



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 313 OF 2018

WANURI KAHIU.....1ST PETITIONER

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

VERSUS

EZEKIEL MUTUA.....1ST RESPONDENT

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

ATTORNEY GENERAL.....3RD RESPONDENT

AND

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

KENYA CHRISTIAN PROFESSIONAL FORUM.....2ND INTERESTED PARTY

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS.....3RD INTERESTED PARTY

RULING

1. The Petitioners through an oral application through their learned Advocate Mr. Ochiel pray, that the court orders that the petitioners film titled "**Rafiki**" be watched by the court as part of the petitioners case.

2. The petitioners film "**Rafiki**" the counsel submitted had been banned by the 1st and 2nd Respondents because of the closing scene as per paragraph 13 of the affidavit of Karuri Kahiu sworn on 13th September 2018 in which he deposed as follows;

"A meeting was held between the 2nd Respondent and on 16th April 2018 during which I was directed to edit the film by April 23rd, 2018 to remove the love song at the end and to give it a remorseful ending. The reason I was given for this directive by the 1st Respondent was that the film's final scene where the characters smile at each other made it seem as if people could be accepted in their own countries despite their differences. The claim by the 1st Respondent that I had been asked to remove the offensive classifiable elements and submit the film for re-classification is not true."

The petitioners refusal to comply with the request by the 1st and 2nd Respondents resulted in the film "**Rafiki**" being banned.

3. It is submitted that by an order of the court issued on 21/9/2018 the film "**Rafiki**" was publically exhibited and watched by willing citizens in the week running from 24th – 30th September 2018. That the film has been watched in over 100 festivals in the world. It is petitioners submissions, that it would be proper for the court to watch the film fully to determine the circumstances raised in the petition.

4. Mr. Kamau, learned Advocate for the 3rd Interested party supports the petitioners' oral application, that the film be watched as it is the creation of the petitioners and forms the entire petition, urging Article 50 of the constitution gives the petitioners right to fair hearing in determination of the dispute. He urged the court after seeing the film will be able to make a decision based on an informed position, as the film is in the middle of the question to be determined and is the integral part of the petition.

5. Miss Wangechi, learned Advocate holding brief for Mr. Wanyama, learned Advocate for 2nd Interested party; submitted that they are not opposed to the court watching the film "**Rafiki**".

6. Mr. Sisule, learned Advocate for 1st and 2nd Respondents are opposed to the court watching the film "**Rafiki**" and in doing so the Respondents filed skeleton submissions. The Respondents are opposed to the issuance of directions on exhibition of the film "**Rafiki**" for the benefit of the court and further in the disposal of the current proceedings for two reasons being as follows:-

a) **The exhibition of the film is not necessary in the expeditious disposal of the current proceedings.**

b) **The exhibition of the film will be in effect adducing evidence without the leave of the court, and without compliance with the Rules of Evidence."**

7. Mr. Sekwe, learned Counsel, appearing for the 3rd Respondent opposed the application, urging the application served no useful purpose in determination of the petition but it will waste the judicial time of the court in view of the prayers sought in the petition under paragraph 96. He urged there is no prayer, that the banning of the film was unconstitutional but the petitioners seek various declarations. He stated the issue for determination is not the film and that the film takes 2 hours to watch. He urged the parties are bound by **Section 106 A** and **Mutungu Rules**.

8. Mr. Ochiel, learned Advocate in response urged, that the real issue in the petition is the reasonableness or the ban of the film.

9. I have considered the Counsel rival oral submissions as well as the 1st and 2nd Respondents written submissions. The issues arising thereto for consideration can be summed up as hereunder:-

a) **Whether the exhibition of the film is necessary for the expeditious disposal of the instant petition?**

b) **Whether the application by the petitioners amounts to admitting new evidence without the leave of the court and without compliance with the Rules of Evidence, under the Evidence Act?**

A) Whether the exhibition of the film is necessary for the expeditious disposal of the instant petition?

10. The petition herein challenges the constitutionality of the Films and Stage Plays Act Cap 22 Laws of Kenya; the Kenya Film classification Guidelines 2012 and declaration that a decision dated 26th April 2018 by the Respondents to restrict the film "**Rafiki**" violated the 1st petitioner's right to freedom of expression including freedom of artistic creativity under Article 33 as well as right to fair administration under Article 47 of the Constitution is unconstitutional and invalid.

11. The court in this matter is called upon to determine the constitutionality of statute in question and can easily do so by laying the Articles of the constitution which are invoked beside the questioned or challenged statute and from the same decide whether the latter squares with the former. The application of this test involves both an objective and subjective scrutiny of the statute which is the subject of constitutional challenge. The position as I understand the petitioners oral application the exhibition of the film "**Rafiki**" is necessary as it forms the basis of the entire petition and by exhibiting the same the petitioners will be accorded a fair hearing under **Article 50 of the Constitution** and the exhibiting the film would enable the petitioners have access to justice under **Article 48 of the constitution**.

12. **Article 159(2) (d) of the constitution** enjoins court to administer justice without undue regard to procedural technicalities and having considered the petition, I am satisfied, that the film "**Rafiki**" and its banning by the 1st Respondent forms the integral part of the petition, which calls, for the court to allow the petitioners to access justice as per Article 48 of the constitution without placing banners to the seat of justice. I have no doubt in my mind procedural technicalities if allowed herein, justice in this matter may not be done to both parties. I find the exhibition of the film "**Rafiki**" is necessary and its exhibition would not cause delay in the disposal of the petition. I find justice demands litigants be given opportunity to present their cases without application of undue procedural technicalities.

B) Whether the application by the petitioners amounts to admitting new evidence without the leave of the court and without compliance with the Rules of Evidence, under the Evidence Act?

13. The 1st and 2nd Respondents as well as the 3rd Respondent urge, that the petitioners are through the oral application seeking to put in further evidence without leave of the court contrary to provisions of the Evidence Act and the Constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) Practice and Procedure Rules, 2013 ("**Mutungu Rules**"). The **Mutungu Rules** provide, under **Rule 21(2)** that any party who wishes to file further information, at any stage of the proceedings may do so only with the leave of the court. The Respondents urge that the petitioners have not sought leave to do so.

14. It is further submitted for the Respondents, that under **Section 106 B (2) Evidence Act**, conditions are well set out which must be met before electronic records can be declared admissible. Further **under section 106 (B) (4)** it is mandatory for the Applicant to produce a certificate on computer output so as to verify the originality of the electronic records.

15. In the case of **William Odhiambo Oduol vs IEBC & 2 Others (2013) eKLR**, the issue of admissibility of a video recording done on a Nokia phone, which was taken to Nairobi and the video recording was then developed into a **CD**; the Court noted, that the video was recorded, saved in the internal memory of the Phone, the phone was connected to a computer using a micro-USB cable, the file was copied to an empty Hard disk, and empty **CD** was then inserted into the computer **CD** write **RAM**, the video was then written on the **CD** or **VCD** using a **CD** writing Application. It was emphasized, that it was important to trace the devices for audit purposes. It was held, that the certificate has to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management

of the relevant activities, whichever was appropriate.

16. In **Nonny Gathoni Njenga & Another vs Catherine Masitsa & Another (2014) eKLR**, the Court found that **DVDs** sought to be relied on were not accompanied by a Certificate as required by the Evidence Act.

17. Then in **Republic vs. Robson & Harris (1972) 1 WLR 651**, there was the issue of admissibility of tape recordings of alleged conversations between the defendants and a prosecution witness. It was held, that in considering the question of admissibility the Court was required to satisfy itself, that what, the prosecution alleged to be original tapes were shown, prima facie, to be original evidence which defined and described the production and the history of the recording up to the moment of production in Court.

18. In the instant application, the petitioners are seeking courts leave, that the court watches the film "**Rafiki**" before proceeding on to hearing the petition. It is clear, that the petitioners are not seeking to file further evidence as submitted nor seeking the electronics records to be declared admissible nor seeking pronation of the doctrine record. The film "**Rafiki**" which this courts leave is required to have it viewed or watched is still a banned film by the 1st Respondent and since it was banned it is illegal for anyone including the petitioners to be in possession of it. That anyone found with it would be arrested and charged with an offence. No one is therefore allowed to exhibit the same. Anyone found in possession or exhibiting the same will have issue with copy right as he will be violating the intellectual property rights. This then calls for leave being sought herein. In view of the fact, that the film "**Rafiki**" remains banned the conditions supposed to be satisfied by Respondents under **section 106 B (2) and 106(B) (4) of the Evidence Act** are impossible to be fulfilled as it would be illegal for anyone to comply with the requirements in respect of a banned film. The only party which has access to the film "**Rafiki**" and who can comply with the requirements under section 106 B (2) and 106 B (4) is the 1st Respondent who ensured the film "**Rafiki**" was banned. It is the same party who urges before exhibition is carried out the requirements set out under **section 106 B (2) and 106 B (4) of Evidence Act** be satisfied. That if such argument is allowed to stand, it would be the petitioners who would be deprived access to justice which is contrary to Article 48 of the Constitution of Kenya. All what the petitioners are required to show is, that the original film "**Rafiki**" exists, it was banned by the 1st Respondent, and conditions set out under **sections 106 B (2) and 106 (4) of the Evidence Act** cannot be satisfied due to the ban of the film. I find it would be a hindrance of justice if a party who has authority and control over the exhibition of the film bans it and insists for it to be allowed to be exhibited before court dealing with the petition the petitioners should met all the conditions set out under **section 106 B and 106(4) of the Evidence Act**. The 1st Respondent is in control of the film "**Rakiki**" and can by provisions of the law exhibit the same to the court once leave is granted by the court as sought by the petitioners.

19. I am satisfied the petitioners prayers are merited and should be granted. I grant the application as prayed. Leave is hereby granted for the Respondents to exhibit film "**Rafiki**" to the court as prayed. The copy of the film "**Rafiki**" to be exhibited, to be accompanied by certificate as provided for under **Section 106 (B) (4) of the Evidence Act**.

20. The upshot is that the application is allowed. The film "**Rafiki**" shall be watched as part of the petitioners petition. Costs shall be in the cause.

Dated, signed and delivered at Nairobi this 6th day of June, 2019.

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J .A. MAKAU

JUDGE