REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 206 OF 2018

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

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

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

THE INSPECTOR GENERAL OF THE

NATIONAL POLICE SERVICE.....3RD RESPONDENT

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

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

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

RULING

Introduction

1. The Petition filed herein on 29th May 2018 was accompanied by a Notice of Motion, filed under certificate of urgency, seeking conservatory orders to suspend the coming into force of certain sections of the Computer Misuse and Cybercrimes Act 2018 (herein after **"the Act"**) pending the hearing and determination of the petition. On the same day that the petition and application were filed, Chacha Mwita J. upon hearing the oral submissions of counsel for the petitioner, certified both the application and the Petition as urgent and gave full directions regarding the hearing of the petition as follows:-

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 after 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 respondents will therefore have 7days to file and serve written submissions to the petition.

6. Directions on the hearing of the petition on 18th July 2018.

7. In the meantime I hereby grant conservatory order in terms of prayers of the notice of motion dated 29th May 2018 until 18th July 2018.

2. It is the issuance of the aforementioned conservatory orders that triggered the filing of the application that is the subject of this ruling.

Application

3. The application dated 11th June 2018 is brought under Articles 25 and 50 of the Constitution, Rules 25 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (***Mutunga Rules***) in which the applicant/1st respondent seeks orders, *inter alia*:

"That this Honourable Court be pleased to review, vary and/or set aside the exparte orders made on 29th May, 2018 suspending the coming into force of the Computer Misuse and Cybercrimes Act, 2018 and all consequential orders thereto."

4. The application is premised on the grounds, *inter alia*, that the impugned orders issued on 29th May 2017 had the effect of determining the petitioner's application dated 29th May 2018 at an exparte stage and without hearing all the parties to the petition contrary to Article 50(1) of the Constitution as read with Rule 25 of the Mutunga Rules.

5. The applicant also contends that the conservatory orders essentially suspend the coming into force of the Act including those provisions whose constitutionality are not under scrutiny.

6. It is the applicant's case that the conservatory orders create a lacuna in the law in respect of the offences created under legislation repealed by the Act, and that as a consequence, there exists no statutory underpinning for the prosecution of crime under Sections 83U, 83V, 83X, 83Z, 84A, 84B, 84F of the Kenya Information Communication Act and Section 16 of the Sexual Offences Act, 2011.

7. The applicant faulted the petitioners for failing to present all material facts to the court, so as to enable the court make a prima facie finding that the provisions of the Act are constitutional and added that the conservatory orders were issued without considering the public interest.

8. The applicant's contention is that the petitioner failed to demonstrate any imminent threat to violation of their rights as there was no evidence to show that there was any prosecution or threatened prosecution of any person pursuant to the Act. It was the applicant's case that the conservatory orders were granted contrary to established legal principles and judicial policy on the grant of exparte orders that:

a) The legislation should only be suspended in exceptional circumstances.

b) The conservatory orders are granted exparte pending inter parties hearing of the application.

c) The exparte orders should not be granted for an inordinately long period of time.

9. The applicant reiterated that as a consequence of the impugned conservatory orders, any offence committed during the pendency of the suspension of the Act can never form a basis for any criminal charges and that it was therefore in the interest of justice that the orders sought in the application be granted. The application is supported by the affidavit of the Solicitor General of the Republic of Kenya, Mr. Kennedy Ogeto, sworn on 11th June 2018 in which he repeats the grounds cited on the body of the application and faults the petitioner for failing to avail a copy of the impugned Act in court as evidence so as to enable the court to arrive at an informed finding on whether or not the conservatory orders were merited. He attached a copy of the said Act to his affidavit as annexture "KO1". He avers that the petitioner failed to inform the court of the extra –territorial and trans-national nature of the

cyber space and the subsequent international obligations of the applicant under the Act and international law on cyber security, in which case, the suspension has adverse effects on the cyber space.

10. He contends that the office of the Attorney General is mandated under the Mutual Legal Assistance Act as read with the now suspended Act, to grant assistance to any requesting state and in light of the conservatory orders the State would be constrained in fulfilling this international obligation. He adds that the State would be unable to fulfill its obligation to warn other states operating within Kenya's domestic networks of vulnerabilities in Kenyan networks and/or other states networks, as well so as to prohibit, mitigate, investigate and respond to domestic cybercrime contrary to international cyber security due to diligence requirements.

11. The applicant further avers that the petitioner did not disclose to the court the implications of the coming into force of the General Data Protection Regulations (GDPR) on the 25th May 2018, which despite being European Union legislation, applies to all enterprises doing business with the European Economic Area regardless of location, and consequently the GDPR has extra-territorial effect. The implication is that in light of the conservatory orders granted herein, public and private Kenyan citizens remain exposed for failure to comply with the GDPR requirements to adequately protect data belonging to the European Union. He contends that with the suspension of the Act, offences under the Act meant to facilitate the protection of data cannot be prosecuted including offences under sections 14, 16, 18, 28, 31, 38 and 39. In this regard the applicant cited various provisions of the GDPR including Articles 3(1), 46(1), 83(5) (c), 44-49.

12. The applicant contends that the suspension of the Act means that the 1st respondent is unable to develop the required laws to secure the states cyberspace in line, and as such the impugned conservatory orders were granted without considering the public interest whose custodian is the 1st respondent as the orders were granted exparte without according the applicant an opportunity to the silent majority, the public, to be heard. The applicant further contended that the orders were granted contrary to the established principles on grant of exparte orders while arguing that they were not accorded a hearing. It was the applicant's case that legislation should only be suspended under exceptional circumstances, whereas the petitioner had not demonstrated such exceptional circumstances. It was also contended that the exparte orders were granted for an inordinately long period of fifty (50) days at the minimum.

The 2nd and 4th respondents supported the application.

The Petitioner's Case

13. The Petitioner opposed the application through the replying affidavit of Jane Muthoni sworn on 2nd July 2018. The petitioner also filed a notice of preliminary objection to the application in which it stated that this court lacks the jurisdiction to hear the application. It was the petitioner's case that the application was an appeal disguised as an application to review, vary and/or set aside the conservatory orders granted on 29th May 2018. The petitioner urged the court to maintain the conservatory orders till the petition is heard and determined on grounds that the impugned Act posed a threat to the citizens' right to freedom of expression and that the lifting of the orders would expose them to possible prosecutions whose consequences may not be mitigated by any other means. The petitioner's case was that it is important that the matter be determined on merits. At the hearing of the application, Miss Mutemi, learned counsel for the petitioner submitted that this court lacks the jurisdiction to hear and determined the application and that the applicant had not established sufficient grounds to warrant the granting of the extreme remedy of setting aside the conservatory orders.

14. On jurisdiction, counsel submitted that the orders sought, if granted, would amount to an attempt to rehear the application for conservatory orders and are akin to an appeal from the decision of Mwita J. camouflaged as an application for new law. Counsel relied on the decision in the case of **Wanjiru Gikonyo & 2 Others vs the National Assembly & 4 Others HCCP. No. 453/2015 [2016] eKLR** wherein the court cautioned that review application is not an appeal and should not be allowed once it is shown that the merits of the orders sought to be reviewed are the subject of the challenge. Counsel also relied on the decision in the case of **Benjoh Amalgamated Ltd vs Kenya Commercial Bank Ltd [2014] eKLR** wherein it was held that review orders are intended to correct mistakes and human error and should be issued exceptional circumstances. Counsel submitted that they had fulfilled the conditions set for the grant of conservatory orders as it had established that it had an arguable case with a likelihood of success and that the court was satisfied that the impugned orders were merited. It was the petitioner's submission that Mwita J. applied the correct principles in granting the conservatory order and that the said orders should not be ousted through the instant application.

15. It was the petitioner's submission that Rule 23(2) of the Mutunga Rules allows a judge to dispense with service and interpartes hearing of an application and that the court gave directions, in the compliance with Rule 21 of Mutunga Rules so as to fast track the

case which was to the advantage of the applicant in view of the fact that the hearing of the main petition had been fast tracked.

16. It was submitted that the applicant had not established sufficient grounds to warrant a review or setting aside of the conservatory orders. Reliance was placed on the case of **Okiya Omtatah Okoiti vs Commissioner General of Kenya Revenue Authority & 2 others (2017] eKLR** wherein it was observed that review on the ground of fair hearing should only be allowed where service was not proper or where the petitioner was cited fraudulently.

17. On the claim that the petitioner did not disclose all material facts of the case, counsel stated that the applicant was only under the obligation to disclose matters that were material to the granting of the orders sought. On the claim that the conservatory orders created a lacuna a in the law, counsel submitted that the impugned law was unconstitutional and therefore not worthy of implementation. It was the petitioner's case that the conservatory orders were made in the wider interest of the public to prevent not only the petitioner but also the general public from the preventable perils of an unconstitutional law that threatens freedom of expression, opinion, media, the right to human dignity and privacy. For this argument, counsel referred to the case of **Jacqueline Okuta & Another vs Attorney General & 2 Others [2017] eKLR** wherein it was held that human rights enjoy a prima face presumptive inviolability and will trump other public good.

18. Mr. Kiprono, learned counsel for the 1st interested party opposed the application and submitted that Chacha J. was properly convinced that certain Sections of the impugned Act were delitarious to Human Rights as criminal libel introduced by the said Act is a disproportionate limitation on freedom of expression in a free and democratic society.

Determination

19. I have considered the application herein, the petitioner's response and the submissions made by counsel for both parties. The issue for determination is whether this court can issue orders to set aside the impugned exparte orders of Chacha Mwita J. issued on 29th May 2018.

20. Article **23 (3)** of the Constitution affords a party to proceedings brought pursuant to Article **22**, asserting violation or threat of violation of any Constitutional right or fundamental freedom, the avenue of moving the court for any relief, including temporary reliefs among them conservatory orders. In the case of ***Nancy Makokha Baraza vs. Judicial Service Commission & 9 Others*** **[2012] eKLR** the court expressed itself on the phrase " *a court may grant appropriate relief....*" as follow:-

"The ...*Constitution gives the court wide and unrestricted powers which are inclusive rather than exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises.*"

21. In the above cited case, the court gave Article 23 (3) a robust interpretation and was of the view that depending on the circumstances of each case the court should always be in a position to fashion such relief as will be necessary to protect and enforce the Constitution.

22. It is trite law that an applicant seeking conservatory orders must demonstrate that he/she has a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. In the case of ***Centre for Rights Education and Awareness and 7 Others –v- The Attorney General HCCP 16 of 2011*** *it was held:-*

"... 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."

23. Upon finding that a prima facie case has been established, the court then decides whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights. Flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory and lastly the court must ensure that the conservatory orders fulfill the public interest dogma as was observed by the Supreme Court in the case of ***Gatirau Peter Munya vs. Dickson Mwenda Githinji & 2 Others [2014] eKLR*** when the court stated:-

"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 adjudicatory authority of the court, in the public interest. Conservatory orders, therefore,

are not, unlike interlocutory injunctions linked to such private-party issues on the "prospects of irreparable harm occurring during the pendency of a case; or "high probability of success" in the applicants case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case bearing in mind the public interest, the Constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes".

24. Conservatory orders are intended to help create and or maintain a given state of affairs pending the hearing of the main suit. In this case, I note that they were intended to help secure and protect the rights and freedoms under the Constitution. The petitioner challenged the constitutionality of certain sections on the Act while stating that the same were unconstitutional for violating both the constitution and fundamental human rights and Justice Mwita had the following to say when granting the impugned conservatory orders:-

"I am satisfied from the material placed before me that 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 provisions are constitutional, there would be no prejudice since the provisions would be reinstated and take effect. However, should the court come to a conclusion that they are unconstitutional, there will be no sufficient compensation to the rights that have been violated."

25. From the above extract of the ruling, it is clear that the learned Judge found that the petitioner had satisfied the conditions set for the granting of conservatory orders exparte and exercised his discretion to grant the said orders so as to preserve the subject matter of the petition. I note that the court did not stop at only issuing the conservatory orders but also appreciated the urgency of the case and the need to determine it within the shortest time possible by giving full directions on the filing of the pleadings after which the matter was listed for directions on 18th July 2018 which was the earliest date possible considering that the said Judge was due to proceed for his annual leave barely a day after issuing the impugned orders. The time frames for filing pleading were therefore informed by the appreciation of the urgency of this case.

Rule 23 of the Mutunga Rules stipulate as follows:-

23. Conservatory or Interim orders

1) Despite any provision to the contrary, a judge before whom a petition under rule 4 is presented shall hear and determine an application or conservatory or interim orders.

2) Service of the application is sub rule (1) may be dispensed with, with leave of the court.

3) The orders issued in sub–rule(1) shall be personally served on the respondent or the advocate on record or with leave of the court, by substituted service within such time as may be limited by the court.

26. Even though Rule 25 of the Mutunga Rules provides that courts may vary, set aside or discharge orders issued under Rule 23 of the said Rules, courts have held that this power must be exercised with great caution and is ordinarily only exercised to correct an error or oversight or to effect a review of the proposed order so that the orders may be able to deal more appropriately with the issues as litigated by the parties. See **Benjoh Amalgamated** case (supra).

27. In the present case, this court on 25th June 2018 varied the impugned orders issued on 29th May 2018 so as to limit the conservatory orders only to the contested sections of the impugned Act as opposed to the entire Act as had inadvertently been indicated in the court's initial orders. Despite the said variation, the applicant still sought the setting aside of the conservatory orders in their entirety on the basis that they were issued exparte without according the applicant a hearing and that the orders had the effect of creating a lacuna in the cybercrimes law.

28. My take, however, is that the concerns raised by the applicant were fully captured and addressed by Mwita J. when he struck the delicate balance between the need to protect the petitioner's rights that were alleged to be under threat of violation by the coming into force of the impugned Act and the public interest that citizens be governed by the an Act that passes the constitutional muster. Before the court is a Petition challenging the constitutionality and or legality of the impugned Act. The determination of this case requires a close examination of the relevant legal regimes and the determination of the constitutionality of the impugned sections of the Act. This can only be determined after a full hearing. Under Article 2 (4) of the Constitution, any law that does not

conform with or is inconsistent with the constitution is null and void to the extent of its inconsistency. It was therefore not enough for the applicant to merely state that it would experience hardship in prosecuting certain cases due to the suspension of sections of the Act. The applicant will at the hearing of the petition be required to demonstrate that the impugned sections of the Act are consistent with the Constitution.

29. It is instructive to note that the decision on whether or not to grant conservatory orders rests entirely within the discretion of the court handling such an application and considering the circumstances of the instant case, this court is reluctant to interfere with the discretion of the learned Judge as to do so will be tantamount to sitting on an appeal from the decision of a court with equal jurisdiction and thus interfering with the said court's discretionary powers. In my humble view, the most appropriate action would have been for the applicant to seek a review before the same judge who made the impugned orders or file an appeal before the Court of Appeal as this court does not wish to come across as trespassing into the domain of another judge fulfilling his constitutional mandate.

30. Whereas it is not disputed that a right to a fair hearing and due process of the law is enshrined in our Constitution under Article 50, it is not lost to this court that there are exceptions to the general rule that a party should not be condemned unheard. I am guided by the decision in the case of **Thomas Edison Ltd. vs. Bathok 1912 15 C.L.R. 679** wherein it was held thus:-

"There is a primary precept governing administration of justice that no man is to be condemned unheard and therefore, as a general rule, no order should be made to the prejudice of a party unless he has the opportunity of being heard in defence, but instances occur where justice could not be done unless the subject matter of the suit is preserved and, if that is in danger of destruction by one party or if irremediable by one party, interim orders may issue to give room to the court to determine the dispute on the merits."

31. A perusal of the orders issued by Mwita J. shows that he satisfied himself that there was a prima facie case warranting the specific orders that he issued. I reiterate that it would, in the circumstances of this case, be improper for this court to purport to overturn the said orders. In any event, it is trite law that before granting orders to set aside or disturb conservatory orders, the court must be satisfied that the applicant will be irreparably injured if the orders are not set aside. In this case the injury complained of is the applicant will be unable to charge suspects with certain offences created by the new Act or fulfill certain international obligations. I find that the injury complained of has to be balanced with the legal requirement that all laws pass the constitutional validity test. In addition to the above consideration, the court is also bound to consider where the public interest lies and in this case, I find that nothing can be of greater public interest than the court playing its constitutional mandate of ensuring that the individual rights and freedoms under the Constitution are protected and that all laws especially those creating offences conform to the Constitution.

32. Given the circumstances of this case, I am not satisfied that the applicant has demonstrated that the orders setting aside the conservatory orders are merited. This court observes that in filing the instant application instead of pursuing the main petition whose hearing had already been fast tracked, the applicant has contributed to an unnecessary delay in the finalization of the main petition that would have settled the ultimate question on whether or not the impugned sections of the Act are unconstitutional.

33. In view of my analysis and observations hereinabove, I find that the application dated **11th** June 2018 is unmerited and I hereby dismissed it with no orders as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 1st day October 2018.

W. A. OKWANY

JUDGE

In the presence of:

Miss Mutemi and Lengo for the petitioner

Mr Kanyoni for the 2nd respondent

Court Assistant – Kombo