



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MUSINGA & KANTAL, J.J.A.)

CIVIL APPLICATION NO. 102 OF 2020

BETWEEN

LAW SOCIETY OF KENYA.....APPLICANT

AND

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

ATTORNEY GENERAL.....2ND RESPONDENT

NATIONAL ASSEMBLY.....3RD RESPONDENT

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

INSPECTOR GENERAL OF POLICE.....5TH RESPONDENT

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

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

*(An Application for conservatory orders pending appeal from the judgment and orders of the High Court of Kenya at Nairobi (Makau, J.) given on 20th February, 2020*

*in*

*HC Petition No. 206 of 2018)*

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**RULING OF THE COURT**

The Law Society of Kenya (LSK) (hereinafter applicant) has moved this Court pursuant to Rules 5(2)(b) of the Rule of this Court for orders *inter alia*:-

**“(c) That pending the hearing and determination of this application an ex parte conservatory order to and is hereby issued suspending enforcement of Section 5, 16, 17, 22, 23, 24, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 48, 49, 50, 51, 52 and 53 of the Computer Misuse and Cybercrimes Act, 2018 by the 4th respondent and 5th respondents;**

**(d) In the alternative, pending the hearing and determination of the intended appeal, a conservatory order do and is hereby issued suspending enforcement of section 22 (false publications) and 23 (publication of false information) of the Computer Misuse and Cybercrimes Act, 2018 by the 4th respondent and 5th respondent.”**

The applicant is a statutory body established under Section 4 of the Law Society of Kenya Act, 2014 with the mandate to protect and assist the public in Kenya in all matters touching, ancillary or incidental to law; and to assist the Government and the courts in all matters affecting legislation and the administration and practice of law in Kenya. It is aggrieved by the decision of Mwita J whereby he dismissed **Petition No. 206 of 2018** in which the applicant was named as the 3rd interested party on 20th February, 2020. In the said petition, the petitioners were

challenging a raft of sections of the Computer Misuse and Cybercrimes Act 2018, which according to them limited freedom of expression by criminalizing “false publication” and publication of “false information” in violation of **Articles 33 and 34 of the Constitution**.

Following the dismissal, the applicant filed a notice of appeal dated 5th March, 2020 but in the meantime filed this application seeking the orders referred to earlier. We find it necessary to point out that under **Rule 5(2)b** of the Rules of this Court, the court can only grant orders of stay of execution pending the hearing and determination of the appeal or orders of injunction. “Conservatory orders” may be a term the applicant wants to introduce to the jurisprudence of this Court under Rule 5(2)b. We do however have an idea of what the applicant seeks from us and we shall therefore consider the application and determine it on its merits.

The application is premised on not less than 28 grounds and supported by the affidavit of Mercy Wambua the applicant’s chief executive officer. From the said grounds and depositions in the affidavit, it would appear that the petition was prompted by the arrest of specific individuals who were said to have disseminated false information in respect of COVID related deaths. The applicant’s fear was that if those provisions were not outlawed, criminal prosecutions would follow and the specific persons who were to be arraigned in court would possibly be sent to prison. In paragraph 17 of her affidavit, Ms. Wambua deposes as follows:-

**“The arrest, arraignment and prosecution for COVID 19 related publications under the statute is likely to have a chilling effect. Bloggers, activists, journalists and whistle blowers will be discouraged from publishing information on suspected violation of the Ministry of Health COVID 19 guidelines – with grave public health consequences. Consequently, the application and the appeal itself will become moot and academic if any members of the public are arrested, prosecuted and convicted under the statute, in the pendency of this matter.”**

The application is opposed through the affidavit of the Attorney General (2nd respondent) and Hilary Nzioki Mutyambai, the Inspector General National Police Service. According to Mr. Mutyambai, the Computer Misuse and Cybercrime Act, 2018 (the Act) is a very important piece of Legislation and the criminalization of the acts complained of is in the exercise of the State’s duty to care for its citizenry. To underline the importance of the said provisions, Mr. Mutyambai deposes at paragraph 10 as follows:-

**“THAT I wish to state that the criminalization of the acts stated hereinbefore is in the exercise of the State’s duty of care to its citizenry. Increased access to the internet and exposure to online risks and insecurity associated with the cyberspace is a pressing concern, not just in Kenya, but the world over. Such phenomenal growth in access to information and connectivity had on the one hand empowered the citizenry and on the other posed new challenges, not just to Governments and law enforcement but also to administrators of cyberspace.**

We need not over emphasise the importance of the said Act and particularly the sections complained of. This is so because it is necessary to strike a fine balance between freedom of speech and information as espoused in the constitution on the one hand, and also the need to disseminate correct information and also combat cybercrime on the other. For purposes of this application, we must eschew delving into those issues and leave them for the bench that will be seized of the hearing and determination of the appeal to deal with.

All we need to do at this point in time is to determine whether the applicant has satisfied the requirement set under **Rule 5(2)b** of the rules of this Court for this motion to succeed. The law in this area is well settled. There are a number of authorities starting with **Githunguri v. Jimba Credit Corporation Ltd (No.2) (1988) KLR 838**, which set out the principles which guide this Court in applications under **rule 5(2) (b)**, aforesaid. First an applicant must show that his intended appeal is arguable or that it is not frivolous. Secondly, that unless he is granted either a stay of execution or an injunction or both, as the case may be, his appeal or intended appeal, if successful, will be rendered nugatory. These principles are now well settled and do not need further discussion or elaboration. We may also add that for the application to succeed, the applicant needs to establish both principles and establishing only one of them will not suffice. See **Stanley Kangethe Kinyanjui vs Tony Ketter and 5 others [2013] eKLR**.

We have carefully considered the application, the rival affidavits and submissions of counsel. On the first limb, we have no doubt in our minds that the application raises serious issues that call for determination of this Court. Among the germane issues to be determined on appeal is whether criminalization of the sections of the Act in question compromises the citizen’s right to information and also the right of expression as guaranteed by the Constitution. We are satisfied that appeal is not frivolous or trifling as it raises serious issues for determination on appeal. We are therefore satisfied that the 1st limb of the two principles has been established.

On the 2nd limb on nugatory aspect, as stated earlier, the applicant seems to focus only on reports on COVID19. At paragraph 4 of its submissions, the applicant states thus:-

**“There is every indication that bloggers, journalists and whistle blowers will be imminently arrested, prosecuted, convicted and jailed under the Act for publishing information including anonymous report on violation of COVID 19 protocols.”**

From the above sentiments, it is clear that the nugatory aspect herein is based on futuristic presumptuous events. It targets events that are prospective, which might or might not happen. It deals with prospective anticipatory circumstances rather than current or probable events. There is no telling or predicting whether COVID 19 will still be with us by the time the appeal is heard and determined; we cannot anticipate whether an unknown blogger somewhere will decide to report on the COVID19 protocols and what they will say. If we were to do so, that would be delving into the realm of the imaginary rather than dealing with what is factual.

Even assuming that some unknown person will report on the COVID19 protocols, and they will be arrested, then there is due process and there are competent courts with jurisdiction to deal with such cases as and when they arise. We cannot stop the police of effecting future arrests even in cases where probable cause is established. Each case will in the end be determined on its peculiar circumstances. The applicant has failed to demonstrate that the appeal will be rendered nugatory if the orders sought are not granted.

We are of course alive to the fact that the Supreme Court in the case of Gatirau Peter Munya v. Dickson Mwenda Kithinji [2014] eKLR added a 3rd principle of “public interest” which should be considered when giving conservatory orders. We hold the view that this consideration did not displace the nugatory aspect and a party still needs to conjunctively establish the arguability aspect and the nugatory aspect before you can consider the public interest point.

For the foregoing reasons, we are not persuaded that the applicants have established the nugatory aspect. This application is therefore for dismissal. We nonetheless recommend that the appeal itself once filed and served be fast tracked for hearing and determination.

We also need to point out that **Civil Application No. 79 of 2020** a 5(2)b application filed by the 1st respondent herein seeking similar orders is still lying in our registry and appears to have been abandoned. It would be prudent for the 1st respondent to withdraw it so that it ceases being counted in our statistics as backlog and also to pave way for the fast tracking of the appeal. Our conclusion is that this notice of motion is hereby dismissed with no order as to costs.

**Dated and delivered at Nairobi this 7th day of August, 2020.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**