IN THE COURT OF APPEAL

AT NAIROBI

CORAM: G.B.M. KARIUKI, MWILU & MOHAMMED, JJ.A.

CIVIL APPLICATION NO. NAI 44 OF 2013 [UR 28/2013]

BETWEEN

ROYAL MEDIA SERVICES LTD ..... APPLICANT

AND

1. **THE ATTORNEY GENERAL**
2. **MINISTER OF INFORMATION & COMMUNICATION**
3. **COMMUNICATION COMMISSION OF KENYA ..... RESPONDENTS**

(Application for injunction pending the hearing and determination of Civil Appeal No. 43 of 2013 being an appeal from the judgment & decree of the High Court of Kenya at Nairobi (Majanja, J) dated 18th January, 2013

in

HC PETITION NO. 346 OF 2012)

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RULING OF THE COURT

The Application under consideration is brought by the ***ROYAL MEDIA SERVICES LTD*****,** *[hereinafter the applicant]*, under the provisions of ***Sections 3A and 3B of the Appellate Jurisdiction Act and Rules 5(2) (b)*** and ***Rule 43 of the Court of Appeal Rules*** to bar the ***COMMUNICATION COMMISSION OF KENYA***, *[hereinafter the 3rd respondent],* and seeks the following orders:

1. *THAT the 3rd Respondent be restrained from usurping the licensing and regulatory powers and functions of the body to be established by Parliament under Article 34(3) and 34(5) of the Constitution pending the hearing and determination of the applicant's Civil Appeal no. 43 of 2013, Royal Media Services Ltd vs. The Attorney General, Minister of Information & Broadcasting and Communications Commission of Kenya.*

2. *THAT the 3rd Respondent be restrained from taking any further steps or enforcing demands and notices in the letters dated 6th March, 2012, (in respect of 94.2 MHz Mazeras), 3rd August, 2012, (in respect of 100.4 MHz Kiboswa Kisumu), the notice of violation issued on 3rd August and the notice issued on 17th May, 2012 published in the Daily Nation pending the hearing and determination of the Civil Appeal no. 43 of 2013 being an appeal from the judgment delivered on 18th January 2013, pending the determination of the applicant's appeal against the judgment of the superior court delivered on 18th January, 2013.*

3. *THAT the costs of and incidental to this application abide the result of the said appeal.*

The application is founded on the grounds set out on the face thereof and also on the averments deponed to in the supporting affidavit of S.K Macharia, a shareholder and Chairman of the applicant. The main grounds on the face of the application are that:-

1. *On 30th January, 2013, the superior court granted to the applicant the orders sought herein for a period of 30 days to enable it to file in this Honourable Court its appeal and thereafter to move it for further orders and it is not possible for the appeal lodged to be heard and determined by this Honorable Court within 30 days;*

2. *On 19th February 2013, the applicant filed in this Honourable Court Civil Appeal No. 43 of 2013, Royal Media Services Ltd. vs. The Attorney General, Minister of Information & Broadcasting and Communications Commission of Kenya;*

3. *The applicant's intended appeal is arguable;*

4. *Unless the prayer of injunction sought is granted, the intended appeal will be rendered nugatory.*

The supporting affidavit echoes mostly the grounds set out on the face of the application to urge that the intended appeal is arguable and that if the order of stay is not granted the appeal will be rendered nugatory. The reasons for the arguability of the appeal are set out in subparagraphs, i-xiv of paragraph (4) of the application while paragraph (5) sets out the grounds in support of the nugatory principle.

The application was opposed by the 3rd Respondent whose replying affidavit was sworn on 23rd April, 2013 by one **John Omo** who described himself as the Commission Secretary of the 3rd Respondent. In the said affidavit, he averred, *inter alia,* that the application was frivolous as the orders sought offended the principle of proportionality because it would create a lacuna in the regulation of a vital sector. He further averred that the frequency of spectrum is a scarce public resource allocated in accordance with complex international agreements and without proper regulation for the use of frequencies, the end result would be chaos or lead to the breakdown of law and order. He further averred that the self-assigned frequencies poses serious risks by threatening the safety of air travel, public safety and security.

BRIEF BACKGROUND

The genesis of the application is a public notice dated 17th May, 2012, wherein the 3rd respondent issued a warning against use and operation of certain frequencies that do not have valid licenses. The notice thus directed the users of the said frequencies to surrender the same within thirty [30] days, failing which the 3rd respondent would take necessary action.

The said frequencies were being operated by the applicant which contended that the same were allocated to it and that it had used them for more than ten years. It further contended that it was entitled to operate the said frequencies until the body envisaged by ***Article 34 (5) of the Constitution*** is established. ***Article 34 (5) of the Constitution*** provides for the establishment of a body to be in charge of licensing and issuing of broadcasters' frequencies. Accordingly, the applicant argued that the 3rd respondent is not the body envisaged by ***Article 34 (5)*** hence its directive was *ultra vires*. It also argued that the said public notice contravenes its broadcasting freedom guaranteed under ***Article 34 of the Constitution***, its right to property as more particularly provided for under ***Article 40*** together with its right to fair administrative action under ***Article 47***. The Applicant further asserts that the notice in question was made in bad faith as the other broadcasters have been discussing with the respondents the nature of the institution contemplated under ***Article 34(5)***.

Subsequently, the applicant sought *inter alia,* injunctive orders:

i. *restraining the 3rd Respondent from usurping the licensing and regulatory powers and functions of the body contemplated by Article 34(3) and 34(5) of the Constitution;*

ii. *restraining the 3rd Respondent from acting on its letter dated 3rd March, 2012 and its notice dated 3rd August, 2012;*

iii. *restraining the 2nd and 3rd Respondents or any of them from cancelling, stopping, suspending, restricting or in any way whatsoever interfering with the petitioner's licences frequencies, broadcasting spectrums and broadcasting services.*

The applicant further averred that since March 2012, the 3rd respondent embarked on a systematic damage of its broadcasting interests when exercising its purported power to allocate or grant broadcasting frequencies by allocating to other persons frequencies so close to those granted to and operated by it resulting in interference with its broadcasting stations. It cites two instances of what it terms as mischievous purported allocations, the first being on 6th March, 2012, while the second one was on or about 3rd August, 2012. It also avers that the 3rd respondent had filed an application for warrants in the Chief Magistrates' court to enable it shut down the applicant's broadcaster transmitters at 17 sites. Subsequently, by the afternoon of 3rd February, 2013, the 3rd respondent had shut down and confiscated either parts of or entire transmitters in 17 sites.

On the other hand, the 3rd respondent contended that frequency spectrum is a scarce public resource allocated to nations in accordance with complex international agreements and in Kenya the 3rd respondent has the mandate to carry out that function. In the replying affidavit, Mr Omo further explained that the 3rd respondent is empowered by the legislature to regulate radio communications under the Kenya Information and Communications (Amendment) Act, 2009 and the Kenya Information and Communication (Radio Communications and Frequency Spectrum) Regulations, 2010. In practice, the 3rd respondent assigns frequencies to users subject to terms and conditions contained in their respective frequency letters/licences. Amongst other terms, the 3rd respondent specifies the frequencies, location of the transmitter, geographical transmitter site co-ordinator and maximum effective radiated power. Licensees are also required to install band pass filters to eliminate emissions outside the assigned broadcast bands.

According to Mr Omo, sometime in 2006, the 3rd respondent started receiving complaints from broadcasters and strategic national institutions including the Kenya Civil Aviation Authority concerning interference with neighbouring frequencies. Upon inspection, the 3rd respondent found that some broadcasters were causing harmful interference with frequencies which were lawfully assigned to aeronautical services and to other broadcasters hence, it issued appropriate notices to offending broadcasters directing them to remedy the breaches. Mr Omo further deposed that the applicant received such notice and undertook to install band pass filters. In the course of its surveillance, the 3rd respondent established that the applicant had been undertaking transmissions on certain frequencies without due assignment hence contravening the law. Subsequently, it sent several letters to the applicant notifying it of the unauthorized use of the frequencies in question and demanding that it ceases to make unauthorized transmissions. However, the applicant continued to operate the unlicensed frequencies thus necessitating the issue of the notice dated 17th May, 2012, which is the subject of the suit.

In an elaborate judgment, the Constitutional Court dismissed the applicant's petition and held that

the 3rd respondent is entitled to exercise regulatory authority over broadcasting and other electronic media pursuant to the Kenya Information and Communications Act until such time that the body contemplated by ***Article 34 (5) of the Constitution*** is established. Following the delivery of the said judgment, the applicant sought extension of conservatory orders erstwhile issued during the pendency of the suit. The High Court granted conservatory orders for a period of thirty [30] days with effect from 30th January, 2013.

Further, the Applicant being dissatisfied with the said judgment has filed Civil Appeal No. 43 of 2013 together with the application herein.

In his submissions, Dr Gibson Kamau Kuria, learned counsel for the applicant, relied on the affidavit of S.K Macharia, and argued that ***Article 34*** was included in the Constitution to guarantee the freedom of the media. He further submitted that the body envisaged under ***Article 34 (5)*** was yet to be established and thus the 3rd respondent has no rights or authority vested under the said Article. On this issue, he maintained that there was no lacuna in ***Article 34*** as the same does not provide for the time frame within which the body is to be established. Consequently, he argued that the status quo is to be maintained until such a body is established. He cited lack of independence on the part of the 3rd respondent arguing that this had been the very mischief the constitution sought to cure by inclusion of ***Article 34***.

Dr Kuria further submitted that the 3rd respondent contravened the principles set out under ***Article 47*** in that it condemned the applicant unheard hence the administrative action taken against it was not fair in the circumstances. He argued that the Judiciary has mandate to control excesses of a government agency as in this case where the 3rd respondent had acted in excess of its powers.

He opined that as long as a broadcaster cannot broadcast, then it is denied freedom of information in contravention of ***Article 33***. To buttress this argument, he cited the European Court of Human Rights which has previously held that the freedom of the media is essential to democracy. He also stated that the actions by the 3rd respondent put at stake the freedom of the media which is a concern to the broadcasting industry. He relied on an article by ***Eric Brendet: Broadcasting Law, OUP, 1993 Chapters 2 and 5*** whose relevant portion states that ***"… broadcasting freedom surely entails freedom from state or government control …".*** He also referred the court to the case of ***OBSERVER PUBLICATIONS LTD V CAMPBELL & 2 OTHERS, PRIVY COUNCIL APPEAL NO. 3 OF 2000***, where the Privy Council ordered return of the seized broadcasting equipment and issue of broadcasting licences to the aggrieved broadcaster.

Dr Kuria submitted that failure to grant the orders would result in the following consequences:

i. *that the entire business of broadcasting owned by the Applicant and its investment worth about 1.4 billion and a wage bill of approximately KShs.180 million is at stake.*

ii. *that unless the orders are granted the appeal would be rendered nugatory- on this point, he stated that the aim of the application is to protect an existing business and if the prayer is not granted, then the business being run will be adversely affected.*

He relied on the case of ***AFRICAN SAFARI CLUB LTD V SAFE ORIENTAL COMMERCIAL BANK LTD, (2010) eKLR,*** in support of the proposition that the overriding objective is broader than the preconditions set out under ***Rule 5 (2) (b)*** hence when exercising its power, the court must give effect to the overriding objective. Thus, he argued that the court had an extended jurisdiction in deciding such cases.

Basing his argument on the case of ***GITHUNGURI V JIMBA CREDIT CORPORATION LTD, (1988) KLR 838*** where the learned judges granted an injunction to preserve the suit property, he urged the court to allow the application as the orders being sought were intended to preserve the subject matter pending the hearing of the appeal. He added that the applicant was seeking an injunction on its own and not on behalf of all other broadcasters.

On his part, the learned counsel for the 3rd respondent, Mr Kilonzo, submitted that the applicant had not shown that its appeal is arguable or that it will be rendered nugatory. If prayer no. 1 is granted, he submitted, it will be inimical to the public good and against public policy. The same would be tantamount to aiding an illegality, he added. He went further to argue that the applicant was acting illegally by transmitting using frequencies for which it did not have licences, hence the court could not aid it in abetting an illegality. On this point, he drew the Court's attention to the case of ***ATTORNEY GENERAL V SUNDERJI T/A CRYSTAL ICE CREAM, (1986) KLR 67*** in support of the view that no cause of action could arise where there was an illegality and hence no injunction could issue in such an instance. He went on to submit that since the Applicant could not demonstrate under which authority they were using the frequencies, then the court should not grant the reliefs sought as there was no cause of action.

Mr Kilonzo went further to cite ***section 35 of the Kenya Communications Act, (1998)***, which mandates the 3rd Respondent to assign frequencies. He submitted that the 3rd respondent is the only custodian of the frequencies in Kenya. He argued that the ***5th Schedule of the Constitution*** which outlines the time frame within which legislation is to be passed, indicates that the same should be passed by 27th August, 2013.

It was Mr Kilonzo's further argument that the framers of the Constitution included ***section 7 of the 6th Schedule*** so as to ensure that there is no lacuna in the affairs of the state. He maintained that there are no arguable issues in the application and that none had been demonstrated in the arguments before the court. He further submitted that were the court to arrive at a different conclusion, the consequences would be grave and the end result would be chaos given that it is only the 3rd respondent that can give frequencies. He further maintained that the need to regulate use of frequencies was in public interest which the learned judge of the High Court appreciated. He urged the court to exercise judicial restraint in granting the orders prayed for. To this end, he relied on the South African case of the ***MINISTER OF HEALTH V TREATMENT ACTION CAMPAIGN, (2002) (5) SA 721 (CC),*** where the court held that in instances where an order could have multiple social and economic consequences for the community, the Constitution contemplates a restrained and focused role of the court. This line of argument was also adopted in the recent case of ***RAILA ODINGA & 5 OTHERS V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 3 OTHERS, (2013) eKLR.***

In concluding his submissions, Mr Kilonzo added that despite the court's order, the applicant was still transmitting the frequencies illegally. The Attorney General [for the 1st and 2nd respondents], did not make oral submissions but instead chose to support the submissions of the 3rd respondent.

In reply, the learned counsel for the Applicant maintained that the constitution was paramount and that as of 27th August, 2010 a new dawn began with a myriad of rights which the Courts had to protect.

However, he admitted that 22 illegal frequencies were being used although no fees had been paid for them. He also admitted that Majanja, J had given 30 days conservatory orders and despite the same lapsing, no enforcement order had been taken.

We have carefully considered the application, the affidavits, rival submissions of the learned counsel and the law.

At this juncture the court cannot go into the merits of the appeal but must attempt to balance the interests of both parties. Since this application has been brought under ***Section 3A and 3B of the Appellate Jurisdiction Act*** and ***Rules 5 (2) (b) of the Court of Appeal Rules***, the court is tasked to consider the following issues:

i. *whether the intended appeal raises arguable issues;*
ii. *whether the said appeal will be rendered nugatory should the court fail to issue the injunction in the event that the appeal is successful; and*
iii. *whether the overriding objective will operate in favour of the Applicant despite not satisfying the two principles above.*

Rule 5 (2) (b) provides that the Court may:

"in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution; an injunction or a stay of any further proceedings on such terms as the Court may think just."

The principles applicable to the determination of applications under ***Rule 5 (2) (b) of the Rules*** are well settled. This Court clearly elucidated the said principles in the case of ***REPUBLIC V KENYA ANTI-CORRUPTION COMMISSION & 2 OTHERS, (2009) KLR 31*** as follows:

"The law as regards the principles that guide the court in such an application brought pursuant to Rule 5 (2) (b) of the Rules are now well settled. The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the result or the success would be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb. [emphasis added] [See also this Court's decisions in the cases of ***RELIANCE BANK LTD V NORLAKE INVESTMENTS LTD*** *(2002) 1 EA 227 &* ***GITHUNGURI V JIMBA CREDIT CORPORATION LTD & OTHERS*** *(NO. 2) 1988 KLR 828;* ***WARDPA HOLDINGS LTD & OTHERS V EMMANUEL WAWERU MATHAI & HFCK*** *(CIVIL APPEAL NO. 72 OF 2011 [unreported]."*

In the case of ***SAMUEL NAIBA KIHARA V HOUSING FINANCE COMPANY OF KENYA LTD AND OTHERS, CIVIL APPLICATION NO. 11 OF 2007 [UNREPORTED]***, this Court stated:

"This Court can only grant an injunction pending appeal under Rule 5(2)(b) of the Rules of this Court if the applicants satisfy us that both the intended appeal is arguable and further that unless the order of injunction in terms sought or a stay of execution is granted the intended appeal would be rendered nugatory see (Madhupaper International Limited vs. Kerr [1958] KLR 840; J. K. Industries vs Kenya Commercial Bank Ltd & Another [1987] KLR 506 and Githunguri vs Jimba Credit Corporation Ltd (No. 2) [1988] KLR 838".

In the case of ***TITUS OTIENO KOCEYO & ANOTHER V MATHEW OUMA OSEKO T/A OSEKO & COMPANY ADVOCATES, CIVIL APPLICATION NO. NAI 300 OF 2009 (UR. 208/2009),*** the learned judges held that satisfaction of only one of the twin principles will not avail the Applicant the orders sought. Thus, having succeeded in demonstrating the arguability of the intended appeal without satisfying the nugatory principle, the application had to fail.

Further, this Court followed the same principle in the recent case of ***PERIS WANJA & 4 OTHERS V HANNAH NJERI MUTHUMBI, (CIVIL APPLICATION NO. NAI 109 OF 2011)*** where it held thus:

"As the applicants were obliged to satisfy the two conditions above, even assuming they were able to satisfy the nugatory aspect, still, they would not have met the threshold for the grant of a stay or the status quo order, they are seeking. In the result, the application dated 20th April, 2011 and filed in Court on 26th April, 2011, must fail and, accordingly, it is dismissed with costs."

In a recent decision of this Court delivered on 31st May, 2013, in ***EQUITY BANK LIMITED V WEST LINK MBO LIMITED, CIVIL APPLICATION NO. NAI 78 OF 2011***, Githinji JA succinctly stated:

"It is trite law in dealing with 5 (2) (b) applications the Court exercises discretion as a court of first instance…It is clear that rule 5 (2) (b) is a procedural innovation designed to empower the Court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals."

Thus, in an application under ***rule 5 (2) (b) of this Court's Rules***, the applicant is obligated, to show firstly, that his appeal or intended appeal is arguable or put differently, that it is not a frivolous one. Secondly, that unless he is granted a stay or injunction as the case may be, his appeal, if it were to eventually succeed, such success will be rendered nugatory.

However, in determining the above preconditions, regard must also be made to the overriding objective (oxygen principle) set out in ***sections 3A and 3B of the Appellate Jurisdiction Act***. ***Section 3A (1)*** provides:

"The overriding objective of this Act and the rules made here under is to facilitate the just, expeditious, proportionate and affordable resolution of appeals governed by the Act".

Sub section (2) provides that in the interpretation of the provisions of the Act, the court shall seek

to give effect to the overriding objective.

Section 3B (1) of the Act stipulates the aims that the court should strive to achieve in matters before it in furthering the overriding objective, one of them being the just determination of the proceedings.

This principle was aptly stated in the case of ***DEEPAK CHAMANLAL KAMANI & ANOTHER V KENYA ANTI-CORRUPTION & 3 OTHERS,*** **[2010] eKLR** as follows:

"The rule which we are called upon to interpret is made under the Act and in applying or interpreting the rule, the Court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of an appeal."

In the case of ***M S K v S N K, [2010] eKLR,*** this court referred to the Australian case of ***PURUSE PTY LIMITED V COUNCIL OF THE CITY OF SYDNEY, [2007] NSWLEC 163,*** where the court underscored the point that the court in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable factual foundation**.** It went on to hold that:

"the overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained."

On the expanded jurisdiction, this Court held in the case of ***CITY CHEMIST (NBI) & ANOTHER VS. ORIENTAL COMMERCIAL BANK LTD, CIVIL APPLICATION NO. NAI 302 OF 2008 (UR. 199/2008)*** as follows:

"The overriding objective thus confers on the court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objective."

The learned counsel for the applicant argued that in their view, the intended appeal is arguable for various reasons including that broadcasting freedom is guaranteed by ***Article 34 of the Constitution***. ***Article 34*** provides:

"Freedom of the media

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

(2) The State shall not–

(a) exercise control over or interfere with any person engaged in broadcasting, the production or

circulation of any publication or the dissemination of information by any medium; or

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

(3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that-

(a) are necessary to regulate the airwaves and other forms of signal distribution; and

(b) are independent of control by government, political interests or commercial interests.

(4) All State-owned media shall-

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

(b) be impartial; and

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

(5) Parliament shall enact legislation that provides for the establishment of a body, which shall-

(a) be independent of control by government, political interests or commercial interests;

(b) reflect the interests of all sections of the society; and

(c) set media standards and regulate and monitor compliance with those standards."

On the point as to whether the intended appeal is arguable, we reiterate what this Court recently stated in ***DENNIS MOGAMBI MONGARE V ATTORNEY GENERAL & 3 OTHERS, CIVIL APPLICATION NO. NAI 265 OF 2011 [UR 175/2011]***:

"An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration."

On the first limb, we are of the view that the applicant's appeal is not frivolous not least, *inter alia*, because of the need to give interpretation of ***Article 34 of the Constitution*** and to determine whether the principles of natural justice were violated by the 3rd respondent. We cannot go into the merits of the appeal at this stage but what emerges is that the appeal is not frivolous. We are satisfied that the

applicant has satisfied the requirement of arguability of the appeal.

On the nugatory aspect, it is trite law that this Court must weigh and balance the competing claims of both parties and that each case must be determined on its own peculiar facts. As this Court held in ***RELIANCE BANK LTD V NORLAKE INVESTMENTS LTD, (2000) 1 EA 227***:

"In determining the second limb of the test, the court in ***ORARO AND RACHIER ADVOCATES V CO-OPERATIVE BANK OF KENYA LIMITED, CIVIL APPLICATION NO. NAI 358 OF 1999,*** *had not been enunciating a third principle but merely stating that, in making its decision, it was bound to consider the conflicting claims of both sides where a decree for the payment of money was issued, the inability of the other side to refund the decretal sum was not the only thing that would render the success of the appeal nugatory. The factors that could render the success of an appeal nugatory thus had to be considered within the circumstances of each particular case* ***ORARO AND RACHIER ADVOCATES V CO-OPERATIVE BANK OF KENYA LIMITED*** *[supra].* ***Rules 5 (2) (b)*** *conferred on the court original jurisdiction based on the exercise of discretion by the Judges of the court."*

Further, we are guided on this by this Court's decision in ***AFRICAN SAFARI CLUB LIMITED V SAFE RENTALS LIMITED, NAIROBI CIVIL APPEAL [APPLICATION] NO. 53 OF 2010 (Unreported)***, where the Court stated:

"… with the above scenario of almost equal hardship by the parties it is incumbent upon the Court, pursuant to the overriding objective to act justly and fairly. The first role we have undertaken in this regard is to consider the hardships of the two parties before us. The second role is to put hardship on scales. … We think that the balancing act as described in the analysis of the parties before us, is in keeping with one of the principle aims of the oxygen principle of treating both parties with equality or in other words placing them on equal footing in so far as is practicable. … We believe that the rules of procedure including ***rule 5 (2) (b)*** *have considerable value in terms of administration of justice but new challenges brought about by the enactment of the oxygen principle brings into focus the fundamental purpose of civil procedure which is to enable the court deal with cases justly and fairly."*

We note that the frequencies will be readily available upon determination of the appeal and, therefore, the applicant, if successful, can continue to make transmissions on the frequencies that are the subject matter of the appeal after Civil Appeal No. 43 of 2013 is determined. In the circumstances, it is our finding that the appeal shall not be rendered nugatory if the appeal succeeds.

From the circumstances of the application before us, the applicant has demonstrated that the appeal is arguable but has failed to demonstrate that the appeal will be rendered nugatory if the instant application is dismissed. The applicant has, therefore, failed to demonstrate the existence of both limbs as required by ***Rule 5 (2) (b) of this Court's Rules***.

The upshot is that we decline to grant an injunction, pending the hearing and final determination of **Civil Appeal No. 43 of 2013**. The application is accordingly dismissed with costs to the respondents.

Dated and delivered at Nairobi this 5th day of July, 2013.

G. B. M. KARIUKI

JUDGE OF APPEAL

P. M. MWILU

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

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