Azzuno Enterprises v Communications Authority of Kenya (Appeal E001 of 2022) [2022] KECMAT 201 (KLR) (Civ) (1 July 2022) (Judgment)

Neutral citation: [2022] KECMAT 201 (KLR)

REPUBLIC OF KENYA

IN THE COMMUNICATION AND MULTIMEDIA APPEALS TRIBUNAL

CIVIL

APPEAL E001 OF 2022

ROSEMARY KURIA, CHAIR

JULY 1, 2022

BETWEEN

AZZUNO ENTERPRISES ..... APPELLANT

AND

COMMUNICATIONS AUTHORITY OF KENYA ..... RESPONDENT

JUDGMENT

1. The appellant has filed this appeal because it is aggrieved by the decision of the respondent in which it repossessed broadcasting frequency 100.8MHz. The decision was communicated through a letter dated December 2, 2021. The appellant initiated these proceedings through a letter of complaint to the tribunal dated January 21, 2022, but when the appeal came up for directions on February 4, 2022, the tribunal granted the Appellant leave to amend its pleadings to approach the tribunal through an appeal instead of a complaint.

2. The Appellant proceeded to file a memorandum of appeal, a witness statement and a list of documents all dated February 7, 2022. In its appeal, the Appellant prays for orders that: -

    a. The Appeal be allowed and this Honourable Tribunal be pleased to direct the Communications Authority to immediately re-assign theappellant their frequency (100.8MHz) so as to enable them resume business.

    b. This Honourable Tribunal be pleased to direct the Communications Authority to take(the) necessary action to stop interference by the previous broadcaster so as to enable theappellant to fully utilize the assigned frequency.

    c. The costs of the appeal be granted to theappellant against the respondent.

3. The Respondent filed a statement of facts dated March 16, 2022 together with its documents in support. The parties subsequently agreed to have the appeal disposed of through written submissions, which they filed and proceeded to highlight before us.

The Appellant's case

4. The appellant's case is that it applied for a commercial free to air broadcasting license through a letter dated April 4, 2019. That by a letter datedJuly 16, 2019, the respondent informed the appellant that a frequency 100.8MHz had been identified for assignment, and that said assignment would take effect from October 16, 2019. In the letter, therespondent outlined the conditions of the frequency assignment. One of the conditions was that the Appellant was to ensure that it first relocates another broadcaster who was utilizing the frequency before activating it. The appellant was also required to operationalize the frequency within 12 months from July 16, 2019. Additionally, the appellant was expected to pay an annual frequency license fee of KShs 130,000.

5. Theappellant further says that it wrote to the respondent on June 9, 2020 and April 22, 2021 indicating that it could not use the frequency due to constant interference, and thereby sought its intervention but receive no response. Then on January 14, 2022, theappellant received a letter dated December 2, 2021 from therespondent by post notifying it of repossession of frequency 100.8MHz.

6. The letter, which was referenced, "Notice of repossession of FM broadcasting frequency" read in part:

> "Subsequent to the assignment of the frequency, the Authority advised you to ensure that the other broadcaster utilizing this frequency relocates from the said frequency before you activate it on 1October 6, 2019. We note that you did not manage to do so and the above frequency has not been activated to date.
>
> Radio frequency is a scarce resource that is managed by the Authority in order to ensure optimal and efficient utilization free of interference in accordance with the provisions of the *Kenya Information and Communications Act*.
>
> We have not noted that it is not possible for your company to utilize the broadcasting frequency without causing harmful interference to other broadcasters as per Clause 2.11. The continued failure to comply with regulatory requirements related to your assignment amounts to a breach of the terms and conditions of the frequency assignment.
>
> Take notice that as a result of the failure to utilize the frequency assignment, the Authority has repossessed your frequency assignment with immediate effect".

The appellant was dissatisfied with this decision and therefore filed this appeal

The Respondent's case

7. The Respondent's case is that on 4th Aril 2019, Azzuno Enterprises Limited- applied for a Commercial FM broadcasting frequency. The frequency that was identified for allocation was Frequency 100.8MHz in Machakos, which was at the time allocated to Royal media Services for a period of 5 years from April 13, 2018. The respondent says that the appellant was therefore aware that the frequency to be allocated was at the time in use by Radio Citizen and was in fact in discussions with them presumably for the latter to give it up.

8. It was this reason that the letter of notification of assignment of frequency dated July 16, 2019 made the appellant ensuring that Radio Citizen relocated from the frequency a condition of the assignment. The appellant accepted this condition. It was also a condition of assignment that the appellant would

lose all the rights to the frequency if it failed to operationalize it within 12 months. The Appellant failed not only to have Radio Citizen relocate from the frequency but also to pay an application fee of KShs 1000 and the annual licence fee of KShs 130,000.

9. The respondent further indicates that no broadcasting licence was granted to the appellant as Radio Citizen was still using the frequency. As a result, the appellant wrote the letters dated June 16, 2020 and April 22, 2021 respectively indicating that it had been unable to fully utilize the frequency. In addition, on April 23, 2021, Adera & Kenyatta Advocates wrote a letter on behalf of a party interested in acquiring the licence from the appellant and sought to know who the current licence holder was. In a reply vide a letter dated May 4, 2021, the respondent informed said advocates that the current licensee was Royal Media Services Limited.

10. The respondent ultimately sent the appellant a notice of repossession of frequency dated December 2, 2021 which is the subject of this appeal by post on December 3, 2021 by post. The respondent therefore considers this appeal to be out of time because it should have been filed on or before February 4, 2022. On March 3, 2022, the respondent received a letter from Veronica Nekoye Sifuna, a partner in Azzuno Enterprises in she informed therespondent that the appeal had been filed without her permission.

The Appellant's submissions

12. The Appellant submits that it complied with all the conditions of assignment of broadcasting frequency 100.8 MHz Concerning the condition that the Appellant was to ensure that the other broadcaster utilizing the frequency relocated before activating it, it submits that the onus of relocating the broadcaster rested on the Respondent and that the Appellant's duty was only to wait for the relocation and then operationalize the frequency. The Appellant submitted that its duty was only to ensure that the broadcaster relocated but not to actually relocate it.

11. Theappellant submits that the respondent ignored its requests to intervene in the relocation, only to invoke its right to repossess the frequency when it accrued. The appellant further said that while it was a condition of assignment that it pays KShs 130,000 as the annual licence fee, the Respondent did not give non-payment of the fee as the reason for the repossession. The appellant also submitted that due process was not followed before the decision before the respondent's decision to repossess was arrived at. The appellant cited case law to support the submission that it was a requirement that the dictates of the *Fair Administrative Action Act* are followed. On the question of the validity of the appeal, the appellant submitted that the complaint by Veronica Nekoye Sifuna had not been formally placed before us, and that we should not therefore entertain it.

The Respondent's submissions

13. In its submissions, the respondent set out the procedure that it followed before the allocation of a frequency. The respondent urged that the appellant was required to comply with 14 conditions of assignment of a license, and to sign a declaration that it had understood the said conditions. The Respondent further submitted that the appellant had first claimed to have complied with the conditions of the assignment only to turn around and admit that it had not done by its failure to relocate the broadcaster who was using frequency 100.8MHz (Machakos).

14. In addition, the respondent urged, the appellant had also not paid the annual licence fee of KShs 130,000. The respondent further submitted that this Appeal is invalid because one of the partners of the appellant, Veronica Nekoye Sifuna had indicated that her partner ,Samuel Mathew Ochola Kwenda, had filed the appeal without securing her consent as contemplated by section 15 of the *Partnership Act*. The respondent cited case law to the effect that if a case is filed without the requisite legal authority, the advocate so filing is liable for costs once the case is struck out. The Respondent

further urged that if the Appellant is a business name as it insists, then the appeal should have been filed in the natural names of its owners, failure to do which the proceedings before us were a nullity.

15. The Respondent also submits that this appeal is time-barred. It urges that the Appellant's grievance that the Respondent failed to address its letters dated 9/6/2020 and 22/4/2021 opens up the scope of the appeal to what transpired more than 9 months before the filing of the appeal thereby making this appeal hopelessly out of time.

16. Concerning the merits of the appeal, the respondent urges that the appellant has approached the tribunal with unclean hands in that it had not complied with the terms of the notification of assignment of a frequency. Secondly, the respondent submitted that there is no right capable of enforcement because the frequency the subject of the appeal is currently assigned to a party that is not before this tribunal. Additionally, the respondent submits that the frequency licence to the appellant already automatically lapsed because the appellant did not comply with the conditions of the licence.

The Appellant's rejoinder

17. In its reply, the appellant submits that the dispute between the partners of the appellant is not an issue before this tribunal and had been improperly introduced by the respondent in the appeal. Further, the appellant urged that other than its misdescription of the respondent as a company there is no document before the tribunal describing it as such or as a partnership. The appellant submits that it has no problem with Royal Media Services who are said to be the current assignees of the frequency, and wonders how therespondent can purport to repossess the frequency from it if said frequency was being used by a third party.

Analysis and Finding

18. We have considered the pleadings, the evidence and the submissions by the parties and have determined the following to be the issues for our consideration: -

    a. Whether this appeal is properly before the tribunal

    b. Whether this appeal was filed out of time.

    c. Whether the respondent followed due process before arriving at the decision dated December 2, 2021.

    d. Whether this appeal should be allowed on its merits

    e. What orders should be made as to costs

    a. Whether this Appeal is properly before the tribunal:

19. The respondent has urged that this appeal is not properly us based on two reasons. The first is that Azzuno Enterprises is a partnership and that one of the partners, Samuel Ochola filed the appeal without the knowledge and/or concurrence of his partner Veronica Nekoye Sifuna, and that this is contrary to section 15(2), (4), (5) and (15) of the *Partnership Act.* The Respondent produced in evidence a letter dated February 23, 2022 which it had received from the said Ms. Sifuna in which she indicated that Mr. Ochola had not obtained her authority to file this appeal, and hence that this appeal is invalid.

20. We take the following view of this issue. First, Azzuno Enterprises is indeed a partnership, having been registered as a business of two individuals, Samuel Mathew Ochola Kwenda and Veronica Nekoye Sifuna, as can be seen in the certificate of registration exhibited by the respondent. Additionally, in

the absence of a partnership deed, the partnership is governed by the provisions of the *Partnership Act*. That said, it is our finding that Ms. Sifuna should have filed an application to be joined as a necessary or an interested party so that we could consider the issue raised by her letter to the respondent substantively. As is it now, we are not persuaded that the issue is properly before us, much less that we have jurisdiction to entertain it.

21. In case we are wrong on these two points, we find that it was not mandatory for Ms. Sifuna to authorize the filing of this appeal. The ratio decidendi in *Bugerere Coffee Growers Limited v Sebaduka & another* (1970) EA 147 which the respondent has cited and which supports a contrary finding is no longer considered good law. Indeed, *United Assurance Co Ltd v Attorney General* SCCA No. 1 of 1998, the Supreme Court of Uganda held in part:

> " .it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct counsel to file proceedings on behalf and in the names of the company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that company

22. Our application of this persuasive authority is that first Ms. Sifuna did not need to consent to Mr. Ochola's filing of this appeal. Secondly, if Ms. Sifuna did not approve of such filing, the responsibility lay on her, not the respondent to raise a challenge, precisely because the Respondent has no legal interest in the affairs of the partnership.

23. Azzuno Enterprises is registered as a business name, is the appeal a nullity because it was not filed in the names of natural persons? We think not. According to Order 30 Rule 1 of the *Civil Procedure Rules*, any two or more persons claiming or being liable as partners and carrying on business in Kenya may sue or be sued in the name of the firm in which such persons were partners at the time of the accruing of the cause of action (See also *Bhudia Builders and Erectors v Ima Agencies Limited* [2014] eKLR).

24. The second limb of the question of the propriety of this appeal is whether the appeal seeks to enforce rights conferred to a non-juristic person, namely Azzuno Enterprises Limited, to whom the letter of notification of assignment of frequency dated July 16, 2019 was addressed. We have perused the documents submitted on behalf of the Appellant and the Respondent in this appeal, and note the following. All the documents presented by Samuel Ochola identified the applicant for the frequency as Azzuno Enterprises. The application form was filled on behalf of Azzuno Enterprises. There is a certificate of registration of a business name No BN-L5CG8BB, a KRA pin certificate No P051820690K and a tax compliance certificate all in the name of Azzuno Enterprises. Additionally, all the letters Mr. Samuel Ochola in which he describes himself as a director has written to the Respondent bear the letterhead of Azzuno Enterprises.

25. It is the respondent who misdescribed the appellant as Azzuno Enterprises Limited in its letter dated July 16, 2019 and continued to do so right up to its letter of notice of repossession of the frequency dated December 2, 2021. We therefore find as a fact that the frequency assignment was for Azzuno Enterprises, and not for the said non-juristic Azzuno Enterprises Limited as suggested by the Respondent. The facts of this appeal are different from those in *Ruga Distributors Limited v Nairobi Bottlers Limited* [2015] eKLR which the Respondent has cited. The High Court struck out that case because the proprietor of Ruga Distributors, which was a business name, had sued as the non-existent Ruga Distributors Ltd and neglected to amend its pleadings when the Defendant denied the said plaintiff's description.

(b)Whether this appeal was filed out of time

26. The respondent has submitted that this appeal is time-barred because the decision appealed from was made onDecember 2, 2021, while the memorandum of appeal was filed on 7th February 2022, which is outside the sixty (60) days allowed by section 102F(2) of the *Kenya Information and Communications Act*. When was the impugned decision made? According to paragraph 24 of the Appellant's witness statement by Peter Ngige Njoroge dated March 16, 2022, the decision dated December 2, 2021 was sent to the Appellant by post the following day, that is to say, on 3rd December 2021. The Appellant says that it got it from the post office on January 14, 2022. We cannot tell why it took more than a month for the Appellant to do so.

27. The more relevant question though is this: did the appellant have a duty to establish that it did not receive the letter on December 2, 2021as suggested by the respondent? We think not. To begin with, the respondent already indicates that the letter was posted onDecember 3, 2021. Secondly, we find that it was therespondent's responsibility to ensure that the decision reached the appellant earliest possible. The Appellant does not say that it did not receive the decision; it only says that instead of the Respondent sending the decision to the Appellant's email address in its possession, it chose to use the slowest and most inefficient method of conveyance of the decision. This is a legitimate complaint: the very letter that communicated the decision has the email address, azzuno20@yahoo.com under the postal address. Therespondent cannot claim that the decision appealed from was made on December 2, 2021for the purpose of computing time.

28. While it is impossible to say precisely when theappellant would have been expected to have received the letter, it is reasonable to assume that it would not have happened earlier thanDecember 7, 2021or thereabouts which is 60 days before the date when the Appellant filed the memorandum of appeal. In any event, it is a matter of record that the appellant approached the tribunal through a letter of complaint dated January 21, 2022 filed on January 24, 2022. That was within time, and we find that to conclude that the appeal is invalid because it was initiated using the wrong form would be to pay undue regard to a procedural technicality which article 159(2) of the *Constitution* frowns upon.

Similarly, we are not persuaded that this appeal relates to the events preceding the decision dated 2nd December 2021.The memorandum of appeal dated February 7, 2022 specifically states that it is in respect of the Respondent's decision communicated vide the letter dated December 2, 2021, and there is no reason for us to find otherwise.

(c) Whether therespondent followed due process before arriving at the decision dated December 2, 2021.

29. The decision communicating the respondent's repossession of the frequency, which is decision is reproduced above, indicated that the repossession was effective immediately. the respondent made the decision in exercise of its mandate as a regulator. The exercise of that mandate must conform to the dictates of the *Constitution* as relates how administrative authority is to be exercised. Article 47 of the *Constitution* stipulates that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The *Fair Administrative Action Act* operationalizes this article, and provides the following in its section 4(4): -

> The administrator shall accord the person against whom administrative action is taken an opportunity to-
>
> a. Attend proceedings in person or in the presence of an expert of his choice
>
> b. Be heard

30. We find as a fact that the Respondent violated these provisions by failing to give the Appellant notice of the adverse administrative action it intended to take against it and by failing to give the Appellant an opportunity to make representations concerning the intended adverse administrative action. The constitutional imperative on fair administrative action is so stringent that it matters not that the Respondent would still have arrived at the same decision if it had accorded the Appellant due process.

31. High Court restated the law that administrative agencies must abide with the dictates of Article 47 of *the Constitution* and section 4 of the Fair Administrative Act in *Republic v Non-Governmental Organizations Co-ordination Board ex-parte Evans Kidero Foundation* [2017] eKLR saying:

> Therefore, by taking an action which clearly adversely affected the interests of the applicant the respondent was duty bound to ensure that in the process of arriving at its decision, the rules of fairness were adhered to. Otherwise such a decision would be tainted with illegality and procedural impropriety..... . Whereas, the decision may well be justified on merits, once it is found to violate the rules of natural justice it cannot be permitted to stand. ..... This was a restatement of Lord Wright's decision in *General Medical Council v Spackman* [1943] 2 All ER 337 cited with approval in *R v Vice Chancellor JKUAT* Misc. Appl. No. 30 of 2007 that: "If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision." 41. In *Ridg v Baldwin* [1963] 2 All ER 66 at 81, Lord Reid expressed himself as follows: "Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."

d. Whether this appeal should be allowed on its merits

32. Having found that due process was not followed in making the decision, and the decision thereof was thereby void, it will not be appropriate for us to examine its merits.

The upshot is that the tribunal make the unanimous orders that:

a. The respondent's decision in a letter to the Appellant dated December 2, 2021repossessing frequency 100.8MHz be and is hereby set aside.

b. The question of the assignment of frequency 100.8 MHz to the Appellant be and is referred back to therespondent for resolution in compliance with the *Fair Administrative Action Act*

c. Each party to bear its own costs.

It is so ordered.

DELIVERED VIRTUALLY ON 1ST JULY 2022 IN THE PRESENCE OF THE HONOURABLE MEMBERS OF THIS TRIBUNAL, COLLINS WANDERI, VIVIENNE ATIENO, DAMARIS NYABUTI AND RAMADHANI ABUBAKAR MUKIRA

In the presence of:-

Naibei for the Appellant

Muchiri appearing with Ms. Bhoke Inimah for the Respondent

C/A Joy Kendi

ROSEMARY KURIA