

**RECEIVED**  
29 MAY 2018  
CONSTITUTIONAL &  
HUMAN RIGHTS DIVISION

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS  
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION  
CONSTITUTIONAL PETITION NO. 206 OF 2018

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

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS UNDER ARTICLES 19, 21, 24, 25, 27, 28, 31, 33, 34,  
35, 40 & 50 OF THE CONSTITUTION OF KENYA, 2010

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

IN THE MATTER OF SECTIONS 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, 52 & 53 OF THE COMPUTER MISUSE  
AND CYBERCRIMES ACT, 2018

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

1. THE HON. ATTORNEY GENERAL..... 1<sup>ST</sup> RESPONDENT
2. THE SPEAKER, NATIONAL ASSEMBLY..... 2<sup>ND</sup> RESPONDENT
3. THE INSPECTOR GENERAL  
OF NATIONAL POLICE SERVICE..... 3<sup>RD</sup> RESPONDENT
4. THE DIRECTOR OF PUBLIC PROSECUTIONS..... 4<sup>TH</sup> RESPONDENT
- ARTICLE 19 EAST AFRICA ..... 1<sup>ST</sup> INTERESTED PARTY
- KENYA UNION OF JOURNALISTS..... 2<sup>ND</sup> INTERESTED PARTY

TO:

THE HIGH COURT OF KENYA

The Petition of the Bloggers Association of Kenya (BAKE) of P.O. Box 8760-00200  
Nairobi in the Republic of Kenya is as follows-

DESCRIPTION OF THE PARTIES

1. The Petitioner is an association of Kenyan bloggers and content creators registered under the Societies Act. The aim of the association is to promote



online creation and free expression in Kenya. This petition is brought in the public interest.

2. The 1<sup>st</sup> Respondent is the legal adviser to the Government and represents the national government in legal proceedings.
3. The 2<sup>nd</sup> Respondent is the Speaker of the National Assembly which deliberated on and passed the Computer Misuse and Cybercrimes Bill, 2018.
4. The 3<sup>rd</sup> Respondent exercises independent command over the National Police Service which investigates offences.
5. The 4<sup>th</sup> Respondent exercises the State power of prosecution of offences.

### **THE IMPUGNED LAW**

6. The Computer Misuse and Cybercrimes Act was introduced to the National Assembly as the Computer and Cybercrimes Bill, 2017 and underwent First Reading on 10<sup>th</sup> October 2017.
7. The Bill was referred to the Departmental Committee on Communication, Information and Innovation for consideration and public participation.
8. The Committee invited submission on the Bill from members of the public through an advert in the local dailies on 6<sup>th</sup> February 2018 and held several meetings with stakeholders thereafter.
9. National Assembly considered individual clauses of the Bill during Committee of the Whole House stage held on 26<sup>th</sup> April 2018. During this stage, new Clauses were introduced to the Bill by individual members of the National Assembly.
10. The Bill underwent Third Reading and was passed on 26<sup>th</sup> April 2018.
11. The Computer Misuse and Cybercrimes Act was assented to law on 16<sup>th</sup> May 2018 and gazetted on the same day.
12. The Act will come into force on 30<sup>th</sup> May 2018 in accordance with Article 116 of the Constitution.

### **GROUND OF THIS PETITION**

13. The Computer Misuse and Cybercrimes Act as passed contravenes the Constitution of Kenya, 2010.
14. Sections 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, 52 & 53 of the Act deny, violate, infringe and threaten various rights and fundamental freedoms in the Bill of Rights in a manner that is not justified under Article 24.



15. The procedure of enactment of the Bill was not in accordance with the Standing Orders and the Constitution. Particularly, the requirement for public participation under Articles 10 and 118 was not satisfactorily met during the consideration of the Bill.
16. Standing Orders 130, 131 & 133 of the National Assembly Standing Orders are inconsistent with the Constitution in so far as they allow the inclusion of Clauses to a Bill without public participation.
17. Sections 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, 52 & 53 of the Act are inconsistent with the objects of the Act as enunciated in Section 3 of the Act.
18. The language of the Act is ambiguous and the Act itself lacks the specificity required of an Act that seeks to limit rights and fundamental freedoms.
- I. **PARTICULAR VIOLATIONS, INFRINGEMENTS AND THREATS TO RIGHTS AND FUNDAMENTAL FREEDOMS**
  - A. **SECTION 5 OF THE ACT VIOLATES ARTICLE 27 OF THE CONSTITUTION**
    19. Section 5 of the Act prescribes the membership of the National Computer and Cybercrimes Co-ordination Committee established under Section 4.
    20. The Committee is to be made up of the principal secretaries for internal security and information, communication and technology, the Attorney General, the Chief of the Kenya Defence Forces, the Inspector-General of the National Police Service, the Director-General of the National Intelligence Service, the Director-General of the Communications Authority of Kenya, the Director of Public Prosecutions, the Governor of the Central Bank and a director to be appointed by the Cabinet Secretary responsible for internal security. The said officials may designate a representative to the Committee.
    21. As constituted, the Committee violates the requirement under Article 27(8) that not more than two-thirds of members of elective or appointive bodies shall be of the same gender.
    22. The 2<sup>nd</sup> Respondent had a responsibility under Article 27(8) to craft legislation in such a way as to ensure that not more than two-thirds of the members of the Committee would be of the same gender at any given time.
    23. If the Committee were to be constituted presently with the stipulated members appearing in person, it would be an all-male Committee.



**B. SECTIONS 16,17, 31, 32, 34, 35 36, 38(1), 38(2), 39 AND 41 OF THE ACT VIOLATE ARTICLES 24 AND 50 OF THE CONSTITUTION IN A MANNER INCONSISTENT WITH ARTICLE 24**

24. Section 16 creates the offence of unauthorised interference where a person intentionally and without authorisation does any act to cause an unauthorised interference to a computer system, program or data.
25. Section 17 creates the offence of unauthorised interception where a person intentionally and without authorisation does any act which intercepts or causes interception of a telecommunication system.
26. The two offences do not include the elements of *mens rea* required to be shown before one is convicted of the same.
27. Without the *mens rea* aspect of these offences, it is not clear what conduct is targeted by the sections.
28. Sections 31, 32, 34, 35 and 36 create the offences of interception of electronic messages or money transfers, wilful misdirection of electronic messages, inducement to deliver electronic message, intentionally withholding messages delivered erroneously and unlawful destruction of electronic messages.
29. Section 38(1) and (2) criminalizes fraudulent use of electronic data.
30. Section 39 creates the offence of issuance of false e-instructions.
31. Section 41 makes it an offence to fail to relinquish codes and access rights to an employer upon termination of employment.
32. These sections only describe the *actus reus* aspects of the offences without giving direction on the *mens rea* elements required to prove them
33. These sections curtail the freedom and security of a person guaranteed under Article 29 and hinder the realization of the right to a fair hearing under Article 50.
34. The lack of clarity and specificity as to the purpose and reach of the offences is inconsistent with Article 24.
35. According to Article 24(2), sections that curtail fundamental freedoms must be clear and specific about the extent to which the right is curtailed and they ought not to limit the freedom so far as to derogate from its core or essential purpose.
36. These sections offend the principle of legality which requires that a law, especially one that limits a fundamental right and freedom, must be clear enough to be understood and must be precise enough to cover only the activities connected to the law's purpose.



37. Failure to prescribe the *mens rea* elements makes it likely that innocent persons, pawns, victims of cyber-attacks and whistle blowers will be found guilty of these offences.

**C. SECTIONS 22 AND 23 OF THE ACT LIMIT THE RIGHTS GUARANTEED UNDER ARTICLES 32, 33 AND 34 OF THE CONSTITUTION IN A MANNER INCONSISTENT WITH ARTICLE 24**

38. Section 22 makes it an offence to intentionally publish false, misleading or fictitious data or misinform with the intent that the data shall be considered or acted upon as authentic.
39. Section 22(2) limits the freedom of expression under Article 33 in respect of intentional publication of false, misleading or fictitious data that is likely to propagate war, incite persons to violence, constitute hate speech, advocates for hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm or is based on any ground of discrimination contemplated in Article 27(4) or negatively affects the rights and reputations of others.
40. Section 23 makes it an offence to publish information that is false in print, broadcast, data or over a computer system, that is calculated or results in panic, chaos, or violence among citizens of the Republic or which is likely to discredit the reputation of a person.
41. The Act does not offer the definition of the word 'publish' thereby failing the requirement of specificity under Article 24 of the Constitution.
42. The two sections infringe on the freedom of belief and opinion protected by Article 32 as they assume that there is a singular truth to which all persons subscribe.
43. The sections also curtail the freedom of expression under Article 33 which guarantees the freedom to seek, receive or impart information or ideas, whether true, fictitious or false.
44. The sections threaten the freedom and independence of the media as protected by Article 34 as it restricts the broadcasting of unpopular and controversial ideas which certain factions of society may consider false.
45. Section 22 and 23 carry heavy sentences.
46. Section 22, in so far as it seeks to criminalize false publications that do not amount to the categories of speech outlined in Section 22(a), (b) and (c) of the Act is inconsistent with Article 33(2) of the Constitution.
47. Section 23 is vague and over-broad with regard to the use of the words 'panic' and 'chaos' therefore inconsistent with Article 24.



48. Use of vague terminologies to limit the freedom of expression is unjustifiable in a modern democratic society like ours. Coupled with the heavy sentences, the sections will cause a chilling effect on the freedom of expression.
49. Section 23 unconstitutionally limits the freedom of expression to speech that discredits the reputation of others.
50. The effect of sections 22 and 23 is to unlawfully impose prior restraint on the freedom of expression and of the media.
51. Sections 22 and 23 will hinder the ability to participate in governance and to hold the State accountable contrary to Article 10 of the Constitution.
52. The two sections derogate from the core purpose of freedom of expression and freedom of the media therefore are outside the rubric of Article 24 of the Constitution.

**D. SECTION 24(1)(C) OF THE ACT LIMITS THE RIGHTS GUARANTEED UNDER ARTICLES 31 AND 32 OF THE CONSTITUTION IN A MANNER INCONSISTENT WITH ARTICLE 24**

53. Section 24 creates the offence of child pornography which is defined as visual or audio data depicting a child engaged in sexually explicit conduct.
54. Section 24(1)(c) on the other hand makes it a crime to download, distribute, transmit, disseminate, circulate, deliver, exhibit, lend for gain, exchange, barter, sell or offer for sale, let on hire or make available in any way pornography in general.
55. While the ban on child photography is anticipated under Article 53, Section 24(1)(c) goes beyond proscribing child pornography.
56. Section 24(1)(c) goes beyond the scope of Section 24 whose purpose is to ban child pornography.
57. The limitation to the freedom of expression under Section 24(1)(c) is inconsistent with Article 24 of the Constitution in the way it limits the right to privacy under Article 31 and freedom of expression under Article 33.
58. The import of the section will be to invade the sanctity of private relationships amongst adults and impose criminal sanctions thereto.

**E. SECTION 27 OF THE ACT LIMITS ARTICLE 33 IN A MANNER INCONSISTENT WITH ARTICLE 24**

59. Section 27 makes it an offence to wilfully communicate with another person or anyone known to that person if one knows or ought to have known that such communication is likely to cause that person apprehension or fear of violence or damage to property, if the communication detrimentally affects that person



or if the whole or part of the communication is of an indecent or grossly offensive nature and affects the person.

- 60. The use of the words 'detrimentally affects that person' and 'indecent or grossly offensive' is vague and overbroad.
- 61. The section limits Article 33 in a manner discrepant with Article 24.
- 62. The section goes beyond its intention and is likely to overreach even those whose conduct was not the intended target.

**F. SECTION 28 OF THE ACT INFRINGES ON ARTICLES 33 AND 40 OF THE CONSTITUTION IN A MANNER INCONSISTENT WITH ARTICLE 24**

- 63. Section 28 of the Act makes it an offence to use the name, business name, trademark, domain name or other words registered, owned or in use by another person on the internet or on any other computer network without authority or right.
- 64. This section limits the right to own property of any description under Article 40 without due justification.
- 65. The section also limits freedom to express ideas and the freedom of artistic creativity under Article 33.
- 66. This limitation on Article 33 and 40 is not reasonable and justifiable in an open and democratic society.
- 67. The importance and purpose of such a limitation is not pronounced in the Act.
- 68. The extent of the limitation is vague and too broad. It is likely that legitimate uses such use of proper nouns for comprehension will lead to an indictment under Section 28.

**G. SECTION 37 OF THE ACT LIMITS FREEDOM OF EXPRESSION UNDER ARTICLE 33 IN A MANNER THAT IS INCONSISTENT WITH ARTICLE 24**

- 69. Section 37 makes it illegal to transfer, publish or disseminate the intimate or obscene image of another person.
- 70. The Act does not define 'intimate' or 'obscene'.
- 71. The Section does not prescribe the *mens rea* elements of this offence therefore the nature of this limitation on the freedom of expression is unclear.
- 72. To the extent that the Section offers no clarity as to what type of images it restricts the publication of, it limits the freedom of expression in a manner that is inconsistent with Article 24.
- 73. The broad nature of Section 37 undermines personal autonomy and makes consensual transfer, publication and dissemination amongst adults also illegal.



**H. SECTION 40 OF THE ACT INFRINGES ON ARTICLE 31 WITH NO CORRESPONDING PUBLIC INTEREST**

74. Section 40 requires anyone who operates a computer system or a computer network, whether public or private, to report any attacks, intrusions and disruptions to the Committee within twenty-four hours. Failure to do so constitutes an offence.
75. In so far as this section applies to individual private users of computer systems, it is an unjustified invasion of privacy contrary to Article 31. It imposes obligations that are burdensome on private individuals without serving a corresponding public interest hence failing the proportionality test.

**I. SECTIONS 48, 50, 51, 52 AND 53 OF THE ACT LIMIT ARTICLE 31 OF THE CONSTITUTION IN A MANNER INCONSISTENT WITH ARTICLE 24**

76. Section 48 allows a police officer to apply for a search warrant if they have reasonable grounds to believe that there may be, in a specified computer system or part of it, data that is reasonably required for criminal investigation.
77. Section 50 constitutes an inexcusable violation of the right to privacy as it gives the court power to grant police officers a production order without listing the factors that a police officer must prove before the said order is granted.
78. Section 51 gives police officers the power to demand the preservation and disclosure of traffic data from a person in control of a computer system in certain circumstances without first obtaining a court order.
79. Section 52 allows a police officer to apply for a court order permitting the collection of traffic data in real-time for a period of up to six months.
80. The real-time collection of traffic data for a period of six months is a severe violation of the right to privacy and human dignity.
81. Section 53 allows a police officer to apply for a court order permitting the collection of content data in real-time.
82. The object of the Act as stipulated under Section 3 is to protect the right to privacy not to limit it. Sections 48, 50, 51, 52 and 53 nevertheless limit the right to privacy in a manner that is unreasonable and unjustifiable in an open and democratic society based on human dignity. Part IV of the Act is therefore inconsistent with the objects of the Act.
83. The Act fails to indicate as required under Article 24(2) that it intends to limit the right to privacy by introducing the provisions in Part IV of the Act, the nature of the limitation and the extent to which the right to privacy will be curtailed.



84. The failure to espouse the nature and extent of the limitation makes it impossible for the court to determine objectively whether to grant the orders sought under Sections 48, 50, 52 and 53.

85. Allowing police officers to obtain information without a court order is a threat to the right to privacy as this power is prone to abuse.

**J. SECTION 49(3) AND (4) VIOLATES ARTICLES 40 AND 50 OF THE CONSTITUTION**

86. Section 49(3) and (4) allows police officers to deny one access and the opportunity to copy information from a seized computer system.

87. Such denial is a violation of the right to property as guaranteed under Article 40 and amounts to a presumption of guilt contrary to Article 50.

88. Section 49(3) makes it possible for police officers to arbitrarily deprive a person of property.

**K. SECTIONS 51(4), 52(6), AND 53(6) LIMIT ARTICLE 35 OF THE CONSTITUTION IN A MANNER INCONSISTENT WITH ARTICLE 24**

89. These sections allow a court to order a service provider to keep confidential the orders issued under Part IV of the Act.

90. The orders issued under Part IV affect the right to privacy.

91. Keeping these orders confidential violates the right of access to information guaranteed under Article 31.

**II. THE PROCEDURE OF ENACTMENT WAS NOT IN LINE WITH THE STANDING ORDERS AND WITH THE CONSTITUTION**  
**CONTRAVENTION OF STANDING ORDERS 131 AND 133**

92. Article 109 of the Constitution requires that any Bill considered in the National Assembly ought to be passed in accordance with the National Assembly Standing Orders.

93. A violation of the National Assembly Standing Orders is therefore a violation of the Constitution.

94. Standing Order 131 gives the 2<sup>nd</sup> Respondent the power to direct any Member of the National Assembly proposing an amendment at Committee of the Whole stage to appear before the relevant Departmental Committee for purposes of harmonization of the proposed Clause with the Committee report.

95. According to Standing Order 133(6), no amendment is to be moved if it is inconsistent with a part of the Bill already agreed to.

96. Section 22 of the Act (initially Clause 12 of the Bill) was considered by the Committee and subjected to public participation.



97. Section 23 of the Act was introduced during Committee of the Whole as Clause 12A of the Bill.
98. Section 23 of the Act was introduced after Section 22 had been agreed to.
99. Section 22 and 23 relate to the same issue.
100. The 2<sup>nd</sup> Respondent failed to invoke his powers under Standing Order 131 to refer the mover of Section 23 to appear before the Committee for harmonization of Section 22 and 23.
101. The 2<sup>nd</sup> Respondent violated Standing Order 133(6) by allowing Clause 12A to be moved after Clause 12 had been agreed to.
102. By allowing Section 23 to be improperly moved, the 2<sup>nd</sup> Respondent facilitated a circumvention of the requirement to facilitate public participation in the legislative process.
103. Section 23 was improperly included into the Act and is therefore unconstitutional.

### **III. STANDING ORDERS 133 CONTRAVENES ARTICLE 118 OF THE CONSTITUTION**

104. The National Assembly is bound by the national values and principles in Article 10 of the Constitution when enacting any law.
105. Participation of the people, transparency and accountability are some of the values the National Assembly must adhere to in carrying out its legislative function.
106. Article 118 requires the National Assembly to facilitate public participation and involvement in its legislative business.
107. Standing Order 133 provides for the Committee of the Whole procedure.
108. Once a Bill is read a first time it is committed to the relevant Committee which is to facilitate public participation.
109. During Committee of the Whole, individual members of Parliament are nevertheless allowed to introduce new Clauses to the Bill.
110. The Committee of the Whole procedure is a circumvention of the public participation procedure in Standing Order 127.

### **SECTIONS 23, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42 and 45 OF THE ACT ARE UNCONSTITUTIONAL AS THEY WERE NOT SUBJECTED TO PUBLIC PARTICIPATION**



111. Sections 23, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42 and 45 of the Act were not subjected to public participation as they were introduced by individual members during Committee of the Whole.
112. The sections added to the Bill during Committee of the Whole are unconstitutional as this addition was done in contravention of the principle of public participation.
113. Standing Order 133 is unconstitutional to the extent that it allows the National Assembly to enact laws without subjecting them to public participation.

### PRAYERS

Your Petitioner therefore prays for-

- (a) Conservatory orders suspending the coming into force of the Computer Misuse and Cybercrimes Act until this petition is heard and determined;
- (b) An injunction barring the 3<sup>rd</sup> Respondent from carrying out arrests pursuant to the Computer Misuse and Cybercrimes Act;
- (c) An injunction barring the 4<sup>th</sup> Respondents from instituting and undertaking criminal proceedings under the Computer Misuse and Cybercrimes Act 2018;
- (d) A declaration that the Computer Misuse and Cybercrimes Act, 2018 in its entirety is invalid as it violates, infringes and threatens fundamental rights and freedoms and is not justified under Article 24;
- (e) A declaration that 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 & 53 of the Computer Misuse and Cybercrimes Act are unconstitutional for violating, infringing and threatening fundamental rights and freedoms;
- (f) Costs of the Petition; and
- (g) Any other orders as this Honourable Court shall deem just.

DATED at ..... NAIROBI ..... this ..... 29<sup>th</sup> ..... day of ..... May ..... 2018

Signed..... MUM .....

MUTEMI SUMBI ADVOCATES  
FOR THE PETITIONER

### **DRAWN & FILED BY-**

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P105/12013/16; LSK/2018/01273

**MERCY MUTEMI**  
**ADVOCATE**  
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**TO BE SERVED UPON-**

1. THE HON. ATTORNEY GENERAL  
STATE LAW OFFICE  
SHERIA HOUSE, HARAMBEE AVENUE  
**NAIROBI**
2. THE SPEAKER OF THE NATIONAL ASSEMBLY  
PARLIAMENT BUILDINGS  
**NAIROBI**
3. OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS  
NSSF BUILDING, BLOCK 'A', 19<sup>TH</sup> FLOOR  
**NAIROBI**
4. INSPECTOR GENERAL- NPS  
JOGOO HOUSE 'A'  
TAIFA ROAD  
**NAIROBI**



28 MAY 2018

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CERTIFICATE OF URGENCY

I, **MERCY MUTEMI** an advocate of the High Court of Kenya do hereby certify that the application and petition filed in this matter are urgent for the following reasons-

1. The Computer Misuse and Cybercrimes Act was assented to on 16<sup>th</sup> May 2018 and published in the Gazette on the same day.



2. The Act comes into effect on 30<sup>th</sup> May 2018 in accordance with Article 116 of the Constitution.
3. 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 & 53 deny, violate, infringe and threaten various rights and fundamental freedoms.
4. There is a likelihood that once the Act comes into force on 30<sup>th</sup> May 2018, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents will move to arrest and prosecute Kenyans on the basis of unconstitutional offences.
5. It is in the public interest that the application and the substantive petition be heard and determined urgently.

DATED at NAIROBI this 29<sup>th</sup> day of May 2018

*MUM*  
**MERCY MUTEMI**  
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NAIROBI.

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ARTICLE 19 EAST AFRICA ..... 1<sup>ST</sup> INTERESTED PARTY

KENYA UNION OF JOURNALISTS..... 2<sup>ND</sup> INTERESTED PARTY

NOTICE OF MOTION

**TAKE NOTICE THAT** this Honourable Court shall be moved on the ..... day  
of ..... 2018 at 9.00 o'clock in the forenoon or soon thereafter as  
the counsel for the Petitioner may be heard on application FOR ORDERS–

(a) **THAT this** application be certified urgent and be heard *ex parte* in the first  
instance;



(b) THAT pending the hearing and determination of this application *inter partes*, a conservatory order does issue suspending the coming into force of the Computer Misuse and Cybercrimes Act, 2018 and in particular 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 & 53 of the Computer Misuse and Cybercrimes Act, 2018.

(c) THAT pending the hearing and determination of the Petition, a conservatory order does issue staying the coming into force of the Computer Misuse and Cybercrimes Act, 2018 and in particular to stay 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 & 53

(d) THAT costs of the application be provided for.

**WHICH APPLICATION** is made on the following grounds—

- i. The Computer Misuse and Cybercrimes Act, 2018 was assented to law on 16<sup>th</sup> May 2018 and published in the *Gazette* on the same day;
- ii. Pursuant to Article 116 of the Constitution, the Act will come into force on 30<sup>th</sup> May 2018 being fourteen days after its publication in the *Gazette*.
- iii. The Act contains provisions that deny, violate, infringe and threaten the freedom of opinion, freedom of expression, freedom of the media, freedom and security of the person, right to privacy, right to property and the right to a fair hearing.
- iv. There are 51.1 million internet users in Kenya who are all at risk of prosecution given the vague and overbroad terminologies used in the Act.
- v. There is a real risk that once the Act comes into force the 3<sup>rd</sup> and 4<sup>th</sup> Respondents will move to arrest and prosecute internet users in Kenya for unconstitutional offences.
- vi. It is in the public interest that the coming into force of the Act be stayed pending the substantive hearing and determination of the Petition.

**AND WHICH APPLICATION** is supported by the annexed affidavit of **JAMES WAMATHAI** and by such other grounds, reasons and arguments as shall be adduced at the hearing hereof.

DATED at NAIROBI this 29<sup>th</sup> day of May 2018

**MERCY MUTEKI**  
ADVOCATE  
P.O. Box 2580 - 00202 NAKURU  
**MUTEKI SUMBI ADVOCATES**  
FOR THE PETITIONER  
105/12013/16; LSK/2018/01273



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SHERIA HOUSE, HARAMBEE AVENUE  
**NAIROBI**
2. THE SPEAKER OF THE NATIONAL ASSEMBLY  
PARLIAMENT BUILDINGS  
**NAIROBI**
3. OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS  
NSSF BUILDING, BLOCK 'A', 19<sup>TH</sup> FLOOR  
**NAIROBI**
4. INSPECTOR GENERAL- NPS  
JOGOO HOUSE 'A'  
TAIFA ROAD  
**NAIROBI**



REPUBLIC OF KENYA

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

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 206 OF 2018

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

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS UNDER ARTICLES 19, 21, 24, 25, 27, 28, 31, 33, 34,  
35, 40 & 50 OF THE CONSTITUTION OF KENYA, 2010

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

IN THE MATTER OF SECTIONS 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, 52 & 53 OF THE COMPUTER MISUSE  
AND CYBERCRIMES ACT, 2018

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

1. THE HON. ATTORNEY GENERAL..... 1<sup>ST</sup> RESPONDENT

2. THE SPEAKER, NATIONAL ASSEMBLY..... 2<sup>ND</sup> RESPONDENT

3. THE INSPECTOR GENERAL

OF NATIONAL POLICE SERVICE..... 3<sup>RD</sup> RESPONDENT

4. THE DIRECTOR OF PUBLIC PROSECUTIONS..... 4<sup>TH</sup> RESPONDENT

ARTICLE 19 EAST AFRICA ..... 1<sup>ST</sup> INTERESTED PARTY

KENYA UNION OF JOURNALISTS..... 2<sup>ND</sup> INTERESTED PARTY

SUPPORTING AFFIDAVIT

I, **JAMES WAMATHAI** of P.O. Box 8760-00200 Nairobi do hereby make oath and  
state as follows–

1. **THAT** I am an adult of sound mind hence competent to swear this affidavit in  
support of the Application and Petition;

2. **THAT** I am the Director of Partnerships at the Bloggers Association of Kenya (BAKE), the Petitioner herein;
3. **THAT** BAKE was formed to empower online creation and promote free expression in Kenya.
4. **THAT** free expression bolsters good governance and accountability.
5. **THAT** a good number of Kenyans now draw their livelihoods from content creation online.
6. **THAT** in the past several years, there have been attempts by the government to clamp down on the freedom of expression online.
7. **THAT** Section 29 of the Kenya Information and Communication Act and Section 194 of the Penal Code were famously used to punish free expression.
8. **THAT** these two sections have since been declared unconstitutional.
9. **THAT** the Computer Misuse and Cybercrimes Act, 2018 was assented to law on 16<sup>th</sup> May 2018 and published in the Gazette on the same day.
10. **THAT** the Computer Misuse and Cybercrimes Act 2018 seeks to reintroduce the purged sections of the law while imposing even more restrictions on the freedom of expression.
11. **THAT** as part of its mandate, BAKE conducts research and releases annual reports on the State of the Internet.
12. **THAT** in its 2016 report, BAKE found that sixty bloggers had been arrested for exercising their freedom of expression online (**Annexed to this affidavit and marked BAKE 1 is the State of the Internet in Kenya Report 2016**).
13. **THAT** in that year, journalists and bloggers were silenced, intimidated, harassed and killed for their persistent exercise of their freedom of expression, freedom of the media and right of access to information.
14. **THAT** BAKE found that in 2017 the Internet and especially Social Media platforms had become effective platforms for online activism, online democracy and the fight for social justice. **Annexed to this affidavit and marked BAKE 2 is the State of the Internet in Kenya Report 2017**).
15. **THAT** the freedom of belief of opinion, freedom of expression, freedom of the media, the right to privacy and the right of access to information are key pillars of our democracy and should therefore not be limited in an incautious manner.
16. **THAT** there is a persistent and organized push by the State to muzzle bloggers, journalists and internet users.



17. **THAT** investigative journalism and efforts to shed light on government controversies and scandals have been labelled as publication of false information by public officers on several occasions.
18. **THAT** the Computer Misuse and Cybercrimes Act introduces offences such as false publication, publication of false information, cyber harassment, unauthorised interference and unauthorised interception.
19. **THAT** the said offences are phrased so vaguely that it is impossible to tell the conduct targeted by these sections.
20. **THAT** Kenyans are entitled to the highest degree of protection of their rights and fundamental freedoms.
21. **THAT** these attempts to constrict the online space prejudice the freedom of opinion, freedom of expression, freedom of the media, right to privacy and the right of access to information in a manner unjustifiable in an open and democratic society such as Kenya.
22. **THAT** the Constitution requires that there be meaningful public participation in the legislative process.
23. **THAT** the requirement on public participation was not met in the passing of the Computer Misuse and Cybercrimes Act.
24. **THAT** if the conservatory orders sought are not granted, bloggers, journalists and online users are at risk of being arrested, charged and prosecuted for unconstitutional offences.
25. **THAT** injustice will be occasioned if any Kenyan is arrested and charged under unconstitutional sections of the impugned law.
26. **THAT** monetary damages would not suffice as compensation should any Kenyan be arrested and charged under an unconstitutional law.
27. **THAT** Kenyans should be encouraged to participate in online debate on democracy, governance and justice instead of being punished for the same.
28. **THAT** the Constitution mandates the State to promote economic opportunities of the youth and facilitate access to employment.
29. **THAT** by restricting freedom of expression online, the State is side-lining the youth from economic, social and political participation.
30. **THAT** free expression online is a source of income to many online users.
31. **THAT** the Computer Misuse and Cybercrimes Act will deny these online users their right to participate in economic opportunities.

32. **THAT** the bloggers, journalists and online users look up to this Honourable Court for the protection of their right to participate in economic, social and political opportunities.
33. **THAT** what is stated hereinabove is true to the best of my knowledge and belief save where the sources thereof are disclosed.

SWORN at **NAIROBI** by the said  
**JAMES WAMATHAI**

This 29<sup>th</sup> day of  
MAY 2018

BEFORE ME



DEPONENT

COMMISSIONER FOR OATHS  
**DRAWN & FILED BY-**  
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