Communications Commission of Kenya & 3 others v Royal Media Servies Limited & 7 others; Nature Foundation Limited (Proposed Interested Party) (Petition 14 of 2014) [2014] KESC 52 (KLR) (25 July 2014) (Ruling)

Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others [2014] eKLR

Neutral citation: [2014] KESC 52 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 14 OF 2014

JB OJWANG & SC WANJALA, SCJJ

JULY 25, 2014

BETWEEN

COMMUNICATIONS COMMISSION OF KENYA ..... 1ST APPELLANT

THE HON ATTORNEY GENERAL ..... 2ND APPELLANT

THE MINISTRY OF INFORMATION COMMUNICATIONS AND TECHNOLOGY ..... 3RD APPELLANT

SIGNET KENYA LIMITED ..... 4TH APPELLANT

AND

ROYAL MEDIA SERVIES LIMITED ..... 1ST RESPONDENT

NATION MEDIA SERVICES LIMITED ..... 2ND RESPONDENT

STANDARD MEDIA GROUP LIMITED ..... 3RD RESPONDENT

CONSUMER FEDEATION OF KENYA (COFEK) ..... 4TH RESPONDENT

STAR TIMES MEDIA LIMITED ..... 5TH RESPONDENT

PAN AFRICAN NETWORK GROUP KENYA LIMITED ..... 6TH RESPONDENT

GOTV KENYA LIMITED ..... 7TH RESPONDENT

WEST MEDIA LIMITED ..... 8TH RESPONDENT

AND

NATURE FOUNDATION LIMITED ..... PROPOSED INTERESTED PARTY

(Being an application by Nature Foundation Limited to be enjoined in these proceedings as an Interested Party)

Supreme Court declines to enjoin a party as an interested party in an appeal

Reported by Andrew Halonyere & Valarie Adhiambo

Civil Practice and Procedure *- parties to a suit - joinder of parties -where a party sought to be enjoined to the proceedings as an interested party - what qualified a party to be enjoined as an interested party in a matter before the Supreme Court - whether the applicant qualified to be enjoined as an interested party in the case - Supreme Court Rules, 2012, rule 25.*

Jurisdiction *- jurisdiction of the Supreme Court - original jurisdiction of the Supreme Court - where the applicant alleged that it's constitutional right would be violated if he is not joined in a matter before the court - whether the Supreme Court had jurisdiction to hear a matter on violation of constitutional rights where the same was not raised before the lower courts.*

Appeals *- cross appeals - cross petitions - where an applicant sought leave to file and serve a cross petition - what was the difference between a cross appeal and a cross petition - who had a right to file a cross appeal or a cross petition - Supreme Court Rules, 2012, rule 38.*

Brief facts

This was an application by Nature Foundation Limited (applicants) where it sought to be enjoined as an interested party in an appeal before the court and a grant of leave to file and serve a cross petition to the appeal. The application was based on grounds that the applicant had been a party in other matters connected to the subject appeal and demonstrated a keen interest in liberalizing the broadcast airwaves in Kenya and on the basis of legitimate expectations drawn from its comprehension of the right in article 34 of the Constitution.

Issues

i. Whether the applicant could be admitted into the proceedings as an interested party.
ii. Whether a party could be joined as an interested party in an appeal before the Supreme Court where it never sought to be joined as such in the lower courts.
iii. Whether the Supreme Court had jurisdiction to hear a matter on violation of constitutional rights where the same was not raised before the lower courts.
iv. What was the difference between a cross-appeal and a cross-petition?
v. Who had a right to file a cross-appeal or a cross-petition?
vi. Whether the issues the applicant intended to raise in the cross-petition were new matters of law and facts.

Relevant provisions of the Law

Supreme Court Rules

Rule 25

(1) a person *may at any time in any proceedings before the Court* apply for leave to be enjoined as an interested party.

(2) An application under this rule shall include-

(a) a description of the interested party;

(b) *any prejudice that the interested party would suffer if* the *intervention was denied;* and

(c) the grounds or submissions to be advanced by the person interested in the proceeding, their relevance to the proceedings and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

Held

1. In developing the rich jurisprudence the court could not refrain from correcting glaring errors of law when presented by litigants and/ or their counsels. Counsel referred to rule 25 of the Supreme Court Rules, 2011 which were repealed. The correct rules were rule 25 Supreme Court Rules, 2012.

2. An interested party was one who had a stake in the proceedings though he or she was not a party to the case. He or she was one who would be affected by the decision of court when it was made either way. Such a person felt that his or her interests could not be well articulated unless he or she appeared in the proceedings and championed her case. The standards to be applied in considering whether or not the applicant could be enjoined as an interested party had not been established. The application was premised upon mere apprehension and speculation, that rights not-yet crystallized, could be violated.
3. In the appeal the applicant was neither a party at the High Court nor at the Court of Appeal. It was therefore not evident from the record that the applicant had a legitimate stake, or interest in the matter.
4. The applicant had not demonstrated how the ends of justice could be served better by enjoining it in the appeal. Despite the applicant's argument that its rights under article 34 of the Constitution would be violated if not allowed to join in the appeal, the proper forum of first instance in seeking the enforcement of the bill of rights was the High Court and not the Supreme Court.
5. A suit in court was a solemn process owned solely by the parties. That was the reason why there were laws and rules under the Civil Procedure Code, regarding parties to suit, and on who could be a party. A suit could be struck out if a wrong party was enjoined in it. Consequently where a person not initially a party to a suit was enjoined as an interested party, the new party could not be heard to seek to strike out the suit on grounds of defective pleadings.
6. The standards to be applied in considering whether or not the applicant could be joined as an interested party had not been established. The application was premised upon mere apprehension and speculation that rights that had not crystallized would be violated.
7. There was a difference between a cross-appeal and a cross-petition. A cross-appeal was an action by a respondent, who intended to counter an appellant's cause in an appeal, with the view of obtaining certain relief(s) from the court. A cross-petition on the other hand, was an action by a defendant in first-instance claims, intended to counter the claim of a petitioner with the view of obtaining certain remedies. The applicant, therefore, did not bear the right to file a cross-petition or even a cross-appeal, as that was a preserve of a respondent who had a claim against another party already in the appeal (cross-appeal), or another party to the suit (cross-petition).
8. While the nature of the questions whether the applicants right under article 34 of the Constitution was being hindered by the 1st,2nd, and 3rd respondents monopolizing the broadcasting frequencies could have availed the applicant the benefit of binding precedent, the same could not accord it the intended remedies as those could only be sought from the High Court. In those circumstances it was clear that no prejudice would be occasioned to the applicant if it were not enjoined, since there were still open avenues for pursuing its course.
9. The applicant, upon being enjoined, was to contend that it had a legitimate expectation to join the broadcasting industry, by virtue of article 34 of the Constitution. From the application, the cross-petition was to urge the Supreme Court to find that media space was not to be monopolized by a few entities, as Parliament had already, by express legislation, opened it up. Those were new issues that required adjudication by a court of original jurisdiction.
10. If the Supreme Court were to consider the matters raised it would not be providing further input, but merely undermining the role of other courts and encroaching on the unlimited original jurisdiction of the High Court which was provided for under article 165(3)(a) of the Constitution. Further the substantive matters in the applicant's petition remained unanswered as they had not yet been canvassed in the proper forum. As a court not furnished with facts the court ran a risk of perpetuating injustice as both parties were to first be heard in the appropriate court before preferring an appeal either to the Court of Appeal or to the Supreme Court. It was such initial hearing on fact that constituted the centrepiece of the right to be heard and to fair trial.
11. The Supreme Court could not allow the applicant to raise the issues intended in the cross- petition. The applicant's recourse could be found in applying to be joined in similar cases pending before the High

Court, and at the discretion of that court. Alternatively, the applicant could have opted to institute fresh proceedings at the appropriate forum.

12. There was similarity between the issues raised by the applicant, and those that arose in Constitutional Petition No. 244 of 2011 at the High Court. Determining those issues at the final stage, in view of the terms of article 163(7) of the Constitution, could have encroached on the independent mandate of the High Court to exercise its jurisdiction, a prospect which could not be entertained by the court. Where litigation was properly commenced, the High Court had the professional aptitude to deal with the issues before it, and it was the courts' obligation to sustain such constitutional mandate.
13. The application was not meritorious. It was plainly speculative and as such, misconceived, and was an abuse of the process of the court. That being an ordinary civil application, the court had broad latitude to exercise its discretion in determining the issue of the costs. Not all the parties were involved in the active canvassing of the application, and as such the order as to costs was to be restricted accordingly.

Application dismissed.

Orders

i. *The application was dismissed with costs of the 1st, 2nd, 3rd, and 4th, appellants and 1st, 2nd, 3rd, and 4th respondents to be borne by the applicants.*
ii. *The 4th, 5th, 6th and 8th respondents were to bear their own costs.*

Citations

East Africa

1. *Kenya Section of the International Commission of Jurists v Attorney-General & 2 others* Criminal Appeal No 1 of 2012- (Mentioned)
2. *Ngoge ,Peter Oduor v Francis Ole Kaparo & 5 others* Petition No 2 of 2012 - (Followed)
3. *Media Owners Association v Attorney General & 5 others* Constitutional Petition No 244 & 284 2011 - (Mentioned)
4. *Meme v Republic* [2004] 1 EA 124 – (Followed)
5. *Republic v Communications Commission of Kenya ex parte Magic Radio Limited,* Miscellaneous Civil Application Number (JR) 284 of 2011-(Mentioned)
6. *Salat , Nicholas Kiptoo Arap Korir Salat v* Independent Electoral & Boundaries Commission & 7 others Civil Application No16 of 2014 – (Followed)
7. *Shabbir Ali Jusab and 2 others v Anaar Osman Gamrai & another* Petition No 1 of 2013 – (Followed)
8. *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* Petition 12 of 2013 - (Followed)
9. *Wanjohi ,Mike v Steven Kariuki & 2 others* Petition No 2A of 2014 - (Followed)

Statutes

East Africa

1. Constitution of Kenya,2010 article 33, 34(3)(b); 58(5); 163(3)(a)(6) - (Interpreted)
2. Kenya Communications (Broadcasting) Regulations,2010 (Act No 1 of 2009 s 3 Sub Leg) regulation 46(1), (2) (3) - (Interpreted)
3. Kenya Information and Communications Act,1998 (Act No 1 of 2009 s 3) section 46A (a) (d); 46D (2)(b) (d); 46K(a) - (Interpreted)
4. Supreme Court Act,2011 (Act No 7 of 2011) section 21(2) - (Interpreted)
5. Supreme Court Rules, 2011 (Act No 7 of 2011 Sub Leg) Repealed rule 25,38, 54(1)(a) (2) - (Interpreted)
6. Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg) rule 25(2)(a)(c)-(Interpreted)

Text & Journals

1. Garner BA., (Ed) 2009 *Black's Law Dictionary,* Standard St Paul Minnesota:West Group 9th edn p 133

RULING

A. Introduction

1. This is an application dated 23rd May, 2014, filed pursuant to Rule 25 of the Supreme Court Rules, 2011, seeking to have Nature Foundation Limited (the applicant herein) enjoined as an Interested Party to the proceedings, and granted of leave to file and serve a cross-petition to the appeal.

B. The Application

2. The essence of the application was elaborated in the body of the application and in the supporting affidavit of Alfrida Boinett. The deponent averred that the applicant had been a party in other matters connected to the subject of the present appeal, and had demonstrated a keen interest in liberalizing the broadcast-airwaves in Kenya. In addition, it was deponed that the applicant was the beneficiary of a Court decision allowing it the privilege to be a player in the media industry, but which finding had been compromised by the 1st, 2nd and 3rd respondents. As a result, the applicant, by the application, gives realization to the said privilege. It was averred that the applicant was the only party in a position to present certain pertinent information to the Court at the hearing of the appeal, and that in the absence of such information, the Court would be incapable of reaching a considered and just determination.

3. The applicant stated that he would be seeking the dismissal of the petition of appeal, on the grounds that the 1st, 2nd and 3rd respondents lacked the operating mandate, as their licences had expired and had not been renewed, pursuant to Section 46 of the *Kenya Information and Communications Act* (Cap 411A), Laws of Kenya) and that, therefore, they had been operating illegally.

4. The applicant had petitioned the High Court in Nakuru Republic v. The Minister for Information and Communications & Another ex-parte The Nature Foundation Limited, Misc. Civil Application No. (JR) 51 of 2010 (Misc. Civil Application No. (JR) 51 of 2010) for an Order of Certiorari to quash Regulation 46(1), (2) and (3) of the Kenya Communications (Broadcasting) Regulations for the reason that they were ultra vires Sections 46A (a) and (d), 46D (2)(b) and (d) and 46K (a) of the Act. The High Court held that Regulation 46(3) had been made contrary to the intent and objects of the Act, and therefore fell outside the mandate of the Communications Commission of Kenya (CCK). However, the Court declined to grant Orders of certiorari, as the applicant failed to demonstrate sufficient interest or standing in the matter before it.

5. According to the applicant, this Regulation (46) having been declared ultra vires the parent Act, by the High Court, was null and void, and anything done in pursuance thereof was illegal. To the applicant, this decision meant that the 1st, 2nd & 3rd respondents were operating illegally, having failed to apply for new broadcasting licences from the 1st appellant, pursuant to Section 46 of the Act.

6. It was clear from the application that the applicant intended to join the broadcast industry, on the basis of a legitimate expectation drawn from its own comprehension of the right enshrined under Article 34 of *the Constitution*. According to the applicant, this right was being hindered by the 1st, 2nd and 3rd respondents, who continued to monopolise the broadcasting frequencies. It was the applicant's intent, upon obtaining joinder in the appeal, to make out a case for an open and democratic media space, in place of a unilateral domination by a few players.

C. The Parties' Respective Cases

The Applicant

7. In addition to the averments made in the application and the supporting affidavit, counsel for the applicant, Mr. Oriema argued that the applicant had been involved in similar litigation and had been a party in Republic v. The Minister for Information and Communications & Another ex-parte The Nature Foundation Limited, Misc. Civil Application No. (JR.) 51 of 2010, which sought orders of certiorari to quash Regulations 46(1), (2) and (3) of the Kenya Communications (Broadcasting) Regulations, for the reason that they were ultra vires Sections 46A (a) and (d), 46D (2)(b) and (d), and 46K(a) of the Act. Counsel submitted that the applicant had a legitimate cause to be enjoined in these proceedings, because it was litigating in favour of liberalizing the broadcasting frequencies on its own behalf, and on behalf of other interested and affected parties, and members of the general public. The applicant intended to demonstrate that the frequencies were unobtainable because the 1st, 2nd and 3rd respondents were holding the same illegally, under the sanction of the 1st appellant. The applicant would thus be asking the Court to order a release of those frequencies, opening up opportunities to others.

The 1st Appellant

8. Learned senior counsel, Mr. Fred Ojiambo, appearing with learned counsel, Mr. Kilonzo, for the 1st appellant, submitted that the applicant had neither applied for nor obtained any broadcasting frequencies and, therefore, had no right or interest in the appeal before the Court. Counsel submitted that the Orders sought by the applicant would have the effect of disorganizing the time-frame allocated to the hearing and determination of the appeal. He submitted that the present appeal arose from the decision of the High Court in Royal Media Services Ltd & 2 Others v. Attorney General & 8 Others, H.C. Constitutional Petition No 557 of 2013 (H.C Constitutional Petition No 557 of 2013) which was subsequently the subject of first appeal in Royal Media Services Ltd & 2 Others v. Attorney General & 8 Others, Civil Appeal No. 4 of 2014, and now the subject of second appeal before this Court; and that this Court was sitting in exercise of its appellate jurisdiction, and not its original jurisdiction. Counsel urged that the applicant was seeking a remedy in the reserve of the High Court, and not this Court sitting on appeal. In addition, it was submitted that the public interest issues alluded to by the applicant were live in other Courts, and this Court would have an opportunity to address them subsequently.

9. Counsel submitted that the applicant had not sought joinder in the proceedings before the High Court or the Court of Appeal, and had not offered any explanation as to why such joinder had not been sought at those earlier stages.

10. Learned counsel urged that the applicant was seeking to introduce a new cause of action, with new sets of fact neither laid before the High Court nor the Court of Appeal. Counsel relied on the cases of Kenya Section of the International Commission of Jurists v. The Attorney-General & 2 Others, Sup. Ct. Criminal Appeal No. 1 of 2012; 2012 eKLR and Peter Oduor Ngoge v Francis Ole Kaparo & 5 Others, Sup. Ct Petition No. 2 of 2012; 2012 eKLR, for the proposition that the applicant could not advance a cause of first instance at this appellate forum.

11. It was submitted that the issues intended by the applicant were also directly and substantially in issue before the High Court in the case of Media Owners Association v. The Attorney General & Others, H.C Constitutional Petition No. 244 of 2011, in which a cross-petition raising similar issues as those in the proposed cross-petition has been filed. It was urged that similar issues to those proposed by the

applicant, were also directly in issue in Republic v The Communications Commission of Kenya ex parte Magic Radio Limited, Nairobi, Misc. Civil Application Number (JR) 284 of 2011; and thus, allowing the admission of the applicant as an Interested Party to the proceedings, and the subsequent filing of cross-petition, would prejudice the matters pending before the High Court.

The 2nd & 4th Appellants and the 7th Respondent

12. Learned counsel, Mr. Kilonzo, holding brief for learned counsel, Mr. Njoroge for the 2nd appellant, learned counsel, Mr. Saende for the 4th appellant, and learned counsel, Mr. Monari for the 7th respondent contested the application, and argued that the application as presented, contemplated two possible options: first, joinder of the applicant as an interested party; and secondly, corresponding leave to file a cross-petition to the appeal. Counsel urged that the primary purpose of the intended cross-petition was the dismissal of the appeal, and that in the circumstances, the proposed role of the applicant as intervener was in the nature of a sham; and appellant was a stranger to the proceedings. Learned counsel further submitted that, Rule 38 of the Supreme Court Rules only allows a respondent to file a cross-appeal, but not a non-party to the proceedings.

13. In conclusion, learned counsel urged the Court to grant costs, in compensation for loss of time occasioned by the instant application.

The 1st 2nd and 3rd Respondents

14. The application was contested by the 1st, 2nd and 3rd respondents in their grounds of opposition dated 21st July, 2014, in which they perceived the application as an abuse of Court process, in the following particulars:

> amicus curiae and who must establish expertise, impartiality and independence, none of which elements had been established by the applicant;15 Learned counsel for the 1st, 2nd and 3rd respondents, Mr. Kimani submitted that the application did not present an ordinary case for joinder, but one that amounted to an interference with the setting for an appeal before this Court. Counsel submitted that the applicant had provided information confirming that it was indeed a party in a concluded cause before the High Court in Nakuru (Misc. Civil Application No. (JR.) 51 of 2010), and in that case, the High Court dismissed the claim, though it agreed obiter, with the applicant that Regulation 46(3) had been made contrary to the intent and objects of the Act, and so was inconsistent with the mandate of CCK.

16. Counsel submitted that the applicant's true intentions were to present a fresh cause of action at this advanced stage, and that the application ought to be dismissed with costs.

The Applicant's Response

17. Learned counsel for the applicant invited the Court to recognise that the application had been filed well before the appeal was set down for hearing, and that the intention of the applicant was not to delay the hearing and determination of the appeal.

18. Counsel urged that the applicant intended to present vital information to the Court, arising from statute as well as judicial pronouncements, with the object of aiding the Court to reach a considered determination.

D. The Issues For Determination

19. The issues emerging for resolution in this application are as follows:

I. whether the applicant should be enjoined to these proceedings as an Interested Party, pursuant to Rule 25 of the Supreme Court Rules, 2012, and whether the applicant should be allowed to file a cross-petition at this stage of the proceedings;

II. whether the issues intended in the cross-petition are already in issue before this Court;

III. whether the applicant intends to argue a fresh cause, by way of cross-petition;

IV. whether there are similar matters pending before the High Court.costsE.

Analysis

20. The applicant seeks to be enjoined in the appeal as an Interested Party, with further leave to file and serve a cross-petition. Before considering the merits of the application, we wish to correct certain errors on the face of the application. The application is premised upon Rule 25 of the Supreme Court Rules, 2011. The correct Rule is Rule 25 of the Supreme Court Rules, 2012. As noted in Nicholas Kiptoo Arap Korir Salat v. The Independent Electoral and Boundaries Commission & 7 Others, Sup Ct. Civil Application No.16 of 2014; 2014 eKLR, the Supreme Court Rules, 2011 were repealed and therefore no longer in operation. In this case, the Court held:

> In developing this rich jurisprudence, the Court will not refrain from correcting glaring errors of law when presented by litigants and/or counsel.....Counsel referred to the Supreme Court, Rules 2011 which were repealed on 26th October, 2012 via Legal Notice No. 123 by the enactment of Supreme Court Rules, 2012."

21. Rule 25 of the Supreme Court Rules, 2012 provides:

1. A person may at any time in any proceedings before the Court apply for leave to be enjoined as an interested party.

   an application under this rule shall include-

   a) a description of the interested party;

   b) <u>any prejudice that the interested party would suffer if the intervention was denied; and the grounds or submissions to be advanced</u> by the person interested in the proceeding, their relevance to the proceedings and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties" emphasis supplied.

22. In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court's Ruling in the Mumo Matemo case where the Court (at paragraphs 14 and 18) held:

> An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause..."

23. Similarly, in the case of Meme v. Republic,2004 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;

(ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;

(iii) joinder to prevent a likely course of proliferated litigation."

24. We ask ourselves the following questions: (a) what is the intended interested party's stake and relevance in the proceedings? and (b) will the intended interested party suffer any prejudice if denied joinder?

25. In accordance with Rule 25 (2)(a), the applicant has been described as a limited liability company undertaking diverse public-interest projects related to public awareness, environmental conservation, community development, and empowerment through various forms and mediums in Kenya. In accordance with Rule 25(2)(c), the applicant also stated that its relevance in these proceedings was drawn from its litigation history, in support of liberalizing the broadcasting frequencies in Kenya, on its own behalf and on behalf of other interested parties and members of the general public. We note, however, that in the instant appeal, the applicant was neither a party at the High Court nor at the Court of Appeal. It is, therefore, not evident from the record that the applicant has a legitimate stake, or interest in the matter.

26. The matter giving rise to this appeal was first determined in High Court Constitutional Petition No. 557 of 2013, in which Judgement was delivered on 23rdDecember, 2013. The 1st, 2ndand 3rd respondents being aggrieved by the decision of the High Court, filed an appeal before the Court of Appeal (Civil Appeal No. 4 of 2014). On 28th March, 2014, the Court of Appeal allowed the said appeal with costs, and which decision is now the subject of the present appeal. The applicant now seeks to be enjoined in this matter, even though it was neither a party at the High Court nor at the Court of Appeal. The applicant has not demonstrated how the ends of justice would better be served by enjoining it in the appeal. Despite the applicant's argument that its rights under Article 34 of *the Constitution* will be violated if not allowed to join in the appeal, we note that the proper forum of first instance, in seeking the enforcement of the Bill of Rights, is the High Court, and not this Court.

27. We cannot exercise our discretion to enjoin a party that disguises itself as an Interested Party, while in actual fact merely seeking to institute fresh cause. On this point, we are guided by the principle which we had pronounced in the Mumo Matemo case (at paragraph 24), as follows:

> A suit in Court is a 'solemn' process, 'owned' solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings."

28. In our view, the standards to be applied in considering whether or not the applicant should be enjoined as an Interested Party, have not been established. This application, in our perception, is premised upon mere apprehension and speculation, that rights not-yet crystallized, will be violated.

29. The applicant also seeks leave to file a cross-petition to the appeal. Part 6 of the Supreme Court Rules, 2012 regulates the mode of filing appeals before this Court, and makes reference to a cross-appeal, as opposed to a cross-petition. Rule 38(1) of the Rules provides the procedure for filing a cross -appeal as follows:

> A respondent who intends to cross-appeal shall specify the grounds of contention and the nature of the relief which the respondent seeks from the Court" emphasis supplied.

30. The Black's Law Dictionary, 9th ed (at page 133) defines "cross-appeal" as follows:

to seek review (from a lower court's decision) by a higher court"

And "cross-petition" (p.433) as follows:

i. a claim asserted by a defendant against another party to the action;

ii. claim asserted by a defendant against a person not a party to the action for a matter relating to the subject of the action."

31. From the above definitions, there is a difference between a cross-appeal and a cross-petition. A cross-appeal is an action by a respondent, who intends to counter an appellant's cause in an appeal, with the view of obtaining certain relief(s) from the Court. A cross-petition on the other hand, is an action by a defendant in first-instance claims, intending to counter the claim of a petitioner with the view of obtaining certain remedies. The applicant, therefore, does not bear the right to file a cross-petition or even a cross-appeal, as this is a preserve of a respondent who has a claim against another party already in the appeal (cross-appeal), or another party to the suit (cross-petition).

32. Learned Senior Counsel, Mr. Ojiambo submitted that the issues which the applicant sought to raise were live, before this Court. We have already outlined the issues that the applicant intends to raise, upon being enjoined to the appeal. Does the applicant intend to introduce arguments different from those of the other parties? The 2nd appellant intimates that, in Attorney General & Another v Royal Media Services, Sup Ct. Petition No. 14C of 2014, one of the broad questions of law that this Court will be asked to consider is, whether the rights of the 1st, 2nd and 3rd respondents, as enshrined under Article 34 of *the Constitution*, have been violated. Also in issue is the question whether the 1st, 2nd and 3rd respondents are acting illegally. The 1st appellant asks the Court to address inter alia, the constitutionality of CCK's existence; the constitutionality of the Regulations; the scope of legitimate expectation by the 1st, 2nd and 3rd respondents under the terms of Articles 33 and 34 of *the Constitution*; the scope of the judicial mandate in respect of Article 33 and 34; the appellate jurisdiction; the doctrine of the separation of powers; and the concept of judicial restraint.

33. In Communications Commission of Kenya & 3 others v. Royal Media Group & 7 Others, Sup Ct Petition No. 14 of 2014, the 1st Respondent contends that the composition of CCK at the time the frequencies were allocated was not as envisaged under Article 34(3)(b) of *the Constitution*, and that CCK, therefore, lacked the legal competence to regulate airwaves after the promulgation of *the Constitution*. The 1st respondent also argues that the Broadcasting Signal Distribution (BSD) licences procurement-process was conducted in an illegal manner. Similar issues have been raised by other parties to the appeal, and will be addressed in the main appeal. While the nature of these questions will avail the applicant the benefit of binding precedent, the same shall not accord it the intended remedies, as these can only be sought from the High Court. In these circumstances, it is clear to us that no prejudice will be occasioned to the applicant if not enjoined, since there are still open avenues for pursuing its cause.

34. Learned Senior Counsel, Mr. Ojiambo had expressed an apprehension that the intended cross-petition would raise new matters of law and fact, which had not previously been adjudicated upon at the High Court or the Court of Appeal.

35. We note from the application that the applicant, upon being enjoined, will be contending that it has a legitimate expectation to join the broadcasting industry, by virtue of Article 34 of *the Constitution*. It appears from the application that, the cross-petition will be urging this Court to find that media space

should not be monopolized by a few entities, as Parliament has already, by express legislation, opened it up. These are new issues requiring adjudication by a Court of original jurisdiction.

36. This Court will only exercise original jurisdiction pursuant to specific provisions of *the Constitution*: Article 58(5) (in determining the validity of a state of emergency); Article 163(3)(a) (in hearing disputes relating to the elections to the office of the President); and Article 163 (6) (relating to Advisory Opinions). This Court, in Peter Oduor Ngoge v. Francis Ole Kaparo and 5 Others, Sup Ct. Petition No. 2 of 2012; 2012 eKLR, (Ojwang & Njoki SCJJ) determined that:

> The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals....."

37. That same principle is stated in Shabbir Ali Jusab and 2 others v. Anaar Osman Gamrai and Another, Sup Ct. Petition No. 1 of 2013, (at paragraphs 39 and 40):

> If this Court were to consider the matters raised, we would not be providing our further input, but merely undermining the role of the other Courts, and encroaching on the unlimited original jurisdiction of the High Court, which is provided for under Article 165 (3)(a) of *the Constitution*....."
>
> "Further, the substantive matters in the appellant's petition remain unanswered, as they have not yet been canvassed in the proper forum. As a Court not furnished with facts, we run the risk of perpetuating an injustice, as both parties should first be heard in the appropriate Court, before preferring an appeal either to the Court of Appeal or to this Court. It is such initial hearing on fact that constitutes the centerpiece of the right to be heard, and to fair trial."

38. Recently, in the case of Zacharia Okoth Obado v. Edward Akong'o Oyugi & 2 Others, Sup Ct. Petition No 4 of 2014, the Court (at paragraph 84) thus held:

The affidavit sought to introduce the issue of rigging, which had been canvassed neither at the High Court, nor at the Court of Appeal. This Court has on previous occasions pronounced itself on the nature of an appeal, and the extent of our appellate jurisdiction. In Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board, SC Petition No. 5 of 2012, this Court held that:

> 'In our opinion, a question involving the interpretation or application of *the Constitution* that is integrally linked to the main cause in a superior Court of first instance is to be resolved at that forum in the first place, before an appeal can be entertained. Where, before such a Court, parties raise a question of interpretation or application of *the Constitution* that has only a limited bearing on the merits of the main cause, the Court may decline to determine the secondary claim if in its opinion, this will distract its judicious determination of the main cause; and a collateral cause thus declined, generally falls outside the jurisdiction of the Supreme Court'.
>
> We are of the opinion that the issue of rigging was a new issue, which the 1st respondent sought to introduce for the first time at the Supreme Court, and therefore, it cannot be entertained."

39. On the basis of those principles, we cannot allow the applicant to raise the issues intended in the cross-petition. The applicant's recourse may be found in applying to be enjoined in similar cases pending

before the High Court, and at the discretion of that Court. Alternatively, the applicant may opt to institute fresh proceedings at the appropriate forum.

40. It is clear that there is a similarity between the issues raised by the applicant, and those arising in Constitutional Petition No. 244 of 2011 at the High Court. Determining those issues at this final stage, in view of the terms of Article 163(7) of *the Constitution*, would encroach on the independent mandate of the High Court to exercise its jurisdiction, a prospect not to be entertained by this Court. Where litigation is properly commenced, the High Court has the professional aptitude to deal with the issues before it, and it is our obligation to sustain such constitutional mandate.

41. Learned counsel Mr. Kilonzo for the 1st appellant, prayed for a dismissal of the application, and for an Order for costs, against the applicants. Counsel was of the view that the time expended in addressing the application could have been used in preparing the ground for the appeal. Other learned counsel also sought the dismissal of the application, and an Order for costs in their favour.

42. Section 21(2) of the *Supreme Court Act* provides that:

> In any proceedings, the Supreme Court may make any ancillary or interlocutory orders, including any orders as to costs that it thinks fit to award".

43. This Court had the opportunity of pronouncing itself on the issue of costs in Mike Wanjohi v. Steven Kariuki & Others, Sup. Ct. Petition No. 2A of 2014 by affirming its holding in Jasbir Singh Rai & 3 Others v. Tarlochan Singh & 4 Others, Sup Ct. Petition 4 of 2012; 2013 eKLR (at paragraphs 120 and 121):

> It emerges that the award of costs would normally be guided by the principle that 'costs follow the event': the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice....."
>
> "In instances where there is a vexatious claim brought by the petitioner or the respondents, the Court will determine whether a party is to be disallowed costs, or the burden of paying costs will fall on such a party... The scope for discretion in this regard, it is clear, is more limited than is the case in normal civil procedure. The purpose is to compensate the successful litigant for expenses incurred in prosecuting the case."

44. We are convinced that the current application was not meritorious, and should not have come before this Court in the first place. It is plainly speculative and as such, misconceived, and is an abuse of the process of the Court. This being an ordinary civil application, we find that we have a broad latitude to exercise our discretion in determining the issue of the costs.

45. We note that, not all the parties were involved in the active canvassing of the application; and we shall restrict our Order as to costs accordingly.

F. Orders

46. In all the circumstances of this matter, our Orders shall be as follows:

    a. The application dated 23rd May, 2014 is hereby dismissed.

    b. The costs of the 1st, 2nd, 3rd and 4th appellants and the 1st, 2nd, 3rd and 7th respondents shall be borne by the Applicant.

c. The 4th, 5th, 6th and 8th respondents shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY, 2014.

J.B. OJWANG

JUSTICE OF THE SUPREME COURT

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar, Supreme Court