burundi plans to migrate in June 2017.
37. Clearly many sub-Saharan countries will not beat the July 17, 2015, deadline. But no catastrophe will visit them simply because they have not migrated.
 38. It is not just the affected media houses that are of concern to the Petitioner; it is the viewing people who are most critical, because digital migration is not an end in itself. Digital migration must allow more not less people to view TV.
 39. As stated elsewhere above, since sometime on February 14, 2015, the Petitioner and millions of other Kenyan viewers have been staring at blank TV screens, unable to access any of the four TV stations because the 1st – 14th Respondents (the regulator) has disabled them in favour of digital pay TV, and refused to allow the ADN the three months they say they require to setup their free-to-air digital broadcasting.
 40. Allowing the ADN the three months today will take the process to the end of May 2015, well within the June 17, 2015, international deadline set for digital migration.

41. The migration to Digital Television broadcasting is a Government initiative resulting from the decision made at the Regional Radio Conference of 2006 in Geneva, Switzerland (RRC-06).
42. The decision requires countries in the RRC planning area to migrate from analogue to digital terrestrial TV broadcasting technologies by June 17, 2015.
43. The Government of Kenya issued a Policy Statement and a Task Force Report on digital migration. Both recommended that due to the heavy investments (estimated at some 40 billion shillings) by the local TV stations, three licences were to be given as follows: to the public broadcaster (KBC); to the existing local media; and through competitive tendering.
44. Implementation of the above was abandoned for undeclared reasons, and the BSD licence was given to the Chinese who did not own a single bit of equipment on the ground in Kenya. Local media houses were knocked out on laughable a technicality that their Kshs 500,000/= bond was for 60 days instead of 120 days. The Kshs 500,000/= is just about the cost of placing a full page advert in the Nation, and the Petitioner is sure the media houses could easily have deposited the amount in cash and not by executing a bond.
45. The result of the unfair process was that unenviable position where the Government controlled Kenya Broadcasting Corporation and the Chinese owned Pan African Network Group were the only ones allowed to carry all content on the digital platform. All other media houses would develop content and hand it over to the Government and to the Chinese for the onward transmission to viewing audiences. Ultimately, the Government was in the position to decide and dictate what Kenyans see on TV screens.
46. The Petitioner posits that 1st – 14th Respondents have handed to the Government on a silver platter the draconian media controls it has been struggling against all odds to push down the throats of Kenyans through the unconstitutional Security Laws (Amendment) Act 2014.
47. The Respondents have decided that Kenya must not only be on the digital platform well ahead of the 17th June 2015 international deadline for the switchover from analogue to digital TV broadcast, but that **ALL** Kenyans must simultaneously also be on pay TV, irrespective of whether or not they can afford the subscription fees.
48. The Respondent set December 31, 2014 as the switchover deadline from analogue to digital for Nairobi and its environs (Phase 1); February 2, 2015, for other major urban centres and their environs (Phase 2); and March 30, 2015 for the few remaining areas (Phase 3).

49. The switchover would involve local media houses losing the right to transmit their content directly to consumers. They would have to do so through third party carriers licenced by the Respondent to charge Kenyan households for content the carriers have not produced.
50. The local media houses did not consent to having their copyrighted material to be aired by third party commercial carriers who have not invested in its development.
51. The local media houses want their content to be carried exclusively by their distributor – the ADN – unless they give consent to be carried by others. They have pointed out and protested that the decision by foreign investors to carry their signals without their consent as required by law is a blatant infringement of their copyrights.
52. The local three main media houses under ADN resorted to court action to protect their business interests, and in the process they also clarified that they (media houses) fully support the digital switchover within the law and in line with universal guidelines and timelines.
53. The local media houses have also publicly announced that they are making heavy capital investment to successfully switch over within the individual media houses and collectively under their ADN consortium.
54. The local media houses accuse the industry regulator (the Respondent) of excelling in placing hurdles in the way of their smooth transition to digital free-to-air TV broadcasting by falling short of being a neutral arbitrator in managing conflicts pitting the ADN and foreign players.
55. The local media houses claim that the timeframe given to the ADN by the Respondent to switch over is practically inconceivable. Further and in particular:
- 55.1. The process of migrating to digital broadcasting is a long, very costly and technical affair, which requires at least three months, from the date of issuance of frequencies, to effect.
- 55.2. Digital transmitters must be acquired from abroad and customised to specific frequencies, shipped in and installed before content can be carried.
- 55.3. Set Top Boxes must be ordered, manufactured and shipped in for viewers to be able to access their channels of choice.

- 55.4. Kenyan households, businesses, and institutions must then be afforded the time required to acquire the Set Top Boxes.
56. On September 29, 2014, the Supreme Court of Kenya ordered the 1st Respondent to consider the local media houses' application for a signal distribution licence and frequencies for their free-to-air digital TV broadcasting.
57. On November 25, 2014, the ADN was given a self-provisioning licence to enable it distribute signals as an interim digital distribution licence, and then on December 15, 2014, they were allocated one frequency for Nairobi, whose switch off date was December 31, 2014. In effect they were to set up a digital platform and roll out in five days, while they required three months. They claimed the time was not enough for the ADN to roll out the requisite infrastructure to broadcast on the frequency. Further and in particular, the ADN claims that:
- 57.1. The frequency is transmitter-specific, requiring time for the manufacturers to synchronise the frequency into the transmitter to customise it.
- 57.2. Customised decoders must be acquired and placed in the hands of viewers if one has to migrate with their audiences. The decoders too could not be manufactured without the frequency.
- 57.3. The ADN would like to offer smart decoders which also offer internet connectivity, and a 3G capability to enable services like mobile money transfers, a function which will play a pivotal role in transforming the country.
- 57.4. The decoders were to retail at Kshs 2,500, and there would be no subscription fees. Also credit facilities, including hire purchase, would be available to help poor viewers take them and then pay gradually.
58. So the ADN group went back to court for protection and they were allowed to continue on the analogue platform pending the hearing and determination of the case.
59. On January 21, 2015, the Respondent cancelled the self-provisioning authorisation, interrupting the acquisition of transmitters, antenna, and set-top boxes by the ADN group.
60. On February 13, 2015, the Supreme Court rendered its verdict, among others, in the following broad terms:

- 60.1. Terminated the temporary order allowing the broadcasters to remain on the analogue platform;
 - 60.2. Ordered the Respondent to immediately reinstate the withdrawn licences and frequencies;
 - 60.3. Ordered the media houses to abide by the conditions for issuance of the frequencies and the licence;
 - 60.4. Ordered the dates for the switch off to remain as scheduled by the 1st Respondent.
61. The Petitioner had a legitimate expectation that after the Supreme Court had rendered its verdict, the migration from the analogue to digital TV broadcasting would be handled professionally in a manner that protects the public interest, and treats all vested commercial interests fairly, and that goes out of its way to protect the rights of those Kenyans who depend on free-to-air TV content.
62. Since the Supreme Court does not act in vain, the Court's orders to the effect that the digital licences it awarded to the ADN Group be restored must be understood to have simultaneously also vested in the ADN all they need, including the reasonable time and the environment they require to operationalize the system before the July 17, 2015, deadline.
63. The Supreme Court never declared that the dates earlier set by the 1st Respondent were unchangeable. The Court only endorsed them as valid and left it to the discretion of the 2nd – 14th Respondents to exercise the administrative discretion fairly, in line with Article 47. In the circumstances, the Petitioner reasonably expected that the 1st – 14th Respondents would work with the local media houses for a seamless migration that would protect the rights of Kenyan masses to free-to-air TV.
64. Hence, the Petitioner is fighting the 1st – 14th Respondents' decision to make Kenya a *de facto* digital pay TV territory. The Petitioner wants the ADN group to be given the three months they require to set up their free-to-air TV broadcasting infrastructure before the Respondent turns the button to switch off their analogue signals.
65. The Petitioner urges that the Respondents are duty bound to ensure that the spirit, values and principles enshrined in the Constitution are upheld.

66. It is the Petitioner's further case that the orders of the Supreme Court cannot legitimately be implemented in a manner that they become the basis upon which the 2nd – 14th Respondents violate the Constitution and the law.
67. It is the Petitioner's case that the 2nd – 14th Respondents are in grave error to have proceeded to implement decisions of the Supreme Court in a haphazard manner that violates the rights of millions of Kenyans to impart and access information, and to fair administrative action.
68. In the circumstances, the Petitioner had a legitimate expectation that the Respondents would holistically implement the orders of the Court, and do so in a manner that the constitutionally secured rights of Kenyans in the Bill of Rights, in particular in **Articles 19, 20, 21, 24, 27, 33(1)(a), 34, 35, and 47** would not be infringed.
69. The Petitioner had a legitimate expectation that the Respondents would consult with stakeholders and provide the way forward in the seamless migration from analogue to digital TV broadcasting. However, that was not to be.
70. Shortly after the Supreme Court rendered its verdict, the 1st – 14th Respondents disabled the analogue signals used by the ADN group to broadcast their free-to-air TV to millions of Kenyans.
71. According to print media reports seen by the Petitioner after he lost his TV viewership, messages broadcast by the stations shortly before they went off air, NTV, KTN, Citizen TV, and QTV claimed they were forcefully switched off when officials from the 1st Respondent accompanied by police officers visited their transmission sites in Limuru.
72. The four TV stations complained that the Respondent had refused to give them time to acquire their own digital boxes. A message reportedly displayed by the four read:

"... We regret to inform our viewers that our regular broadcasts are no longer on air. Despite the Supreme Court ruling on February 13, 2015 reinstating us the license and frequencies for digital broadcasting the CA has declined to allow us the requisite time to import our own transmitters and set top boxes that will enable our viewers to receive our broadcasts on our own platform as provided by the self-provisioning license granted by the Supreme Court.

Our channels are, as a result, not available on pay TV or any digital platforms"

73. The switch off affected those areas targeted in phases 1 and 2 of the Respondent's deadlines. All major Kenyan towns and their environs were switched off from the analogue TV broadcast. This effectively locked out millions Kenyans from viewing NTV, QTV, KTN, and Citizen TV because there is the lack of free-to-air TV broadcasting infrastructure for poor Kenyans who can afford pay TV.
74. Since that switch off, only the relatively very few Kenyans who had installed DSTV, Zuku, GOTV, Signet, StarTimes and Bamba decoders have been able to receive the pay TV digital signal.
75. Since the majority of those switched off are the poor who can't afford pay TV, and the ADN group have not refused to migrate to digital broadcasting, but are insisting on being allowed to offer the poor free-to-air TV, the Petitioner finds it reckless, unreasonable, and totally inconsiderate of the Respondent to hastily shut down the analogue platform in circumstances where there is no infrastructure for the free-to-air TV.
76. It is even worse that signal has been switched off despite the fact that the ADN group have publicly stated that they just need three months to get the free-to-air digital platform fully operational, by May 2015.
77. Ideally, given the July 17, 2015, international switchover deadline, the Respondent ought to have given the ADN group the room they require to setup their infrastructure for free-to-air TV digital broadcasts, before the deadline.
78. The Petitioner avers that the requirement of having third parties, who were mainly foreign owned and controlled commercial entities, or government controlled public broadcasters, take control of the distribution of **ALL** TV content would give the State total control over what information reaches the masses in Kenyan homes.
79. For having introduced a very simple but totally effective mechanism of filtering information in violation of the media rights of Kenyans, the requirement that digital content be carried by easy to manipulate foreign owned carriers, amounts to reinventing the draconian means of media control and censorship which Kenyans rejected under the new Constitution.

80. This touches on matters of fundamental importance to Kenyans since it impedes and/or has the potential to impede their hard won rights and fundamental freedoms, specifically, the rights to freedom of expression, media freedom, and access to information.
81. Access to information is a corollary of media freedom. The freedom to impart information goes hand in hand with the freedom to receive the information.
82. Already as noted by the Supreme Court in its judgment of February 13, 2015, Signet, a subsidiary of the Kenya Broadcasting Corporation, which was awarded a licence to redistribute digital content, based on the public interest of its role as a public broadcaster, had defeated that purpose by yielding its licensed operations to private corporate interests. Intriguingly, the 1st – 14th Respondents have not taken any action to hold them accountable.
83. The 1st – 14th Respondents have no capacity to limit the enjoyment of rights and fundamental freedoms as they have done herein, without reference to Articles 24 and 25 in Constitution.
84. The constitutional right of every Kenyan citizen to impart and access information is severely threatened by the Respondent's move to forcefully switch off analogue television transmission.
85. Since the 1st – 14th Respondent has demonstrated that the only effort required to switch off the analogue signal is to turn the button and with that the job is done, it beats the Petitioner as to why the regulator cannot allow the ADN Group the time they require between now and May, and before the international deadline of July 17, 2015, for switching off the same.
86. The Respondent is using the digital migration as a camouflage for advancing the commercial interests of pay TV networks whose uptake has remained insignificant for years they have been in operation in Kenya.
87. The delusionary and fraudulent packaging of the digital migration as a move from free-to-air TV to pay TV constitutes the unconstitutional and criminal action of using public office to advance vested interests, and it is an insult of the Petitioner's intelligence and that of other Kenyans.
88. In the spirit of patriotism, which is a national value, being local investors with demonstrated capacity to deliver world-class content through free-to-air TV broadcasting, the

ADN Group deserves support from the 1st – 15th Respondents to execute that all-important mandate in service of the public interest.

89. Since early in the 20th Century, national governments have asserted sovereignty over the electromagnetic spectrum, which is a limited resource. These assertions are still the basis of radio regulation, since wireless communication has not yet moved to higher and higher frequencies - into the range of infrared (heat) and free space optics (light) – that would obviously make claiming sovereignty over radio frequencies make no more sense than claiming sovereignty over colours of the rainbow.

90. The migration from analogue to digital terrestrial TV broadcasting technologies by June 17, 2015, is to be effected within the territory of the sovereign Kenyan State.

91. The Petitioner is therefore disturbed by complaints from the ADN that the 1st – 14th Respondents, who are agents of the sovereign Kenyan State, are acting in the most unpatriotic manner by going out of their way to further the interests of foreign companies against those of local ones. Further and in particular:

91.1. The a self-provisioning licence ADN was given to enable it distribute signals as an interim digital distribution licence, restricts them to carrying only their content and not that of any other third parties, a condition that is not imposed on the Chinese.

91.2. They have failed to ensure that the companies licensed to operate under digital migration have at least a 30% Kenyan equity holding. They have basically given Kenyan digital terrestrial TV broadcasting a Chinese character.

91.3. They have failed to suspend the licence violations by the Chinese, giving them one year to comply whereas they have denied the ADN group the 90 days they require to set up a free-to-air digital TV broadcast system.

91.4. Out of the 211 frequencies available to Kenya, as to all other independent territories irrespective of size, the 1st – 14th Respondents have allocated 120 frequencies (i.e., 57.8%) to the Chinese to use for pay TV. This is totally against the sustainable development of Kenya.

91.5. When allocating the frequencies to the ADN group, the Respondents rightly invited the participation of the people to determine whether the allocation should be made.

Most tellingly, the Respondents never invited the participation of the people in their unpatriotic decision to give 57.8% of Kenyan frequencies to the Chinese.

- 91.6. To broadcast digitally to Nairobi and its environs (covered in the 1st Respondent's Phase One switch off date) requires four frequencies. Whereas the Chinese were given all the four frequencies, the ADN were only allocated ONE frequency making it impossible for them to operate. The Petitioner states that that was pure discrimination.
92. The Petitioner urges that the 2nd – 14th Respondents have also demonstrated gross incompetence in managing the digital migration. Other than the chaos caused by the blank TV screens:
 - 92.1. They are enforcing compulsory pay TV on terrestrial digital platform in circumstances where best practice across the world reserves those frequencies for free-to-air TV broadcasting to reach the masses, while pay TV uses satellites and cables to reach their audiences.
 - 92.2. Pay TV is usually targeted at the elites, or the well to do higher echelons of society which can afford the subscription fees. Free-to-air is usually for the hoi polloi.
93. The Petitioner is fighting the 2nd – 14th Respondents' decision to make Kenya a de facto digital pay TV territory. The Petitioner wants the ADN group to be given the three months they require to set up their free-to-air TV broadcasting infrastructure before the Respondent turns the button to switch off their analogue signals.
94. The Petitioner urges the Honourable Court that it will be irregular and unconstitutional for matters to stay as they are. The Court has the duty and jurisdiction to protect the Constitution and the law from being threatened and/or violated.
95. The Honourable Court should therefore take decisive action against the 1st – 14th Respondents, ordering the Respondents to execute their constitutional mandate in strict compliance with the Constitution.
96. Only strict adherence to the values, principles, procedures, and processes spelt out in the Constitution can ensure that the digital migration is not done in a manner injurious to the rights of Kenyans, including to free-to-air digital TV.

LEGAL FOUNDATIONS OF THE PETITION

97. The Constitution of Kenya 2010 is the fountainhead from which all our laws derive their authority and force.
98. The Petition is filed pursuant to the Preamble, and articles 1, 2, 3, 4, 10, 12(1)(a), 19, 20, 21, 22, 23, 24, 27, 33(1)(a), 34, 35, 46,47, 48, 50, 56, 73, 75, 232, 258, AND 259, of the Constitution of Kenya.
99. In the Preamble, the people of Kenya have aspirations for a government based on the essential values of human rights, equality, freedom, democracy, social justice **and the rule of law.**
100. Under Article 1, the People are sovereign.
101. Under Article 2, the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government. The Supremacy of the Constitution basically means the supremacy of the rule of law.
102. Under Article 3, every person has an obligation to respect, uphold and defend the Constitution, and any attempt to establish a government, otherwise than in compliance with the Constitution is unlawful. Further and specifically:
- 102.1. Kenya is a constitutional state: all state authorities are ultimately subject to judicial control vide the sovereign people's authority vested in the Judiciary as the final arbiter of disputes, and as the institution with exclusive authority and power to make binding interpretations of the Constitution and the law.
- 102.2. The primacy of the basic rights in the Bill of Rights, the definition of the principles of a democratic and open State, and the foundation of an independent Judiciary which watches over and ensure adherence to the Constitution are the basic cornerstones of Kenyan democracy.
- 102.3. Among other things, the basic rights guarantee the accountability of all, freedom to act within the law, equality before the law, including access to justice.

- 102.4. The Petitioners have a reasonable and legitimate expectation by dint of articles 2(3) and 2(4) that public officials can only act legitimately if they act in compliance with the Constitution and don't contravene it in any way.
103. Under Article 4(2), the Republic of Kenya is a multi-party democratic State *founded on the national values and principles of governance referred to in Article 10*.
104. Article 10 of the Constitution sets out national values and principles of governance that bind all state officers, state organs, and public officers. All persons are required to apply the national values and principles of governance, including *inter alia* patriotism, the rule of law, participation of the people, social justice, equity, non-discrimination, protection of the marginalised, good governance, integrity, transparency, accountability and sustainable development.
105. Article 10 binds the Respondent to uphold the national values and principles of governance, in particular herein, **patriotism, protection of the marginalised, and the rule of law**.
106. Article 12(1) (a) declares that every citizen is entitled to the rights, privileges and benefits of citizenship, subject only to the limits provided or permitted by the Constitution.
107. Under Chapter Four of the Constitution, various fundamental rights have been declared to belong to all persons in Kenya (Article 19, 20), including *inter alia* the following:
- 107.1. Article 19(1) makes the Bill of Rights an integral part of Kenya's democratic state and the framework for social, economic and cultural policies.
- 107.2. Article 19(3)(a) provides that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the state.
- 107.3. Article 20(2) provides that every individual shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

- 107.4. Article 20(4)(a) provides that in interpreting the Bill of Rights, a court, tribunal or other authority shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom.
- 107.5. Article 22 vests the locus standi for the enforcement of the Bill of Rights in inter alia the Petitioner herein.
- 107.6. Under Article 23, the High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. The appropriate relief, a court may grant include an order for an injunction.
- 107.7. Article 24, a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity.
- 107.8. Article 25, lists the right which cannot be limited.
- 107.9. Article 27(1), every person is equal before the law and has the right to equal protection and equal benefit of the law.
- 107.10. Article 27(2), equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- 107.11. Article 28 provides that every person has inherent dignity and the right to have that dignity respected and protected.
- 107.12. Article 33(1)(a) decrees that every person has the right to freedom of expression, which includes— freedom to seek, receive or impart information or ideas.
- 107.13. Article 34 guarantees the freedom and independence of the media, and forbids the State from exercising control over or interfering with the media, except where necessary to regulate the airwaves and other forms of signal distribution, independent of control by government, political, or commercial interests.
- 107.14. Article 35, every person has the right to access information.

- 107.15. Article 47, declares the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- 107.16. Article 50(1), the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
- 107.17. Article 56 protects the interests of the marginalised, such as the poor TV viewers who depend on free-to-air broadcasting.
- 107.18. That the only emergency situations that can oust constitutional provisions are those contemplated in Article 58, as read with Article 132(4)(d).
108. Under Articles 73 and 75, State officers are required to act in accordance with various principles of leadership and integrity, including *inter alia* compliance with the Constitution, promoting public confidence in the integrity of the office, avoiding conflict of interest between public duty and personal interests, and to promoting, **protecting and upholding the rule of law and defending the public interest.**
109. This Honourable Court is the primary custodian of the Constitution and has inherent power to uphold and defend the Constitution. Further and in particular:
- 109.1. Under Article 160(1), in the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.
- 109.2. Under Article 159(1) judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
- 109.3. Under Article 159(2), in exercising judicial authority, the courts and tribunals shall be guided by the following principles—(a) **justice shall be done to all, irrespective of status;** (b) justice shall not be delayed; (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3); (d) justice shall be administered without undue regard to procedural technicalities; and (e) the purpose and principles of this Constitution shall be protected and promoted.

- 109.4. Articles 165 and 258 give the Court jurisdiction as the custodian of the Constitution and Article 259 states how that jurisdiction is to be exercised. There is no doubt that the Judiciary is the ultimate custodian of the Constitution. A clue to the reach and authority of the courts is in the fact that the rule of law is among the values and principles of governance entrenched in Article 10. Indeed, Article 258 gives the courts the power to interpret the entire Constitution, and to give appropriate remedies for its breach. In Article 259(1), the courts must interpret the Constitution in a manner that *“(a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance.”*
110. Article 232 states that the values and principles of public service include— involvement of the people in the process of policy making; accountability for administrative acts; transparency and provision to the public of timely, accurate information; fair competition and merit as the basis of appointments and promotions; affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service.
111. Under Article 258, on the enforcement of the Constitution, any person, acting in their own interest, or on behalf of another person, or as a member of, or in the interest of, a group or class of persons, or acting in the public interest, has the right to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention.
112. Under Article 259(1) the Constitution shall be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance.
113. The *National Information & Communications Technology (ICT) Policy*, gazetted on 31st March, 2006, by the Government states, at Section 4.2, on **Policy Objectives**, that :
- “The overall policy objective for the sector is to create an environment that enables broadcasting services to be provided in the public interest and to contribute equitably to the socio-economic and cultural development of Kenya. Specific objectives of the policy are:*

- i. *Development of a legal and regulatory framework as a basis for investment in, growth and sustenance of broadcasting services and for dispute resolution;*
- ii. *Encouraging the growth of a broadcasting industry that is efficient, competitive and responsive to audience needs and susceptibilities;*
- iii. *Provision of a licensing process and for the acquisition of licences and allocation of frequencies through an equitable process;*
- iv. *Ensuring the development of broadcasting services that reflect a sense of Kenyan identity, character, cultural diversity and expression through the development of appropriate local content;*
- v. *Promoting diversity in ownership and control of broadcasting services and availability throughout Kenya;*
- vi. *Promoting fair competition, innovation and investment in the broadcasting industry;*
- vii. *Ensuring adherence to social responsibility by encouraging the development of and respect for codes of practice by all broadcasting licensees;*
- viii. ***Ensuring universal access to, and viability of public service broadcasting.***

[Emphasis supplied by applicant]

114. The *National Information & Communications Technology (ICT) Policy*, gazetted on 31st March, 2006, by the Government states, at Section 4.10, on **Equity Participation and Control**, that :

*“Kenyans will be encouraged to participate in the sub-sector through equity ownership. Furthermore, to ensure that the broadcasting system meets the needs of Kenyans, **effective local ownership and control of the Kenyan broadcasting system will be maintained. Any firm licensed to provide broadcasting services shall have at least 30 percent Kenyan equity ownership.** However, for all listed companies, the equity participation shall conform to the existing rules and regulations of the Capital Markets Authority (CMA).”*

[Emphasis supplied by applicant]

115. **THAT** the *National Information & Communications Technology (ICT) Policy*, gazetted on 31st March, 2006, by the Government states, at Section 7.3.7, on **Public Consultation**, that:

“Appropriate mechanisms will be put in place to allow stakeholders to provide inputs to ensure that the radio frequency spectrum management process is more responsive to technological advances and user demands.”

PARTICULARS OF THE VIOLATIONS OF THE CONSTITUTION AND STATUTE

116. The rules of natural justice require that the process of appointing the migrating to the digital TV platform should be fair, impartial, independent, competitive, and insulated from any possibility of compromise by the Respondent as the honest broker. To the extent that the ADN Group have been frustrated in their efforts to advance their business interests by providing provide the millions of marginalised poor Kenyans with free-to-air digital TV, the Respondent has violated natural justice.
117. To the extent that the Respondent has cut off the millions of mainly poor free-to-air TV consumers by turning off the analogue signals they relied upon, without first making sure that an alternative free-to-air digital system is in place to serve them, the following provisions of the Constitution have been violated:
- 117.1. Article 3(1) which imposes an obligation on the Respondent to respect, uphold and defend the Constitution.
- 117.2. Article 4(2) which decrees that the Kenyan State is founded on the national values and principles of governance in Article 10.
- 117.3. Article 10(2) which binds the Respondent to uphold national values and principles of governance in Article 10, and provides specifically that the rule of law and the protection of the marginalized are national values and principles of governance.
- 117.4. Article 12(1) (a) which declares that every citizen is entitled to the rights, privileges and benefits of citizenship, subject only to the limits provided or permitted by the Constitution.
- 117.5. Article 19(1) which makes the Bill of Rights an integral part of Kenya's democratic state and the framework for social, economic and cultural policies.
- 117.6. Article 19(3)(a) which provides that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the state.
- 117.7. Article 20(2) which provides that every individual shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

- 117.8. Article 24, which states that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity.
- 117.9. Article 27(1), which declares that every person is equal before the law and has the right to equal protection and equal benefit of the law.
- 117.10. Article 27(2), which states that equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- 117.11. Article 28 which provides that every person has inherent dignity and the right to have that dignity respected and protected.
- 117.12. Article 33(1)(a) which decrees that every person has the right to freedom of expression, which includes— freedom to seek, receive or impart information or ideas.
- 117.13. Article 34 which guarantees the freedom and independence of the media, and forbids the State from exercising control over or interfering with the media, except where necessary to regulate the airwaves and other forms of signal distribution, independent of control by government, political, or commercial interests.
- 117.14. Article 35, guarantees every person the right to access information.
- 117.15. Article 47, which declares the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
118. To the extent that the Respondent has denied the ADN the room they require to set up a free-to-air digital TV broadcasting platform, the following provisions of the Constitution have been violated:
- 118.1. Article 3(1) which imposes an obligation on the Respondent to respect, uphold and defend the Constitution.
- 118.2. Article 4(2) which decrees that the Kenyan State is founded on the national values and principles of governance in Article 10.

- 118.3. Article 10(2) which binds the Respondent to uphold national values and principles of governance in Article 10, and provides specifically that the rule of law and the protection of the marginalized are national values and principles of governance.
- 118.4. Article 12(1) (a) which declares that every citizen is entitled to the rights, privileges and benefits of citizenship, subject only to the limits provided or permitted by the Constitution.
- 118.5. Article 19(1) which makes the Bill of Rights an integral part of Kenya’s democratic state and the framework for social, economic and cultural policies.
- 118.6. Article 19(3)(a) which provides that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the state.
- 118.7. Article 20(2) which provides that every individual shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.
- 118.8. Article 24, which states that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity.
- 118.9. Article 27(1), which declares that every person is equal before the law and has the right to equal protection and equal benefit of the law.
- 118.10. Article 27(2), which states that equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- 118.11. Article 28 which provides that every person has inherent dignity and the right to have that dignity respected and protected.
- 118.12. Article 33(1)(a) which decrees that every person has the right to freedom of expression, which includes— freedom to seek, receive or impart information or ideas.

- 118.13. Article 34 which guarantees the freedom and independence of the media, and forbids the State from exercising control over or interfering with the media, except where necessary to regulate the airwaves and other forms of signal distribution, independent of control by government, political, or commercial interests.
- 118.14. Article 35, guarantees every person the right to access information.
- 118.15. Article 47, which declares the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
119. To the extent that the Respondent is favouring foreign investors over local ones, the following provisions of the Constitution are violated:
- 119.1. Article 10(2) of the Constitution, which states that: national values and principles of governance include patriotism, national unity, human dignity, equity, social justice, inclusiveness, equality, human rights, and good governance.
- 119.2. Article 73(1) which states that: ***“(1) Authority assigned to a State officer— (a) is a public trust to be exercised in a manner that— (i) is consistent with the purposes and objects of this Constitution; (ii) demonstrates respect for the people; (iii) brings honour to the nation and dignity to the office; and (iv) promotes public confidence in the integrity of the office; and (b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.***
- 119.3. Article 73(2) which states that: ***“(2) The guiding principles of leadership and integrity include— (a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections; (b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices; (c) selfless service based solely on the public interest, demonstrated by— (i) honesty in the execution of public duties; and (ii) the declaration of any personal interest that may conflict with public duties; (d) accountability to the public for decisions and actions; and (e) discipline and commitment in service to the people.***
120. Under the Preamble and articles 1, 2, 3, 4, 10, 12(1)(A), 19, 20, 21, 22, 23, 24, 27, 33(1)(a), 34, 35, 47, 48, 50, 73, 75, 232, 258, and 259 of the Constitution, the Petitioner

and other Kenyans have a legitimate expectation that Respondent will adhere strictly to the Constitution in the process of migrating from analogue to digital TV broadcasting. That right of the Petitioner and other Kenyans to Legitimate Expectation was shattered by the irrational, irregular and unconstitutional switch off of the analogue signal without following the provisions of the Constitution.

121. To the extent that the 1st – 14th Respondents have not ensured universal access to TV under the digital platform, they have violated the *National Information & Communications Technology (ICT) Policy*, gazetted on 31st March, 2006, by the Government states, at Section 4.2, on **Policy Objectives**, that :

“The overall policy objective for the sector is to create an environment that enables broadcasting services to be provided in the public interest and to contribute equitably to the socio-economic and cultural development of Kenya. Specific objectives of the policy are:

- i.;*
- ii. Encouraging the growth of a broadcasting industry that is **efficient, competitive and responsive to audience needs and susceptibilities**;*
- iii. Provision of a licensing process and for the acquisition of licences and allocation of frequencies through **an equitable process**;*
- iv. Ensuring the development of broadcasting services that reflect a sense of **Kenyan identity, character, cultural diversity and expression** through the development of appropriate local content;*
- v. Promoting **diversity in ownership and control** of broadcasting services and availability throughout Kenya;*
- vi. **Promoting fair competition, innovation and investment** in the broadcasting industry;*
- vii. Ensuring adherence to social responsibility by encouraging the development of and **respect for codes of practice by all broadcasting licensees**;*
- viii. **Ensuring universal access to, and viability of public service broadcasting.***

[Emphasis supplied by applicant]

122. To the extent that the 1st – 14th Respondents have NOT demanded 30% Kenyan equity holding in the Chinese companies, the *National Information & Communications Technology (ICT) Policy*, gazetted on 31st March, 2006, by the Government states, at Section 4.10, on **Equity Participation and Control**, that :

*“Kenyans will be encouraged to participate in the sub-sector through equity ownership. Furthermore, to ensure that the broadcasting system meets the needs of Kenyans, **effective local ownership and control of the Kenyan broadcasting system will be maintained. Any firm licensed to provide broadcasting services shall have at least 30 percent Kenyan equity ownership.** However, for all listed companies, the equity participation shall conform to the existing rules and regulations of the Capital Markets Authority (CMA).”*

[Emphasis supplied by applicant]

123. To the extent that the people were not invited to, and did not participate in, the process of awarding licences, the 1st – 14th Respondents violated the *National Information & Communications Technology (ICT) Policy*, gazetted on 31st March, 2006, by the Government states, at Section 7.3.7, on **Public Consultation**, that:

“Appropriate mechanisms will be put in place to allow stakeholders to provide inputs to ensure that the radio frequency spectrum management process is more responsive to technological advances and user demands.”

YOUR PETITIONER THEREFORE HUMBLY PRAYS THAT:

124. **The Honourable Court be pleased to determine the following QUESTIONS:**

- A. Whether the 1st – 14th Respondents violated the National Information & Communications Technology (ICT) Policy in the digital migration.
- B. Whether by dint of Article 47 of the Constitution there is a constitutional obligation on the Respondent to ensure a smooth and seamless migration from analogue to digital TV broadcasting.
- C. Whether by dint of Articles 33(1)(a) and 35 the Petitioner and other Kenyans, especially the poor who can't afford to subscribe to pay TV have a constitutional right to free-to-air digital TV broadcasting.
- D. Whether the Respondent's decision to frustrate the setting up by the ADN of a free-to-air digital TV broadcasting platform violates the media rights in Article 34.
- E. Whether by dint of Articles 4(2) and 10 the Respondent was under obligation to consider the needs of the poor who dependent on free-to-air TV and avoid forcing everybody to migrate to pay TV.

- F. Whether digital migration means the migration to pay TV.
- G. Whether the decision by the Respondent to switch off the digital analogue system in circumstances where there was no infrastructure for free-to-air TV is unconstitutional and, therefore, null and void.
- H. Whether the Respondent ought to allow the ADN Group the three months they require to establish a free-to-air digital TV broadcasting infrastructure.
- I. Whether the Respondent should bear the costs of this Petition for being the party directly responsible, through their actions and/or omissions, for the violations of the Constitution and the law which necessitated the Petitioner to seek remedy in the Honourable Court.

125. **The Honourable Court be pleased to make the following DECLARATIONS and issue the following ORDERS:**

- a) **A Declaration** be and is hereby issued that by the 1st – 14th Respondents violated the National Information & Communications Technology (ICT) Policy in the digital migration.
- b) **A Declaration** be and is hereby issued that by dint of Article 47 of the Constitution there is a constitutional obligation on the Respondent to ensure a smooth and seamless migration from analogue to digital TV broadcasting.
- c) **A Declaration** be and is hereby issued that by dint of Article 33(1)(a) and 35 the Petitioner and other Kenyans, especially the poor who can't afford to subscribe to pay TV have a constitutional right to free-to-air digital TV broadcasting.
- d) **A Declaration** be and is hereby issued that the Respondent's decision to frustrate the setting up by the ADN of a free-to-air digital TV broadcasting platform violates the media rights in Article 34.
- e) **A Declaration** be and is hereby issued that the by dint of Articles 4(2) and 10 the Respondent was under obligation to consider the needs of the poor who dependent on free-to-air TV and avoid forcing everybody to migrate to pay TV.
- f) **A Declaration** be and is hereby issued that the digital migration DOES NOT mean the migration to pay TV.

- g) **A Declaration** be and is hereby issued that the decision by the Respondent to switch off the digital analogue system in circumstances where there was no infrastructure for free-to-air TV is unconstitutional and, therefore, null and void.
- h) The Honourable Court do issue and hereby issues a **mandatory order** quashing the Respondents decision to switch off the analogue signal.
- i) The Honourable Court do issue and hereby issues a **mandatory order** ordering the Respondent to allow the ADN the three months they require to set up a free-to-air digital TV broadcasting infrastructure.
- j) The Honourable Court be pleased to issue any other or further remedy that the Honourable Court shall deem fit to grant in the interests of justice in the circumstances of this Petition.
- k) **THAT** the Honourable Court be pleased to issue an order ordering the Respondent to bear the costs of this Petition for being the party directly responsible, through actions and/or omissions, for the violations of the Constitution and the law which necessitated the Petitioner to seek remedy in the Honourable Court..

DATED at **NAIROBI** this **18th** day of **FEBRUARY, 2015**

**OKIYA OMTATAH OKOITI
THE PETITIONER**

DRAWN & FILED BY:

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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
(CONSTITUTIONAL & JUDICIAL REVIEW DIVISION)

PETITION NO. _____ OF 2015

IN THE MATTER OF: THE PREAMBLE AND ARTICLES 1, 2, 3, 4, 10, 12(1)(a), 19, 20, 21, 22, 23, 24, 27, 33(1)(a), 34, 35, 46, 47, 48, 50, 56, 73, 75, 232, 258, AND 259 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE VIOLATION OF ARTICLES 3(1), 10, 12(1), 19, 20, 21, 24, 33(1)(a), 34, 35, 46, 47, 56, 73, 75, AND 232 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE VIOLATION OF THE RIGHTS OF KENYANS TO FREE-TO-AIR DIGITAL TV THROUGH THE IMPOSITION OF DIGITAL PAY TV

IN THE MATTER OF: THE CONSTITUTIONAL OBLIGATION ON THE COMMUNICATION AUTHORITY OF KENYA TO ENSURE A SMOOTH AND SEAMLESS MIGRATION FROM ANALOGUE TO DIGITAL TV BROADCASTING

IN THE MATTER OF: THE CONSTITUTIONAL VALIDITY OF IMPLEMENTING COURT ORDERS IN VIOLATION OF THE CONSTITUTION

IN THE MATTER OF: THE INCOMPETENCE OF AND THE DERELICTION OF DUTY BY THE MINISTER FOR INFORMATION AND THE MANAGEMENT AND BOARD OF THE COMMUNICATION AUTHORITY OF KENYA

IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATION

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

~VERSUS~

COMMUNICATIONS AUTHORITY OF KENYA	1ST RESPONDENT
FRED MATIANG'I.....	2ND RESPONDENT
BEN NGENE GITUKU	3RD RESPONDENT
FRANCIS WANGUSI	4TH RESPONDENT
PETER MUTIE	5TH RESPONDENT
KENNEDY NYAUNDI.....	6TH RESPONDENT
WILBERT CHOGE.....	7TH RESPONDENT
GRACE MUNJURI.....	8TH RESPONDENT
HELLEN KINOTI	9TH RESPONDENT
BEATRICE OPEE.....	10TH RESPONDENT
MONICA JUMA.....	11TH RESPONDENT
KAMAU THUGGE.....	12TH RESPONDENT
LEVI OBONYO.....	13TH RESPONDENT
JOSEPH TIAMPATI ole MUSUNI.....	14TH RESPONDENT
HON. ATTORNEY GENERAL.....	15TH RESPONDENT

AFFIDAVIT SUPPORTING THE PETITION

I, **OKIYA OMTATAH OKOITI**, a citizen of Kenya resident in Nairobi City County, and of care of **Room 4, Floor B1, Block A, Western Wing, NSSF Building, Bishops Road, P. O. Box 60286-00200, NAIROBI**, do hereby solemnly make oath and state as follows:

1. **THAT** I am an adult male of sound mind and a citizen of Kenya, aware of the matters in issue and hence competent to swear this affidavit on my own behalf as the Petitioner.
2. **THAT** I am also the Executive Director of Kenyans for Justice and Development (KEJUDE) Trust, which is a legal trust founded on republican principles and set up with the purpose of promoting democratic governance, economic development and prosperity.
3. **THAT** I swear this Affidavit in good faith in support of the Petition herein.
4. **THAT** I have perused the Petition herein and confirm that the facts stated therein are true and correct.
5. **THAT** I hereby reaffirm and solemnly repeat the facts and averments stated and included in the Petition, including each of the paragraphs (each individually as well as cumulatively), and solemnly state that the facts therein are true and to my own knowledge, information and belief.
6. **THAT** the Petition herein is part of the struggle to entrench the rule of law into the fabric of the State. Hence, there will be disastrous implications for the rule of law if this Honourable Court does not grant the orders sought in the Petition.
7. **THAT** the administrative action of the 2nd – 14th Respondents to discontinue free-to-air TV are unconstitutional and, therefore, null and void for contravening the values and principles enshrined in Articles 3(1), 10, 12(1), 19, 20, 21, 24, 27, 46, 47, 73, 75, 232, and 259(1) of the Constitution, and in the National Information & Communications Technology (ICT) Policy.
8. **THAT** it underscores the 2nd – 14th Respondents' gross incompetence that they have engaged in irregular, illegal and unreasonable administrative action which has trampled upon the rights and fundamental freedoms of Kenyans in the Bill of Rights, and upon the Constitution.
9. **THAT** I had a legitimate expectation the 2nd – 14th Respondents would discharge their all-important mandate in accordance with the Constitution.

10. **THAT** the Honourable Court should declare the 2nd – 14th Respondents to be unsuitable for public office.
11. **THAT** in support of my averments above I enclose hereto a bundle of documents marked “**Exhibit 000-1**” containing the following:
- 11.1. *The Supreme Court’s Media Summary in the case of Communications Commission of Kenya & 5 Others v. Royal Media Services & 5 Others, Supreme Court Petition No. 14 of 2014, at pages 40 – 44.*
- 11.2. *The National Information & Communications Technology (ICT) Policy, at pages 45 – 103.*
- 11.3. *ADN Business Plan Jan 2015, The Road to Digital Migration at pages 104 – 111.*
- 11.4. *Status of TV frequencies, at pages 112 – 118.*
- 11.5. *Geopoll – Understanding the World, at pages 119 – 133.*
- 11.6. *Digital Migration and its Immediate Implications to Advertisers, at pages 134 – 149.*
- 11.7. *A case study of digital TV Switchover in Tanzania, at pages 150 – 156.*
- 11.8. *Lessons and Opportunities in Rwanda’s Digital Migration Fairy Tale, at pages 157 – 159.*
- 11.9. *Migrate then Upgrade: Rwanda to use older DVB-T Technology, at pages 160.*
- 11.10. *Brief on Digital Migration from Analogue to Digital TV Broadcasting System (Rwanda), at pages 161 – 164.*
- 11.11. *Rwanda Experience on Migration from Analogue to Digital TV Broadcasting, at pages 165 – 174.*
- 11.12. *Country Status on Migration from Analogue to Digital Broadcasting, at page 175 – 198.*
- 11.13. *The Supreme Court Judgment in the case of Communications Commission of Kenya & 5 Others v. Royal Media Services & 5 Others, Supreme Court Petition No. 14 of 2014, at pages 199 – 207.*

11.14. Copies of newspaper articles, at pages 208 – 216.

12. **THAT** the Honourable Court should grant the orders sought in the Petition.
13. **THAT** there is an overarching requirement of justice that the orders sought be granted.
14. **THAT** the balance of convenience favours the granting of the orders sought.
15. **THAT** it is meet and just, for the purposes of justice and equity and the overarching purpose of constitutional integrity and rule of law, to make the orders sought.
16. **THAT** this Honourable Court has unfettered powers and jurisdiction to make the orders sought.
17. **THAT** we are a country ruled by a law which binds all persons, and makes us all equal before it. Being a country ruled by law means profoundly that those who rule us must do so according to an objective standard found in our laws, and not based on their subjective or even whimsical choice as has been demonstrated by the 2nd – 14th Respondents in the digital migration.
18. **THAT** the Petition herein is an opportunity for the public to know and get an assurance that the Government and its agencies will govern according to the Constitution and the law.
19. **THAT** the Petition has been necessitated by the unlawful and unconstitutional actions on the part of the 1st–14th Respondents.
20. **THAT** I verily believe, that in regard to continuing violation of the Constitution, it is of utmost importance and urgency that the 1st-14th Respondents be ordered to pay the costs of the Petition herein.
21. **THAT** I have a right of access to the Constitutional Court to safeguard my rights and those of others, and to defend the Constitution of Kenya, 2010, which has been, is being and is in danger of further infringement.
22. **THAT** under Article 22(2) of the Constitution of Kenya, a person may institute court proceedings to claim that its rights and/or fundamental freedoms have been denied,

violated or infringed, and/or to act on behalf of other persons whose rights are also being violated, or to act in the public interest.

23. **THAT** under Article 258 of the Constitution of Kenya, a person may institute court proceedings to claim that the Constitution has been contravened, or is threatened with contravention.

24. **THAT** under Article 23 and 165 of the Constitution of Kenya, the High Court has jurisdiction to hear any question regarding the interpretation of the Constitution, including questions of contradiction between any law and the Constitution.

25. **THAT** if the Petition herein is not immediately ventilated and necessary orders made, the damage or harm would be of an immediate, incalculable and irreversible nature.

26. **THAT** in view of the above, and pursuant to the High Court's duty to promote and safeguard constitutionalism and the rule of law, I verily believe that it is now incumbent for this Honourable Court to determine the issues raised in this Petition to ensure that the Constitution is protected, and that the law will henceforth be applied with certainty.

27. **THAT** I confirm that there have been no previous proceedings between the parties concerning the matters in issue herein.

28. **THAT** what is deponed to herein is true and to my own knowledge save as to facts deponed to on information and belief the sources and grounds whereof have been respectively specified.

SWORN by the said **OKIYA OMTATAH OKOITI**
at Nairobi this **18th** day of **FEBRUARY, 2015**
BEFORE ME

COMMISSIONER OF OATHS / MAGISTRATE

DRAWN & FILED BY:

OKIYA OMTATAH OKOITI,
ROOM 4, FLOOR B1, BLOCK A,
WESTERN WING, NSSF BUILDING,
BISHOPS ROAD,
P. O. BOX 60286-00200,
NAIROBI.

}
.....
DEPONENT

“Exhibit 000-1”