REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL NO 197 OF 2020

THE BLOGGERS ASSOCIATION OF KENYA (BAKE)…….....APPELLANT

and

1. THE HON.ATTORNEY GENERAL……..1ST RESPONDENT

2. THE SPEAKER, NATIONAL ASSEMBLY……..2ND RESPONDENT

3. THE INSPECTOR GENERAL
OF THE NATIONAL POLICE SERVICE…….……...3RD RESPONDENT

4. THE DIRECTOR OF PUBLIC PROSECUTIONS……...…….4TH RESPONDENT

ARTICLE 19 EAST AFRICA…….....1ST INTERESTED PARTY

KENYA UNION OF JOURNALISTS……...……....2ND INTERESTED PARTY

LAW SOCIETY OF KENYA…….3RD INTERESTED PARTY

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Honourable Mr. Justice James A. Makau) dated 20th February, 2020 in Constitutional Petition No. 206 of 2018

between

THE BLOGGERS ASSOCIATION OF KENYA (BAKE)……...…….PETITIONER

versus

1. THE HON.ATTORNEY GENERAL……...……....1ST RESPONDENT

2. THE SPEAKER, NATIONAL ASSEMBLY……..2ND RESPONDENT

3. THE INSPECTOR GENERAL
OF THE NATIONAL POLICE SERVICE…….……...…3RD RESPONDENT

4. THE DIRECTOR OF PUBLIC PROSECUTIONS……...……4TH RESPONDENT

ARTICLE 19 EAST FRICA…….....1ST INTERESTED PARTY

KENYA UNION OF JOURNALISTS…….....2ND INTERESTED PARTY

LAW SOCIETY OF KENYA…….3RD INTERESTED PARTY

SUPPLEMENTARY RECORD OF APPEAL

DATED at **NAIROBI** this 10th day of February **2021**

NZILI & SUMBI
ADVOCATES FOR THE APPELLANT

DRAWN & FILED BY–
NZILI & SUMBI ADVOCATES
JUNCTION OF NGONG ROADS AND KIRICHWA ROAD
P.O.BOX 2580-00202
NAIROBI
Tel: 0737061138 E-mail: **mercy@mutemisumbi.com**

TO BE SERVED UPON—

1. THE HON. ATTORNEY GENERAL
   STATE LAW OFFICE
   SHERIA HOUSE, HARAMBEE AVENUE
   NAIROBI
2. S.M MWENDWA ADVOCATE
   PARLIAMENT BUILDINGS
   NAIROBI
3. V.A. NYAMODI & COMPANY ADVOCATES
   HOUSE NO. 7 DUPLEX APARTMENTS
   LOWER HOLL ROAD, UPPERHILL
   P.O. BOX 51431-00200
   NAIROBI
   Tel-07202227631
4. OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS
   NSSF BUILDING, BLOCK 'A', 19TH FLOOR
   NAIROBI
5. ARTICLE 19 OF EASTERN AFRICA
   ACS PLAZA, 2ND FLOOR
   LENANA ROAD
   P.O.BOX 2635-00100
   NAIROBI
6. KENYA UNION OF JOURNALISTS
   INTERNATIONAL LIFE HOUSE, 1ST FLOOR
   MAMA NGINA STREET
   P.O.BOX 47035-00100
   NAIROBI
7. OCHIEL DUDLEY
   KATIBA INSTITUTE
   HOUSE NO. 5, THE CRESCENT,
   OFF PARKLANDS ROAD,
   NAIROBI

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL NO 197 OF 2020

THE BLOGGERS ASSOCIATION OF KENYA (BAKE).....APPELLANT

and

1. THE HON.ATTORNEY GENERAL…….……..1ST RESPONDENT

2. THE SPEAKER, NATIONAL ASSEMBLY……..2ND RESPONDENT

3. THE INSPECTOR GENERAL

OF THE NATIONAL POLICE SERVICE……..…..3RD RESPONDENT

4. THE DIRECTOR OF PUBLIC PROSECUTIONS……...4TH RESPONDENT

ARTICLE 19 EAST AFRICA…….....1ST INTERESTED PARTY

KENYA UNION OF JOURNALISTS……...…….....2ND INTERESTED PARTY

LAW SOCIETY OF KENYA…….3RD INTERESTED PARTY

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Honourable Mr. Justice James A. Makau) dated 20th February, 2020 in Constitutional Petition No. 206 of 2018

between

THE BLOGGERS ASSOCIATION OF KENYA (BAKE)……..PETITIONER

versus

1. THE HON.ATTORNEY GENERAL…….……...…..1ST RESPONDENT

2. THE SPEAKER, NATIONAL ASSEMBLY……..2ND RESPONDENT

3. THE INSPECTOR GENERAL

OF THE NATIONAL POLICE SERVICE….…….……3RD RESPONDENT

4. THE DIRECTOR OF PUBLIC PROSECUTIONS……...……4TH RESPONDENT

ARTICLE 19 EAST AFRICA…….....1ST INTERESTED PARTY

KENYA UNION OF JOURNALISTS…….....2ND INTERESTED PARTY

LAW SOCIETY OF KENYA…….……3RD INTERESTED PARTY)

INDEX OF DOCUMENTS

DATED at NAIROBI this 10th **day of** February **2021**

NZILI & SUMBI ADVOCATES
FOR THE APPELLANT

DRAWN & FILED BY–

NZILI & SUMBI ADVOCATES
JUNCTION OF NGONG ROADS AND KIRICHWA ROAD
P.O.BOX 2580-00202
NAIROBI

mercy@mutemisumbi.com

Tel: 0737061138

TO BE SERVED UPON—

1. THE HON. ATTORNEY GENERAL
   STATE LAW OFFICE
   SHERIA HOUSE, HARAMBEE AVENUE
   NAIROBI
2. S.M MWENDWA ADVOCATE
   PARLIAMENT BUILDINGS
   NAIROBI
3. V.A. NYAMODI & COMPANY ADVOCATES
   HOUSE NO. 7 DUPLEX APARTMENTS
   LOWER HOLL ROAD, UPPERHILL
   P.O. BOX 51431-00200
   NAIROBI
4. OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS
   NSSF BUILDING, BLOCK 'A', 19TH FLOOR
   NAIROBI
5. ARTICLE 19 OF EASTERN AFRICA
   ACS PLAZA, 2ND FLOOR
   LENANA ROAD
   P.O.BOX 2635-00100
   NAIROBI
6. KENYA UNION OF JOURNALISTS
   INTERNATIONAL LIFE HOUSE, 1ST FLOOR
   MAMA NGINA STREET
   P.O.BOX 47035-00100
   NAIROBI

7. OCHIEL DUDLEY
   KATIBA INSTITUTE
   HOUSE NO. 5, THE CRESCENT,
   OFF PARKLANDS ROAD,
   NAIROBI

Office Copy

MUTEMI SUMBI LAW

Gate 23, Office 2,
Olenguruone Road, Lavington
P.O. Box 2580-00202, Nairobi
+254 737 061138
mercy@mutemisumbi.com
www.mutemisumbi.com

RECEIVED
24 FEB 2020
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

21st February 2020

Deputy Registrar
Constitutional and Human Rights Division at Milimani
Milimani Law Courts
NAIROBI

RE: REQUEST FOR TYPED PROCEEDINGS
PETITION 206 OF 2018 – BLOGGERS ASSOCIATION OF KENYA VERSUS THE ATTORNEY GENERAL AND 3 OTHERS

The above matter refers.

We appear for the Petitioner in this matter. The matter was in court for judgement on the 20th of February 2020. We intend to appeal and require a copy of the typed proceedings. Kindly furnish us with the same.

We undertake to pay your charges.

Yours faithfully,

NZILI &SUMBI ADVOCATES

MKM
Mercy Mutemi

VANCO
V. A. NYAMODI & Co ADVOCATES
RECEIVED
24 FEB 2020
HSE. No. 7, DUPLEX APART... TS,
LOWERHILL ROAD UPPER...
P. O. Box 51431 – 00200,
NAIROBI – KENYA

OFFICE OF THE ATTORNEY GENERAL
& DEPARTMENT OF JUSTICE
P.O. Box 40112 - 00100, NAIROBI
24 FEB 2020
CIVIL LITIGATION REGISTRY
RECEIVED
OFFICER... TIME...

RECEIVED FOR
SPEAKER/CLERK OF THE
NATIONAL ASSEMBLY
24 FEB 2020
TIME 12.00PM
SIGNATURE...

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO.206 0F 2018

THE BLOGGERS ASSOCIATION OF KENYA (BAKE).....PETITIONER

VERSUS

THE HON.ATTORNEY GENERAL.....1ST RESPONDENT

THE SPEAKER, NATIONAL ASSEMBLY.....2ND RESPONDENT

THE INSPECTOR GENERAL OF THE POLICE SERVICE.....3RD RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT

ARTICLE 19 EAST FRICA.....1ST INTERESTED PARTY

KENYA UNION OF JOURNALISTS.....2ND INTERESTED PARTY

LAW SOCIETY OF KENYA.....3RD INTERESTED PARTY

CERTIFICATE OF DELAY

(Under Rule 82(1) of the Court of Appeal Rules)

1. **THAT** judgement in this matter was entered on 20th February 2020.
2. **THAT** a request for certified typed proceedings was lodged by the firm of Nzili and Sumbi Advocates (Formerly Mutemi Sumbi Advocates) for the Petitioner on 24th February 2020 which was within the 30 days of the intended appeal.
3. **THAT** on **18th November 2020**, vide an email from this court informed the firm of Nzili and Sumbi Advocates that the proceedings were ready for collection upon payment of the balance of Ksh.1, 080.
4. **THAT** the balance of the payment was made on 1st December 2020 and the proceedings were collected by the firm on **2nd December 2020.**
5. **THAT** the time period between the application and the date of collection was **two hundred and sixty eight (268) days.**
6. **THAT** this Certificate of Delay was prepared and ready for collection on 27th day of January 2020.

DEPUTY REGISTRAR

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 206 OF 2018

IN THE MATTER OF ARTICLE 2, 3, 20, 22, 23, 116, 165, 258 & 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 19, 21, 24, 25, 27, 28, 31, 33, 34, 35, 40, & 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 1, 10, 118 & 238 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 3, 5, 16, 17, 22, 23, 24, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 48, 49, 50, 51 & 53 OF THE COMPUTER MISUSE AND CYBERCRIMES ACT

AND

IN THE MATTER OF STANDING ORDERS 119, 127, 130, 131 & 133 OF THE NATIONAL ASSEMBLY STANDING ORDERS

BETWEEN

THE BLOGGERS ASSOCIATION OF KENYA (BAKE)... PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL ..... 1ST RESPONDENT

THE SPEAKER, NATIONAL ASSEMBLY ..... 2ND RESPONDENT
THE INSPECTOR GENERAL OF
NATIONAL POLICE SERVICE ..... 3RD RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS .... 4TH RESPONDENT
ARTICLE 19 EAST AFRICA ..... 1ST INTERETED PARTY
KENYA UNION OF JOURNALISTS ..... 2ND INTERESTED PARTY
LAW SOCIETY OF KENYA ..... 3RD INTERESTED PARTY

PROCEEDINGS

29.5.18

Coram: Hon. E. C. Mwita J.

Lekaram – Court Assistant

In open Court Exparte

Miss Mutemi with Mr. Kiprono for Petitioner

This Petition is dated 29/5/2018 and filed on the same day. It seeks to challenge the Constitutionality of the computer misuse and Cyber-crime Act, 2018. We seek to nullify 26 Section of the Act which the Petitioner consider offend their constitutional rights including privacy, opinion information access to information, human dignity among others.

Together with the Petition is an application of same day seeking conservatory orders, suspending the coming into force of the impugned Act or the enumerated Sections whose constitutionality has been challenged.

We submit that the Petitioners have a prima facie case and we have come to this court under Articles 165 (3) (d) to determine whether an Act of Parliament is inconsistent with the constitution.

We submit that if interim orders are not granted, there will be a violation of rights will be continued and cannot be compensated by way of damages.

The provisions are offensive to human rights including Section 22 and 23 of the Act, 33, 34, 35, 36 and 37 relate to the normal functions of creating emails and receiving text messages. If there will be proof that these Sections are unconstitutional it will be a gross contravention of the basis in Article 10 and the right to human rights.

The Act limits rights and fundamental freedoms, the issue of presumption, constitutionality does not arise. We rely on the case **of Cord v AG** Petition No. 628/2014.

In that where the provision challenged is isolating constitutional rights, the only test is that under Article 24. The set comes into force tomorrow 30/5/2018. We deem it urgent and pray that the orders be granted. There will be no prejudice on the Respondent if the coming into force if the Act is suspended. If the order is not

granted, it will be a sanction for the Respondent to enforce provision of the law that may end up violating constitutional rights.

E. C. MWITA

JUDGE

29.5.2018

Court:

I have considered the application exparte. The Petitioner/Applicant have sought a conservatory order suspending the provisions of the Computer Misuse and Cyber-crime Act, 2018 on grounds that they violate constitutional rights of the Petitioner and other persons generally.

The Applicants argue that these provisions if enacted will violate human rights and the constitution. They therefore pray that the impugned provisions be suspended.

I have perused the application and Petition. I note that the provisions complained of are challenged on grounds, that they are intended to suppress the rights of access to information and right to have opinion and even sending principle as regards Section 4 of the Act.

The provision are challenged on the basis that they violate human and Constitutional rights. They will violate the Petitioners rights and continue with the violations if the court does not intervene at this stage.

I am satisfied that from the material placed before me, there is likelihood that rights will be violated and continue to be violated while the Court awaits to hear and determine the Petition as to the constitutionality of these provisions.

On the other hand if the Court would come to the conclusion that the provision are constitutional, there would be no prejudice since the provision will be reinstated and take effect. However should the court come to the conclusion that they are unconstitutional, there will not be sufficient compensation in the merits that will have been violated.

Consequently, I am inclined to grant the application at this stage to protect constitutional and human rights albert briefly as the court determines the constitutionality of the impugned provision.

For that reason I make the following order;

1. The Application and Petition are hereby certified urgent.
2. The Application and Petition be served on the Respondents immediately.
3. The Respondents do file and serve responses to the Petition within 7 days upon service of the Petition.
4. Once served, the Petitioners will have 7 days to file and serve a supplementary affidavit, if need be, together with written submissions to the Petition.
5. The Respondent will thereafter have 7 days to file and serve written submissions to the Petition.

6. Direction on the hearing of the Petition on 18/7/2018.
7. In the meantime I hereby grant conservatory orders in terms of prayer 3 of the Notice of Motion dated 29/5/2018 until 18/7/2018.

E. C. MWITA

JUDGE

29.5.2018

12.06.2018

Coram: Hon. W. A. Okwany J.

Court Assistant: Kombo

Ex parte

In Chambers

Ruling

I have perused the application dated 11/6/2018 together with the supporting affidavit and the certificate of urgency. I have also perused the court file especially the proceedings taken by the court on 29/5/2018 and the directions issued thereto.

The directions were clear that the parties were to comply with them and thereafter the case be mentioned on 18/7/2018 for directions on the hearing of the Petition.

I note that the Respondents herein have not complied with the court's earlier directions especially in respect to filing responses to the Petition.

Under the above circumstances, I am of the view that the ex parte orders sought in the application dated 11/6/2018 cannot be issued at this stage.

Consequently, I direct that the application dated 11/6/2018 be served on all the parties immediately and that the said application be mentioned on 18/7/2018 for further directions.

W. A. OKWANY

JUDGE

12.6.2018

22.06.18

Coram: Hon. W. A. Okwany J.

Court Assistant: Kombo

Nyamodi & Mrs. Ndong for the 3rd Respondent

Nyamodi holding brief for Ogetto for the 1st Respondent

Nyamodi:

Before the court is a certificate of urgency by 1st Respondent dated 20/6/2018. It is supported by the affidavits of Christine Agimba the Deputy Solicitor General and the I. G. Of Police dated 20/6/2018.

The urgency of the matter emanates from an order made by Mr. Justice Chacha Mwita made on 29/5/2018 that suspended in its entirety the computer misuse and cybercrimes Act 2018.

The reasons for the urgency are set out in the Affidavit in support thereof.

Firstly, the Act is suspended in its entirety –there are certain Sections of the Act that repealed Kenyan Information Communication Act 1998 – these Acts provides for certain penal offences. There is now a lacuna in respect to the said offences that those repealed provisions relate to.

The Sections are: S. 834 of the Kenya information Communication Act,

S. 83 V – access of internet with intent to commit an offence.

S. 83 W – Unauthorized access to information and computer services.

S. 83 X – On unauthorized modification of computer material.

S. 832 Z – On unauthorized disclosure of password.

S. 84 A – Unlawful possession of device and data.

S. 84 B – Electronic fraud.

S. 84 F – On unauthorized access to protected systems.

S. 16 – of the Sexual offences Act which deals with child pornography

As shown in the affidavit of the I. G.there are ongoing prosecutions in respect to those sections and the suspension verse put in doubt i.e. there are any legal fund actions to sustain prosecution under those repealed sections.

The 1st Respondent has made an application, under Rule 25 of these courts rules governing the hearing of Constitutional petitions i.e. have the orders issued ex parte on 29.5.18 varied audo set aside. The application dated 11.6.2018 was before this

court on 11.6.2018 by way of certificate of urgency and this court directed that it be served. The Respondent's delayed due to some logistics. There are non responses on record from the AG and the I. G. who are the substantive parties in this case. For the reasons submitted on and for the reasons on the application and certificate of urgency, pray that the application be certified as urgent and be assigned a mention date that is convenient to this court other than 18.7.2018 so that directions can be taken for the hearing of the substantive application dated 11.6.2018.

The Petitioner has been served with the application dated 11.6.2018 and there will be no prejudiced to any of the parties if the court agreed to the request made as the continued suspension creates a lacuna that may be used by the parties currently being prosecuted.

The Petitioner was served with the application dated 11.6.2018 on 14.6.2018.

The Petitioners are yet to be served with the responses which were only filed today.

W. A. OKWANY

JUDGE

22.6.2018

Court:

I have considered the application dated 11.6.2018 ex parte. I have also considered the certificate of urgency 20.6.2018 together with the supporting affidavits of

Christine Agimba, the Deputy Solicitor General and Joseph Kipchirchir Boinnet, the Inspector General of Police.

I am satisfied that the 1st and 3rd Respondents have demonstrated that the application dated 11.6.2018 is urgent and ought to be heard and determined on priority basis.

I have also perused the court file and note that the conservatory orders issued by Chacha Mwita J. on 29.5.2018, which orders the Applicants now seek to set aside and/or vary through the application dated 11.6.2018, were issued after the hearing of the Petitioner's submissions in open court.

Under the above circumstances, I am of the humble view that it would be improper to grant orders setting aside or varying the orders issued on 29.5.2018 exparte considering the submissions of counsel for the 1st and 3rd Respondents that the Petitioner has already been served with the said application i.e. the application dated 11.6.2018.

Consequently, I hereby certify the application dated 11.6.2018 as urgent and direct that it be mentioned before me 25.6.2018 for orders and/or directions. Mention notice to issue to the Petitioner.

W. A. OKWANY

JUDGE

22.6.2018

25.6.2018

Coram: Hon. W. A. Okwany J.

CA - Kombo

Mutemi for the Petitioner

Nyamodi for the Solicitor General for the 1st Respondent

Nyamodi + Ogetto + Miss Ndong for the 3rd Respondent

Ashimosi for the 4th Respondent

Kiprono for the 1st Interested Party

Nyamodi:

The purpose of today's mention is to take directions in respect to the 1st Respondents application dated 11.6.2018.

Mutemi:

We were served on 14.6.2018.

Ashimosi:

We can take directions on the hearing of that application.

Kiprono:

We oppose the application dated 11.6.2018. We have not been served with the said application.

Mutemi:

We only challenge the 26 sections that have been highlighted in the conservatory order issued on 29.5.2018 and not the entire Act.

Nyamodi:

The order dated suspends the entire Act. The order also suspends Section 24. 1st schedule of the Act includes and affects many other sections. We pray that the application dated 11.6.2018 be heard at the earliest opportunity.

Court:

In view of the above submissions I hereby issue further orders and directing as follows:

a) The order issued on 29.5.2018 is hereby varied as follows;

   A conservatory order be and is hereby issued suspending the coming into force of sections 5, 16, 17, 22, 23, 24, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 48, 49, 50, 51, 52, and 53 of the computer misuse and cybercrimes Act 2018 until 18.7.2018.

b) The Petitioner is hereby granted 7 days to file and serve a response to the application dated 11.6.2018.

c) Hearing on 3.7.2018. Parties are at liberty to file written submission if they deem it necessary.

W. A. OKWANY

JUDGE

25.6.2018

Mutemi:

We seek a certification under Article 165 (4) of the Constitution that this petition raises substantial question of law and having been certified as such, have the petition placed before the Chief Justice for purposes of the constitution of a 3 Judge Bench for the hearing of the petition in finding so, we ask to be guided by the case of Trunilal Mehta - vs – Century Spinary 1962 AIR 1314 which case has been adopted in the case of Martin Nyaga vs Speaker Embu Petition 7 and 8 of 2014 and again in the case of Okiya Omtatah vs IEBC Petition 465/2015. We need to show that

a) This is a matter of public importance – we submit that it is going by the statistics of the Communication Authority of Kenya 51.1 Million internet users and the provisions that we challenge relate to ordinary use of the internet so by extension anyone with a handset that can connect to the Internet becomes subject to the Act and regular use such as deleting emails, receiving mpesa from the wrong numbers e.t.c. are the things challenged in the Act.

They have far reading consequences and so this petition is of general public importance.

b) We need to show that the petition raises a novel point for which no precedence from the Supreme Court exists. The issues raised in this petition are novel although our main contention is the violation of Human Rights to wit, the right to privacy, freedom of opinion, expression, freedom of the media – whereas there have been many cases on these issues, this petition raises a new angle that has not been dealt with conclusively, i.e the realization and actualization of these rights over the internet. It is in this petition that the issues of traffic data, content data and subscriber information are being challenged. This is unprecedented in this country. We have so far been dealing with the Right to privacy in physical interaction – but the internet permits every sector and complicates such simple concepts that it is impossible to apply the same principles that we are used to applying when discussing such matters.

For these reasons, we pray for certification to be heard by a 3 Judge Bench.

W. A. OKWANY

JUDGE

Nyamodi:

In response, I submit that my experience in this division is that Article 165 (4) of the Constitution vests on the Chief Justice, the ability to empanel a bench upon

certification by this court.

The Chief Justice now require 5 Judges to write written rulings perhaps that application should be made formally so that we can understand it and respond formally.

Ashimosi:

I agree with Mr. Nyamodi that it will be in order for a formal Application to be made so that we respond to it substantively. In certifying matters, counsel referred to the case of LSK – vs – AG and Another Petition 3/2016 one of the issues to be considered is the issue of novelty. In several decisions, courts have decided on novelty. I wish to be given time to refer to those authorities.

Kiprono:

I support the Petitioner in this application. The Petitioner touches on several sections of human rights.

Mutemi:

Nothing stops the court from hearing an oral application for certification – the overall objective is the expeditious disposal of the case. The court can still give reasoned rulings, even to oral applications.

Court:

I have considered the application by counsel for the Petitioner for certification of this matter under Article 165 (4) of the Constitution on the basis that it raises

substantial questions of law among other reasons.

I have also considered the response made by Mr. Nyamodi, Mr. Ashimosi and Mr. Kiprono learned counsel's for the 1st Respondent, 4th Respondent and Interested Party respectively.

This court is of the view that in view of the substantive issues raised by the Petitioner in the application for certification, it would be fair and just that the Respondents be given an opportunity to respond to them in an in-depth manner as they have requested. Consequently, I direct the Petitioner to file and serve a formal application for certification of application dated 11.6.2018. Hearing on 3.7.2018.

W. A. OKWANY

JUDGE

25.6.2018

3.7.2018

Coram: Hon. W. A. Okwany J.

CA - Kombo

Mutemi for the Petitioner

Nyamodi for the Solicitor General for the 1st Respondent

Nyamodi + Ndona for the 3rd Respondent

Ashimosi for the 4th Respondent

Angaya for Mwendwa for 2nd Respondent

Kiprono for the 1st Interested Party

Nyamodi:

The 1st Respondent application dated 11.6.2018 is coming up for hearing. I am ready to proceed.

Mutemi:

We had put in a Notice of Preliminary Objection and we are ready to proceed.

Ashimosi:

I am ready.

Angaya:

I am also ready to proceed

Kiprono:

I am equally ready to proceed.

Court:

Case to proceed for highlighting of submissions.

W. A. OKWANY

JUDGE

Nyamodi:

We propose that the Preliminary Objection filed by the Petitioners counsel be urged as a response.

Mutemi:

That is okay.

Nyamodi

The 1st Respondent filed an application dated 11.6.2018. it is accompanied by the Affidavit of the leaned Solicitor General (SG) We have filed written submissions and list and bundle of authorities.

The application is brought under Article 25 and 50 + Rule 25 (Mutunga Rules). There is a notice of Preliminary Objection challenging the courts jurisdiction. The Petitioner takes objection to this court's jurisdiction to hear and determine the application on the basis that it amounts to this court sitting on appeal – by putting the Preliminary Objection. The Petitioner in my understanding does not object to the facts.

It is an objection in law with the courts ability to deal with the application. The applications brought under Rule 25 of Mutunga Rules. It is not an appeal or renew under CPA Rule 25 allows setting aside orders issued under Rule 22 (23) – see Rule. We have come under Rule 25. Although the Notice of Motion by the Petitioner doesn't state under what rule it is brought, but the orders sought and obtained could only have been obtained under Rule 23 of the Mutunga Rules – then Rule 25 is applicable and the court has jurisdiction to entertain the application.

We seek to vary and or set aside the orders issued by Chacha J. because the orders of 29/5/2018 determined the Notice of Motion with finality – a quick look at the order reveals.

1) That the application and petition are certified as urgent.

2) Responses be filed to the petition not to the Notice of Motion.

3) Once served Petitioners to file and serve a replying Supplementary Affidavit together with written submissions to the Petition.

4) Response to the submission.

The order in number (7) determined with finality, the Notice of Motion. It is a final determination ex parte, a violation of Article 50 of the Constitution and is therefore a fit and proper order to be set aside.

Secondly, the grounds to be considered when ex parte conservatory orders issued. The first consideration is the nature of harm the Petitioner fears. That nature of harm can't be gleaned from ground (v) of the Notice of Motion by the Petitioner and paragraph 24 of the affidavit of James Wamati. The harm apprehended by the Petitioner is fear of arrest and prosecution. See paragraph 8 and 12 of the replying affidavit.

The harm apprehended can be addressed effectively by this court on a need by need or case by case basis. The harm that the Petitioner, apprehends was not sufficient

for the grant of an ex parte order suspending the legislation. There is no averment that any member has been arrested or are being prosecuted.

The fear was not sufficient to suspend a legislation properly enacted by Parliament. Odunga J. in the case of Kanini Kega vs Okoa (K) movement and 6 Others – in that matter Justice Odunga considered an application inter parties and stated what is to be considered at paragraph 119 – (See paragraph) and paragraph 122 in this petition there is no allegation of threatened arrest or imminent prosecution. What the Petitioner has averred to is that there is a danger – this is a mere possibility. The nature of the harm envisaged by the Petitioner is a consideration to be borne in mind by a court dealing with an application such as this one.

In the case of Philip K.Tunoi and Another, Odunga J. considered a request for an ex parte conservatory order at paragraph 2 -

In the Tunoi case the 2 Judges had been retired – the actual retirement was real. In the absence of real and present danger, an ex-parte order should not have been issued and this is then a fit and proper matter for variation and setting aside order.

The other consideration is the purpose of a conservatory order. The ultimate beneficiary of a conservatory order is the court itself – in the Kanini Kega case the Judge was at pains to consider if the matter would have gone beyond the ambit of the court. In this case the fear of arrest and prosecution would not be beyond the ambit of the court to address the arrest and prosecute it and when they arise and not

in an anticipatory manner as the Petitioner wanted the court to do without hearing the Respondents.

The issue to be borne in mind in issuing conservatory order is the nature of the relief sought ex parte. What was sought was a conservatory to suspend a legislation even before it came into effect.

The nature of result was ex parte suspension of legislation. The suspension of legislation should be done as a last resort especially when that suspension is to happen ex parte and when there is no real and present danger as a result of execution of the legislation.

I refer to the case of (No. 4 list) CORD vs Republic of Kenya and 10 others. Odunga J. considered an application at inter parties stage (at paragraph 174 page 76 bundle of annextures) the power to suspend/legn during peace time to be exercised cautiously …

None of those requirements were established by the Petitioner. The Petitioner were merely apprehended the possibility of arrest.

Also refer to the Judgment of Musinga J. (ahtw) in AIDS Law project vs AG and Another – See No. 5 in list of bundle of Annexture(page 83 – 92) last paragraph of page 91.

It restates a similar person as in the CORD case. The nature of relief sought ex parte required real and present danger to life and limits, provisions of BOR, at the time

the application was made and orders issued. None of those facts were present and for that reason the orders of 29.5.2018 should be varied.

The Petitioner in this case was guilty of material non-disclosure. It is a well established principle in law that a party seeking order is under a duty to disclose all material facts at the point of seeking the order.

2 important facts not disclosed:

1) Because the order was to suspend the writing into force of an Act of Parliament. It was incumbent upon the Petitioner to place the Act before the court. Instructions Justice Chacha's proceedings it is not shown that the Act was produced as an exhibit. The deponent of the affidavit was not present during the hearing so if the Act was produced it was through his counsel.

2) It was incumbent upon the Petitioner to disclose to the court that the orders they sought would have an effect on the state of Kenya cyber due diligence obligation that will be impossible if the entire Act is suspended. In the case of Uhuru High way Dev. Ltd vs Central Bank of Kenya. (See extracts in the written submissions .

3) The conservatory orders as issued creates a lacuna in law. See the provisions in the impugned Act – Section 16 of the Act – unauthorized interference Section 17 – unauthorized interception Section 20.

The offence created at Section 20 is joined to Section 16 and 17 – the order suspends Section 16 and 17 and the suspension makes them in operative. Where the effect of a conservatory order is to create a lacuna in the law, it forma a ground to vary the order – Reference AG and Another – vs CORD and 7 Others (No 7 list) page 132 – last paragraph.

We have demonstrated a lacuna – the fact that conservatory order creates a lacuna is a reason for setting aside.

The public interest militates that an Act of Parliament enjoys the presumption of Constitutionality the 1st Respondent is the custodian of public interest by virtue of Article 156 (b) of the Constitution. The fears that the conservatory orders seek to protect are very private interest bordering on parochial interests which can be addressed when the fear materializes. The Kenyan state has the duty to provide a safe and secure cyberspace. The correlative of any right is an obligation. No right exists in glorious absolution.

The kind of unregulated utopia that the Petitioner envisages does not exist in any open and democratic society. Cyberspace is a relatively new aspect of human life and the legn challenged seeks to ensure that those who seek to use the space are secure. The court needs to balance the rights the Petitioner seeks to assert and the safety of the state. The danger that the Petitioner are afraid of has not materialized.

The application dated 29.5.2018 can still be canvassed inter parties and the court to make up its mind after hearing all the parties to the application.

W. A. OKWANY

JUDGE

Angaya:

For the 2nd Respondent (N.A.) I wish to associate myself with the submissions of Mr. Nyamodi and wish to emphasize the presumption of Constitutionality over legn and should not be suspended ex-parte. I pray that the application dated 11.6.2018 be allowed.

W. A. OKWANY

JUDGE

Ashimosi:

On behalf of the 4th Respondent - we support the application and adopt the submissions by Mr. Nyamodi – we emphasize that even after variation of the of the initial order suspending the entire Act to remain an order suspending the named sections–apply the CORD case –

There is still a lacuna in the Government application in protection of cyber space among the suspended sections. Section 48 – 53 – amongst other things suspends investigations of any cybercrime. The inv. Involves production order, a court order – due process.

Section 16 – 41 seek to protect cyberspace of these sections. Only 2 relate to the Petitioner. Section 23 – publication of false information and Section 22 which deals with false publication.

We have satisfied the criteria that if matters remain as it is, investigation relating to cyberspace has been suspending which prejudices the state. The Petitioners have not demonstrated imminent danger.

We pray that the orders be set aside.

W. A. OKWANY

JUDGE

Mutemi:

In response to the application the Petitioners filed a Notice of Preliminary Objection dated 2.7.2018 together with a Replying Affidavit sworn by Jane Muthoni.

We wish to state that a Replying Affidavit means we challenge both the facts of the application and basis of the law (P.O) We have annexture marked (BAKE 4) certified copy of the hansard record of the National Assembly sitting of 21.3.2018 when the Bill came up for committee for whole consideration. We also have "BAKE 5" which is the overal memo of objects and reasons.

We filed submissions on 2.7.2018 and list of authorities

1. Firstly the jurisdiction of the court to hear this application.

2. Has the 1st Respondent demonstrated grounds to warrant the extreme remedy of setting aside ex parte orders.

3. On jurisdiction – we wish to distinguish b/w an appeal and application for renew – what the 1st Respondent has done is an attempt to rehear our application. He has appealed the decision of Mwita, J and camouflaged it as review see case of Wanjiru Gikonyo and 2 Others vs NA. Petition 453/2015 at paragraph 26, the court cautions that a review application is not an appeal and should not be allowed to act as an appeal in disguise it ceases to be an application for review once the merits of the orders are invoked.

The 1st question is why a review order issued – see answer in case of Benjoh Amalgamated vs KCB where the court held that review orders are issued to correct human falability and human perversion i.e. where a mistake has been made.

2nd question is when should a review order be issued?

The answer is at paragraph57 of the Benjoh case i.e. it should be issue rarely see case of Okiya Omtatah vs Comm – General KRA Petition 532/2017 – the court observed that it should only be issued in exceptional circumstances and with great caution to correct an error so as to reflect the intention of the court issuing the order. In that case the court gave a test to be applied i.e. where the need to do justice outweighs the finality principle.

In determining whether the application amounts to an appeal or review proper urge the court to refer to the test created in the Wanjiru case – when court stated that the responsibility of court is not to consider the factual and legal hypothesis of the case – rather the court is to restrict itself to the grounds of review raised in the application. Most importantly, the court not to concern itself with the minute dissection of facts. The following amount to grounds of appeal.

1) The Petitioner did not present sufficient material for the court to make a finding that there was a prima facie case. See paragraph 6 of Notice of Motion and paragraph 7 Supporting Affidavit.

We ask the court to pay attention to how that ground has been stated because it reads as an alternative order as if the 1st Respondent was sitting in Judgment quing the wisdom of the court that amounts to an appeal.

When we appeared in court on 29.5.2018 we understood our responsibility and submitted based on the case of Hon. Kanini Kegave vs. Okoa Kenya Movement. Our responsibility was to show that the petition was not frivolous but disclosed arguable issues and the judge was satisfied that the threshold had been made to later lynch/challenge the decision based on the 1st Respondents opinion that a prima facie case was not established is to call in question the wisdom and discretion of a High Court decision which, with respect is not the right forum for that.

On the 2nd ground that we failed to demonstrate an imminent threat to violation of rights – or what the 1st Respondent termed fear of the unknown – he couldn't be more wrong. In our petition, we annexed 2 reports titled the state of the internet in Kenya and in those reports, there are details of arrests made on the basis of what was Section 29 (a) of the Kenya Information and Communication Act Section 132 of the penal code the fate of those 2 provisions is that they have been declared un constitutional but interestingly what we see in the new Act is the reintroduction of those sections.

See page 26 of the Hansard Record where it was clear that the intention of the National Assembly when passing the legn was that "young people be arrested within the first 24 hours of the Act coming into force". When we were before Mwita J, we showed him the tendency by the 4 Respondents to strangle the online space and the judge was convinced that there was a real danger which is prejudicial to the public and the Petitioner. We urge this court not to sit on appeal over Mwita J's. decision.

Thirdly the applicant state that the orders granted were contrary to legal principles and judicial policy – the legal principles called to question are concerns.

1. Ex parte orders should be granted in exceptional circumstances.
2. Ex parte orders be granted pending inter partes hearing.
3. Ex parte orders not be granted for an in ordinal period of time.

See paragraph 12 of Notice of Motion and paragraph 25, 26 and 27 of Supporting Affidavit.

This ground in tantamount to ground on misapprehension of law which is at ground of appeal and not review.

We submit that Mwita J. applied the correct principles in granting those orders. When the 1st Respondent states that legn enjoys a presumption of constitutionality. We refer to the case of Geoffrey Andare vs the AG, Petition 149/2015 paragraph 72 where it was held that legn limiting human rights does not enjoy the presumption of constitutionality.

Secondly Rule 23 (2) of the Mutunga Rules gave Mwita J. the power to dispense with service and inter parties hearing of the application – and he gave those directions in accordance with Rule 21 so that the hearing of the application could be fast tracked which is to the benefit of the 1st Respondent who is very keen to implement the grounds.

Having shown the grounds to be struck off for being appeal grounds and not review – we wish to address the question of whether sufficient grounds have been shown for review.

1 – Right to be heard see paragraph 2 Notice of Motion.

Paragraph 4 Supporting Affidavit invokes the right under Article 50(1), Right to have a dispute resolved at a public hearing. In the Omtatah case at paragraph 25 –

the question of reviewing under the ground of fair hearing was discussed and the courts interpretation was that review should only be allowed where service was not proper or where the Applicant acted fraudulently – this does not apply in this case. Article 50 (1) does not in any way inhibit the courts powers to decide application at ex parte stage.

On allegation that Petitioner is guilty of misrepresentation of facts and law material non-disclosure. At paragraph 5 – no particulars of misrepresentation are given and so that ground must fail.

On non-disclosure of

1) Extra territorial nature of cyber space – that is a matter of general notoriety which we had no obligation to disclose.
2) Non-disclosure of the duties of the Respondent – this is false – paragraph 2, 4 and 5 of the petition do exactly that.
3) On failure to disclose the impact of the general data protection regulation (GDPR).

This is a EU regulation concerning the protection of personal data of subjects of EU it places no obligation on the Respondent or Kenyan as a state and only places responsibility on individuals who seek to do bizz with the members of EU – so it is not relevant in this case because this case challenge the Act which concerns itself with interarity of system in Kenya and content offences.

Our duty for disclosure was laid bare in the case of Eric Cheruiyot vs IEBC Petition 1/2017 – we are only to disclose all those matters that were material to the granting of the orders. We had no obligation and indeed it is discouraged for us to go on a tangent on anything and everything on the cyberspace that is not relevant to our case.

4) On the issue of Lacuna created by the conservatory orders, we refer to page 13 of our submissions where we have broken down Sections alleged in the 1st Respondents application.

He alleges that the sections repealed by the Act in Kenya Information and Communication Act (KICA) and Sexual Offence Act – he alleges that the Sections were replaced by various Sections in the impugned Act which have now been suspended creating a lacuna – we have gone to great lengths to break down the repealed sections and the sections in the impugned Act replacing the repealed sections and whether the repealed sections have been suspended by the order.

From our analysis, none of the sections cited in paragraph 4 of the 1st Respondents Notice of Motion is affected by the conservatory orders.

To push for consideration – so what if there was a lacuna in an unconstitutional law – so what if we did not have a law that seeks to limit Human rights in a manner inconsistent with the constitution. Is that the 1st Respondents desire.

On the issue of public interest – paragraph 9 Notice of Motion and paragraph 20 Supporting Affidavit, the 1st Respondent argues that National security and

International. Obligation on cyber space are the ultimate public interest – we submit that, that is a misapprehension on the Respondents role because;

1. Conservatory orders themselves are orders in the public interest – if we go by the case of Philip K. Tunoi vs JSC the purpose of conservatory orders is to prevent not only the Petitioner and the general public from preventable perils.

The question has been asked what is the Petitioner so afraid of?

In response I would like to paint a picture of the role of Social Media in today's society as a field for practicing active democracy conducting civic education, political expression, access to information, policy making i.e Hashtag activism, where everyone regardless of status is able to participate – so when a question is asked on the risk the risk is that this space where we have finally realized the spirit of the Constitution is now at risk thank to the computer misuse and cyber crimes Act.

We challenge the threat to freedom of expression, opinion, media, Right to human dignity and privacy.

We refer to the case of Jackline Okuta vs Act.

"Human rights enjoy a prima facie presumptive inviolability and will trump other public goods." In that case the writing of Louis Henkins in the Age of rights was celebrated that individual human rights cannot be sacrificed even for the good of the greater number even for the general good.

What we fear is the enforcement of an Act that could violate even the rights of one person – recalling that under Article 22 of the Constitution – it is the responsibility of all the Respondents and then to protect and promote right – we should not want for a right to be violated. We should avoid the violation.

Article 10 of the Constitution is what guides us on where the public interest is. We appreciate the zeal of the 1st Respondent in wanting to curb bad actors in cyber space, but through the 1st Respondent needs to be reminded that his loyalty should lie with the Constitution and not an Act of Parliament.

Whereas Article 156 implores him to promote public interest, he is not the custodian of Public Interest.

In this case, he is complicit in the violation of Human Rights. The computer and Cyber-crimes Bill, is a Bill that was introduced by the majority leader which means it was a Bill by the Government which passed through the 1st Respondents office, he approved him and the 3rd Respondent have confessed in the affidavit that they formed a "working lip" to work on that law. He does not deserve special treatment/audience by this court if the case for a conservatory order had been made and if unhappy with the order – he should follow the appeal procedure which is the right procedure. What this court is being called upon to do, is not only unlawful and unprocedural, but is also unfair and will spell doom to not only the Petitioner, but every internet user in this country.

Human Rights are not to be treated casually, where there is a matter such as this, the desire of all the Respondents being state officers is to encourage the suspension so that the resultant Act is implemented in the most Constitutional respecting mode. They should not be in a hurry to implement an Act that raises fears and concerns on its constitutionality.

What they call for is the lifting of the suspension on the 26 Section. We submit that in the rarest chance that the application is merited. What they would deserve is a chance to state their case – which is what they have done in the submission – the right remedy would not do away with the interim orders.

We pray for a finding that this court has no jurisdiction to consider the application since it is an appeal disguised as an application.

We pray for a finding that no valid ground has been proved to merit the variation of the ex parte orders.

I pray for a dismissal of the application with costs.

W. A. OKWANY

JUDGE

Kiprono:

The 1st Interested Party supports the Petitioner.

We have to consider the Rights in question. The nature of freedom of expression is that it affects the enjoyment of other Rights. So freedom of expression includes the

Right to seek, receive and impart information online or offline regardless of frontiers should be protected jealously.

Certain sections of the impugned Act threaten the right to information privacy and the right to Fair Trial. We submit that Chacha J. was properly convinced that certain sections of the law were delitarious to the Human Right. E.g CORD vs Republic – Odunga J. found that the imminent danger of BOR is enough to warrant the suspension of legn.

At para 135 of CORD case, Odunga J. lamented – what use is a favourable determination of a petition if by the time of the determination torture has taken place and freedom lost beyond recall.

Section 22 and 23 of the impugned Act reintroduce the crime of criminal defamation which was determined by this court in Jackline Okuta case and the court pronounced itself that criminal libel is a disproportionate limitation on freedom of expression in a free and democratic society. The same sections 22, 23 and 27 are overly broad and vague.

This court in the Geoffrey Andare case found that overly broad provisions cannot be a basis for limitation of fundamental rights.

In the CORD case, the court stated that when deliberating on the constitutionality of sections that seek to limit rights and freedoms based on Article 24 – the onus moves and shifts to the party seeking the limitation – the Petitioner herein properly

demonstrated that certain sections threatened fundamental freedoms and the court was properly convinced and issued ex parte orders accordingly. The CORD case also and away with presumption of constitutionality regarding fundamental rights and freedoms.

Odunga J, asked – "can the court entertain a case before it, whereby Parliament has passed a law legalizing torture?" His answer was that the courts will loose all legitimacy and it will have abdicated its duty to the Constitution and Kenyans if on the face of it fundamental freedoms are threatened.

On the issue of lacuna in law, under the Communication Authority of Kenya – there is the Kenya National Computer Incident Response Team – in that website their function is to provide information and assistance in implementing active measures … respond to incidents when they occur.

In our submissions paragraph 12 – 18 we have set out law that can be used by the state and the Respondents in protecting the cyber space pending the hearing and determination of this case.

On investigatory powers, of the impugned Act seems to introduce something a kin to the device management system that was found unconstitutional in the case of Okiya Omtata – vs – Communication Authority.

We submit that the orders of Chache J. were appropriate according to our laws.

At paragraph 37 of the affidavit of Christine Agimba there is a claim of misrepresentation by the Petitioner with regard to the presence of the 1st Interested Party and that the Petitioner should have disclosed that the 1st Interested Party was part and parcel of the drafting of the impugned Act – the 1st Interested Party was not on record at the time the ex – parte orders were issued.

W. A. OKWANY

JUDGE

Nyamodi:

The court record is clear on the appearance at the exparte hearing. On Rule 23 and 25 Mutunga rules. Rule 23 – court given the ability to issue ex parte order.

Rule 25 ability of the court to relook those orders. The 1st Respondent properly before this court.

To distinguish 2 cases Wanjiru & Benjoh, both were for the review under Section 80 CPA & Rule 45 CPR. This is not an application under Section 80 &Rule 45 it is under Rule 25 Mutunga Rules.

In Benjoh case the Court heed that the overriding consideration was not finality but justice. Undue emphasis has been placed on establishment of a prima facie case that is a consideration when granting a conservatory order. But component of imminent harm must be established. The only response was that BAKE & 2 Others Court should consider the context of BAKE 1-60 blogger arrested BAKE 2I is a self

serving statement advancing the push of the Petitioner- the arrest spoken of in BAKE I are not as a result of this Act.

The petitioner seeks to justify a push that is indefensible in law. NOM decided ex parte top expedite a hearing of petition. There is no situation where a matter can be determined conclusively ex parte. That was not the request made by the petitioner in the application.

There can be no expeditions hearing in the face of a glaring injustice. The issues of policy Hashtag etc are averments from the bar.

W. A. OKWANY

JUDGE

Court:

Ruling 1.10.2018 interim orders extended till then.

W. A. OKWANY

JUDGE

01.10.18

Coram: Hon. W. A. Okwany J.

CA - Kombo

Miss Mutemi & Elizabeth Lenjo for the Petitioner

Kiprono for the Interested Party

Kuyuoni for Mwendwa for the 2nd Respondent

Ochiel for Miss Ngesa for the 2nd Interested Party.

Ashimosi for the 4th Respondent

Court:

Ruling read in open court in the presence of Miss Mutemi & Lenjo for the petition and Mr. Kuyuoni for the 2nd Respondent.

W. A. OKWANY

JUDGE

Mutemi:

I have an application dated 28.6.2018 is pending hearing. I seek directions on how to proceed with it.

Ashimosi:

I pray for a date for mention before Justice Mwita on how to proceed with the matter considering that he is the one who issued the initial orders in this case .

Court:

The Respondents are hereby granted 14 days to file and serve their responses to the application dated 28.6.2018. Mention before Mwita for further directions on 5.11.2018. Conservatory orders extended till 5.11.2018.

W. A. OKWANY

JUDGE

1.10.2018

5.11.2018

Coram: Hon. W. A. OkwanyJ.

C.A - Kombo

Miss Mutemi for Petitioner

Mr.Kuyuoni for Mwendwa for the 2nd Respondent

Ashimosi for 4th Respondent

Miss Ndong for the Solicitor General for the 1stRespondent &

Mr. Nyamondi for the 3rd Respondent

Ochiel for Miss Ngesa for the 2nd Interested Party

Mutemi:

This matter was to be mentioned before Mwita J. for further directions.

Court:

Mention before Mwita J. on 3.12.2018.

Conservatory orders extended till then.

W. A. OKWANY

JUDGE

5.11.2018

3.12.2018

Coram: Hon E.C. Mwita J.

CA - Lekaram

Miss Mutemi for Petitioner

Mrs. Cherono for Nyamondi 3rd Respondent

Mr. Kuyuoni for 2nd Respondent

Mr. Ashimosi for 4th Respondent

Mr. Ochiel for Miss Ngessa for 2nd Interested Party

Court:

Parties do comply with orders of 29.8.2018 on the filing of submission.

Hearing of the main petition on 6.3.2019.

Interim orders extended till then.

E.C. MWITA

JUDGE

3.12.18

Mr. Ochiel:

We wish to be enjoined in this petition as the 3rd Interested Party.

Mr. Ashimosi:

We have no objection.

Court:

The Law society of Kenya is hereby enjoined in these proceedings as the interested party. The 3rd Interested Party do file and serve a response and written submissions to the petition within 14 days from the date hereby.

Hearing on 6.3.2019.

E.C. MWITA

JUDGE

3.12.2018

6.03.19

Coram: Hon J. A. Makau, J.

Court Assistant: Kombo

Mr. Kapio holding brief Miss Mutemi for Petitioners

Miss Ndong together Nyamondi for 3rd Respondent

holding brief for 1st Respondent

Mr. Kinyoili for 2nd Respondent

Miss. Ochiol holding brief for Mr. Ochiel for 3rd Interested Party

Miss Ochiol holding brief for Hellen Ngesa for 2nd Interested Party

Mr. Ashimosi for the 4th Respondent

Mr. Kapio:

Matter for hearing of the main petition on 29/5/2018.

Parties directed to file submissions.

We filed our submissions. Yesterday was served with submissions of the 1st, 3rd & 4th Respondents. Today served with submission of the 2nd Respondent.

I seek for additional time to file supplementary submission. There was conservatory orders issued in this matter. We pray they be extended until next hearing date.

We pray for a hearing date.

Miss Ndong:

1st and 3rd Respondents filed submissions and served. The Petitioner did not file submissions in time. We seek for an early hearing date.

Mr. Kinyoili:

We have filed submissions though not in time. We filed our submissions in this morning but were ready.

Miss Ochol:

This Court on 3/12/2018 gave an order that Petition 222 of 2018 be struck out, and Petitioner enjoined 3rdInterested Party's. We were ordered to file fresh submissions. We have been served with 2ndRespondents submission and we seek leave to file responses. The 2nd Interested Party do not Intend to put in any submissions.

Mr. Ashimosi:

We have filed and served our submissions out of time. We were ready to proceed. We seek early hearing date.

Court:

The Petitioner and 3rdInterested Party are granted leave to file supplementary submissions within the next 14 days from today.

Conservatory orders to remain inforce meanwhile.

Hearing on 30/4/2019.

J. A. MAKAU

JUDGE

6.3.19

30.4.2019

Coram: Hon. J. A. Makau, J.

Court Assistant - Kombo.

Miss Mercy Mutemi for Petitioners

Miss Kihara holding brief Mr. Ashimosi for 4th Respondent

Mr. Ochiel for 3rd Interested Party jointly with Miss Ochol

holding brief for Mr. Kiprono for 1st Interested Party

Miss Ngesa for 2nd Interested Party

Miss Ndong holding brief Solicitor General for 1st Respondent

jointly with Mr. Nyamondi for 3rd Respondent

Mr. Kuyuoni holding brief Mr. Mwenda for 2nd Respondent

Miss Mercy Mutemi:

We were not able to comply with the courts order. We pray that supplementary affidavit be admitted. We are ready to proceed.

Miss Ndong:

We are ready to proceed.

Miss Kihara:

We are not ready as Mr. Ashimosi is before Supreme Court in Application No. 12 of 2018. DPP vs Engineer Kamau. We seek another date.

Mr. Kuyuoni:

We are ready to proceed.

Mr.Ochiel:

We were ready and are concerning to his request by DPP.

Court:

The Petitioners Supplementary submission dated 24th April 2019 is admitted to hearing.

This matter was for hearing today and though all parties have complied with the courts order, the 4th Respondent is not ready as the lead counsel is engaged at the Supreme Court in Application No. 12 of 2018.

It is in the best interest all parties be heard. In view of the above this Petition is adjourned to 17/7/2019 for hearing.

Conservatory orders extended till then.

J. A. MAKAU

JUDGE

30.4.2019

17.07.2019

Coram: Hon. C .Kithinji (Dr.)

Court Assistant - Kombo

Mr. Mudao holding brief Mercy Mutemi for the Petitioner

Mr. Baraza holding brief for Nyamondi for the 3rd Respondent and

Solicitor General for the 1st Respondent

Mr. Mudao:

Matter was for hearing. He prays for the extension of conservatory orders.

C. KITHINJI

DEPUTY REGISTRAR

Court:

Matter be mentioned before Justice W. Korir for directions on extension of interim orders today 17.7.2019.

C. KITHINJI

DEPUTY REGISTRAR

17.7.19

17.07.2019.

Coram: Hon. W. Korir, J

Court Assistant - Mohamed

Ms Mercy Mutemi for Petitioner - present

Mr. Kuyuoni for 2nd Respondent and holding brief for Miss Ndong for the 1st& 4th Respondent - present

Mutemi:

This matter was to come up for hearing before Makau, J. but he is on leave. We pray that the interim orders in force be extended until the hearing date.

W. Korir

JUDGE

17.7.2019

Kuyioni:

The conservatory orders were up to the hearing and determination of the Petition. We ask for a hearing date on priority basis considering there are conservatory orders.

W. KORIR

JUDGE

17.7.2019

Court:

Conservatory orders extended to 23.10.2019 when the Petition will be heard before Makau, J.

W. KORIR

JUDGE

17.7.2019

23.10.2019

Coram: Before Hon. J. A. Makau J.

Court Assistant - Lovender

Ms Mercy Mutemi for Petitioner

Mr. Nyamondi jointly Miss Ndong for 1st & 3rd Respondent

Mr. Bashir holding brief for Mr. D. Kiprono for 1st Interested Party

Mr. Kuyoni for 2nd Respondent

Mr. Ochiel jointly with Mr. Kosgei, Mr. Oduor for 2nd& 3rd

Interested Party

M/s Mercy Mutemi:

We are ready to proceed with highlighting our submissions.

Mr. Nyamondi:

Parties have filed submissions.

Mr. Bashir:

I will take 2 minutes.

Mr. Kuyoni:

I will take time given by the court.

Mr. Ochiel:

This is a hearing Petition affecting the whole Act.

Court:

Matter to proceed to hearing at 1:40 pm.

J. A. MAKAU

JUDGE

AT 3:10 pm

Same Court.

Mr. Kiprono for Interested Party

M/s Mercy Mutemi:

We rely on Petition dated 29/5/2018, Supporting Affidavit dated 29/5/2018, Petitioner written submission 5/11/2018, Petitioners index of authorities dated 5/11/2018, Petitioners supplementary submission dated 24/4/2019 and Petitioners supplementary index of 24/4/2019.

The context of this case is that we are in the middle of digital age. The hearing transferred to digital have different effect. This can reach million people in ten minutes and the effect is that we are in process of legislating online. We are asking the Court to ignore the charter that give effect to human rights. This is how one digital right to be constituted as constitution remains unchangeable despite the era. The computer misuse and cyber Act came in law on 16/5/2018. 26 Sections of that Act are in question in that Petition. We cite violation of constitutional rights at

Section of the Act. Section 3(d) to protect rights to privacy and freedom of expression and access to information.

We will come back to Section 3 to find out what the act says.

Under issues for determination are

(a) Whether Section 22, 23, 24 (1) (c); 27, 28, 37 of the Act violated Article 32, 33 and 34 in a manner in consistent with Article 24 of the Constitution.

(b) Whether Section 48, 50, 51, 52, 53 of the Act violate Article 31, in a manner inconsistent with Article 24 of the Constitution?

(c) Whether Sections 16, 17, 29, 31, 32, 34, 35, 36, 38 (1) 38 (2), 39 and 41 of the Act are unconstitutional for failing to prescribe the mensrea element of the offence?

(d) Whether Section 5 of the Act violates Article 27 of the Constitution.

(e) Whether Section 33 (1); 40, 49 (3) of the Act are unconstitutional for being too vague.

(f) Whether Standing Order 133 (5) of the National Assembly Standing Orders is unconstitutional in so far as it violates Article 118 of the Constitution?

No where are we saying the rights we have listed are not limited but we are saying if so it has to be in terms of Article 24 of the Constitution.

Issue No. 1

On section 22 and 23 of the Act.

On 22 fable publication are title of 23 publications of fable information.

Two offences dealing with the same conduct. Section 22 deals with intentional publication of document with or without financial gain commits an offence – Fine 5 million and sentence 2 years or both. This Section violates Article 32 of the Constitution dealing with or limiting a freedom to hold an opinion. One has an opinion to hold an opinion and Article 33 then is a right to hold an opinion. The implication of this Section is for one to enjoy the two rights, ones opinion end expression must be truth.

The question is who will gauge the truth.

No qualification under Article 32 and / or Section 33 of the Constitution.

In affidavit of Mr. Wamathai he annexed a report "Bunch one" which shows a trend in which authorities have been arresting bloggers for publication of fake news. Taking a long que at Government Office at questioning expenditure of CDF funds etc.

There is presumption the government is the holder of the truth and any other opinion is false.

Section 22 & 23 are very familiar to Section 29 of the Kenya Information and Communication Act; which in 2016 was declared unconstitutional in the case of Geoffrey Andere vs. Attorney General (see authority No. 4 in the original index)

Argue similar to Section 194 of the penal code declared unconstitutional in Jackline Okuta vs. AG (authority No. 5 in original Index).

Section 23 of the Act introduces another layer of the offence; what is likely to discredit the fact that attacking a person is now an offence – the fine is the same and imprisonment is upto 10 years or both.

Can the 2 offences pass the test set for us under Article 24 they have subdued the provisions of Section 32 and 33.

In page 10 of original submissions, we have gone on to explain how important the freedom of expression is. It is backbone of that democracy. Bearing this threatens democracy and is enabler of other rights.

Article 24 of the Constitution requires we ask the importance for the purpose of limitation and its effect. Is there legitimate purpose served by that limitation. Why is government interested in the limitation and regulation.

In our research the only place as to why parliament to enact power law is in the an hazard and annexed as No.24. The mover said he will deal with you as your days are numbered. The Constitutional issue sought to be cured is not clear.

In the 2nd annexture to Mr. Wamathai's affidavit Back 2. It shows the biggest beneficiary were the legislators themselves during the campaign period. We submit the purpose of coming up with false hearing is unconstitutional. The effect is to muzzle opinion, to storm on opponent and to arrest dessidents.

Section 24 is on child phonography and Section 24 (1) (c). The child is removed under 24 (1) (c). This deals with all types of phonograph in Kenya. Section 2 defines what phonograph is. Our submissions on the many sections defines phonograph is nude enough to not by edition, motion pictures, television.

In page 6 of our original submissions, we pinout out why such a vague definition is unconstitutional utterance ones opinion may be Section 27 of the Act creates an offence Cyber harassment.

Our question is on page 6. It is the vague nature in which the offence is defined.

It talks of act which indecent can affect a person.

This takes us back to Section 29 of the Kenya Information and Communication Act (KICA) declared unconstitutional.

Section 28 deals with cyber-squatting. Cyber squatting is using a famous name to book a domain (Internet address) waiting to sell at an exorbitant price.

Section 28 defines cyber-squatting in such broad way even using common names is now an offence. This is why people using the same names may rely in Court.

Section 37 of this Act, creates an offence of wrongful distribution as obscene scene or images. What is obscene image? No definition. This section affects freedom of opinion, expression and freedom of media in a manner inconsistent with Article.

Issue No. 2

Section violates right to privacy.

This deal with investigation proved by and contemplating 3 types of investigation;

1. Subscriber date (yellow pages)
2. The Real time collection of traffic data (footprint online)
3. Content data (actual content of communication)

These three category of data should not be dealt with in the same way.

Content data being the most intrusive should not be dealt with in the same way.

The investigation priced the dissented source require search warrant yet Section 50, 51 of the Act give a way to bypass that oversight step; the issue requirement my protection. We urge the Court to be guided by case decided on digital investigation procedures – case of Big Brother Natal and others v. UK (See 4 in our supplementary index).

It makes 7 proposals and we urge the Court to be guided by the proposal having found the Sections under issue 2 violates Article 31 in a manner inconstant with Article 24.

Issue 3

Section 5 thereto and their failure to prosecute mainstream element. If you create an offence you must prosecute the guilty conduct and guilty mind.

The section when applied in digital conduct lead to ridiculous offences. Section 16 and 17 was intrusively and without authorization. One can cheat in knowing on infected key. The virus could be a worm. One could be guilty without criminal intent.

They violate requirements under Article 24 where any affair be prescribed by law. It should be clear. This is also application to offences under Issue No.5. The offences are vague. One cannot know what conduct to avoid to evade criminal liability.

Issue No. 4

This attacks section 5 of the Act and establish the national computers and cyber crime coordination committee.

Article 27 of the Constitution the 2nd Respondent is required to write legislation in a way that, not more than 2/3 of same gender are to be present in the committee.

There is a drafting error. In page 3 of original submissions we explain why a one gender committee is dangerous.

On Standing Orders is on the affected without mensrea. The Section was introduced after public participation. The amendment not debated but adopted as a whole. Issue on No.3 without mensrea. See Standing Order No. 133. Why was there no public participation. There is a shortcut in the standing orders to allow members to short-change citizens of their rights.

We pray all section be declared unconstitutional as this section seeks to return Sections declared unconstitutional before. We pray the 2nd Respondent be condemned to pay costs.

J. A. MAKAU

JUDGE

23.10.2019

Mr. Ochiel:

for 2nd and 3rd Interested Party.

The freedom of expression is granted and internally limited by Article 33. The guarantee is Article 33(1)(a) – (c) while limitation is 33 (2) (a) – (d).

The law is that the statutes can be unconstitutional either for its purpose or effect.

The court can quash the entire statute.

Any law that limit the right must meet the following conditions in Article 24 of the Constitution to pass the test.

(a) The limitation must be provided by law.

(b) Persuade of legitimate aim.

(c) It must be necessary in open and democratic society.

If it fails any of this conditions it is unlawful.

To be considered law the same must be formulated with sufficient provision to enable an individual regulate his conduct. It may not confer invented discretion.

Article 50 (2) (n) it is a principle of legality and that reason precision on law imposes penal sanction it must be clear. The offence must be clearly defined.

On freedom of expression under Article 33 (2) (a) - (d) of the constitution.

The prohibited sections are clearly spelled out. If law persives that the law will be pursuant of a legitimate law. In the case of cord case (paragraph 10) Those grounds are only limitation given.

On issue of necessity, the mensrea must be the last restructure measure available (see authority no. 5 in Petitioners bundle).

The burden of proof lies with the Respondent (Article 24 (3) of the Constitution.

We have highlighted why the impugned Section are unconstitutional. Section 23 of the Act fails the test of precision because the information that is false is not defined.

We have Civil Defamation Act in force.

Section 16 and 17 of the Act – these overlapping sections. Parliament has failed to declare the aim. It is ambiguous. Section 16 has fine not exceeding upto 10 million or imprisonment for a period of upto 5 years. The Section is over bill and its not proportionate.

Section 24 of Act there is social need to curb child phonograph. Is child sucking mother breast an offence.

Cyber harassment under Section 27 does not pursue a legitimate aim as it is outlaid the sections of section 33 (2) (a) – (d) are not vague phrases. The fine is yet upto 20 million or imprisonment to 10 years.

Cybersquatting, we have Copyright Act and Tradesmark Act for which there is a remedy. The Penalty is Ksh.200,000/=.

Section 36 does not require a mensrea and does not define unlawful destruction and is vague. An offence that does not value mensrea is vague and unlawful.

Mr. Kiprono:

I will highlight on three points. This is section 22, 23 and 27 of the Act.

Criminal defamation was found to be unjustified and unconstitutional. This is sneaking back what has been declared unconstitutional on false and misleading information. This is somehow an arbiter of the truth in open and democratic society, as guided by Article 33; 33 (2) and gives what speeches we cannot go into. We submit false and misleading publication are an abide the speakers which are not allowed in our constitution (See Federation of Africa Journalist and other vs Gambia) Evenos statement is enabled in free debate and will be protected to have a free breathing space inorder to survive this may lead to say censorship.

Section 17 of the Act - dealing with interceptive of hacking of communication. Section needs a public interest. Clause of riders to be used as defence. This has become a public requirement.

Section 48, 49, 50, 51 and 53 these Section allow the police to support or cease material, that they deem fit for investigation. There need to be judicial oversight for any interception that will be a violation to privacy and even in security laws. This is safeguard to the right of privacy. (Mr. Okiya Omtata v Communication Authority of Kenya and Human Communication of Kenya).

Any interception by security organs should come through a Judicial oversight through a warrant; so by extension is through the court.

Mr. Nyamondi:

The Petition is opposed and not to respond to some arguments, in support of the Petition.

The dispute is about legislation that seeks to regulate certain aspect of digital space. This is a space where it is artificial it is real in that what takes place is for all of to see. It may be true the Petitioners is specialized in that space unregulated. Under Article 156 of the Constitution it is the responsibility of 1st Respondent to act in public interest.

There is a vast majority of Kenyans who have been victims of all manner of mischief who are reported by the 1st Respondent.

The Petitioner are fighting for their livelihood. The state in moment constant with its constitutional obligation seeks to regulate that space. The Petitioner envisages a utopia where people are free to say what they want against other and make a living out of it. They have courage to say the constitution enables them to do so.

Said utopia do not exist and the constitution of this Country should not enable them to do so.

The Petitioner has misunderstood adversely the constitution.

The 1st and 3rd Respondent have filed their submissions and filed a Replying Affidavit which I wish to rely on and wish to highlight as follows.

On page 2 is our identified grievances.

From page 4 – 8 have set the considerations

1. The doctrine of separation of powers Parliament does not legislate with the people. See Article 94 and 118 and involve people but subject to the people. People elect representatives coram calling out its policy through legislation. People cannot micromanage the Parliament with need of public participation. Parliament is not required to legislate with the people.
2. State doing of care to its citizens. Article 24 of the Constitution. Article 24 (1) (d) prejudice the rights of others. The responsibility is on the state the right exists to the extent it does not injure others. It cannot exist when one is saying they are nature on offensive. The right to free speech do not exist to say things which demean others.
3. Presumption of constitutionality – the petition has been done to rebut the presumption.

In interpreting the constitution, where it contains a progressive charter it sets out the duty the state has and should not be interpreted in a manner that hinders the state ability to carry out their responsibility.

If the committee had been appointed. No committee had been appointed. The argument has no basis.

Article 27 on discrimination not attenable as it does not form Article 27. It avoids discriminating.

Section 5 of the Act has nothing that offends Article 27 of the constitution.

Section 22 of the impugned Act, was not properly read. Section 22 (2) is equivalent to Article 32 (2) of this constitution. I urge the Petition be dismissed as utopian environment cannot exist. Where people can act freely cannot be allowed where people can distribute obscene image as a society not envisaged by our society. If Petitioner wishes to leave country without moral they are in the wrong country.

We have responded on all issues said by the Petitioner.

M/s Ndong:

I will submit on issues, No. 3 and 4.

On issue No. 3

Failure to present mensrea. The Petition is a constitutional Petition, and has to state which Article of the constitution has been violated. That is a requirement for a Petition.

I submit the section listed thereto, is to look for constitutional provision and find what he has been violated. I submit determining the constitutionality of this Petition is place the statutory provision and the Article of the constitution side by side which is not possible as the violated Article is not in the body of the Petition.

I refer to security law consolidated case Petition No. 628/2015 consolidated 630/2015 (See submission by 1st Interested Party).

We submit mensrea varies in various aims. These computer Integrity Crime which comprise the integrity of computer system. (See our submissions).

In Tanzania Court was able to determine mensrea that would be preferred on since opposed (See page 18 at page 315). We rely on our submissions.

Issue No. 4

The section impugned by Petitioners are investigation procedure. The same investigation procedure cannot be same as other procedures. We submit the impugned provisions do not limit the rights under Article 31 because there is Judicial oversight in a respect of all investigating procedures.

Section 50 and 51, alleged do not have Judicial oversight. Section 52 of the Act provides for Judicial oversight. (See the section).

There are clearly spelled safeguards in the relevant sections.

Once a production order is issued under section 50 and 51 of the Act the period of preservation is provided for. There is a period specified in the Section.

Petitioner has not proposed any other way specially the 3rd Respondent.

On issue 5 and 6 we rely on our submissions.

We have in our submission distinguished the alleged sections said to have been declared unconstitutional.

Mr. Kuyoni:

The 2nd Respondent is opposed to that Petition. We have filed a Replying Affidavit sworn by Michael Syialai, clerk to Parliament. We have filed submissions dated 5/3/2019 filed on 6/3/2019 and list and bundle of authorities dated 7/5/2019 and filed on 14/5/2019.

We submit as follows:

Article 251 of the constitution states the International Laws will form part of laws of Kenya.

Article 2 (6) states what forms part of the laws of Kenya.

Kenya has ratified Budapest convention which requires as a matter of propriety requires state to adopt appropriate legislation on cyber crime issues. Kenya also ratified the Malabo Convention of Africa unity, which requires state within the African Union to strengthen their Domestic Legislation on cyber space security and protection of data.

The two Conventions impose obligation on Kenya to legislate a cyber law. In the East Africa region comparatives prevail state have enacted legislation of cybercrime e.g. Uganda has enacted the computer misuse of 2011; Tanzania, cyber crime of 2015, Rwanda has enacted cyber crime Act 2018. The Act was enacted see short file of the Act. It is an Act of parliament to provide for offences related to computer systems to enable timely and effective dictation, prohibition, prevention, response

investigation and prosecution of computer cyber crimes, to facilitate international corporation in dealing with computer and cyber matters and for connected process. The objective of the Act can be found under that title. It is to enable government to protect its citizens from cyber attacks that is a policy decision. This is within the mandate of the executive and enacted by parliament.

We urge this court to refrain itself from interfering with policy decisions.

Section 5 of the Act infringes on Article 27 or its members. The composition of the committee an opposed by virtue of the office they hold and under this Act they can send responsibility.

It is not possible for this court to determine the composition of the members. The averment by Petitioner are thereof speculative. Section 22, 23, 24 , 27, 28 and 37 are inflict with Article 32, 33 and 34. The Article are not absolute. They subject to reasonable restriction.

The International instrument allows such restriction be imposed on those rights. I refer to Article 19 (3) of ICCPR. (We rely on authority at page 211 - 221) of list of bundle of authorities paragraph 43 of our submissions.

Section 28 on cyber-squatting are not to point Article 40 (5) of the Constitution allows that.

On stating order No 133 alleged, as unconstitutional as it allowed to be made at the floor of the house. It has a backing under Article 124 of the constitution (see Court

of Appeal on page 259 - 271) of our bundle of authority and High Court decision at page 222 – 258.

The complaint by Petitioners has been answered.

On issue of costs, this is a public interest Petition. The Petition has no merits.

M/s Mercy:

The Respondent has failed to fulfil his duty under Article 243 of the Constitution. It is upon the Respondent to state that all conditions under Article 24 of the constitution has been met. They should show the nature of the threat, the right and limiting and in acting a legitimate right, on forcing the content of the Petition by calling them utopic by holding on the authoritical regime. No justification for limiting the rights forgetting the court has stated the words has straight meaning. How are the rights of others are being protected.

The respondents have not demonstrated the rights. In our authority No. 4 deals with the presumption for constitutionally (See the authority).

Every element of the Article 24 must be met. The 1st Respondent is not an abstract of public authority (See authority No. 17 in our list. We urge this court to consider it.

All Respondents under Article 21 have the obligation to comply with the Bill of rights.

On the Petition we have on page 4 at Section illustrated how each offence violated relevant Article of the constitution.

On mensrea we refer to authority No. 3. This rule is very clear. If a section producing more than one meaning it cannot be said mansrea, is defined.

On digital procedures rules we submit rules do not change. They continue without change.

We did not mislead Court on Section 50 (2) of the Act. The word can be given as the would is shall.

Section 51 of the Act the police go to person they want and record the data.

Similar structure in neighbouring Countries not the same. The rights can only be limited by our constitution. The conversation referred to Budapest and Malabo Conventions not relevant.

What is the purpose of public participation?

Is it to include the public participation?

J. A. MAKAU

JUDGE

Court:

Judgement on 30/1/2020.

J. A. MAKAU

JUDGE

3.2.2020

Coram: Before Hon. J. A. Makau J.

Court Assistant: Lavender

Mr. Ochiel for 1st and 2nd Interested Party

holding brief for M/s Mutemi for Petitioner

M/s Ndong for 1st and 3rd Respondent

M/s Thanji holding brief Muyoni for the 2nd Respondent

Court:

Judgement was due for 30th January 2020 but could not be delivered as Court was away on three Judge Bench.

Judgement to be delivered on 20/2/2020.

J. A. MAKAU

JUDGE

20.2.2020

Coram: Before Hon J. A. Makau J.

Court Assistant: Lovender

Mr. Kiprono holding brief for Mrs. Sumba for Petitioner

Mr. Kiprono for 1st Interested Party

M/s Adere holding brief for Mr. Kuyoni for the 2nd Respondent

M/s Ndong for the 1st and 3rd Respondent

Court:

Judgement delivered in open court in presence of counsel.

J.A MAKAU

JUDGE

I CERTIFY THIS IS TRUE COPY OF THE ORIGINAL
DATED: 18.11.2020
DEPUTY REGISTRAR
HIGH COURT OF KENYA
NAIROBI