REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 313 OF 2018

WANURI KAHIU.....1ST PETITIONER

CREATIVE ECONOMY WORKING GROUP.....2ND PETITIONER

VERSUS

CEO KENYA FILM CLASSIFICATION BOARD, EZEKIEL MUTUA.....1ST RESPONDENT

KENYA FILM CLASSIFICATION BOARD.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

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

KENYA CHRISTIAN PROFESSIONALS FORUM....PROPOSED 2ND INTERESTED PARTY

RULING

1. The 1st petitioner herein describes herself as an internationally acclaimed Kenyan-born film maker and states that her films have been seen in more than a hundred film festivals around the world and that the films are also live online. She states that she is the producer of and director of the film 'Rafiki' (hereinafter **"the film"**) which is the subject of the instant petition and application.

2. The 2nd petitioner is the Creative Economy Working Group (CEWG) a consortium of civil society organizations and institutions whose objective is to campaign for the advancement of legislative and policy reforms in the creative sector for the advancement of culture, arts and media in Kenya.

3. The 1st respondent is the 2nd respondents Chief Executive Officer while the 2nd respondent is a body corporate established under Section 11 of the Films and Stage Plays Act Cap 222 of the Laws of Kenya (hereinafter, **"the Act"**) to regulate creation, broadcasting, possession, distribution and exhibition of films and broadcast content.

4. The 3rd respondent is the Attorney General of the Republic of Kenya, a constitutional office created under Article 156 of the Constitution mandated to represent national government in civil suits.

5. The petition challenges the constitutionality of sections of the Act for violating freedom of expression including freedom of artistic creativity under Article 33(1) of the Constitution, freedoms of the media under Article 34 of the Constitution, a right of access to information under Article 35 and principles of legality under Article 50(2) (n) of the Constitution that requires that any law which limits a fundamental right and freedom should not to be vague or over broad.

6. A summary of the petitioners' case is that the 1st petitioner submitted the original script of the film to the 2nd respondent after which she applied for and was granted a film license pursuant to Sections 4 and 5 of the Act. The 1st petitioner states that she submitted the film to the 2nd respondent on 10th April 2018 for examination and rating when she was directed to edit the film to remove the offensive classifiable elements after which she requested the 2nd respondent to classify the film but that through a letter dated 26th April, the 1st respondent notified the 1st petitioner of the 2nd respondents decision to restrict /ban the said film from being exhibited anywhere within the Republic of Kenya.

7. The petitioners' case is that because of the said decision, the 1st petitioner is unable to enter her film under the 'Foreign Film' category at the International Film Competition that includes the Best Foreign Language Film Category at the Academy Awards (Oscars) to be hosted by the USA Academy of Motion Picture Arts and Science for which entries close on 30th September 2018.

Application

8. It is against the above background that the petitioners filed the instant petition dated 11th September 2018. Accompanying the petition is a Notice of Motion of the even dated in which they seek the following orders:

a) Spent

b) Pending the hearing and determination of this application interpartes a conservatory order does issue staying the respondents' decision to restrict the petitioners' film Rafiki. For avoidance of doubt the petitioners' be and are hereby allowed to submit the film Rafiki to the Oscars Selection Committee Kenya for entry to the 2019 Oscars Awards festival under the Best Foreign Language Film category.

c) Pending the hearing and determination of the petition a conservatory order does issue staying the respondents' decision to restrict the petitioners' film Rafiki. For avoidance of doubt the petitioners' be and are hereby allowed to submit the film "Rafiki" to the Oscars Selection Committee Kenya for entry to the 2019 Oscars Awards festival under the Best Foreign Language Film category.

d) That the respondents bear the petitioners' costs of this application.

9. The application is supported by the 1st petitioner's affidavit sworn on 3rd September 2018 and the further affidavit of dated 14th September 2018.

Applicants submissions

10. At the hearing of the application, Mr Ochiel, learned counsel for the 2nd petitioner submitted that the application raises the single question of law, which is whether the petitioners had made out a case for the granting of the conservatory orders sought. He stated that because of the respondents' said decision of 26th April 2018 to ban the film, the petitioner was informed through emails dated 14th August 2018 and 13th September 2018 (annexture **"LS2"),** that since the film had not been shown in Kenya for at least 7 days, it was not eligible for entry to the Oscars competition which is the most prestigious award for any film maker. Counsel observed that the Oscars is every single film maker's dream that catapulted Lupita Nyong'o to celebrity status that she currently enjoys.

11. On the jurisdiction of this court to hear and determine the petition, counsel submitted that Section 29 of the Act that provides for an appeal process from the decision of the 2nd respondent is permissive as it uses the word 'may'. For this argument, counsel relied on the case of **Mark Ndumia Ndungu vs Nairobi Bottlers Ltd & Another [2018] eKLR** in which it was held that a party who alleges the existence of an alternative dispute resolution remedy bears the burden of proving the existence of that remedy.

12. Counsel submitted that the application touches on the interpretation of the Constitution, the Act, and the guidelines and further seeks conservatory orders for which the minister has no jurisdiction to determine.

13. Counsel further relied on the decision in the case of **E. W. A. vs Director of Immigration and Registration of Persons & Another [2018] eKLR** in support of the argument that the court can issue any appropriate relief that is necessary to enforce the rights.

14. Counsel submitted that the applicants have an arguable case and referred to the case of **George Mike Wanjohi vs Stephen Kariuki [2014] eKLR** in which it was held that an arguable case is one that elicits a constitutional controversy. He maintained that in the instant petition the arguable points were:-

a) Whether there has been a limitation of the petitioners' freedom of expression and artistic creativity under Article 33 of the Constitution.

b) Whether the limitation was for a reason with no proximate relation to the 4 limitations set under Article 33(2)of the Constitution

c) Whether the limitation meets the 2 part test under Article 24 of the Constitution.

15. On the issue irreparable loss to be suffered by the applicants if the orders sought are not granted, counsel submitted that the Oscars window opens only once in the lifetime of a film in which case the window for the 'Rafiki' film opened on 1st October 2017 and closes on 30th September 2018. He added that if the 1st petitioner is left out of the Oscars, there is no way that the court can, through the petition, compensate the 1st petitioner for the fame, glory, exposure, and opportunity that the Oscar nomination brings to a film maker.

16. On public interest, counsel relied on the decision in **Jackine Okuta vs Attorney General [2017] eKLR** and urged the court to weigh the competing interests of the partes so that there is the equation of advantage to the petitioner and disadvantage to the respondents. He added that, in the instant case, public interest is not in favour of a blanket ban considering that the film is rated '16' in South Africa and has featured in film festivals in other open democratic jurisdictions.

17. Counsel further submitted that the Act does not provide for a blanket ban but instead provides for classification and added that the film was restricted because of its theme for depicting gayism which even the 2nd respondents rating team found to be a theme that could be tolerated by adults. It was the applicants case that the 2nd respondent ignored its own officers report and obligation under Article 21 of the Constitution to protect, respect, promote and fulfill freedom of expression.

1st interested party's Submissions

18. In supporting the application, Mr. Haggai, learned counsel for the 1st interested party submitted that freedom of expression and artistic creativity is an edict of the law under Article 33 of the Constitution. He submitted that under Section 17 of the Act, the respondents had the option to classify the film 'adults only' if they perceived it to be unsuitable for persons of a certain age instead of imposing a total ban which has had the effect of curtailing the 1st applicants right to artistic creativity as a medium of expression. Counsel added that even though certain ideas may be considered subversive, their very essence is to stir the conscience of the public to reflect on the said unpopular ideas with a view to raising questions at the end.

19. Counsel drew the court's attention to the fact that our country is replete with great play rights and artists whose works have evoked the conscience of the nation to think differently and whose works were at one time banned in the country for going against popular view only for them to go ahead to win international awards and accolades. He implored the court to grant the conservatory orders so as to enable the film complete for an Oscar at the international arena.

20. It was the 1st interested party's case that our democracy can only flourish in an environment where the modern day film makers and play rights are protected and granted the rights to express their artistic creativity freely.

21. Mr Kiprono, learned counsel for the 1st interested party submitted that in determining the application, the court should be guided by the provisions of Article 10 of the Constitution as the ban on the film, was because it depicted homosexuality yet homosexuals are a minority group who need protection as a marginalized group.

22. Counsel argued that Lupita Nyong'o, an Oscar award winner, clinched the said award in a movie depicting slavery, which is similarly an outlawed practice under our Constitution, emphasize the point that the mere fact that a film depicts a certain practice or belief that is not popular does not necessarily warrant a ban. He reiterated that if the 2nd respondent's intention was to protect children, then it ought to have classified the film as "adults only" film.

3rd respondents' submissions

23. Mr Sekewe learned counsel for the 3rd respondent submitted that the conservatory orders sought would have the effect of determining the main petition which would be tantamount to allowing the petitioners to distribute the film without going through the checks and procedure that is provided for under Act.

24. Counsel argued that Section 16 of the Act grants the 2nd respondent the power to approve a film for exhibition with or without conditions and that the 2nd respondent may also refuse the exhibition should he find that the film wound offend decency. According to the 3rd respondent therefore the 2nd respondent acted within the law in imposing a ban on the film.

25. It was submitted that the mere fact that the 1st petitioner's film has been nominated for an Oscar does not mean that the law should be suspended to accommodate her. He equated allowing the exhibition of the film to the distribution of poisonous food and referred to the case of **Simeon Kioko Kitheka & 18 others vs County Government of Machakos & 2 others [2018] eKLR** in which the circumstances under which conservatory orders should be issued were discussed. He reiterated that Section 29 of the Act must be adhered to in support of the argument that the court lacks jurisdiction to entertain this matter.

26. On the issue of irreparable loss, counsel submitted an Oscar nomination is not a matter of life and death and that the court should consider the interest of the other 50 million Kenyans as against the interest of the petitioners. Counsel relied on the decision in the case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji [2014] eKLR** in which the court held inter alia, that public interest must be considered in the issuance of conservatory orders.

1st and 2nd respondent's submissions

27. Mr. Sisule learned counsel for the 1st and 2nd respondent also submitted that by dint of the provisions of Section 29 of the Act, this court lacks jurisdiction to entertain the petition. Counsel relied on the case of **Diana Kethi Kilonzo vs IEBC & 2 Others NBI HCCP No. 359 of 2013** in support of the argument that various bodies and tribunals should be allowed to carry out their functions.

28. Counsel submitted that the applicants had not established a prima facie case to warrant the granting of conservatory orders in view of the fact that rights under Article 33 of the Constitution are not absolute and are subject to restriction under Article 24 of the Constitution.

29. It was submitted that there is a presumption of constitutionality of laws until the contrary is proved. For this argument, counsel relied on the decision in the case of **Kizito Mark Ngaywa vs Minister of State for Internal Security and Provincial Administration & Another [2011] eKLR.**

30. Counsel also submitted that the petitioners had not established that they would suffer irreparable loss if the conservatory orders sought are not granted.

2ND INTERESTED PARTY'S SUBMISSIONS

31. Mr. Kanjama, learned counsel for the 2nd interested party submitted that he represents an association of Christian professionals, which Christians form 80% of the Kenyan population, whose main role and aim is to promote the moral values of the people of Kenya which values ought to be taken into consideration in determining this case.

32. Counsel drew the court's attention to ongoing litigations on the broader question of homosexuality and urged the court not to grant orders at this stage but instead make an exhaustive final determination of the philosophy and interpretation of rights as provided for under the Constitution. He highlighted the two philosophies as individual and communitarian philosophies.

33. Counsel referred to Section 162 and 165 of the Penal Code in support of the argument that anyone who aids or abets procures or is an accessory to the prohibited behavior is guilty of the same act. It was submitted that the court should strike down any action that seeks to undermine the provisions of the Constitution.

34. On the timelines for the nomination for the Oscars, counsel submitted that the applicants had not demonstrated that 30th September 2018 is the deadline for submission to the Oscars. He also faulted the applicants for failing to provide the evidence on rules governing the Oscars committee. It was the 2nd interested party's case that the applicants are seeking to enforce individual rights through the Oscars in order to compel Kenyans to change their moral values. He added that Article 33 of the Constitution

does not contain an exhaustive list of restrictions to freedom of expression.

35. On the issue of whether the applicant will suffer irreparable harm, counsel submitted that the court should consider public interest and whether the film would be suitable for the public viewing guided by the Constitution of Kenya which does not permit homosexuality. He maintained that the film would occasion irreversible harm to the public once it is released for viewing. It was the 2nd interested partys' case that allowing the conservatory orders would have the effect of compromising the reliefs sought in the petition.

DETERMINATION

36.I have considered the application that is the subject of this ruling, the responses made by the respondents, and the submissions made by the parties' advocates together with the law and the authorities that they relied upon.

37. I discern the main issues for determination to be firstly whether this court has jurisdiction to hear and determine the petition/application herein and secondly, whether the applicants have made out a case to warrant the granting of the conservatory orders sought.

JURISDICTION

38. The respondents argued that this court lacks jurisdiction to entertain the matter on the basis that the applicants have not exhausted the appeal process provided for under Section 29 of the Act in the event that they were not satisfied with the 2nd respondents decision to ban the film.

39. On their part the applicants argued that Section 29 of the Act is permissive meaning that it was not a mandatory requirement that the appeal option be pursued and further stated that the orders sought in this petition do not fall within the purview of the jurisdiction of the Minister. To my mind however, the matter before the court is not an appeal from the decision of the 2nd respondent to ban the 1st petitioner's film *per se* but the constitutionality of not only the said ban but also the sections of the Act that were applied in effecting the said ban which the applicants contend, are unconstitutional for violating freedom of expression, including freedom of artistic creativity, freedom of the media, right to access to information and the principle of legality under Article 50(2) of the Constitution.

40. Jurisdiction is the authority granted to a court of law to administer justice and has been likened to an engine that enables the court to take cognizance of matters presented before it for determination as without jurisdiction, the court's decisions will be in vain. As was succinctly stated by **Nyarangi JA** in the case of **Owners of Motor Vessel Lillian"S" v Caltex Oil (Kenya) Limited [1989] 1 KLR 1**:-

"Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction…."

41. The Supreme Court expressed itself in support of that statement of law, in **RE: The matter of Interim Independent Electoral and Boundaries Commission [2011] eKLR stated** as follows-

"The Lilian "S" established that jurisdiction flows from the law and the recipient court is to apply the same with any limitation embodied therein; such a court may not arrogate itself jurisdiction through a craft of interpretation, or by way of endevours to discern or interpret intentions of parliament, where the wording of the legislation is clear and their respective jurisdictions are donated by the constitution."

42. In the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR,** the Supreme Court once again stated–

"A court's jurisdiction flows from either the constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the constitution or the other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law… where the constitution exhaustively provides for jurisdiction of a court of law, the court must

operate within the constitutional limit."

43. The above cited decisions illustrate the fact that a court of law must first have jurisdiction before it can proceed to hear a matter presented before it and must exercise that jurisdiction in accordance with the law. Article 165(3) of the Constitution is clear in its provisions and needs no explanation. The said Article bestows jurisdiction on this Court as follows:-

(3) ***Subject to clause (5), the High Court shall have—***

(b) ***jurisdiction to determine the question whether a right or fundamental right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.***

(d) ***jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-***

i. ***the question whether any law is inconsistent with or in contravention of this Constitution;***

ii. ***the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.***

44. **Article 23 (1)** reiterates the fact that the High court has jurisdiction in accordance with **Article 165**, to hear and determine applications to redress denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights. At the heart of the instant petition and application is the applicants' claim that their rights to freedom of expression and artistic creativity have been infringed.

45. Having regard to the above provisions, I find that this court has wide jurisdiction to deal with the instant petition as it raises questions of violation/ threat of violation of rights under the Constitution.

Conservatory orders

46. Turning to the question of whether the applicants have established that they deserve the conservatory orders sought, I note that the gist of the applicants' case was that as a result of 2nd respondents ban on the film, the 1st applicant was unable to enter her film 'Rafiki' under the Foreign Film category at the International Film Competition that includes the Best Foreign Language Film Category at the Academy Awards (Oscars) hosted by the USA Academy Motion Picture Arts and Sciences for which entries close on 30th September 2018. According to the applicant's the nomination for entry to the Oscars is once in a lifetime opportunity

47. It has severally been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a *prima facie* case with a likelihood of success. Accordingly, in determining this application, this Court is not required, and is indeed it is forbidden from making definite and conclusive findings on either fact or law. I will therefore not venture into the forbidden path of making any determinations whose effect would have the impact of prejudicing the hearing of the main Petition.

48. Apart from establishing a *prima facie* case, the applicant must further demonstrate that unless the conservatory order is granted he or she stands suffer real danger or prejudice. See **Centre for Rights, Education and Awareness (CREAW) & 7 others vs. The Hon. Attorney General**, Nairobi HC Pet. No 16/2011, **Muslims for Human Rights (MUHURI) & 2 others vs. The Attorney General & Judicial Service Commission,** Mombasa HC Pet. No. 7 of 2011

49. In the case of **Centre for Rights Education and Awareness (CREAW) & 7 Others Nairobi** Petition No. 16 of 2011 **Musinga, J** (ahtw) stated that:

"...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order,

there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."

50. In a majority decision in the case of **The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**, it was held as follows:

"In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission."

51. Similarly, in **Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR** this Court expressed itself as follows in regard to Conservatory orders:

"Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."

52. This position was adopted by the Supreme Court in **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others, S.C. Application No. 5 of 2014**, the Court held as follows at paragraph 86 and 87:

"Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes...The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

i. ***the appeal or intended appeal is arguable and not frivolous; and***

ii. ***Unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.***

These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:

iii. ***That it is in the public interest that the order of stay be granted.***

This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution."

53. Starting from the question of whether the applicants have established a *prima facie* case I find that it has been held that a *prima facie* case is not a case which must succeed at the hearing of the main case but is rather a case which is not frivolous. In other words the applicants needed to demonstrate that their case discloses arguable issues and in this case arguable Constitutional issues. According to the petitioners, in banning the film, the respondents applied sections of the Act that violate the provisions of the Constitution and as a consequence thereof, violated the 1st petitioner's rights to freedom of expression under Article 33 of the Constitution including freedom of artistic creativity, freedom of the media, right to access to information and the principle of legality under Article 50(2) of the Constitution.

54. Having considered the totality of the issues raised in this petition, this Court cannot say with certainty that the Petitioner's case is so frivolous that it ought to be terminated at this stage. I am guided by the decision in the case of **Tom Odhiambo Achillah T/A Achilla T.O & Co Advocates vs. Kenneth Wabwire Akide T/A Akide & Company Advocates & 3 Others [2015] eKLR** wherein it was held:-

"Summary determinations of cases are Draconian and drastic and should only be applied in plain and obvious cases both as regards the facts and the law. In a matter that alleges that the suit is scandalous, frivolous and vexatious, and otherwise an abuse of the court process, I must be satisfied that the suit has no substance, or is fanciful or the Plaintiff is trifling with the court or the suit is not capable of reasoned argument; it has no foundation, no chance of succeeding and is only brought merely for purpose of annoyance or to gain fanciful advantage and will lead to no possible good. A suit would be an abuse of the court process where it is frivolous and vexatious."

55. I further find that the petitioner has satisfied the requirement under Article 23(3) (c) of the Constitution which provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including a conservatory order. A reading of Article 23(3)(c) shows that the reliefs specified thereunder are only available where a party is alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. As I have already found in the ruling, the petitioners herein allege that their fundamental rights under the Bill of Rights have been violated by the ban on the film. I therefore find that the applicants have demonstrated that they have a prima facie case against the respondent with a likelihood of success.

56. On irreparable loss to be suffered in the event that the conservatory orders sought are not granted, the applicants contended that nomination for entry to the Oscars is once in a lifetime opportunity in a film maker's life which the 1st applicant cannot afford to miss because of the ban imposed on the film by the 2nd respondent. In the exact words of Mr. Ochiel, learned counsel for the 2nd respondent, the nomination presents "a window of mercy" opened for the film on 1st October 2017 and closes on 30th September 2018. According to the applicants, should the 1st applicant miss entry into the nominations, there is no way in which the court can, through the petition, compensate the 1st petitioner for the fame, glory, exposure and opportunity that the Oscar nomination brings to a film maker. In effect therefore, time is of essence to the petitioners who urged the court to consider granting them a window of opportunity by temporarily lifting the blanket ban on the film for a maximum of 7 days only, so as to allow its entry to the Oscars that is set to close on 30th September 2018. On their part, the respondents and the 2nd interested party poured cold water on the petitioners' plea while citing the irreparable loss to suffered by the Kenyan public who, in the words of counsel for the 2nd interested party, who stand to be compelled to change their moral values through the exhibition of the film.

57. I have considered the rival arguments advanced by the parties on the issue of the loss that the 1st petitioner stands to suffer should the orders sought be disallowed. For the obvious reason that the film in question is banned in Kenya, this court notes that it has not had the advantage to watch the film in question so as to be in a position to comment on its content. It was however not disputed that the film has been watched in many countries all over the world including being exhibited at the prestigious Cannes Film Festival and in South Africa where it is rated "16" meaning that it can be viewed by persons over the age of 16.

58. I have perused the 1st respondent's letter dated 26th April 2018 in which the decision to ban the film was communicated to the 1st applicant. At paragraph 3 of the said letter, the letter states:-

The Board notes with great concern that the said film contains objectionable classifiable elements such as homosexual practices that run counter to the laws and culture of Kenyan people. It is our considered view that the moral of the story in this film is to legitimize lesbianism in Kenya contrary to the laws and the Board's content classification guidelines.

59. I have also perused the 2nd respondent's report on classification of the film "Rafiki" which was attached to the 1st and 2nd respondents' replying affidavit as exhibit "EM2". I note at the end of the said report the team of examiners made a conclusion as follows:-

On 11th April 2018, a separate team of examiners(see Examiners Register attached) examined the film, pointed out the classifiable elements as Crime and Violence, Coarse Language and Religion and rated it "18". In their justification for this rating, the examiners opined that the impact of all the classifiable elements in the film as well as the gay theme could easily be tolerated by the adults.

60. From the contents of the above documents it is clear to this court that the reason for the ban on the film was because of its gay theme. This court wishes to clarify that the matter before it for determination is not whether homosexuality is right or wrong, moral

or immoral. The matter before this court is the determination of whether an artist or a filmmaker can, in exercising his or her right to freedom of expression and artistic creativity, make a film depicting gay theme. The undisputed fact is that gayism or the practice of homosexuality did not begin with the film "Rafiki". This is a subject that has sparked debate and controversy in many countries including Kenya where the same is not legalized. In effect therefore, homosexuality is an issue that is a reality in the society and the question which then arises is whether a film should be restricted merely because it depicts gay theme. My answer to the above question is to the negative because one of the reasons for artistic creativity is to stir the society's conscience even on very vexing topics such as homosexuality.

61. This court notes that the ban on works of art by state agents is not new in Kenya. As rightly pointed out by counsel for the applicants, our history is replete with instances where plays and books were banned for being subversive only for the said works to eventually receive accolades both locally and abroad. A case in point is the case of the world renowned writer Ngugi Wa Thiong'o who, due to political intolerance of the powers that be before the advent of multi-party democracy, and the new Constitution, had to seek asylum in a foreign country simply because of his literary works. In the recent past, Majanja J. had occasion to deliberate on a similar application for conservatory orders to lift a ban imposed on a play in the case of **Okiya Omtatah Okoiti V Attorney General & 2 others [2013] eKLR.** The Judge held as follows:-

"Plays are a medium of expression of ideas which are sometimes subversive of accepted ideas. Plays may challenge long held beliefs and conventional wisdom. Artistic expression is not merely intended to gratify the soul. It also stirs our conscience so that we can reflect on the difficult questions of the day. The political and social history of our nation is replete with instances where plays were banned for being seditious or subversive. This is the country of Ngugi wa Thiong'o, Micere Mugo, Francis Imbuga, Okoth Obonyo and other great playwrights who through their writings contributed to the cause of freedom we now enjoy. Some plays were banned because they went against the grain of the accepted political thinking. Kenya has moved on and a ban, such as the one imposed by the Kenya National Drama Festival must be justified as it constitutes a limitation of the freedom of expression. I am not convinced that Kenya is such a weak democracy whose foundation cannot withstand a play by high school students. I am also of the view that if our democracy is to flourish then it is students of today who must at an early age understand the meaning of freedom."

62. Guided by the decision and in echoing the wisdom of Majanja J. I am not convinced that Kenya is such a weak society whose moral foundation will be shaken by simply watching a film depicting gay theme as counsel for the 2nd interested party appeared to suggest. Having regard to the above cited case and the facts set out in this case I am of the humble view that the importance of the rights and freedom of expression in a democratic state such as ours cannot be gainsaid or taken for granted. There are Kenyans who paid the ultimate price so that we can enjoy the freedoms that are now enshrined in our Constitution. In this regard the duty of this court is to give effect to the enjoyment of the fundamental rights and freedoms to the fullest extent. In doing so the court ought to consider and carefully scrutinize any action that tends to undermine these hard earned freedoms.

63. In this case I find that the 2nd respondents own agency rated the film as suitable for adult viewing. At the hearing of the application the applicants stated that all that the 1st applicant required in order to be considered for the Oscars nomination was proof that the film had been exhibited in the country for at least 7 days. In this regard, the applicants stated that conservatory orders lifting the ban on the film and allowing its exhibition to an 'adults only' audience for 7 days would suffice for the Oscar nominations. The respondents' position on the other hand, was that the film would have the effect of compelling Kenyans to change their moral values. On weighing the interest of the petitioner who has a right to freedom of expression and artistic creativity, against the rights of the public who are under no obligation whatsoever to watch the film or even associate with the theme that it depicts, I come to the irresistible conclusion that on a prima facie basis, the application is merited. This court notes that the choice by an adult on whether or not to watch a film cannot be directed by the applicants or anyone else for that matter so as to justify the claim that the film will compel change of moral values. In any event, the applicants have not stated that any Kenyan will be under any obligation to watch the film or that they will be forced to watch it against their will.

64. For the above reasons and without saying much at this interlocutory stage lest I run the risk of determining issues that are ideally the preserve of the court that will eventually hear and determine the main petition, I find that the applicants have made out a proper case for the grant of the conservatory orders and in line with the provisions of Article 23 of the Constitution, on the granting of appropriate orders, I allow the application dated 11th September 2018 in the following terms:-

(a) Pending the hearing and determination of the petition herein, a conservatory order is hereby issued staying and/or suspending the respondent's decision to restrict the petitioners' film 'Rafiki'. For avoidance of doubt, the petitioners be and are hereby allowed to submit the film 'Rafiki' to the Oscars Selection Committee Kenya for entry to the 2019 Oscars Award Festival under the Best Foreign Language Film Category.

(b) The said suspension/stay in (a) above shall be for a period of 7 days only from the date of this judgment, but for clarity purposes the suspension period will lapse on 30th September 2018.

(c) I further direct that during the 7 day suspension period, the film shall be open for the viewing of willing adults only.

(d) The costs of this application shall abide the outcome of the petition.

Dated, signed and delivered in open court at Nairobi this 21st day of September 2018.

W. A. OKWANY

JUDGE

In the presence :-

Mr Sisule for the 1st and 2nd respondents

Miss Leteipan for the 1st petitioner

Mr Ochiel for the 2nd petitioner

Mr Kanjama for the 2nd interested party

Court Assistant - Kombo

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