REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Civ Appli 821 of 2002

IN THE MATTER OF THE FILMS AND STAGE PLAYS ACT [CAP 222 OF

THE LAWS OF KENYA]

AND

IN THE MATTER OF GAZZETTE NOTICE NO. 4014 ISSUED BY THE MINISTER

FOR INFORMATION, TRANSPORT AND COMMUNICATION DATED 6TH JUNE 2002

AND

IN THE MATTER OF AN APPLICATION UNDER SECTION 84 OF THE CONSTITUTION

OF KENYA FOR THE ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF

NATION MEDIA GROUP LIMITED ………………..….……. APPLICANT

VERSUS

THE ATTORNEY GENERAL ………………….……..……..…. RESPONDENT

JUDGMENT

By a gazette Notice number 4014 dated 6th June, 2001, the Minister for Information, Transport and Communication in exercise of the powers conferred on him by Section 12 of the Films and Stage Plays Act Chapter 222 of the Laws of Kenya issued a legal Notice in the following terms:-

"……….***In exercise of the powers conferred by Section 12 of the Films and Stage Plays Act, the Minister for information, Transport and Communication notifies broadcasting networks, Cinema theatres, production houses, Advertising agents and all those concerned that Films (including Television commercials, Television dramas, comics, documentaries and features) for Public exhibition, screening or broadcast, whether foreign or locally produced are required to obtain a Certificate of***

approval from the Film Licensing officer and the Kenya Film Censorship Board prior to being exhibited. Pursuant to Section 12 (3) of the Act, any person who exhibits any film in contravention of this requirement commits an offence……"

Nation Media Group Limited, hereinafter referred to as the Applicant and who operates a broadcasting Network was alarmed and aggrieved by the far reaching effects of the said legal notice and opted to challenge the same.

By an originating summons dated and filed in this Court on 22nd July, 2002, and expressed to be brought under Chapter 75 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules and all other enabling provisions of the Law, the Applicant sought the following orders:-

(a). A declaration that the order by the Minister for Information, Transport and Communication, to act in exercise of the powers conferred on him by Section 12 of the Films and Stage Plays Act Chapter 222 of the Laws of Kenya, Published as Gazette Notice No. 4014 dated 6th June, 2001 infringes upon the Fundamental rights and freedoms of the Applicant which are protected under Chapter V of the Constitution of Kenya.

(b). A declaration that the Order by the Minister for Information, Transport and Communication published as Gazette Notice No. 4014 dated 6th June, 2001 is null and void and of no legal effect.

(c). Any such further and other order as the Court may deem just and equitable in the circumstances of this case.

The grounds advanced in the support of the Application can be paraphrased as follows:-

(a). That the Order by the Minister aforesaid imposed conditions upon the Applicant in exercising its press freedom guaranteed under the Constitution of Kenya, which conditions infringe upon and are inconsistent with the Applicant's said Constitution rights.

(b). That the requirements imposed by the order are not reasonably required in the interest of defence, public safety, public order, public morality or public health and are nor for the protection of the rights and freedoms of other persons.

(c). That the order is vague and ambiguous and does not provide the standard or criteria for the grant or refusal of approval by the Kenya Film Censorship Board and also the Licensing officer and is therefore unreasonable and oppressive.

(d). That the Penal sanction imposed for failure to comply with the order violates express Constitutional provisions and deny the Applicant the equal protection of the Law as guaranteed by Section 70 of the Constitution.

(e). That the requirements imposed in the order in respect of all Films and Broadcasting material are infeasible, impracticable and would lead to absurd results and constitute an unconstitutional abridgment of press freedom and finally,

(f). That the requirements in the order would threaten the viability and feasibility of various Television programmes and deny the Applicant as well as many members of the Public their Constitutional guaranteed freedom to communicate and receive information without interference.

The originating summons was also supported by an Affidavit sworn by one Wilfred Kiboro, Group Managing Chief Executive of the Applicant, who in pertinent paragraphs depones as follows:-

3. "…….THAT on 6th June, 2001, the Minister for Information, Transport and Communication

(hereinafter referred as "the Minister") issued a Gazette Notice number 4014 notifying all broadcasting networks, Cinema Theatres, Production houses, advertising agents and all those concerned that all Films (including Television commercials, Television dramas, comics, documentaries and features) for Public exhibition, screening or broadcasting whether foreign or locally produced are required to obtain a Certificate of approval from the Film Licensing officer and also the Kenya Film Censorship Board prior to being exhibited. Annexed hereto and marked "WK – 1" is a true copy of the said Gazette Notice.

4. THAT I am advised by the Applicant's Advocate on record, which advice I verily believe to be true, that the aforesaid order by the minister is unconstitutional and its implementation shall result in the infringement of the Applicant's fundamental rights and freedoms, particularly its press freedom as provided for by the Constitution of Kenya.

5. THAT I am also advised by the Applicant's Advocate on record, which I verily believe to be true that by making the aforesaid order the Minister was acting in excess of the powers conferred upon him by Section 12 of the Films and Stage Plays Act (Chapter 222 of the Laws of Kenya, as the provisions of the said Act only apply to Cinematograph Films and Plays, while he purports to regulate, interalia, Television commercials, Television dramas, documentaries and comics.

6. THAT I verily believe that one of the effects of the implementation of the Minister's order, would be to deny the Applicant the right to air live broadcasts and material from satellite transmissions, hence denying the Applicant the right to provide this information to members of the Public. Further, I verily believe that it would threaten the viability of various locally produced television programmes, thereby denying the Applicant and members their opinions in the forums provided by the said televisions programmes……"

When the originating summons was served on the Respondent, no Affidavit (s) were filed in Response to counter the averments by the Applicant. Instead the Respondent on 22nd March, 2004 filed a Notice of Preliminary objection. Two issues were raised by the Respondent in the Preliminary Objection to wit:-

1. That the Applicants have not shown that the matters they complain of has or is likely to contravene any right vested upon them personally.

2. That the issues raised in the Originating Summons are matters within the domain of Judicial Review and not Constitutional Interpretation.

The originating summons was then placed before the Honourable the Chief Justice for directions as to the manner and mode in which the Application shall be heard and also directions regarding other parties who may wish to join in the suit. Upon hearing he parties, the then Chief Justice, the Honourable Mr. Justice B. Chunga directed that:

"…***..Everything considered, I am satisfied that this is a proper Application to be heard before a bench of two Judge whom, as I have indicated, I will appoint in due course……"***

He left the issue of interested parties to be dealt with by the bench to hear the Application. The Honourable the Chief Justice then proceeded to appoint Khamoni and Hayanga JJ to preside over the Application.

When the Application came up for substantive hearing interpartes on 20th November, 2002, it was adjourned on the Application by the Respondent to 20th and 21st January, 2003 respectively for hearing. When the matter came up for hearing again on the aforesaid dates, it was stood over to 24th February, 2003 for mention with a view to recording an out of Court settlement. Counsel for the Applicant indicated then to the Court that he was talking with the Respondent's office and it was likely that the offending Gazette Notice could be de-gazetted. When the matter came up again on 24th July, 2003 no settlement had been reached. In the meantime Justice Khamoni had been re-deployed to the High Court

of Kenya at Nyeri and there was need to appoint another Judge in his place. The matter was then placed again before the Chief Justice to reconstitute the bench to hear the Application.

On 18th March, 2004, the Honourable the Chief Justice appointed Aluoch J to preside over the matter. When the Application subsequently came before the Learned Judge for hearing, Miss Kimani, Chief Litigation Counsel, for the Respondent sought to argue the preliminary objection filed in Court on 22nd March, 2004. Mr. Githu Muigai, Counsel for the Applicant objected to the course adopted by the Learned Chief Litigation Counsel. Following lengthy submissions on the issue, Justice Aluoch then ruled that the points raised before her orally should be raised during, or at the hearing of the Preliminary Objection. This would enable the Court to have all the facts and therefore reach a just and fair conclusion. The Judge further held that the Court would at the substantive hearing of the Preliminary Objection consider the issue of whether the Respondent can raise a Preliminary Objection after directions by the Chief Justice had been given for the originating Summons to be heard. The Judge then directed that the matter be referred to this Division for further orders.

Upon being seized of the matter, the presiding Judge of this Division then referred the matter once again to the Honourable the Chief Justice to empanel another bench to preside over the hearing of the matter. It was then that the instant bench was appointed.

When the matter came before us for hearing on 28th February, 2005, we directed the parties to file skeleton written arguments together with any authorities they may wish to rely on. These directions were complied with. We carefully read and considered the skeleton arguments advanced by each party in support of their case together with the several authorities cited. We are greatly indebted to both Counsel's for their industry and research that has gone along way in assisting us reach a decision in this rather complex matter.

When the original summons opened before us for arguments, Mr. Githu Muigai appeared for the Applicant, whereas Mr. Mwaniki, Learned State Counsel appeared for the Attorney General. In his oral submissions in support of the Application, Mr. Githu Muigai submitted that the Minister's action was unconstitutional as it amounted to interference with the Applicant's freedom of expression as enshrined in Section 79 of the Constitution of Kenya as well as freedom to communicate and the right of Public to receive communication and or information. Counsel submitted further that there was only one burden on the Applicant to demonstrate that the Gazette Notice had been published and that the Applicant had been affected by the said Gazette Notice. Once an infringement of the right to freedom of expression is alleged by a citizen as in the instant case, the burden of proof shifts to the Respondent to justify the law. Counsel submitted further the state had also to justify the reasonableness of the limitation to the right. Counsel maintained that he Applicant had demonstrated that the Gazette Notice had been published by virtue of a copy of the same annexed to the Application. Since the publication of the Gazette Notice, the Respondent had demanded the Applicant's compliance by two letters, whose copies were annexed to the Application. Accordingly it was Counsel's position that the Applicant was thus affected by the Notice. Counsel also submitted that the limitations imposed on the freedom of expression by the said Gazette Notice prohibits the broadcasting and or giving breaking news without having first obtained a Certificate of approval from the Licensing officer and the Kenya Film Censorship Board. Counsel however conceded that there could be instances where the Minister could exercise powers of regulation in certain instances such as films with explicit sexual contents. Permission to air such material might be necessary in the interest of Public morality.

Counsel further submitted that the Minister cannot issue orders which make it impossible to run a modern T. V. Station. There is nothing like absolute right. However for a Constitutional right to be taken away, it must be in accordance with the law. It was Counsel's submission that the Minister could not take away a Constitutional right by a mere Gazette Notice. In the Applicant's view therefore that order was nnul and void and illegal.

Counsel also pointed out that the Gazette Notice was impracticable. To demonstrate its impracticability, Counsel made reference to the other media houses that beam directly into Kenya from outside such as DSTV M-NET, EATV, sky T. V. BBC e. t. c. How would the Gazette Notice apply to such media houses

unless the intention of the Gazette Notice was to discriminate the local media which would also be un-constitutional.

Counsel also submitted that the Minister was not a Licensing authorities for T. V's in Kenya. This is the role reserved for Communication Commission of Kenya (CCK). To the Counsel, the Minister was extending provisions meant for stages, theatres and cinemas to the broadcast and Television media. Counsel maintained that there was nothing in the Minister's Gazette Notice that purports to protect public interest or public morality. On the question of interpretation of Constitutional provisions Learned Counsel referred us to the case of ***MINISTER OF HOME AFFAIRS & ANOTHER VS FISHER & ANOTHER (1979) 3 ALL ER 21.*** for the proposition that it is the statute that should comply with the Constitution. For the proposition that the Constitution should be interpreted in a purposive manner, Counsel referred us to the case of ***RE MUNHUMESO AND OTHERS (1994) 1 LRC 282.***

Counsel also raised the principle of proportionality in his submissions. He stated that the power conferred to the Licensing Officer in the regulations were not proportionate to the vice sought to be corrected that that could not have been the intention of Parliament. On the principles of proportionality Counsel referred us to the case of ***REPUBLIC VS MOUSHUU & ANOTHER (1994) 2 LRC 335.***

Finally Counsel submitted that the Films and Stage Plays Act was enacted in 1962 just before the Constitution was written and enacted. It did not therefore anticipate the wide freedoms enshrined in the Constitution. The Constitution of Kenya creates a multi-party democracy. It specifically makes reference to the requirement of a democratic society. Counsel submitted that in the circumstances the claims back provision ought to be used reasonably in a democratic society. For this submission Counsel referred the Court to the case of ***MTN PTY LTD AND NBN LTD VS THE STATE (1986) LRC (CONST) 33.*** Counsel further submitted that the complaint by the Applicant was not frivolous. The Gazette Notice breached the Applicant's freedom to communicate ideas and the corresponding right to receive communication. As a result of the Gazette Notice the Applicant is leaving in constant fear as it does not know when the Respondent will bring down its sword on it.

In submissions in opposition to the Application and in response to the Applicant's submissions, Mr. Mwaniki, Learned State Counsel only limited himself on issues of law. As already stated, the Respondent did not file a replying Affidavit to counter the averments by the Applicant in support of the Application. The first issue of law to be tackled by the Learned State Counsel was the question of jurisdiction. Counsel pointed out that the Applicant had grounded its Application on Chapter 75 of the Constitution of Kenya, amongst other provisions of the Law. It was the contention of the Learned State Counsel that there was no Chapter 75 in the Constitution of Kenya. That despite this issue being brought to the attention of the Applicant in good time, no attempts to amend the Originating Summons were made. Counsel further pointed out that even if we were to assume that it was a typographical error to have cited Chapter 75 instead of Section 75 of the Constitution, Counsels stated that the Section deals with deprivation of property. The instant Application in its present form was not about deprivation of property but was about enforcement of fundamental rights. That being the case the Application was vexatious and oppressive to the Respondent. Counsel submitted that a party coming to Court must adhere to the rules of procedure failing which such proceedings are liable to be struck out. For this proposition Counsel relied on the case of ***WILLIAM KIPRUTO ARAP CHELASHAW VS REPUBLIC, MISC APPLICATION NO. 692 OF 2003 (UNREPORTED)***. Counsel also pointed the Applicant did not also cite Section 84 of the Constitution in its Application. It only referred to Rules 9 and 11 of the Constitution of Kenya (Protection and Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules without citing the parent Section. This omission too was fatal according to the Learned State Counsel. In support of this proposition, Counsel referred us to the Ruling in the case of ***CYPRIAN KUBAI VS STANLEY KAIYONGI MWENDA, MISC. APP. NO. 612 OF 2002 (UNREPORTED)***

The second point of law taken up by the Learned State Counsel is that the Applicant was not challenging the powers conferred on the minister by the parent Act but was challenging the use of those powers by the Minister. Counsel submitted that if the Applicant felt that the Gazette Notice infringed on its freedom of expression, it should have challenged their Constitutionality rather than bring the instant Application. The challenged Act is such law as contemplated under Section 79 (2) of the Constitution. In the

Application, the Applicant seeks a declaration that the legal notice by the Minister be declared null and void. To Counsel, this is not a remedy available to the Applicant. Rather the Applicant's remedies lies in the purview of Judicial Review. Counsel relied on the case of ***REV. DR. TIMOTHY NJOYA & OTHERS VS THE ATTORNEY GENERAL & ANOTHER*** as well as the ***REPUBLIC VS COMMISSIONER OF POLICE EXPARTE NICHOLAS GITUTU KARIA, MISC. APP. NO. 534 OF 2003 (UNREPORTED).*** Accordingly the Application was incompetent and ought to fail.

In the alternative, the Learned State Counsel argued that assuming that the Application was found to be proper, can it stand the test of law? Counsel submitted that Section 79 of the Constitution confers a right which is not absolute. The Section has a proviso and or limitation that was imposed for a good cause. The sub-section limits the freedom conferred by the Section and allows the Minister to make laws that derogate from the freedom conferred by the Section. The Gazette Notice was made pursuant to the law and was for purposes of protection of Public morality. The Learned State Counsel stated the Minister's actions could be challenged if they were deemed to be unreasonable and out of proportion. Counsel pointed out that unlike the Article 36 of the South African Constitution, the Kenyan Constitution does not give a bench mark of what is deemed to be proportional, reasonable and justifiable in an open democratic Society. According to Counsel, the Minister's actions were not unreasonable and did not impose a heaver burden to the Applicant. All that Applicant was being asked is to submit the films for inspection for purposes of Public morality, contrary to the submissions by Counsel for the Applicant, the regulation did not cover news or breaking news according to the Respondent. The regulation only covered films. The Gazette Notice was not unreasonable and unproportional even under the Wednesbury principles. To Counsel it would be unreasonable not to control the exhibition of all sorts of films. Are the powers conferred to the Minister ultra vires? The Learned State Counsel submitted that the submissions by the Applicant that the Act did not cover media houses was unfounded. Learned State Counsel faulted the Applicant for relying on the preamble to the Act to buttress its argument. To Counsel the preamble can only be resorted to for interpretation if the Act itself is not clear. See ***PRINCIPLES OF STATUTORY INTERPRETATION, PRASANNA, G. S. 3RD EDITION, INDIA, BHARAT LAW HOUSE, 1984.***

This was not the case here. Long little could not overrule the clear meaning of the enactment. The legal Notice was therefore intra vires. Finally Counsel submitted that the Legal Notice was not vague or ambiguous. It was neither unreasonable or oppressive. It is practicable and reasonable. With that Counsel urged us to dismiss the Application for lacking in merit.

In a brief reply, Mr. Majanja, Learned Counsel who had stepped in place of Mr. Githu Muigai, submitted that Procedure is a handmaid of justice. That procedure should not be followed slavishly in a manner that impede the cause of justice. Counsel submitted that the purposes of procedure is to let the parties know the case they are to meet so as to avoid prejudice. Counsel further submitted that the case the Respondent was to meet is clear from the originating summons, the Affidavit in support thereof and even by the ruling by the Chief Justice on 27th September, 2002. There are occasions when remedies may overlap in which case aggrieved party could choose as in the instant to come to Court either by way of Judicial Review or Constitutional reference. However what a party should not do is to combine the two jurisdictions in one Application. For this submission Counsel referred us to the case of ex-parte ***NICHOLAS GITUTU KARIA (SUPRA).*** Learned Counsel further submitted that the limitation sought to be relied on by the Respondent are matter of fact. However no replying Affidavit was filed by the Respondent. The regulations in their current state captures every conceivable matter and the Applicant is left at the mercy of a bureaucrat to decide what should be approved. As the Minister breached the Applicant's fundamental rights, the Applicant was entitled to come to this Court in the manner it did. It was not a matter for Judicial Review, the Learned Counsel of the Applicant concluded his submissions.

From our appreciation and consideration of the pleadings herein and the submissions made in support and in opposition thereof we discern twin issues for our determination to be as allows:-

(a). Jurisdiction.

(b). Legality and constitutionally of the Gazette Notice number 4014 of 6th June, 2001 and finally

JURISDICTION

The issue of jurisdiction is two fold. The Respondent faults. the Application, one, on the basis that the originating summons was commenced under a non-existent law as Chapter 75 of the Constitution citation in the Application does not exist. Further the Respondent faults the Application for being vague as it cites the whole of Chapter 75 of the Constitution in respect of the reliefs. The main prong of attack on the Application by the Respondent is that the Constitutional reference raises matters of statutory as opposed to Constitutional interpretation and adjudication. As the Application questions the mode and manner of exercise of power by the Minister the Applicant should have contested the issue by way of Judicial Review proceedings and not a Constitutional reference.

From the title of the Application, the Applicant seems to have brought the Application:-

"…***Under Chapter 75 of the Constitution of Kenya, rules 9 and 11 of the Constitution of Kenya (Protection of Fundamental rights and freedoms of the Individual Practice and Procedure rules and other enabling provisions of the law…"***

It is therefore true as argued by the Learned State Counsel that there is no such Section 75 in our Constitution. Further the Applicant ought to have cited Section 84 of the Constitution pursuant to which rules 9 and 11 were made. Are these omissions however, fatal to the Application? We do not think so. First and foremost, Mr. Githu, did indicate at the very commencement of the hearing of the Application that the reference to Section 75 was inadvertent and typographical error. The Applicant actually meant Chapter 5 of the Constitution of Kenya. Having gone through the body of the Application, we agree with the explanation given by Learned Counsel for the Applicant. Yes, procedure is a handmaid to justice. Procedure requires that proper provision of the Law upon which the Application is grounded be cited. However we do not think that where a non-existent provision of the law is cited but after a careful reading of the body of the Application and prayers sought and the Court is able to tell with certainity the nature of the Application that such an Application should be struck out for incompetence. This would be a drastic step to take, not atleast in Constitution Court. A Constitution Court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice. The very Constitution that imposes a duty on this Court to administer justice without undue regard to technicality. In our view as long as a party is aware of the case he is to meet and no prejudice is be caused to him by failure to cite the appropriate Section of the law underpinning the Application, the Application ought to proceed to substantive hearing.

In the instant case we are satisfied that though the Applicant cited non-existent Section of the Constitution and also failed to make reference to Section 84 of the Constitution that failure did not occasion any prejudice or injustice to the Respondent. The Respondent from the prayers sought in the Application knew the case it was to confront……. The Learned State Counsel also raised the issue of vagueness of the Application. That the Application was vague as it cites the whole of Chapter 5 of the Constitution. That may be so, however the prayers sought are specific and they refer to freedom of expression guaranteed under the Constitution. If there is any doubt by the Respondent as to the case it was to meet, that doubt was disabused by the Ruling by the Honourable the Chief Justice when the matter was placed before him for directions. In the course of his ruling the Chief Justice stated:-

"……***The essence of the maters raised by the Applicants is that the action of the Minister for Information, Transport and Communication as expressed in Gazette Notice No. 4014 of 6th June, 2002 are a transgression on the Applicants Constitutional rights. Accordingly, they are bringing the originating summons under Section 84 (1) of the Constitution as read with the Constitution of Kenya (Protection of Fundamental rights and Freedoms of the individual) Practice and Procedure Rules. Put briefly, the Applicants are seeking the intervention of the Court for the protection of their Constitutional rights against alleged violations by the Respondent……… A person alleging violation or likelihood of violation of his or her Constitutional rights under Chapter V of the Constitution of Kenya must set out his or her complaint in the clearest possible manner. To do so, the following areas ought to emerge with sufficient clarity in the Application papers filed in Court.***

(a). The nature of the alleged violation or likely violation of the Constitutional rights

(b). The person, or persons or authority or Institution alleged to be responsible for the violation or likelihood of violation.

(c). The manner of the violation or likely violation

(d). The Section of the Constitution which creates and gives the Constitution right that is under violation or under threat of violation.

The Learned Chief Justice then went onto observe that:-

"…***.. I have examined the originating summons and the supporting Affidavit and I am satisfied that a clear case, generally speaking, in terms of the matters I have set out earlier in this ruling has been made out to justify appointments of a bench to hear the Application…."***

In the light of this ruling can the Respondent confidently say that they did not know the case they were meeting despite the Applicant citing a non-existent provision of the Law? As we have already observed, this cannot be the case. In the body of the Application, the Applicant has clearly set out the nature of the violation, the Institution alleged to be responsible for the violation and the manner of violation. The Application is therefore very clear. We are satisfied as indeed was the Chief Justice that the Applicant has set out a clear case of violation or potential violation of its Constitutional right to freedom of expression. Learned State Counsel invited us to rely on the case of ***<u>CYPRIAN KUBAI (SUPRA)</u>*** to strike out the originating summons for want of citing the correct provision of the law. First and foremost we wish to point out that the aforesaid authority is not binding on us and it is only of persuasive value. As we have already stated, once a party knows what case he/she has to meet from the pleadings, the inappropriate citation of the Section upon which the Application is grounded notwithstanding, the Application ought to proceed to hearing. We find the reasoning in the aforesaid case rather too restrictive and does not accord well with our interpretation of the Constitutional as a Constitutional Court that substance should not be sacrificed at the alter of technicality.

The other issue raised by the Respondent and which goes to the jurisdiction is that the Constitutional reference raises matters of statutory as opposed to Constitutional interpretation and adjudication. As the Application questions the mode and manner of exercise of power by the Minister, this falls within the realm of Judicial Review under the special jurisdiction of the Court pursuant to the Law Reform Act and Order LIII of the Civil Procedure Code and cannot be entertained in a Constitutional Court. In other words it is the position of the Respondent that in so far as the Applicant is not challenging the powers conferred on the Minister by the Films and Stage Act, Cap 222 Laws of Kenya, but he is challenging the use of those powers by the Minister, the Applicant's remedy lies in Judicial review. It is not a matter for Constitutional reference and or interpretation.

Nothing can be far from the truth. There is no doubt at all that the Application is premised on Chapter V of the Constitution. The Applicant is seeking the intervention, enforcement and protection of its Constitutional rights against the alleged violations by the Respondent. There are general averments in the Originating Summons and in the Affidavit in support of thereof about breach or likely breach of the Applicant's Constitutional rights. We think that the Applicant was perfectly entitled to come to this Court in the manner he did in the circumstances. Yes, he could have opted to come to Court by way of Judicial Review for a limited remedy excluding the alleged Constitution contravention but he chose to come under the Constitution. A Constitutional application is much wider and may in suitable cases such as the instant one also include Judicial Review. To give one illustration this Court has power under Section 65 (2) of the Constitution to exercise its Judicial Review power over subordinate Courts in Civil and Criminal matters and by analogy the restrictive approach suggested ought not to apply. However failure to so does render the instant Application a nullity. After all the proviso to Section 84 of the Constitution gives this Court very wide powers in terms of the prayers it can grant on a proper Application brought pursuant to Section 70 to 83 (inclusive) of the Constitution. The proviso is in these terms:-It provides:-

"…….***And it may make such orders, issue such writs and give such directions as it may consider appropriate for the purposes of enforcing or securing the enforcements of any of the provisions of Sections 70 to 83 (inclusive)……"***

Our interpretation of the above proviso is that this Court has such wide latitude in the kind of remedies it can grant on a Constitutional reference. We can give orders available in Judicial Review in a Constitutional reference.

Section 84 (1) of the Constitution also provides that a party with any other remedy or action lawfully available can still move to Court by way of Constitutional reference.

In support of the proposition that the Applicant should have invoked Judicial Review Proceedings, Counsel for the Respondent referred us to the case of ***REV. DR. TIMOTHY M. NJOYA VS ATTORNEY GENERAL & ANOTHER (SUPRA)*** where the Court stated:-

"……***As regards the objection that the summons raises matters of statutory as opposed to Constitutional interpretation and adjudication, we would agree that any relief sought which does not involve the interpretation of the Constitution or the enforcement of the fundamental rights is misplaced in a Constitutional Court. We also agree that where what is complained of is the composition of a statutory body or the procedural provisions thereof or the mode and manner of the exercise of its power, without more – that matter belongs to the realm of Judicial review under Order LIII of the Civil Procedure rules and it cannot be entertained in a Constitutional Court……"***

Our response to this is that the matter at hand relates to the enforcement of the fundamental rights of the Applicant. Further we do not think that the Court's attention was drawn to the provisions thereto to Section 84 (1) and (2) of the Constitution and in particular the proviso which permits this Court even to grant Judicial Review remedies in a Constitutional reference, including Section 65 (2) of the Constitution. A party has a right to choose the jurisdiction to invoke when coming to Court depending on the results he/she desires as correctly submitted by Mr. Majanja. What such party should not do however is to invoke two different jurisdictions in one Application and or suit. In essence that was the holding by this Court in the case of ***REPUBLIC VS THE COMMISSIONER OF POLICE EX-PARTE NICHOLAS GITUHU KARIA (SUPRA).*** In that case we delivered ourselves thus:-

"….***On this we find that it is improper for the Applicant to have combined Judicial Review relief Application with a Constitutional Application.***

(i). Because both Judicial review jurisdiction and Constitutional Jurisdiction are special and each jurisdiction has a set of special rules. The first jurisdiction is donated by an Act of Parliament namely Law Reform Act, Cap 26 and second Constitutional Jurisdiction springs directly from the Constitution itself with rules made pursuant to Section 84 (6) of the Constitution.

(ii). The Constitution is the supreme Law and all other laws must confirm to the Constitution. The rules of interpretation are different and the methods of amendment or repeal of ordinary laws are different from those of the Acts of parliament. See TIMOTHY NJOYA VS ATTORNEY GENENRAL & 30 OTHERS, MISC CA 82 OF 2004 (OS).

(iii). At the moment although desirable it is not statutorily possible in Judicial review proceedings to grant, declarations innjunctions and damages whereas under Section 84 of the Constitutional, the Court has a wide discretion to grant such orders as may be appropriate.

A combination as in this case unnecessarily muddles up and confuses both parties and the Court and we hold that such a combination is fatal to the Application as well….."

In the instant Application, the Applicant is seeking to enforce his fundamental rights under the Constitution. There is no combination of two or more jurisdiction in the application. Invoking Constitutional jurisdiction in place of Judicial Review Jurisdiction where there is a Constitutional issue

for determination does not by itself amount to invoking a wrong procedure as argued by Mr. Mwaniki and consequently that the Application should fail. Flowing directly from all the foregoing, it is our conclusion that the Applicant is properly before this Court and the objection by the State on that score must automatically fail.

The Applicant's complaint in the main is that the Respondent has unlawfully invaded his Constitutional rights to freedom of expression.

The Applicant takes the view that the Gazette Notice is unconstitutional as it violates its Constitutional right to protection of freedom of expression. Section 79 of the Constitution provides that:-

"…***..Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression that is to say, Freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of person) and freedom from interference with his correspondence.***

(2) Nothing contained in or done under the authority of any Law shall be held to be inconsistent with or in that the Law in question makes provisions:-

(a). That is reasonably required in the interest of defence, public safety, Public order, Public morality or public health.

(b). That is reasonably required for the purpose of protecting the reputation, rights and freedoms of other person or the private lives of persons concerned in legal proceedings preventing disclosure of information received in confidence, maintaining the authority and independence of the Courts or regulating the technical administration or the technical operation of telephone, telegraphy, posts, wireless broadcasting or television or,

(c). That imposes restrictions upon public offices or upon persons in the services of the local authority, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably required in a democratic society…"

There is no doubt that the Gazette as promulgated is an invasion to the Constitutional protection of freedom of expression as aforesaid. It is now an accepted principle that a party alleging a breach of a Constitutionally guaranteed freedom has the evidential burden of proving such breach. In the Tanzanian case of ***REPUBLIC VS MBUSHUU AND ANOTHER (1994) 2 LRC 335,*** Justice Mwalusanya cited with approval what Justice Braithwaite had stated in the famous case of ***A. G. OF TRINIDAD*** and ***TABOGO VS MORGAN 45 (1985) LRC 9 (CONST) 770*** on the burden of proof where infringement of a right is alleged. He delivered himself thus:-

"…***Where an Act is passed into law… and that Act is one that restricts the rights and freedoms of an individual, in order to impugn such an Act, all that an individual is required to do is to show that one or more of his rights have been restricted. Having done so the burden shifts to the proponent of the Act to show that the provisions of the Act restricting such rights and freedoms are "reasonable" restrictions. If the proponents of the Act fail to discharge this burden then the Court of competent jurisdiction may pronounce against the validity of the impugned Act…."***

We accept this statement as a reasonable proposition of Law.

In the instant case, the Minister in issuing the Gazette Notice was purportedly acting pursuant to the powers conferred to him under Section 12 of the Films and Stage plays Act. That Section provides interalia:-

"…***..12 (1). No person shall exhibit any film at an exhibition to which the public are admitted unless the board has issued a certificate of approval in respect thereof approving it for exhibition.***

(2). Where the Minister is of the opinion that any Film, or any class or Film, should not be exhibited at all (neither publicly nor privately) without a Certificate of approval having been issued in respect thereof, he may, by notice served personally or by registered post on any person who appears to him to likely to exhibit the film, or a film of that class, or by Notice in the Kenya Gazette, require that Film, or class of Film, shall not be exhibited at all, neither publicly nor privately, unless the board has issued a Certificate of Approval in respect thereof, and thereafter the person who as been given Notice shall not, or where Notice has been given in the Gazette, no person shall, exhibit the film, or any film of that class, at any exhibition whatever unless the board has issued a Certificate of approval in respect thereof, not otherwise than in accordance with the terms and conditions.

(3). "Any person who exhibits any film in contravention of the sub-Section (1) or sub-Section (2) shall be guilty of an offence.."

It is the Gazette Notice that the Minister issued pursuant to this provision that the Applicant alleges infringes on its rights. Indeed pursuant to the Gazette Notice the Licensing Officer has twice demanded of the Applicant compliance. In two letters of demand, the Licensing officer has demanded of the Applicant to:-

"….***Submit to him all the films and T.V. commercials scheduled for or being aired or copies of their Certificates of approval, failure to comply would lead to further action being taken without further reference to you…"***

There are penal sanctions for non-compliance. Accordingly the complaint by the Applicant is not frivolous but based on real and not imagined fear. The possibility that he Respondent would come down hard on the Applicant are not remote. Our reading and interpretation of Section 12 of the Act however, leaves us in no doubt at all that it places a restriction to a person who intends to exhibit a film at an exhibition. In such situation that person must obtain a Certificate of approval in respect thereof. Accordingly what the Act allows the Minister to regulate is the exhibition of the Films and stage. What does exhibition mean? The word is defined under Section 2 of the Act as "*Exhibition"* means the projection of a film or other optical effect by means of a cinematograph or similar apparatus.

As correctly submitted by Mr. Githu, the guiding word here is "*projection"*, which again means conveying of the Cinematograph film through projection. In our view therefore the Minister actions under this provision of the Law was meant to regulate the showing of films in theatres, cinema halls etc. in public or other semi-public places. He cannot purport to extend the legislation to broadcasting Networks, i. e. T.V's and radios. Neither can he lawfully seek to regulate television commercials, dramas, comics, documentaries and features. We are fortified in this holding by the preamble to the Act. The preamble to the Act describes its purpose as:-

An Act of Parliament to provide for controlling the making and exhibition of cinematograph films, for licencing of stage plays, theatres and cinemas, and for purposes incidental thereto and connected herewith.

It is now settled law that a title of an Act is part of the Act and is admissible as an aid to its constructions and interpretation. ***SEE PRINCIPLES OF STATUTORY INTERPRETATION, PRASANA G. S. 3RD EDITION, INDIA BHARAT LAW HOUSE, 1984.***

In our view and for the purposes of this Application, the Act is meant to control the making and exhibition of films. The places where the exhibition is contemplated are cinema Halls, stages and theatres. These places as envisaged are closed areas or rooms. These are the places that he Act intended to regulate by way of licencing. The Act does not envisage and or make reference to the Licencing of Media houses or the regulation of their broadcasts. It is our considered opinion in view of what we have stated that the Minister in promulgating the Gazette Notice complained of went beyond what the Act authorized him to do. He acted in excess of jurisdiction and therefore ultra vires the Act. The applicant being a broadcasting network and not exhibitionist, could not be compelled to come within the regime of the Act. If the intention of the legislature was to regulate broadcasters as well, nothing would have been

easier that specifically and expressly say so. In any case we are aware that the Act was enacted in 1963, when the present day television technology was a far cry It is instructive to note that the opening words in Section 12 (10. They are to this effect:-

"…..No person shall exhibit any film at an exhibition to which the Public are admitted….."

These words reinforces our finding that the Act was meant to control the exhibition of Films in cimena halls, theatres, stages and any other enclosed area and or rooms. It could never have been meant to apply to media houses such as the Applicant who, in any event are now subject to regulation by the Kenya Communications Act.

Mr. Mwaniki, argued that the Act conferred on the Minister's power to issue such regulations and in promulgating the impugned regulations, the was acting in accordance with law and he cannot therefore be faulted. That may be so. However we think that the Minister exceeded the powers conferred on him pursuant to Section 12 of the Act. Consequently the Gazette Notice is void for illegality and for being ultra vires the present Act.

We must conclude this aspect of the matter by quoting the case of ***BELIZE BROADCASTING AUTHROITY VS COURTENAY AND HAORE (1988) LRC (CONST) 276***, in which it was stated that:-

"…..Today, television is the most powerful medium for communicating, ideas and disseminating information. The enjoyment of freedom of expression therefore includes freedom to use such a medium…."

We think that the Gazette Notice as promulgated unreasonably and arbitrarily abrogates the Applicant's fundamental right to freedom of expression.

LEGALITY AND CONSTITUTIONALITY OF THE GAZETTE NOTICE

Ofcourse the fundamental rights enshrined in our Constitution are not absolute rights. They can be limited. However that limitation must be in accordance with the law. Section 79 (2) (a) of the Constitution provides the manner in which freedom of expression can be curtailed. It provides:-

"….Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Section to the extent that he Law in question makes provision:-

(a). That is (emphasise ours) in the interest of defence, public safety, public order, public morality or public health…"

We have no doubt at all that the Minister had the power and authority to promulgate the Gazette Notice but only as regards films. Consequently by illegally extending the same to T. V. Communication etc he clearly infringed the principle of legality as set out in Section 79 (2) of the Constitution i.e. any curtailing of freedom of expression must be by law. There is no such valid law here. For any curtailment to be valid and effective it must be in accordance with the law. This is not the case here. The Gazette notice does not constitute the law covered under Section 79 (2). Moreover can it be said that he said Notice was reasonably required in the interest of defence, public safety, public order, public morality or public health? We do not think so. First and foremost the Respondent did not file a replying Affidavit to show the basis upon which the Minister was compelled to issue the impugned Gazette Notice. However in his oral submissions, in opposition to the Application, Mr. Mwaniki seemed to imply that the Gazette Notice was put in place for purposes of Public morality. Public morality in a vast subject which cannot be proved by evidence from the bar. In our view the Respondent ought to have filed replying Affidavit to put forward his case for proclaiming the Gazette Notice so that the Applicant would be placed in a better position to respond. We are unable to accept the word of Counsel from the bar that in promulgating the gazette Notice the Minister was acting in the interest of Public morality.

Even if we were to accept that the Gazette Notice was found reasonably required in the interest of

public morality, can those regulations pass the test of reasonableness. We do not think so! The law requires that all films for public exhibition, screening or broadcast, whether foreign or locally produced should be approved by a Film censorship board prior to being exhibited. The word "***Film"*** as already stated is defined under Section 2 of the Act to mean:

"……***. A cinematograph film, and includes any commentary (whichever spoken and whether the person speaking appears in the film or not), and any music or other sound effect, associated with the film, and any part of the Film…."***

From this definition it is clear that the Gazette Notice would even cover live broadcasts. How then is the Applicant expected to submit a live coverage Film for approval before airing. This is unreasonable expectation and or requirement. Secondly there are those media houses that beam directly into this country for instance DSTV, M-NET, CNN, BBC, T. V. China, Sky T.V. etc, how would the Gazette Notice apply to them? If the legal Notice was found to be inapplicable to those media houses, wouldn't that not be a case of discrimination against local media houses which is also forbidden and outlawed under our Constitution?

The Gazette Notice also imposes on the Applicant an obligation to obtain a Certificate of approval of the film from two bodies – the Licencing officer and the Kenya Film Censorship Board. Why was it deemed necessary that two bodies doing the same thing be involved in the matter. Could one body have sufficed! Why should the Applicant be compelled to hope from one body to another to obtain the same certificate of approval which could reasonably have been given by the body. Moving from one body to another for the same Licence, is a waste of time, and unnecessary expenses will be involved. It is also possible that the Applicant could be unconvinced. What would happen in the event that Licencing officer grants the Certificate of approval but the Film Licensing Board turns it down. This is further proof of the unreasonableness of the Legal Notice.

There is no criteria as to how the licensing officer and the film censorship board will exercise power in approving or rejecting the film. The subjective nature in which the board's powers have been couched renders it sustable to abuse. For instance Section 16 (4) of the Act provides that:-

"…***.The Board shall not approve any film or poster which in its opinion tends to prejudice….."***

There ought to be objective standards to be applied in the determination of an Application for a certificate of approval from the Licencing officer and the Film censorship board. In the absence of such criteria, the two bodies are likely to act arbitrarily and they might abuse the power. In modern era, it is highly unacceptable that a body should be entrusted with arbitrary powers in a determining the fate of a right constitutionally conferred to a subject.

It is something that must be frowned upon. Indeed even in determining whether or not to approve the film, the Applicant has no right to be heard. This is an outrage and an affront to democracy. A right to be heard before an adverse decision is made against a subject is sacrosanct under our laws. One should never be condemned unheard. The Applicant's case is even worse because the decision to refuse to approve the film may have far reaching financial and economic implications. Finally we would observe that the Gazette Notice as laid denies the Applicant right of Appeal to an impartial tribunal. The only remedy accorded to the Applicant by way of Appeal is to Appeal to the Minister and whose decision is final. This is not a fair way of doing things. The Applicant cannot be expected to get a fair hearing from the Minister alone, the Appeal being literally handled by the Executive arm of the Government. It is the Minister who promulgated the legal Notice. If pursuant to the legal Notice, the Applicant is denied Certificate of approval of the film and he is compelled to appeal to the same Minister. Can it, in all fairness be said that he will be accorded fair treatment by the Minister. We have our own doubts. Indeed it is very possible that the Minister will be like a referee and or Judge in his own cause.

The Courts have been quick to frown upon legislation that has the effect of limiting the enjoyment of fundamental rights. More often than not, such legislation have been declared unconstitutional. In the case of ***RE MUNHUMESO AND OTEHRS (1994) ILRC 282,*** the Court delivered itself thus:-

"…***..Derogations from rights and freedoms which have been conferred should be given a strict and narrow, rather than a wide construction. Rights and Freedoms are not to be diluted or diminished unless necessity or intractability of the language dictates otherwise……..”***

Dealing with a similar situation as in the instant case where the discretionary power of the regulating authority was arbitrary and uncontrolled, the Court in ***RE MUNHUMESO AND OTHERS (SUPRA)*** stated:-

"……***..There is no definition of the criteria to be used by the regulating authority in the exercise of the discretion. It may be gravely misplaced and made the instrument for the arbitrary suppression of the free expression of views. Second, if the potential disorder could be prevented by the imposition of suitable condition, then it is only reasonable that such less stringent course of action be adopted than an outright ban. Third, although the rights to freedom of assembly are primary and the limitations thereon secondary, (the impugned legislation) reverse, the order. Its effect is to deny the rights unless the condition is satisfied. Fourth, the holding of a Public procession without a permit is criminalized irrespective of the likelihood of occurrence of any threat to public safety or public order……”***

This case is on all fours with the circumstances obtaining in the instant case. In this modern day and era, where transparency and accountability is the norm rather than the exception, it is unreasonable to grant discretionary powers to a body without setting out the criteria as to how such power should be exercised. Power exercised in an opaque manner opens avenues for corruption, manipulation, misuse and even extortion. These vices are no longer tolerable in modern times and yet the regulations impugned have the potential of creating such an environment. We are certain and as correctly submitted by the Learned Counsel for the Applicant that the ends intended to be achieved by the regulations could be achieved by the imposition of suitable guidelines on what is and what is not allowed to be shown.

Counsel for the Applicant also submitted that all that a law sought to derogate from fundamental freedoms had to satisfy the principal of proportionality. According to Counsel, because the board and the Licencing Officer act in absolute discretion, there is no right of Appeal against the decision of the Minister, the Applicant has no right to make representations before the decision is made either way, the derogation would not, in a purposive construction of the freedom of expression, satisfy the principles of proportionality. The Gazette Notice outweighs the mischief sought to be contained. The Respondent's answer is that the Minister's action was not unreasonable or unproportional. That our Constitution did not give a benchmark of what is deemed as proportional and reasonable unlike the South African Constitution. That the Gazette Notice did not impose a heavier burden to the Applicant.

In determining the issues raised in the above submissions, we must fall back on the principles of interpretation of Constitutional particularly on the provision touching on fundamental rights. In the case of ***REV. TIMOTHY NJOYA & OTHERS VS ATTORNEY GENENRAL (SUPRA)*** Justice Ringera stated that the Constitution must be given a broad and generous interpretation so as to give full effect to the fundamental rights and values it enshrines. This proposition has been accepted and followed by the Privy Council in the case of ***REYES VS THE QUEEN (2002) 2 AC 235*** and also in the case of ***MATHEW VS THE STATE (2005) 1 AC 433.*** In the later case Lord Bingham referred to the approach adopted in the ***TIMOTHY NJOYA'S case*** as being the correct "***approach"*** which is "***well established by authority of high standing."***

In the case ***of BOYCE AND JOSEPH VS THE QUEEN (2005) 1 AC 400,*** the Privy Council stated thus regarding the role of Judges in the interpretation of the Constitution:-

"…***..Parts of the Constitution, and in particular the fundamental rights and provisions of Chapter III (Constitution of Barbados) are expressed in general and abstract terms which invite the participation of the Judiciary in giving them sufficient flesh to answer concrete questions. The framers of the Constitution would have been aware that they were invoking concepts of liberty such as free speech, fair trial and freedom from cruel punishments which went back to the age of enlightenment and beyond. And they would have been aware that sometimes the practical expression of these concepts – what limits on free speech are acceptable…… had been different in the past and might again be***

different in the future. But whether they entertained these thoughts or not, in terms in which these provisions of the Constitution are expressed necessarily co-opts future generation of Judges to the enterprise of giving life to the abstract statements of fundamental rights. The judges are the mediators between the high generalities of the Constitutional text and the messy detail of their Application to concrete problems. And Judges, in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time. In so doing, they are not performing a legislative function. They are not doing work of repair by bringing an obsolete text up to date. On the contrary they are applying the language of these provisions of the Constitution according to their true meaning. The text is a "living instrument" when the terms in which it is expressed, in their Constitutional context, invite and require periodic re-examination of its Application to contemporary life….."

In the recent decision of this Court by Nyamu and Emukule JJ in the case of ***RANGAL LAINGARAN***, ***MISC. CIVIL APPLICATION NO. 305 OF 2004,*** the Court adopted the said interpretation.

We would also refer to the speech of Lord Wilbrforce, in the case of ***MINISTER OF HOME AFFAIRS AND ANOTHER VS FISHER AND ANOTHER (1479) 3 ALL ER 21*** in which he delivered himself thus:-

"……***A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a Court of law. Respect must be had to the language used and the traditions and usages which have given meaning to that language……. and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms…."***

Finally, in the case of ***NDYANABO VS ATTORNEY GENNAL (2991) 2 EA 485*** it was held that:-

"…***..In interpreting the Constitution the Court would be guided by the general principles that:-***

(i). The Constitution was a living instrument with a soul and consciousness of its own,

(ii). Fundamental rights provisions had to be interpreted in a broad and liberal manner,

(iii). There was a rebuttal presumption that legislation was Constitutional and

(iv). The onus of rebutting the presumption rested on those who challenged that legislation's status save that where those who supported a restriction on a fundamental right relied on a claw back or exclusion clause, the onus was on them to justify the restriction……"

What emerges from this line of authorities is that in interpreting the Constitution and in particular provisions pertaining to fundamental rights, the Courts must interpret them broadly, purposively and in liberal manner, bearing in mind the changing times. The Constitution should not be interpreted as an abstract document but as a living document with concepts ever evolving with the passage of time, and finally that limitations on rights and freedoms which have been conferred should be given a strict and narrow interpretation and that such limitation must satisfy the principle of legality.

Approaching the matters in hand in the manner aforesaid, we do consider the Gazette Notice to be arbitrary and does not satisfy the principle of proportionality. The implications of the Gazette Notice far outweigh the mischief sought to be contained. As already stated and contrary to the submissions by the Learned State Counsel, the impugned Gazette Notice though it could have been promulgated in public interest, is arbitrary to the extent that the board and the licensing officer in deciding to issue a certificate of approval Act in absolute discretion, subject to no checks whatsoever. And though there is a provision of Appeal against refusal , the Appeal is to the Minister who promulgated the Gazette Notice. In this era and time there can be no logical basis nor justification for granting an entity in matters pertaining to freedom of expression, to receive and propagate information such arbitrary powers. There is no justification to allow such an entity to act in absolute discretion with no bench marks and or criteria. In our view the Gazette Notice is a curtailment or limitation of the fundamental right of freedom. In our

broad, general and purposive construction and interpretation of the Constitution we are of the persuasion that the limitation or curtailment does not satisfy the principle of proportionality. There are no safeguards in place to prevent the abuse of the powers thereby enabling the two entities to curtail the Applicant's rights.

It is instructive that the Films and Stage Plays Act came into force in 1963. At that time, there were no such things as videos, DVD's etc. The Legal Notice as promulgated in our view is out of time and tune with current trends in information technology. It is no longer strange that one can even access and download all sorts of news, movies, music etc, from the computers in the comforts of their offices or houses. How then can the Gazette Notice apply to such scenario. The legal Notice would in those circumstances appear to be inapplicable, impracticable and unreasonable. Although the Learned State Counsel argued vehemently that the Gazette Notice was neither unreasonable, oppressive or impracticable, it is however our view that it is exactly just that i.e. it is impracticable, oppressive and unreasonable.

Were the limitations imposed by the Gazette Notice reasonably required in a democratic society? Section 79 (2) (c) of the Constitution provide that:-

"……***Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Section to the extent that the law in question makes provisions:-***

"……***.That imposes restriction upon public officer or upon persons in the service of the local government authority, and except so far as that provision or, as the case may be, the thing done here under the authority thereof is not to be reasonably required in a democratic society……"***

Once again the Learned State Counsel submitted quite correctly that there is no bench mark as to what is "……….reasonably required in a democratic society…."

However in the case of ***<u>RE MUNHUMESO (SUPRA)</u>*** it was stated:-

"………***What is reasonably justifiable in a democratic society is an illusive concept – one which cannot be precisely defined by the Courts. There is no legal yardstick save that the quality or reasonableness of the provision under challenge is to be judged according to whether it arbitrarily or excessively invades the enjoyment of a Constitutionally guaranteed right……."***

The concept was further expounded in the case of ***<u>NTN PTL LTD AND NBN LTD VS TEHSTATE (1988) LRC (CONST) 33</u>*** when the supreme Court of Papua New Guinea, expressed itself thus:-

"…***..The elusive concept of what was reasonably*** *"justifiable in a democratic society"* ***could not be precisely defined by Courts, but regard had to be given to a "proper respect for the rights and dignity of mankind. The proper test was an objective one and, taking into a account the interests of everyone in a democratic society, including the Applicants and their employees, and the corresponding right of the Public to receive broadcasts……..."***

To the extent that the Gazette Notice gives to the Board and Licensing Officer unhindered discretionary power with no definite criteria in deciding whether or not to grant Certificate of approval, the requirements imposed are impracticable, oppressive and unreal and does not take into account modern technology and could lead to absurd results. They are discriminatory, they impose conditions upon the Applicant in exercising its press freedom which conditions infringe upon and are inconsistent with the Applicant's rights. The totality of the foregoing is that the requirements imposed are not reasonably required in the interest of defence, public order, public morality or public health nor for the rights of the rights and freedoms of other persons or reasonably justifiable in a democratic society. The duplicity of the roles of the board and the licensing officer with attendant financial implications and time, lack of independent Appeal mechanism in the regulation and finally the ends intended to be could be achieved by a less stringent course of action makes the regulations not reasonably required in a democratic society and are therefore an unconstitutional limitations on the freedom of expression guaranteed to the Applicant

under Section 79 of the Constitution and we so hold.

Human rights are generally universal and inalienable but rights such as the right to freedom of expression, the right to freedom of association and assembly, the right to freedom of movement are generally accompanied by certain limitations that can be imposed for instance in order to protect the rights and freedoms of others, national security, public health and public morality. The Kenyan situation is reflected by Section 70 which subjects nearly all Chapter 5 rights to the rights of others and the public interest. This is the case with regard to freedom of expression under section 79 of the Constitution. Section 79 (2) allows limitations to the right of freedom of expression.

In this case, it is clear that we are being called upon to consider whether the limitation imposed is lawful or Constitutional. In order to adjudicate or determine this question it is necessary for us to consider how the limitations are framed and what considerations come into play in defining the limitiations. Limitations result for a balance of the individuals interest to maximise the enjoyment of the right with the interest of society in general otherwise known as general interest and for such limitations to be lawful they must comply with the following:-

(i) Be defined by law see Section 79 (2)

(ii) Be imposed for one or more specific legitimate purposes.

(iii) Be necessary for one or more of these purposes in a democratic society (this is the meaning of "***proportionality***".)

In order to be necessary, we should add that the limitations, both in general and as applied in the individual case, must respond to a clearly established social need. It is not sufficient that the limitation is desirable or simply does not harm the functions of the democratic Constitutional order.

In this case it is our view that the above conditions for limiting the freedom have not been satisfied thus the offending Gazette Notice has been done in excess of jurisdiction and is tainted with illegality – therefore condition (i) above is not met. The legitimate purpose of the limitation should be to safeguard public morality and it has not been shown how public morality is threatened and how it is intended to safeguard it – no affidavit was filed to demonstrate the legitimacy of the purposes. Finally, it has not been shown that the limitation is necessary in a democratic society. There is no pressing social need for the intended curtailment or limitation and it has not been shown that all the available options have been unsuccessful. Thus the limitation is passed on vague grounds and the criterion of proportionality has not been met.

In addition if the limitations are based on public morality, the absence of affidavit by the Attorney General to explain the basis for this is fatal to our sustaining the limitations. In this regard we wish to borrow from the Swiss case of ***MULLER AND OTHERS VS SWITZFALALND*** by the European Court on 24th May, 1988 series A No. 133 to 19 paragraph 28, where the Court observed:-

"…***..It is not possible to find in the legal and social orders of the contracting states a uniform European conception or of morals. The view taken of the requirements of morals varies from time to time and from place to place especially in our era, characterized as it is only a far-reaching explosion…….of opinions on the subject….."***

As regards a democratic society and what is necessary is to uphold the values of broadmindedness and pluralism including the respect for human rights, constitutionalism, the rule of law, freedom and equality and where limitation to the right is claimed it must always be absolutely necessary, pursuing a legitimate aim and for the purposes of serving a pressing social need. This is not the case here hence Courts intervention to uphold the right and to disregard the limitation because it cannot pass the high scrutiny required in justifying the limitations. The reason why the Court should be even more guarded in the case of freedom of expression is that it is in the first place the doorway to other fundamental risks such as freedom of association and freedom of assembly and it is in the second place the cornerstone of a

democratic society without which such a society would be difficult to exist in the structure recognized today. The other trait of human rights is their interdependence and indivisibility, the breach of one, has the potential to trigger breaches in the others hence the importance of a broadminded approach in protecting and enforcing them.

This Court in a different panel, Nyamu J and Emukule J had occasion to consider the extent of the freedom of expression in the case of ***HON. MARTHA KARUA VS RADIO AFRICA AND OTHERS HCCC 288 OF 2004***. in this case the Court adopted as good law the holdings in the European Commissions case of ***HANDYSIDE VS UNITED KINGDOM IE HRR737*** where the European Court of Human rights observed:-

"….***Freedom of expression constituted one of the essential foundations of a democratic society, one of the basic conditions of its progress and for development of every man……"***

Nearer home this Court expressed its approval of the holding by Chalkalson, President, of the Constitutional Court of South Africa in the case of ***S. MAKUANGANE AND ANOR 1995 6 BCLR 665*** in these terms:-

"…***..The limitations of Constitutional rights for a purpose that ….. and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality…."***

The proportionality factors which the Court should apply as regards limitations of Constitutional rights is:-

(a). That it be rationally connected to its objective.

(b). That it infringes the right or freedom as little as possible and

(c). That there is proportionality between its effects and its objectives.

The encroachment under scrutiny cannot pass the above test.

Again the clearest definition or vision what is justifiable in an open democratic society is that expressed in the ***HANDSIDE VS UNITED KINGDOM case*** (supra) as follows:-

"………***The questions which fall to be considered are the needs or objectives of a democratic society in relation to the right or freedom concerned without a notion of such needs, the limitations essential to support them cannot be evaluated. For example, freedom of expression is based on the need of a democratic society to promote the individual self fulfillment of its members the attainment of truth, participation in decision making, and the striking of a balance between stability and change. The aim is to have a realistic, open, tolerant society. This necessarily involves a delicate balance between the wishes of the individual and the utilitarian "greater good of the majority." But democratic societies approach the problem from the stand point of the importance of the individual, and the undesirability of restricting his or her freedom. However in striking the balance certain controls on the individuals freedom of expression may, in appropriate circumstances be acceptable in order to respect the sensibilities of others. In this context freedom of expression is commonly subjected in a democratic society to far importing restrictions considered necessary to prevent seditions, libelllous blasphemous or obsence publications. Indeed, the legal codes of all the member states of the EU contain legislation restricting in one way or another the right to freedom of expression in the context of indecent obscene or pornographic objects and literature. This can be regarded as a clear indication of the need for such legislation in a democratic society……"***

It is therefore perfectly in order to have a limiting or restricting Act such as the Act challenged in this case or a gazette notice made pursuant to such an Act provided both pass the tests set out above.

The impugned gazette notice does not in our view pass the above tests and the Respondents have not demonstrated to the Court by way of Affidavit evidence or otherwise that the decision to have the gazette notice or its contents was informed by the above tests. Consequently we hold that the gazette notice and its contents are ineffective in restricting or limiting the Applicants right to freedom of expression.

Arising from the above the following declarations shall forthwith issue:-

(1). A declaration that the order by the Minister for Information Transport and Communication purporting to act in exercise of the powers conferred on him by Section 12 of the Films and Stage Plays Act (Chapter 222 of the Laws of Kenya, published as Gazette notice number 4014 doted 6th June, 2001 infringes upon the Applicants right of freedom of expression and the related rights.

(2). A declaration that the order by the Minister for Information Transport and Communications published as gazette notice number 4014 dated 6th June, 2001 is null and void and of no legal effect in that it does not satisfy the principle of legality set out in the Constitution and it is not necessary or justifiable in a democratic society such as Kenya.

(3). As this is a case where proper legal advice could have been sort or availed by the state law office the Court awards the costs of the originating summons to the Applicant as against the Respondent.

DATED at **NAIROBI** this 13th day of February, 2007.

………………………..

J. G. NYAMU

JUDGE

…………………………………..

M. S. A. MAKHANDIA

JUDGE