

14 JUN 2018

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REPUBLIC OF KENYA

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RECEIVED THE HIGH COURT OF KENYA AT NAIROBI

C.R. No. 2580 - 00202, NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 206 OF 2018

CONSTITUTIONAL &  
HUMAN RIGHTS DIVISION

IN THE MATTER OF: ARTICLE 2, 3, 20, 22, 23, 116, 165, 258 & 259 OF THE  
CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS UNDER ARTICLES 19, 21,  
24, 25, 27, 28, 31, 33, 34, 35, 40 & 50 OF THE  
CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLES 1, 10,  
118 & 238 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTIONS 3, 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 & 53 OF THE  
COMPUTER MISUSE AND CYBERCRIMES ACT

AND

IN THE MATTER OF: STANDING ORDERS 119, 127, 130, 131 & 133 OF THE  
NATIONAL ASSEMBLY STANDING ORDERS.

BETWEEN

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

VERSUS

THE HONOURABLE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT

THE SPEAKER, NATIONAL ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT

THE INSPECTOR GENERAL OF THE

NATIONAL POLICE SERVICE. .... 3<sup>RD</sup> RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 4<sup>TH</sup> RESPONDENT

ARTICLE 19 EAST AFRICA ..... 1<sup>ST</sup> INTERESTED PARTY

KENYA UNION OF JOURNALISTS ..... 2<sup>ND</sup> INTERESTED PARTY



## CERTIFICATE OF URGENCY

**KENNEDY OGETO, the Solicitor General** of the Republic of Kenya and of P.O. Box 40112 - 00100 NAIROBI, do hereby certify that this instant application is extremely urgent and should be heard on a priority basis for the following reasons:-

1. **THAT** this Honourable Court issued orders on 29<sup>th</sup> May, 2018, *inter alia*, that:-

*"...a conservatory order be and is hereby issued suspending the coming into force of the Computer Misuse and Cybercrimes Act, 2018 and in particular the coming into force of Sections 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 & 53 of the Computer Misuse and Cybercrime Act, 2018 until 18/07/2018"*

2. **THAT** the conservatory order essentially suspends the coming into force of the entire Computer Misuse and Cybercrimes Act, 2018 (hereinafter the Act), including those sections whose constitutionality is not under scrutiny.

3. **THAT** the conservatory order was granted without the Honourable Court hearing all the parties to the Petition and in violation of the right to fair hearing.

4. **THAT** the conservatory order was granted without relevant facts being placed before this Honourable Court.

5. **THAT** the conservatory order was granted on the basis of misrepresented facts and on misrepresentation of the law.

6. **THAT** it is therefore in the interest of justice that this matter be certified as urgent and be heard forthwith.

DATED at NAIROBI this .....11<sup>TH</sup>.....Day of .....JUNE..... 2018

  
**KENNEDY OGETO**  
**SOLICITOR GENERAL**  
**FOR THE ATTORNEY GENERAL**

**DRAWN AND FILED BY**  
OFFICE OF THE ATTORNEY GENERAL  
SHERIA HOUSE  
HARAMBEE AVENUE  
P.O. BOX 40112 - 00100  
**NAIROBI.**

**TO BE SERVED UPON**

MUTEMI SUMBI ADVOCATES

GATE 23, OFFICE NO. 2

OLENGURUONE ROAD, LAVINGTON

P.O. BOX 2580-00202

**NAIROBI**

P105/12013/16; LSK/2018/01273

THE SPEAKER OF THE NATIONAL ASSEMBLY

PARLIAMENT BUILDINGS

**NAIROBI**

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

NSSF BUILDING, BLOCK A, 19<sup>TH</sup> FLOOR

**NAIROBI**

THE INSPECTOR GENERAL – NATIONAL POLICE SERVICE

JOGOO HOUSE 'A'

TAIFA ROAD

**NAIROBI**



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
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ARTICLE 19 EAST AFRICA.....1<sup>ST</sup> INTERESTED PARTY

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## NOTICE OF MOTION

(Under Articles 25 & 50 of the Constitution, Rule 25 of the Constitution Of Kenya  
(Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and  
all other enabling provisions of law)

18th  
TAKE NOTICE THAT this Honourable Court shall be moved on.....day  
of July.....2018 at 9:00 o'clock in the forenoon or soon thereafter as the Counsel  
for the 1<sup>st</sup> Respondent/Applicant may be heard on an application **FOR ORDERS:-**

1. THAT this Application be certified as urgent and heard *ex-parte* in the first instance.
2. THAT this Honourable Court be pleased to review, vary and/or set aside the *ex parte* orders made on 29<sup>th</sup> May, 2018 suspending the coming into force of the Computer Misuse and Cybercrimes Act, 2018 and all consequential orders thereto.
3. THAT the costs of this Application be provided for.

**WHICH APPLICATION** is made on the following grounds:-

1. THAT upon reading the Petitioner's Petition, Application, Supporting Affidavit and annextures therein and without hearing the Respondents herein, the Honourable Court issued orders on 29<sup>th</sup> May, 2018, *inter alia*:-

"7. a conservatory order be and is hereby issued suspending the coming into force of the Computer Misuse and Cybercrimes Act, 2018 and in particular the coming into force of Sections 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 & 53 of the Computer Misuse and Cybercrime Act, 2018 until 18/07/2018"

2. THAT the effect of the conservatory order was that it determined the Petitioners' Notice of Motion Application dated 29<sup>th</sup> May, 2018 at an *ex parte* stage and without hearing all the parties to the Petition contrary to **Article 50(1) of the Constitution as read with Article 25 of the Constitution.**
3. THAT the conservatory order essentially suspends the coming into force of the **Computer Misuse and Cybercrimes Act, 2018 (the Act)** including those provisions whose constitutionality is not under scrutiny.
4. THAT the conservatory order creates a lacuna in the law in respect of the offences created under legislation repealed by the Act. Particularly, as a consequence of the conservatory orders, there exists no statutory underpinning for the prosecution of crimes under **Sections**



83U, 83V, 83W, 83X, 83Z, 84A, 84B, 84F of the Kenya Information Communication Act, 1998 and Section 16 of the Sexual Offences Act, 2011.

- ✓ THAT the Petitioner failed to present all the material facts before the Court and this Honourable Court therefore issued the orders based on misrepresentation of facts and law.
- ✓ THAT the Petitioner did not place sufficient material before this Honourable Court to make a *prima facie* finding that the provisions of the Act are unconstitutional.
- ✓ THAT the Petitioner failed to disclose to this Honourable Court the extra-territorial and trans-national nature of the cyberspace and the subsequent international obligations of the Respondents under the Act and international law on cybersecurity.
- ✓ THAT the Petitioner failed to disclose to this Honourable Court the obligation placed on the Respondents to protect the public from unceasing threats to national security, public health and safety and adverse economic effects of the frequent cyber-attacks on both public and private computer systems.
- ✓ THAT the conservatory orders were granted without considering the public interest whose custodian is the 1<sup>st</sup> Respondent.
- ✓ THAT the constitutionality of Sections 23, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, and 45 of the Act has been challenged on the basis of the procedure of their enactment and not the content and substance of these provisions.
- ✓ THAT the Petitioner failed to demonstrate any imminent threat of violation of their rights in the Application and Petition. No evidence was adduced before this Honourable Court that there was any prosecution or threatened prosecution of any person pursuant to the Act.
- ✓ THAT subsequently, the conservatory orders were granted contrary to established legal principles and judicial policy on the grant of *ex parte* orders. That is –
  - a. That legislation should only be suspended in exceptional circumstances.
  - b. That conservatory orders are granted *ex parte* pending *inter partes* hearing of the Notice of Motion Application.
  - c. That *ex parte* orders should not be granted for an inordinately long period of time.

13. **THAT** the rights sought to be asserted in the Petition and the Application are not absolute rights but derogable rights. The extent of compliance with **Article 24 of the Constitution** would require the Court hearing all parties to the Petition.
14. **THAT** as a consequence of the conservatory orders, any offence committed during the pendency of the suspension of the Act can never form a basis of any criminal charge.
15. **THAT** it is in the interest of justice that this Honourable Court reviews, varies and/or sets aside the orders granted on 29<sup>th</sup> May, 2018 and that the Honourable Court hears all parties before issuing any substantive orders.

**AND WHICH APPLICATION** is supported by the annexed Affidavit of **KENNEDY OGETO** and by such other grounds, reasons and arguments as shall be adduced at the hearing hereof.

**DATED** at **NAIROBI** this 11<sup>TH</sup> Day of JUNE 2018

**KENNEDY OGETO**  
**SOLICITOR GENERAL**  
**FOR THE ATTORNEY GENERAL**

**DRAWN AND FILED BY**

OFFICE OF THE ATTORNEY GENERAL  
SHERIA HOUSE  
HARAMBEE AVENUE  
P.O. BOX 40112 – 00100  
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THE INSPECTOR GENERAL – NATIONAL POLICE SERVICE  
JOGOO HOUSE 'A'  
LAFA ROAD  
NAIROBI

*If any party served does not appear at the time and place above-mentioned, such order will be made and proceedings taken as the court may think just and expedient."*



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### SUPPORTING AFFIDAVIT

**KENNEDY OGETO** of Post Office Box Number 40112- 00100, Nairobi do hereby make an affidavit and state as follows:-

1. THAT I am a male adult and the Solicitor General of the Republic of Kenya. I am conversant with the facts of this matter and I am therefore competent to swear this Affidavit.
2. THAT I swear this Affidavit in support of the Application seeking to set aside the orders issued by this Honourable Court on 29<sup>th</sup> May, 2018.
3. THAT I am aware that this Honourable Court granted orders, *inter alia*,:-

*"7. a conservatory order be and is hereby issued suspending the coming into force of the Computer Misuse and Cybercrimes Act, 2018 and in particular the coming into force of Sections 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 & 53 of the Computer Misuse and Cybercrime Act, 2018 until 18/07/2018"*

4. THAT the effect of the conservatory order was that it determined the Petitioners' Notice of Motion Application dated 29<sup>th</sup> May, 2018 at an *ex parte* stage and without hearing all the parties to the Petition contrary to **Article 50(1) of the Constitution as read with Article 25 of the Constitution**.
5. THAT the conservatory order essentially suspends the coming into force of the **Computer Misuse and Cybercrimes Act, 2018 (the Act)** including those provisions whose constitutionality is not under scrutiny, contrary to the presumption of constitutionality of legislation.
6. THAT the conservatory orders granted create a lacuna in the law as to the offences created under legislation repealed by the Act. Particularly, as a consequence of the conservatory orders, there exists no statutory underpinning for the prosecution of crimes under **Sections 83U, 83V, 83W, 83X, 83Z, 84A, 84B, 84F of the Kenya Information Communication Act, 1998 (KICA) and Section 16 of the Sexual Offences Act, 2011**, that is –

- Section 83U – Unauthorised access to computer data.
- Section 83V – Access with intent to commit offences.
- Section 83W – Unauthorised access to and interception of computer service.
- Section 83X – Unauthorised modification of computer material.
- Section 83Z – Unauthorised disclosure of password.



- Section 84A – Unlawful possession of devices and data.
- Section 84B – Electronic fraud.
- Section 84F – Unauthorised access to protected systems.
- Section 16 Sexual Offences Act – Child pornography.

✓ **THAT** the Petitioner did not place sufficient material before this Honourable Court to make a *prima facie* finding that the provisions of the Act are unconstitutional. The Petitioner failed and/or neglected to adduce in evidence the Computer Misuse and Cybercrime Act, 2018 to enable this Honourable Court arrive at an informed finding on whether conservatory orders were merited.

**(Annexed hereto and marked “KO-1” is the Computer Misuse and Cybercrime Act, 2018)**

✓ **THAT** the Petitioner failed to disclose to this Honourable Court the extra-territorial and trans-national nature of the cyber space and the subsequent international obligations of the Respondents under the Act and international law on cyber security. Whereas the suspension relates to Kenyan law, it has adverse effects on the entire cyber space.

9. **THAT** as the competent authority pursuant to the Mutual Legal Assistance Act, the office of the Honourable Attorney General is mandated to grant any requisite assistance to any requesting state in accordance with the Mutual Legal Assistance Act as read with Part V of the now suspended Computer Misuse and Cybercrime Act, 2018. In light of the conservatory orders, the State is constrained in its ability to fulfil its international mutual assistance obligations in the absence of dual criminality.

10. **THAT** the suspension of the Act and its various provisions result in the State's inability to fulfil its cybersecurity due diligence obligations, including the obligation to warn other States operating within Kenya's domestic networks of vulnerabilities known to exist on our networks, or those detected in that other State's or a third State's networks.

11. **THAT** the suspension of the Act hinders the State's ability to prohibit, mitigate, investigate and respond to domestic cybercrime contrary to international cybersecurity due diligence requirements.

✓ 12. **THAT** further, the Petitioner failed to disclose to this Honourable Court the implication of the coming into force of the General Data Protection Regulations (GDPR) on 25<sup>th</sup> May, 2018. Whereas it a European Union legislation, the GDPR applies to all enterprises



regardless of location, that are doing business with the European Economic Area, including Kenyan enterprises. By dint of **Article 3(1) of the GDPR**, the Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the European Union, regardless of whether the processing takes place in the Union or not.

✓ **THAT** further, **Article 3(3) of the GDPR** provides the territorial scope of the GDPR to include a controller not established in the European Union but in a place where Member State law applies by virtue of public international law.

✓ **THAT** resultantly, the GDPR has extra-territorial effect and, *inter alia*, enjoins all entities that handle the personal data services of any European Union data subject to ensure the security of data belonging to the European Union data subject. Specifically, **Article 46 (1) of the GDPR** provides as follows –

*In the absence of a decision pursuant to Article 45(3), a controller or processor may transfer personal data to a third country or an international organisation only if the controller or processor has provided appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available.*

✓ **THAT** **Article 83(5)(c) of the GDPR** provides that infringement of **Articles 44 – 49** on transfers of personal data to a recipient in a third country or an international organisations, including **Article 46(1) above** attracts a fine of up to €20 million (Sh2.5billion), or four per cent of the entities' global annual turnover (whichever is higher). Effectively, any private entity that is engaged in socio-economic activities which handles the personal data of European Union data subjects must comply with the GDPR or risk paying these hefty fines.

(Annexed hereto and marked “KO-02” are the relevant provisions of the General Data Protection Regulation (EU) 2016/679 of the European Parliament and of the Council of 27<sup>th</sup> April, 2016)

✓ **THAT** in light of the conservatory orders granted herein, public and private Kenyan citizens remain exposed for failure to adequately protect data belonging to European Union data subjects in compliance with the GDPR. With the suspension of the Computer Misuse and Cybercrime Act, 2018, offences under the Act meant to facilitate the protection of data cannot be prosecuted. These include –

- Section 14 - Unauthorised access.



- Section 16 - Unauthorised interference.
- Section 17 – Unauthorised interception.
- Section 18 – Illegal devices and access codes.
- Section 28 – Cybersquatting.
- Section 31 – Interception of electronic messages or money transfers.
- Section 38 – fraudulent use of electronic data.
- Section 39 – issuance of false e-instructions.

17. THAT the European Union is one of Kenya's largest trade partners and pursuant to the GDPR, Kenyan citizens risk loss of trade and employment for non-compliance with the GDPR.

(Annexed hereto and marked "KO-03" are trade statistics between Kenya and the European Union published by the European Commission, Director General for Trade)

18. THAT the Petitioner failed to disclose to this Honourable Court the obligation placed on the Respondents to protect the public from unceasing threats to national security, public health and safety and adverse economic effects of the frequent cyber-attacks on public and private computer systems. The conservatory orders make it impossible for the Respondents to protect the private rights of the majority of Kenyan citizens from these perpetual threats.

19. THAT as a result of the suspension of the Act, the 1<sup>st</sup> Respondent is unable to meet its objective to develop the required laws, regulations and policies required to secure the State's cyberspace in line with the National Cybersecurity Strategy.

(Annexed hereto and marked "KO-04" is the National Cybersecurity Strategy by the Ministry of Information Communication and Technology)

20. THAT as such, the conservatory orders were granted without considering the public interest whose custodian is the 1<sup>st</sup> Respondent. Pursuant to **Article 156 (6) of the Constitution**, the office of the Attorney General is mandated to uphold the rule of law and defend public interest. In the instant case, the conservatory orders were granted *ex parte* and without the Court hearing the voice of the silent majority whose interests are resident in the 1<sup>st</sup> Respondent. The State is unable to ensure the safety, confidentiality, integrity and availability of computer systems.



- 21 THAT the Petitioners failed to highlight that the Act which was earlier referred to as *Computer and Cybercrime Bill, 2016* as pointed out in their Annexure BAKE 2 at page 9 -

*"sought to provide for offences relating to computer systems; and to enable timely and effective collection of forensic material for use as evidence. The Bill borrows heavily from the Council of Europe Convention on Cybercrime (CETS) (Budapest Convention) with the aim of aligning it with international standards and streamlining international cooperation efforts."*

- 22 THAT indeed, the Bill, which resulted in the Act is in line with the Budapest Convention.

The suspension of the Act or sections of the Act undermines Kenya's ability to protect its citizens from cyber-attacks, contribute in regulation of cyberspace, and meaningfully participate in international cooperation.

- 23 THAT having perused the Petition and the Application, I note that the Petitioner/1<sup>st</sup> Respondent failed to establish the imminent threat of violation of their rights in the Application. No evidence was adduced before this Honourable Court that there was any prosecution or threatened prosecution of any person pursuant to the Act. On the contrary, the Petitioners adduced evidence in their own reports annexed as "BAKE 1" and "BAKE 2" of the rampant negative effects of cybercrime in Kenya, including loss of lives.

- 24 THAT further the constitutionality of Sections 23, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, and 45 of the Act has been challenged on the basis of the procedure of their enactment and not the content and substance of these provisions. The Respondents ought to have been given the opportunity to respond on the procedure of the enactment prior to the conservatory orders being granted.

- 25 THAT I also observe that the conservatory orders were granted contrary to established legal principles and judicial policy on the grant of *ex parte* orders.

- 26 THAT I am particularly aware that legislation should only be suspended in exceptional circumstances. No exceptional circumstance was demonstrated in the Petition and the Application to warrant the suspension of the Act.

- 27 THAT moreover, having granted the conservatory orders at an *ex parte* stage and with no provision for *inter partes* hearing of the Notice of Motion Application dated 29<sup>th</sup> May, 2018, the 1<sup>st</sup> Respondent has no opportunity to be heard in response to the aforesaid Application.



27. THAT the conservatory orders suspending the Act were granted for an inordinately long period of time, being fifty (50) days, at the minimum.
28. THAT the rights sought to be asserted in the Petition and the Application are not absolute rights but derogable rights. The extent of compliance of the impugned provisions with Article 24 of the Constitution would require the Court hearing all the parties to the Petition.
29. THAT I have read the pleadings filed in this matter and noted that these material facts were never disclosed to this Honourable Court. This Honourable Court would not have issued the orders it granted on 29<sup>th</sup> May, 2018 had all the facts been presented before it.
30. THAT furthermore, it is only just and fair for the Court to hear both parties and all the facts before issuing conservatory orders.
31. THAT I pray that this Honourable Court reviews, varies and/or sets aside the conservatory orders granted on 29<sup>th</sup> May, 2018.
32. THAT what is deponed herein is true to the best of my knowledge, information and belief save what has been deponed to on information sources whereof have been disclosed.

**SWORN** at **NAIROBI** by the said  
**KENNEDY OGETO**  
on the 1<sup>st</sup> day of JUNE 2018  
**MUMBI NGUCHU GITAU**  
**BEFORE ME, ADVOCATE**  
&  
**COMMISSIONER FOR OATHS**  
P. O. Box 105625 - 00101  
**NAIROBI**  
**COMMISSIONER FOR OATHS**



**DEPONENT**

**DRAWN AND FILED BY**  
**OFFICE OF THE ATTORNEY GENERAL**  
**SHERIA HOUSE**  
**KIAMBEE AVENUE**  
**P. O. BOX 40112 - 00100**  
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