REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION NO. 102 OF 2020

LAW SOCIETY OF KENYA……..…..…….APPLICANT

VERSUS

THE BLOGGERS ASSOCIATION OF KENYA……..…….....1ST RESPONDENT

THE HON. ATTORNEY GENERAL...……..2ND RESPONDENT

THE NATIONAL ASSEMBLY..……..3RD RESPONDENT

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

THE INSPECTOR GENERAL OF THE

NATIONAL POLICE SERVICE..……..……...5TH RESPONDENT

ARTICLE 19 EAST AFRICA……...….....6TH RESPONDENT

KENYA UNION OF JOURNALISTS……..……..……..7TH RESPONDENT

(Being an Application for conservatory orders pending appeal from the judgment and orders of the High Court at Nairobi (Makau J) given on 20th February, 2020 in Petition No. 206 of 2018)

2ND & 5TH RESPONDENTS' SUBMISSIONS ON THE APPLICATION FOR CONSERVATORY ORDERS DATED 20TH APRIL, 2020.

We submit on behalf of the 2nd and 5th Respondents as follows –

A. BACKGROUND

1. The Applicant filed an Application dated 20th April, 2020 seeking, inter alia, that conservatory orders suspending the enforcement 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 Cybercrime Act, 2018. In the alternative, the Applicant seeks conservatory orders suspending the enforcement of Section 22 (False publication) and Section 23 (Publication of false information) of the Computer Misuse and Cybercrime Act, 2018 ('hereinafter the Act') pending the hearing and determination do the intended Appeal.

2. We humbly submit that the issue for determination in this matter is whether the Application satisfies the conditions for the issuance of conservatory orders under **Rule 5 (2) (b) of the Court of Appeal Rules, 2010**.

B. ANALYSIS

3. My Lords, we submit that the objective of **Rule 5(2)(b)** of this Honourable Court's rules has been elucidated by the various Courts including the Supreme Court in **Deynes Muriithi & 4 others v Law Society of Kenya & another [2016] eKLR** at paragraph 33. The principles for consideration by this Honourable Court in exercise of its discretion is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied.

4. We humbly submit that the Honourable Judge of the High Court applied the law and the facts independently and suitably found that the impugned provisions were constitutional. None of the grounds raised in the Application are arguable in any shape or form. The structure of a Judgment ought not to form a ground of appeal. It was well within the discretion of the High Court Judge to decide what to write and how to structure the Judgment which was indeed the Honourable Judge's statement of the conclusions that flow from the application of the governing law to the facts before him during the trial. The Applicants have not demonstrated either an error of fact or an error of law in the form of the Judgment.

5. My Lords, the Court considered the facts in question employed the "constitutional mirror" laying the impugned legislation or provision alongside the Article(s) of the constitution and determined that the Act indeed passed constitutional muster. Further, the court considered both the purpose and effect of the Act and observed whether any of the two could lead to the provision being declared unconstitutional and came to the correct conclusion that indeed, the Act had passed the constitutional muster.

6. We further urge the Court to be guided by the presumption of constitutionality of statute as was advanced by Majanja J (Par 6) in **Susan Wambui Kaguru & Ors vs. Attorney**

General Another [2012] KLR to the effect that every statute passed by the legislature enjoys a presumption of legality and it is the duty of every Kenyan to obey the very law that are passed by our representatives in accordance with their delegated sovereign authority. In that matter, the Court was of the opinion that whereas legal arguments had been advanced, any answer to them must await full argument and consideration by the court. The Court declined to make an interim order which would effectively undo the legislative in the absence of strong and cogent reasons to do so.

7. It is our humble submission that the right to freedom of expression is not an absolute right. It is subject to limitations provided the limitations are line with the requirements under **Article 24 of the Constitution**.

8. Moreover, my Lords, we humbly submit that the right to freedom of expression contains both positive and negative connotations. The negative connotation restrains the government from unnecessarily intruding into the private sphere of an individual. The positive connotation, on the other hand, places an obligation on the Government to protect its citizens from misleading information whose effect would be to cause panic among members of the public thus affecting the ability of the government to exercise its duty of care over its citizens.

9. We rely on the decision of the European Court of Human Rights in **Özgür Gündem v. Turkey, 16 March 2000, Application No. 23144/93** in which the Court observed that in determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual.

10. My Lords, as to whether the Appeal would be rendered nugatory, we submit that in the event the appeal is successful, there are sufficient safeguards in the Constitution and the Criminal Procedure Code that safeguard the rights of accused persons. In the event the Appeal is successful, the two accused persons stated in the Affidavit in support of the Application are entitled to a reversal under the law and consequently, their freedom.

11. A third principle for consideration by this Honourable Court is that of public interest which was established in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR**. Your Lordships, we submit that conservatory orders, unlike interlocutory injunctions, affect the public as a whole.

12. In this Application, My Lords, the public interest is the need to protect the wider public from the dangers posed by the spread of fake news during the COVID-19 pandemic as outlined in the 2nd & 5th Respondents' Replying Affidavit which outweighs the grant of the orders sought in the Application which only serve to protect private interests of certain individuals.

13. We implore upon this Honourable Court to adopt the reasoning of the High Court to the effect that the provisions of the Act effectively protect the public interest. Indeed, this Honoruable Court must hold public interest in higher esteem. We urge your Lordships to adopt the definition of public interest set out in **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR**

14. My Lords, the need to have a regulatory regime in place to protect the public from information on a global pandemic, that is misleading and unverified whose effect is to cause panic, fear and tension among members of the public far outweighs the grant of the orders sought in the Application.

15. In line with the principles espoused in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (supra)** it is imperative that the Court consider the principle of proportionality in determining whether a grant of the orders sought in the Application would be in the public interest.

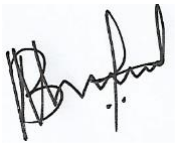
16. We submit that in determining whether an action is proportional, one is required to examine the reasonableness of the legally provided measure by weighing the limitation of the right and the aim it seeks to achieve. The Applicant has failed to demonstrate the extent to which the limitation of the right to freedom of expression is excessive in relation to the objective to protect public interest.

17. We therefore submit that in order to determine whether the Applicant's prayer for conservatory orders should be granted, it is important to examine the arguments made by the Applicants vis-à-vis the totality of the principles mentioned above.

C. CONCLUSION

18. It is our humble submission that the Application is unmerited and should be dismissed with costs.

DATED at **NAIROBI** this……..**29TH** …….....day of ……..**MAY**……..……...**2020.**



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