

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.313 OF 2018

WANURI KAHIU..... 1st PETITIONER
CREATIVE ECONOMY WORKING GROUP.....2nd PETITIONER

VERSUS

EZEKIEL MUTUA..... 1st RESPONDENT
KENYA FILM AND CLASSIFICATION BOARD..... 2nd RESPONDENT
ATTORNEY GENERAL.....3rd RESPONDENT

AND

ARTICLE 19 EASTERN AFRICAINTERESTED PARTY

INTERESTED PARTY'S WRITTEN SUBMISSIONS ON THE APPLICATION DATED
11th SEPTEMBER 2018

May it please this Honourable Court,

INTRODUCTION

1. ARTICLE 19 Eastern Africa, is an international non-profit organisation duly registered in Kenya that promotes freedom of expression, access to information and freedom and independence of the media through research, monitoring, advocacy and Public Interest litigation.
2. The application dated 11th September 2018 and as concerns ARTICLE 19 Eastern Africa (hereinafter "*The Interested party*") seeks *inter alia*:
 - (a) *This application be certified as urgent and heard ex-parte in the first instance.*
 - (b) *Pending the hearing and determination of this application inter-partes a conservatory order does issue staying the Respondents' decision to restrict the Petitioners film*

*Sisile for
1st & 2nd Respondents.
19/9/2018*

*Ochiel for
1st and 2nd Petitioners*

Rafiki. For avoidance of doubt the Petitioners' be and are hereby allowed to submit the film *Rafiki* to the Oscars Selection Committee Kenya for entry to the 2019 Oscars Awards festival under the Best Foreign Language Film category.

(c) Pending the hearing and determination of the petition a conservatory order does issue staying the Respondents' decision to restrict the Petitioners film *Rafiki*. For avoidance of doubt the Petitioners' be allowed to submit the film *Rafiki* to the Oscars Selection Committee Kenya for entry to the 2019 Oscar Awards festival under the Best Foreign Language Film Category.

(d) That the Respondents bear the cost of the suit.

3. While prayers (a) & (b) have been dispensed with, the Interested party supports the Petitioner's Application dated 11th September 2018; prayer (c) and relies on the Petitioners' Supporting Affidavit, present submissions and such other oral submissions made on behalf of the Interested party by its counsel.
4. My lady, without delving much into the merits of the Petition at this stage, the crux of this Petition and the aforesaid Application is premised on the letter written by 2nd Respondent (KFCB) dated 26th April 2018, which letter expressly denies the Petitioner to exhibit and/or distribute her film "*rafiki*" in any form anywhere or platform within the Republic of Kenya.
5. The letter expressly categorizes the Petitioner's film as containing prohibited acts that contravene the Films and Stage Plays Act and the guidelines thereunder, thus the reason for denial of exhibition and distribution of the film.
6. The aforesaid letter, My lady, plainly put, infers that the Petitioners film is hell bent on destroying the cultural values of Kenyans, and must therefore not be allowed, and further that whereas the Petitioner in her film wishes to exercise her freedom of artistic creativity, she would, in doing so, be promoting prohibited acts against public interest. A position that is in itself unconstitutional and unjustifiable.

7. My lady, Article 33 (1) of the Constitution of Kenya, 2010 provides for the freedom of expression and states as follows;

“Every person has the right to freedom of expression, which includes –

- (a) freedom to seek, receive or impart information or ideas;*
- (b) freedom of artistic creativity;*
- (c) Academic freedom and freedom of scientific research.”*

8. Article 33 (2) of the Constitution further states the extent to which the right to freedom of expression provided for in Article 33(1) can be limited. It states;

“The right to freedom of expression does not extend to –

- (a) propaganda for war;*
- (b) incitement to violence;*
- (c) hate speech; or*
- (d) advocacy of hatred that –*
 - (i) constitutes ethnic incitement, vilification of others or incitement to cause harm;”*

9. In the letter dated 26th April 2018 the Respondents while banning the film stated that Petitioners’ film,

“...contains elements such as homosexual practices that run counter to the laws and the culture of the Kenyan people (emphasis ours) ... and in light of the above the film Rafiki should NOT be exhibited or distributed in any form anywhere or platform within the Republic of Kenya.

10. We humbly submit that in light of the above constitutional provisions the Respondents have failed to reconcile their reasons as stated in the letter dated 26th April 2018 to any of the reasons premised by law as limitations to the right to freedom of expression thus rendering their decision unjustifiable in an open democratic society.

11. My lady, Freedom of expression, including *artistic creativity* is universally accepted as fundamental to a democratic society. The principles of a democratic state necessitate that all citizens be free to express their opinions, which opinions can be expressed in any print or media format, and be limited to do so only under very narrow and specific circumstances. Which circumstances and limitations have been clearly provided for under Article 33 (2) and Article 24 (1) of the Constitution.
12. From the above, it is clear that the any limitation of a Bill of right must be justifiable as provided under Article 24 (1) of the Constitution, and all Government agencies and Public officers must seek to promote and not to curtail these rights, unless to the extent provided in the Constitution.
13. Borrowing a reading from the case of Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others [2015] eKLR, the Honourable court will relying on the decision of the Uganda Court of Appeal in Kivumbi vs. Attorney-General [2008] 1 EA 174 stated as follows:

“The fundamental right of freedom of expression is closely related to freedom of religion, belief and opinion, the right to dignity, the right to freedom of association and the right to peaceful assembly etc. These rights are inherent and not granted by the State and it is the duty of all Government agencies who include the police to respect, promote and uphold these rights...”
14. The film *Rafiki* was created under the Petitioners’ right to freedom of artistic creativity. The 1st and 2nd Respondent as state agents have no right to limit or restrict the Petitioners’ rights to that freedom. They should instead be duty bearers at the forefront of protecting and promoting this right.
15. The aforesaid letter, further states that the decision of the board to ban the film, “... is premised on the need to promote Kenyan culture, national aspirations and values to protect children from exposure to harmful content...”

16. **Article 10 of the Constitution** sets out national values and principles which bind all state organs, state officers, public officers, and all persons whenever any of them applies, or interprets the constitution, enacts, applies or interprets any law or makes or implements public policy decisions. These national values and principles include;

“ ... (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non- discrimination and protection of the marginalized...”

17. My lady, banning the film on grounds of culture and public interest, is in itself irrational, illogical and a Constitutional misunderstanding. This invariably means that, the Respondent before banning the film, subjected the Petitioners artistic freedom to the realms of public opinion and “culture” .
18. It is noteworthy, to state that, if only the views that are popular can freely be expressed under Article 33 of the Constitution, then the room within which one can freely express their minds, opinions and *artistic creativity* will be unjustifiably denied by Government agencies and public officers who purport to protect and uphold the popular views.
19. The issue of public opinion was addressed by the Constitutional Court of South Africa which held at paragraph 88 of its decision in S v Makwanyane and Another (CCT3/94) [1995] ZACC 3, :(supra)

“Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for Constitutional adjudication.... The very reason for establishing [the Constitution], and for vesting the power of judicial review.... in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society.”

20. It is therefore our submission that in banning the film, the Respondents, seek to substitute the constitution with public opinion and further take on the interpretative role of the Court on what amounts to "artistic creativity" as envisaged under the Constitution.
21. Additionally, the right to freedom of expression applies regardless of the popularity of the views. At the heart and core of our Constitutional supremacy is that the Constitution reigns supreme, regardless of popularity or otherwise of other people's views and opinions.
22. We further submit that the 2nd Respondents' mandate to protect children from exposure to harmful content is clearly provided for in Section 17(1) & (2) Films and Stage Plays Act which states that;

(1) If it (the Board) considers that any cinematograph film is unsuitable for general exhibition, the Board shall record its ruling in one of the following forms—

(a) for adults only;

(b) unsuitable for children under the age of sixteen years;

(c) unsuitable for children under the age of ten years.

(2) Where the Board records its ruling in the form "for adults only" it shall issue a certificate of approval subject to the condition that no child shall be admitted to the exhibition thereof.

23. Section 17 (2) of the Films and Stages Play Act provides a remedy for a film being reviewed by the 2nd Respondent that is unsuitable for general exhibition. The 1st and 2nd Respondents in law were/are under obligation to classify the film *Rafiki* as suitable for adults only if it qualifies as such and to issue a certificate of approval to the applicants/petitioners on condition that no child shall be allowed to the exhibition thereof.

24. We therefore submit and reiterate that the respondents had/have no authority in law or otherwise to ban the exhibition of the film *Rafiki* under the guise that it was protecting children from harmful content.
25. The Petitioner being aggrieved by the decision of the Board filed this Petition and the Application hereunder.

THE LAW ON CONSERVATORY ORDERS

26. Article 23 (c) provides that in any proceedings brought under Article 22, a Court may grant appropriate reliefs, including a conservatory order.
27. It has been held over time that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a *prima facie* case with a likelihood of success.
28. The Honourable Court in *Judicial Service Commission -vs- Speaker of the National Assembly & 8 others [2014] eKLR* stated that:
- “Conservatory orders in my view are not ordinary civil law remedies, but are remedies provided for under the Constitution, the supreme law of the land...”*
29. The Petitioner herein seeks a Conservatory order staying the Respondents decision to restrict the Petitioner’s film, for purposes of allowing the Petitioner to submit the same to the Oscars Selection Committee Kenya for entry to the 2019 Oscars Awards festival, under the Best Foreign Language Film category. A process that ends on 30th September 2018.
30. Over time, judicial precedents have developed cardinal principles to guide the Court whenever such an application befalls the Court. In the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others, S.C. Application No. 5 of 2014** the Court framed the issues for determination with regards to an application for Conservatory orders as follows;
- (a) *Whether the suit is arguable or frivolous;*
- (b) *Whether the suit should be rendered nugatory unless the conservatory orders sought are granted; and*

(c) Whether it is in the public interest that the orders sought are granted.

31. The petitioner raises arguable issues that needs to be addressed and determined by this Honourable Court.
32. The gist of the Petition herein, is premised on the 1st and 2nd Respondents letter dated 26th April 2018. Which letter restricted the Petitioner from distributing, exhibiting and broadcasting the film anywhere within the Republic of Kenya.
33. This decision expressly violates and limits the Petitioner's rights and freedoms as guaranteed under Article 33 (1) (b) of the Constitution.
34. Further, it is the Interested party's position that the 1st and 2nd Respondents arbitrarily interpreted what amounts to "*artistic creativity*", an interpretation which stifles and curtails the promotion and protection of the right to freedom of expression.
35. **In Board of Management of Uhuru Secondary School -vs- City County Director of Education & 2 others. [2015] eKLR** Musinga J (as he then was) relied on the case of **Centre for Rights Education and Awareness and 7 Others -v- The Attorney General [HCCP No. 16 of 2011]**; which stated

A party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution".
36. It is apparent that the Petitioner's rights and freedom of expression has been violated by the decision to restrict and ban the film *rafiki*, which ought to be presented before the Oscar Selection Committee Kenya.
37. My lady, it is clear that unless the court grants the conservatory orders sought herein and suspends the Respondents decision to restrict the film, the Petitioner will suffer irreparable loss as the film will have been left out of the 2019 Oscars.
38. The Oscars are the oldest worldwide entertainment awards ceremony. The awards are a set of 24 awards for *artistic and technical* merit in the film industry given

annually by the Academy of Motion Picture Arts and Sciences to recognize excellence in cinematic achievements as assessed by the Academy's voting membership. They are also possibly the most prestigious awards in the world for film and cinematography.

39. If the restriction by the respondents is upheld and the conservatory orders denied, the film will be left out of the 2019 Oscar Awards nominations and the entire Petition will be rendered nugatory and the trial process will amount to an academic process.
40. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice.
41. It is our Humble submission, My Lady, that the Petitioner risks facing irreparable loss if the conservatory orders herein are not granted. The Honourable Court in The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012, held by a majority as follows:

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

42. My Lady, from a reading of the Petitioner's Application and the entire petition, it is apparent that the Petitioner risks suffering irreparable harm if conservatory orders are not granted.

43. In conclusion, we humbly beseech this Honourable Court to grant the prayers sought in the Petitioner's Application dated 11th September, 2018 pending the hearing and determination of the Petition.

44. In view of the fore going we submit that;

i. The petition or its substratum will be rendered nugatory if the orders sought are not granted.

ii. That the orders sought do issue.

DATED AT NAIROBI THIS 18th DAY OF September, 2018

Demas Kiprono

Litigation Counsel

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