



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION No. 475 OF 2019**

**HAART-KENYA.....PETITIONER**

**-VERSUS-**

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

**INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS.....3<sup>RD</sup> RESPONDENT**

**CABINET SECRETARY MINISTRY OF LABOUR**

**SOCIAL SECURITY AND SERVICES.....4<sup>TH</sup> RESPONDENT**

**CABINET SECRETARY MINISTRY OF IMMIGRATION.....5<sup>TH</sup> RESPONDENT**

**CABINET SECRETARY MINISTRY OF FOREIGN AFFAIRS.....6<sup>TH</sup> RESPONDENT**

**DEPARTMENT OF CHILDREN SERVICES.....7<sup>TH</sup> RESPONDENT**

**COUNTRER TRAFFICKING IN PERSONS**

**ADVISORY COMMITTEE.....8<sup>TH</sup> RESPONDENT**

**BOARD OF TRUSTEES, NATIONAL ASSISTANCE TRUST**

**FUND FOR VICTIMS OF TRAFFICKING IN PERSONS.....9<sup>TH</sup> RESPONDENT**

**-AND-**

**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS....INTERESTED PARTY**

**-AND-**

**LEGAL ADVICE CENTRE**

**(Trading as Kituo cha Sheria).....PROPOSED AMICUS CURIAE**

**RULING**

1. Through the notice of motion application dated 21<sup>st</sup> February, 2020 supported by the affidavit of its Executive Director, Dr. Annette Mbogoh, the Applicant, Legal Advice Centre better known as Kituo Cha Sheria seek leave to join these proceedings as *amicus curiae*.

2. The Applicant's case as gleaned from the grounds in support of the application and the supporting affidavit is that it is a non-partisan, non-profit making, non-governmental organization, committed to the protection, promotion and enhancement of the rights of poor and marginalized people to effectively access justice in the areas of forced migration, land, labour, succession and housing through advocacy, networking, lobbying, legal aid, education, representation and research.

3. It is the Applicant's case that in order to achieve its objective it is guided by its core values being respect for human rights, commitment to justice and equity to all, solidarity with pro poor individuals and agencies, courage in promoting social transformation and empowerment of the poor and marginalized, service through volunteerism and an obligation to upholding the rule of law.

4. It is further the Applicant's case that it is an objective and non-partisan organization with technical competence and expertise dedicated to the faithful implementation of the Constitution and promotion of the principle of constitutionalism in Kenya including the right to access to justice, which is the subject matter of the petition herein, and protection of refugees, asylum seekers and victims of human trafficking.

5. The Applicant proposes that if allowed to join the proceedings it will assist the Court with the interpretation and application of relevant constitutional principles, international law and comparative foreign law as a means of interpreting the constitutional provisions relied upon by the Petitioner.

6. In order to demonstrate its experience in refugee matters, the Applicant discloses that it was a petitioner in **Kenya National Commission on Human Rights & another v Attorney General & 3 others [2017] eKLR** relating to the rights of refugees and asylum seekers, and was admitted as *amicus curiae* in **Kalpana H. Rawal v Judicial Service Commission & 4 others [2015] eKLR** and **Law Society of Kenya v Attorney General & 10 others [2016] eKLR**.

7. The Petitioner, HAART-Kenya, opposed the application through grounds of opposition dated 20<sup>th</sup> May, 2020 as follows:

**“a) The intended *Amicus Curiae* has failed to demonstrate any expertise that is relevant to the Court for the disposition of the matter before it.**

**b) While the Petitioner appreciates the general expertise of the intended *Amicus curiae* in matters concerning the rights and welfare of refugees and asylum seekers it has failed to disclose or demonstrate any specific expertise in matters concerning human trafficking.**

**c) The intended *Amicus Curiae* has failed to demonstrate how any orders given in the current suit will have a direct, material or substantial impact on the handling of refugee and asylum seekers.**

**d) The previous participation of the intended *Amicus Curiae* in other constitutional litigation cases has no bearing on the matters before the Court in the current suit.**

**e) The intended *Amicus Curiae* seeks to introduce new issues concerning the rights of refugees and asylum seekers which are currently not the subject of determination in the current suit.”**

8. The advocates for the Applicant and the Petitioner filed and exchanged written submissions on the application as directed by the Court. The submissions will be given consideration in the determination of this application.

9. The question for the determination of the Court is whether Kituo Cha Sheria has met the test for admission into these proceedings as *amicus curiae*.

10. The law governing the admission of a friend of the court to proceedings is found in Rule 6 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules which states as follows:

**The following procedure shall apply with respect to a friend of the court—**

**(a) The Court may allow any person with expertise in a particular issue which is before the Court to appear as a friend of the Court.**

**(b) Leave to appear as a friend of the Court may be granted to any person on application orally or in writing.**

**(c) The Court may on its own motion request a person with expertise to appear as a friend of the Court in proceedings before it.**

11. The legal principles applicable to the admission and participation of a friend of the court in proceedings were stated by the Supreme Court in **Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others [2015] eKLR** as follows:

**“[41] From our perceptions in the instant matter, we would set out certain guidelines in relation to the role of *amicus curiae*:**

**i. An amicus brief should be limited to legal arguments.**

**ii. The relationship between *amicus curiae*, the principal parties and the principal arguments in an appeal, and the**

direction of amicus intervention, ought to be governed by the principle of neutrality, and fidelity to the law.

iii. An *amicus* brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tends to compromise their essence as well as the terms of the Constitution's call for resolution of disputes without undue delay. The Court may therefore, and on a case- by- case basis, reject amicus briefs that do not comply with this principle.

iv. An amicus brief should address point(s) of law not already addressed by the parties to the suit or by other amici, so as to introduce only novel aspects of the legal issue in question that aid the development of the law.

v. The Court may call upon the Attorney-General to appear as *amicus curiae* in a case involving issues of great public interest. In such instances, admission of the Attorney- General is not defeated solely by the subsistence of a State interest, in a matter of public interest.

vi. Where, in adversarial proceedings, parties allege that a proposed *amicus curiae* is biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appears to be partisan on an issue before the Court, the Court will consider such an objection by allowing the respective parties to be heard on the issue (see: *Raila Odinga & Others v. IEBC & Others*; S.C. Petition No. 5 of 2013-Katiba Institute's application to appear as amicus).

vii. An *amicus curiae* is not entitled to costs in litigation. In instances where the Court requests the appearance of any person or expert as amicus, the legal expenses may be borne by the Judiciary.

viii. The Court will regulate the extent of amicus participation in proceedings, to forestall the degeneration of amicus role to partisan role.

ix. In appropriate cases and at its discretion, the Court may assign questions for amicus research and presentation.

x. An *amicus curiae* shall not participate in interlocutory applications, unless called upon by the Court to address specific issues.

[42] In addition, we would adopt, with respect, certain guidelines which emerge from *Mr. Justice Odunga's* decision in the Justice Tunoi case (*op.cit.*):

xi. The applicant ought to raise any perception of bias or partisanship, by documents filed, or by his submissions.

xii. The applicant ought to be neutral in the dispute, where the dispute is adversarial in nature.

xiii. The applicant ought to show that the submissions intended to be advanced will give such assistance to the Court as would otherwise not have been available. The applicant ought to draw the attention of the Court to relevant matters of law or fact which would otherwise not have been taken into account. Therefore, the applicant ought to show that there is no intention of repeating arguments already made by the parties. And such new matter as the applicant seeks to advance, must be based on the data already laid before the Court, and not fresh evidence.

xiv. The applicant ought to show expertise in the field relevant to the matter in dispute, and in this regard, general expertise in law does not suffice.

xv. Whereas consent of the parties, to proposed amicus role, is a factor to be taken into consideration, it is not the determining factor."

12. The Petitioner is indeed correct that impartiality is the cornerstone of an application for joinder of proceedings as a friend of the court. The statement finds support in the decision of the Supreme Court in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* [2015] eKLR where it was held that:

"[47] Impartiality is a central tenet in the conduct of judicial proceedings. As counsellor before the Court, an *amicus curiae* should not exhibit partiality towards any party's cause; otherwise some party would be prejudiced. Given the role of *amicus* as friend of the Court, impartiality is required of an *amicus curiae*. The role of an *amicus* is to aid the Court so it may reach a legal, pragmatic and legitimate decision, anchored on the tenets of judicial duty.... An *amicus curiae* has to stay aloof, assisting the Court, without being seen to take sides."

13. The Petitioner is also correct that a friend of the court should not be allowed to introduce its own issues in the litigation. This principle of law was stated by the Supreme Court in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* [2015] eKLR thus:

"However, this opening ought to be regulated, in order to protect the rights of the parties to the causes before us. *Amicus* briefs ought to be carefully appraised, so as not to interfere with the causes of the parties, or the bounds of jurisdiction. While the Court may admit a motion to appear in any proceedings as *amicus*, there is the risk of the real interest of the *amicus* threatening the position of the original suitors, whose rights and obligations stand to be upset by the outcome of the appeal."

14. It is also indeed correct, as submitted by the Petitioner, that a friend of the court should demonstrate its expertise in order for it to be allowed into the proceedings. This principle of the law was stated in **Nubian Rights Forum v Kenya Human Rights Commission & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property and Information Technology (Proposed Amicus Curiae) [2019] eKLR** as follows:

**“42. We are constrained, upon a careful appraisal of its application and submissions, to agree with the respondents that the applicant has not sufficiently answered the questions regarding its legal status and identity, what its areas of expertise and mandate are, and what its past experience in matters such as are before us is. In short, it has not established any expertise as an institution, or with regard to the members that it is composed of. The impression we get is that the applicant may be in its formative stages and may not be of any assistance to this Court at this moment in time.”**

15. Applying the stated legal principles to the instant application, I find that the neutrality of Kituo Cha Sheria has not been questioned by the Petitioner. Kituo Cha Sheria has demonstrated through evidence that it has previously participated in constitutional petitions as a petitioner and as friend of the court.

16. A perusal of the petition dated 26<sup>th</sup> November, 2019 clearly shows that this petition is all about violation of the rights of victims of human trafficking and refugees. The Applicant indicates that it was the petitioner in **Kenya National Commission on Human Rights & another v Attorney General & 3 others [2017] eKLR** which dealt with issues touching on refugees. I have not had the benefit of going through the decision in that matter. Nevertheless, annexed to the Applicant’s submissions is the decision in **Kituo Cha Sheria & 8 others v Attorney General [2013] eKLR** which squarely dealt with issues relating to the rights of refugees. It is therefore my finding that this is sufficient evidence of the Applicant’s competence in refugee affairs.

17. It is therefore clear that the Applicant has met all the requirements for admission into these proceedings as a friend of the court.

18. In **Nairobi H.C. Petition No. E.266 of 2060 Okiya Okoiti v. Director of Public Prosecutions & others**, I opined on the role of *amicus curiae* thus:

**“The impression I get from the jurisprudence cited by the parties in this matter is that one of the roles of *amicus curiae* is to fill in the gaps left by the principal parties to the case. A friend of the court highlights areas of law neglected by the parties to the case but which may aid the court in reaching a sound decision. Therefore, the role of an *amicus curiae* can only be adequately discharged after it accesses and assesses the pleadings and submissions of the parties to the case. That role cannot be properly discharged without the benefit of the pleadings and submissions of all the parties to the case.”**

19. The outcome of the instant application is that I admit Kituo Cha Sheria to join these proceedings as *amicus curiae*. Kituo Cha Sheria shall file its *amicus* brief after all the other parties have filed and exchanged their pleadings and submissions.

20. As is usual with matters of this nature, there shall be no orders as to costs.

**Dated, signed and delivered virtually at Nairobi this 17<sup>th</sup> day of December, 2020.**

**W. Korir,**

**Judge of the High Court**