

19 DEC 2012

REPUBLIC OF KENYA

HIGH COURT OF KENYA
CENTRAL REGISTRY

IN THE HIGH COURT OF KENYA AT NAIROBI

15 DEC 2012

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

CIVIL SIDE
BI

PETITION NO. 563 OF 2002

IN THE MATTER OF: ARTICLES, 10, 22, 23, 27, 35 AND 46 OF THE
CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: THE KENYA INFORMATION AND COMMUNICATION ACT,
NO. 2 OF 1998

BETWEEN

CONSUMER FEDERATION OF KENYA (COFEK)

Suing through its officials namely STEPHEN MUTORO,

EPHRAIM GITHINJI KANAKE and

HENRY MESHACK OCHIENG'

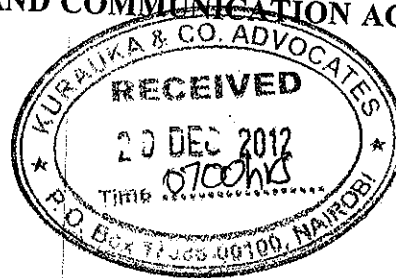
PETITIONER

VERSUS

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

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

COMMUNICATIONS COMMISSION OF KENYA.....3RD RESPONDENT



REPLYING AFFIDAVIT

I, Eng. LEO BORUETT of Post Office Box 14448-00800 Nairobi do hereby make oath and state that:

1. I am the Acting Director Multimedia Services Division of the 3rd Respondent herein and I have been authorized to swear this affidavit on its behalf.
2. I have read, have had explained to me and understood the Notice of Motion application dated 10th December 2012 supported by the affidavit of Stephen Mutoro sworn on the same date, the Petition dated 10th December 2012 and the verifying affidavit of Stephen Mutoro sworn on the same date and do swear this affidavit in opposition thereto.

3. I confirm that advertisements were made to the public through various media to the effect that Kenya would switch the Nairobi region from analogue to digital transmission on 31st December 2012. However, it is not true that the global date for switch off is 2015. I am aware each country had been given the liberty to choose the date for the switch off and had to comply latest by 2015.
4. The decision to migrate from analogue to digital migration cannot be said to be unreasonable and abrupt since it was conceived in 2006 following the participation of Kenya in t^{he} Regional Radio Communications Conference 2006 (RRC-06) held in Geneva where it was agreed that June 2015 would generally be the cutover date for the transition from analogue to digital television broadcasting. *Annexed herewith and marked ELB-1 is a copy of the Regional Communication Conference Report.*
5. I am indeed aware that the decision to migrate by 2012 was a joint decision made by the Countries of the East African Community. In fact Tanzania is scheduled to switch off analogue transmission to facilitate the migration on the same on 31/12/2012.
6. I am aware that in Kenya the initial *deadline was set for June 2012 and towards that end, the Government set up a Task Force Committee* to look into Kenya's migration and due consideration was made to protecting Kenyans as far as setting the timeline for migration is concerned. As stated in the report by the Task Force, the Committee was representative and included all relevant stakeholders. *Annexed herewith and marked ELB-2 is a copy of the Report by the Taskforce.* (See page 11 of the Task Force Report in this respect)
7. The pilot project for Nairobi was tested in 2009 following its inauguration by His Excellency the President Mwai Kibaki and the 3rd Respondent has made adequate preparation to ensure that the migration is successful.
8. Even though it had been proposed that the migration in Nairobi be undertaken in June 2012, that proposal was not realized for the reasons that the decoders that were intended to facilitate the migration were not readily available. It was projected that this challenge was to be addressed by 31st December 2012

9. I am aware that these challenges have now been addressed and Nairobi region is ready to move from analogue to digital transmission by 31st December 2012.

10. I thus verily believe that the decision to migrate is not abrupt, malicious or irrational since it has been within the public domain since 2006 when the move was conceived.

11. I am aware that the decision to migrate is for the benefit of Kenyans and the Government and Kenyans stand to derive lots of benefits from the migration to digital transmission in the following respects:

- (a) Kenyans will have access to clearer pictures and more/diverse content.
- (b) Broadcasting investors will have reduced operating costs since they will avoid the duplication of resources where broadcasters are maintaining a parallel analogue network and are also being accommodated in the digital platform.
- (c) The broadcasters will have an expanded coverage in the digital platform than they currently have in the analogue services, again to the ultimate benefit of the public;
- (d) Expanded capacity on digital platform means more demand for content hence new jobs will be created for creative artists and other Kenyans;
- (e) More channels will result in more competition amongst broadcasters hence cheaper advertising rates and ultimately, cheaper products for consumers;
- (f) Frequency Spectrum that will be released upon migration (known as digital dividend which is a national resource) will be available to support new services which will spur the country's economic growth and benefit the consumers at large (low tariffs, employment creation, increased accessibility).

For a detailed analysis of the benefits of the digital migration, see pages 4, 5, 9-10 of the Task Force Report above.

12. It is also not true that the decision to migrate was not publicized or that it was concealed from Kenyans. I am aware that the said decision to move from analogue to digital received nationwide publication between June and July in print and electronic media. In particular;

- (a) At least 198 advertisements were aired on various television stations being Citizen T.V, Nation, KBC, KTN, Kiss, and Family TV Channels;
- (b) At least 141 advertisements were aired on various radio channels in the said months of June and July;
- (c) At least 5 advertisements were made on print media on either half or full pages;
- (d) At least 6 advertisements were put on digital screen in various parts of Nairobi;
- (e) A seven-day road show in Nairobi and its environs was held starting 7th September 2012 where customers were allowed to publicly participate, share their views and gain knowledge on the process.

Annexed hereto and marked "ELB 3 and ELB 4 are copies of the road shows activation report between 7th and 16th September 2012 and the digital Migration Nairobi Roadshow Report respectively demonstrating the public awareness campaigns

13. The aim of the advertisements and road show campaigns was to inform, sensitize and alert the members of the public on the migration from analogue to digital migration and it is therefore untrue that insufficient public information, education and communication campaigns have been made to raise awareness on digital migration.
14. In preparing Nairobi for the migration, I am aware that the Government has commenced a phased analogue switch-off strategy so that those areas that have had the digital signal longer are usually targeted to be the ones to be switched off first. Other regions where the signal shall be tested later will be gradually switched off after the Government has notified the public. The justification for this phased approach to the migration is dealt with at pages 21-23 of the Task Force Report.
15. It is also not true that the move is unreasonable and expensive. I am aware that indeed, due consideration has been made to the members of the public in regard to the cost of such migration and in particular:
 - a. The government has zero-rated tax on importation of set top boxes;

- b. The cost of set top boxes has been on a downward trend due to the government intervention. The first generation set top boxes were retailing at over Kes. 10,000 to the less than half this cost.
- c. There has been decreasing prices as a result of increasing competition at the supply chain by issuing type approvals for a number of different models of compliant DVB-T2 set top boxes.
- d. Whereas three years ago we only had two models sold by two vendors, we currently have 15 models being sold by 15 different vendors thereby increasing competition and resulting in lower costing to the benefit of the consumer.
- e. The increasing number of suppliers of set top boxes goes a long way in bringing the cost down.
- f. Minimum specifications for a set top box were revised to make it possible for less expensive free to air set top boxes to be approved for sale in Kenya. This move coupled with the removal of duty on set top boxes has made set top boxes more affordable by consumers.

A detailed analysis of the consumer concerns arising from the digital migration and the steps that were to be taken to ameliorate them has been addressed at pages 26-30 in Chapter 7 of the Task Force Report. I verily believe that every effort has been taken to reduce any negative impact on the consuming public.

16. I am advised by the 3rd Respondent's advocates on record, Messrs. Mohammed Muigai Advocates, whose advice I verily believe to be sound, that the migration from analogue to digital will not curtail the freedom to information. It will in fact enhance the realization of that right and the efforts of the government are intended to discharge its obligation in this respect. For instance, the switch to digital will enable the consuming public to access more channels with a wider variety and better quality content using a single aerial at minimal cost.

17. In any event, I am aware there are other multiple sources of information readily available to the consuming public namely radio, internet and newspapers whose usage far outstrips television usage and from which members of the public may profit during the period of transition. Therefore, it is factually inaccurate to state that millions of Kenyans will be locked out from following civic education and other important matters relating to the general elections.

18. Further, no reliable data has been placed before the Court to demonstrate that the cost of the set top boxes is beyond the reach of a majority of Kenyans in general or those living in Nairobi in particular as suggested in the Petition.

19. I also verily believe that it is in fact in the wider interest of the public that Kenya migrates from analogue to digital migration which is in the wider goal of achieving Vision 2030.

20. Further, I verily believe that though the general switch off date is in the year 2015, there is no justifiable reason that Kenya should await for the last date to make the switch off. Kenya has been granted its level of appreciation depending on its level of preparedness and resources to determine when to make the switch. For the reasons stated above, it is in the ultimate public interest to have the phased switch off starting 31st December 2012 rather than have an order allowing for a last minute switch. There is no guarantee that a similar application will not be made at that time given that the current switch off was in the public domain since the year 2006.

21. What I have deponed to herein above is true to the best of my knowledge and belief save as to matters deponed on information and advice, sources whereof have been otherwise disclosed.

SWORN by the said

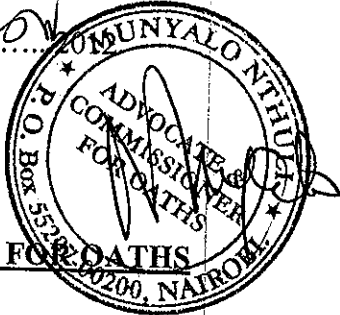
Eng. LEO BORUETT

At NAIROBI this 19/18 day

of

December

BEFORE ME



COMMISSIONER FOR OATHS

Deponent

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