



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.605 OF 2014**

**BETWEEN**

S W K..... 1<sup>ST</sup> PETITIONER  
P A K .....2<sup>ND</sup> PETITIONER  
G W K .....3<sup>RD</sup> PETITIONER  
A M M .....4<sup>TH</sup> PETITIONER

**KENYA LEGAL AND ETHICAL ISSUES NETWORK**

**ON HIV AND AIDS (KELIN) ..... 5<sup>TH</sup> PETITIONER**

**AFRICAN GENDER AND MEDIA**

**INITIATIVE TRUST (GEM) ..... 6<sup>TH</sup> PETITIONER**

**AND**

**MEDECINS SANS FRONTIERES- FRANCE ..... 1<sup>ST</sup> RESPONDENT**

**PUMWANI MATERNITY HOSPITAL ..... 2<sup>ND</sup> RESPONDENT**

**MARIES STOPES INTERNATIONAL ..... 3<sup>RD</sup> RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE MEMBER IN CHARGE OF**

**HEALTH SERVICES- NAIROBI COUNTY .....4<sup>TH</sup> RESPONDENT**

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

**THE HON. ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

**SECRETARIAT OF THE JOINT UNITED NATIONS PROGRAMME**

ON HIV/AIDS (UNAIDS SECRETARIAT) .....	1 <sup>ST</sup> AMICUS CURIAE
PROF. ALICIA ELY YAMIN.....	2 <sup>ND</sup> AMICUS CURIAE
NATIONAL GENDER AND EQUALITY COMMISSION.....	3 <sup>RD</sup> AMICUS CURIAE
INTERNATIONAL COMMUNITY OF WOMEN	
LIVING WITH HIV (ICW).....	1 <sup>ST</sup> INTERESTED PARTY
INTERNATIONAL COMMUNITY OF WOMEN	
LIVING WITH HIV, KENYA CHAPTER (ICW-K).....	2 <sup>ND</sup> INTERESTED PARTY

## RULING

### Introduction

1. The Petitioners herein filed a Petition dated 9<sup>th</sup> December 2014 against the Respondents in which they allege violation of various constitutional rights. Subsequently, the Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS Secretariat), the National Gender and Equality Commission, the International Community of Women Living with HIV (ICW), the International Community of Women Living with HIV-Kenya Chapter (ICW-K), and Prof. Alicia Ely Yamin filed their respective Applications to be enjoined in the Petition in various capacities, as shall be shown shortly. This Ruling relates to the said Applications.

### The Applications

#### Application by the Secretariat of the Joint United Nations Programme on HIV/AIDS

2. In the Notice of Motion Application dated 15<sup>th</sup> May, 2015, together with an Affidavit in support sworn on the same date by its Director of the Rights, Gender, Prevention and Community Mobilization Department, Dr. Mariangela Batista Galvao Simao, the Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS Secretariat) applies for orders that:

***(1) The Secretariat of the Joint United Nations Programme on HIV/AIDS, be granted leave to be enjoined as an Amicus Curiae in this suit.***

***(2) There be no award of costs for or against the Amicus Curiae.***

3. The Application is premised on the grounds that the UNAIDS Secretariat is an innovative partnership comprising it and eleven co-sponsors from the United Nations system. That the Joint United Nations Programme on HIV/AIDS was established in 1994 pursuant to the UN Economic and Social Council Resolution 1994/24, which tasked UNAIDS with various objectives including to provide global leadership in response to the HIV/AIDS epidemic.

4. That, in line with its mandate, it is a global expert on the HIV epidemic and the response(s) to it and it thus benefits from the expertise and resources of its co-sponsors, as well as that of a wide range of governments, civil society and private sector advisors, academics, professionals and practitioners with experience and interest in the fields of HIV, public health and human rights across the globe.

5. Dr. Batista has deponed therefore that in the course of its work, the UNAIDS Secretariat has gathered considerable information on effective HIV prevention policies and programmes and through its work in

all regions of the world, it has developed policy and programme recommendations that emphasise human rights and public health norms and principles relating to non-discrimination, security, privacy, autonomy and informed consent as critical to the response to HIV, including in the context of efforts to address mother-to-child transmission of HIV, and other sexual and reproductive health needs of women living with HIV. Additionally, that UNAIDS has convened international experts and supported research and programmes either on its own or in conjunction with other entities, in relation to aspects of the legal, policy and social environment that are most appropriate to respond to the sexual and reproductive health needs of women living with HIV.

6. It is now its contention that it seeks to participate in the present proceedings by virtue of its mandate, expertise and experience in advancing human rights-based and effective responses to HIV globally, as well as by virtue of its interest in assisting countries to adopt policies and programmes that enable people living with HIV to lead full and dignified lives, free of discrimination and coercion, in an enabling environment that supports their access to HIV and other sexual and reproductive health services. That its exclusive purpose in seeking to participate in the present Petition is to impartially appraise the Court of public health and international human rights standards and guidance regarding access to HIV and sexual and reproductive health services for women living with HIV, including in the context of efforts to eliminate mother-to-child HIV transmission. In that regard, it is its plea that if granted leave to intervene, it would develop its submissions along the following lines:

- (a) International public health and human rights standards relevant to this Petition;
- (b) Informed consent, as opposed to coercion, in relation to access to health services, including family planning;
- (c) Enabling and protective environment's support, access to, and uptake of, HIV prevention, treatment and care services, including for pregnant women and children living with HIV.

7. In its Written Submissions dated 9<sup>th</sup> November, 2015, it is its further submission that it will only serve to offer information that bears on the present Petition within its expertise and competence in order for the Court to reach an informed decision in light of the fact that there is no specific legislation in force that addresses the issues of informed consent before medical procedures are conducted in Kenya and that the present case is one of public interest and of medical ethics.

8. It asserts that its Application has been made timeously since the Petition has not yet been set down for hearing and the Application has further been brought under the correct provisions of the law and the objection raised by the 1<sup>st</sup> Respondent is countered by **Section 3A of the Civil Procedure Rules, Article 159 (2) (d) of the Constitution** and the holding of the Court in **Justice Philip K. Tunoi and Others vs The Judicial Service Commission and Others, Petition No. 244 of 2014**, that there are no comprehensive rules which govern the admission of persons as Amici in legal proceedings.

9. The UNAIDS Secretariat relies further on the decisions in **Trusted Society of Human Rights Alliance vs Mumo Matemu and Others, Petition No. 12 of 2013** and **Moses Kuria and Others vs The Independent Electoral Commission and Others, Petition Nos. 3, 4 and 5 of 2013** in support of its Application in regard to the role of an Amicus Curiae.

10. For the above reasons, the UNAIDS Secretariat therefore asserts that it is only just and fair that it be enjoined in the present proceedings as its presence is necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in it.

#### **Application by Prof. Alicia Ely Yamin**

11. In her Notice of Motion Application dated 22<sup>nd</sup> October, 2015, together with her Affidavit in support sworn on 15<sup>th</sup> October, 2015, Prof. Alicia Ely Yamin seeks the following orders:

***“a) Prof. Alicia Ely Yamin, the Applicant herein and Policy Director of the Francois-Xavier Bagnoud Center for Health and Human Rights (FXB Centre) be granted leave to be enjoined as an Amicus Curiae in this suit.***

***b) Upon granting of Prayer (1) above, the Court do give directions on how the intended Amicus Curiae shall participate in further proceedings herein on such other or further directions as the Court may deem fit to give.***

***c) There be no award of costs for or against the Amicus Curiae.”***

12. In her Affidavit, Prof. Ely stated that she is one of the world’s foremost experts on matters of health and human rights, including with respect to sexual and reproductive health, and has been a pioneering thought leader in the field of social and economic rights. She has also deponed largely in regard to her qualifications, experiences in the field of health and human rights and her various publications on related subjects.

13. Prof. Ely has stated further that she has sufficient experience in advising Courts and other Government entities, as well as international bodies and UN agencies on human rights issues such as those raised in the present case. She asserts that the present Petition in so far as it relates to the sexual and reproductive health rights of women living with HIV and raises questions regarding from the rights afforded to women under the **Constitution**, is directly related to her work and to the mission of the Francois-Xavier Bagnoud, Center. Accordingly, she contends that she respectfully seeks to ensure that the Court is well informed of issues of health and human rights relevant to the matter at hand, considering the current state of international and comparative law as interpreted by Courts elsewhere in the region and the world.

14. It is her further contention that if granted leave, as prayed she will provide the Court with information regarding the issue of intersecting forms of discrimination against women and people living with HIV with respect to the provision of healthcare services, principles of health and human rights in international agreements to which Kenya is a party and how they relate to issues of informed consent to medical interventions, sexual and reproductive rights, and the obligations of the State and of the private sector in the provision of care, interpretations of rights, and reasoning with respect to the ensuing obligations of States, similar to those granted by the Kenyan Constitution, other national Courts, regional and international legal bodies, and the role of judicial review in deciding matters related to health and human rights.

15. Prof. Ely maintains that if granted leave as prayed, she will mainly comment only on the principles of health and human rights as described herein above, and will not engage in the facts or merits of the respective cases of the Parties. Furthermore, that she will not take a position regarding the outcome of the proceedings and that, given her significant expertise on the issues relevant to the present suit, her participation as an Amicus Curiae, as provided for under **Article 22 (3) (e)** of the **Constitution**, would assist the Court in effectively adjudicating on the issues raised.

16. For the above reasons, it is Prof. Ely’s final deposition that it is only just, fair and in the interest of the wholesome determination of the issues in this Petition, that she be granted leave and be enjoined as an Amicus Curiae.

#### **Application by International Community of Women Living with HIV Kenya Chapter (ICWK)**

17. In its Notice of Motion Application dated 27<sup>th</sup> October, 2015, supported by the Affidavit sworn by one, Inviolata M’mbwavi, the International Community of Women Living with HIV Kenya Chapter (ICW-K) seeks the following orders:

***“1 That leave be granted to the Applicant, ICW-K, to be admitted in the Petition as an Interested Party.***

***2) That the Interested Party be granted an opportunity to submit written and oral arguments and where necessary Affidavit evidence in the Petition.***

***3) That the costs of this Application be in the cause.”***

18. Ms. M’mbwavi deponed that ICW-K is a registered national advocacy network and membership based organization founded in 2012 that exists to give visibility to women living with HIV through civic education on the rights of women living with HIV, capacity building of the women, research on concerns and issues facing women and encouraging and supporting public participation in deliberation and decision making regarding the rights of women living with HIV. That, ICW-K is a national branch of ICW which was founded in 1992 at the International AIDS Conference in Amsterdam by 52 women living with HIV from all over the world, who had a common desire to support, inform and influence policy development pertaining to the needs of women living with HIV and which action later culminated in the formation of ICWEA within the East African Region for an even wider outreach to its members based in Africa.

19. According to Ms. M’mbwavi, the present Petition is of immense public interest in relation to the interpretation of various Articles of the **Constitution** and ICW-K also has considerable expertise on sexual health matters pertaining to women living with HIV and more importantly, the present Petition stems from the fact that the Petitioners are colleagues in their struggle against the effects of HIVI and most of the women undergoing the violations cited in the Petition are also members of ICW-K and they will continue to be in need of peer and psychological support as well as continuous sisterhood solidarity from the network. Further, that ICW-K has been fully involved with the Petitioners herein and has participated in various fora in trying to support them and other women suffering and continuing to suffer similar fate as the Petitioners, and it also conducted study assessments that led to the revelations of the violations raised in the Petition.

20. In its Written Submissions dated 10<sup>th</sup> November, 2015, it is ICW-K’s position that an Interested Party is an entity with a recognizable stake in the outcome of a matter before the Court, but may not be directly involved in the litigation process. In that regard, it has argued that it has a recognizable stake in the present matter as the 1<sup>st</sup> – 4<sup>th</sup> Petitioners form part of its membership and that it is further tasked with the responsibility of providing support for them.

21. It has maintained that as an Interested Party, it would not cause any delays or embarrass the present proceedings as it would be able to effectively highlight to the Court what it champions for in terms of the rights of women living with HIV, based on its expertise in this field and on account of the works it has so far undertaken in Kenya and urges the Court to allow its Application.

### **Application by the National Gender and Equality Commission**

22. In its Notice of Motion Application dated 18<sup>th</sup> January, 2016, together with an Affidavit in support sworn by its Chairperson, Ms. Winfred Osimbo Lichuma on 21<sup>st</sup> January, 2016, the National Gender and Equality Commission seeks the following orders:

***“1) ...***

***2) That leave be granted to the National Gender and Equality Commission to be enjoined in these proceedings in the capacity of Amicus Curiae.***

***3) That leave be granted to the National Gender and Equality Commission to present its submissions by way of Amicus Brief.”***

23. The Application is premised on the grounds that the Applicant is a constitutional Commission established pursuant to **Article 59 (4) and (5) of the Constitution** and the **National Gender and Equality Commission Act No. 15 of 2011**, with the overall mandate of promoting gender equality and freedom from discrimination in accordance with **Article 27 of the Constitution** and that its over-reaching

goal is to contribute to the reduction of gender inequalities and discrimination in Kenya.

24. Ms. Lichuma has also deponed that the Commission is an institution with expertise in issues of promoting gender equality and freedom from discrimination and would therefore contribute to the resolution of some of the issues arising in the present Petition and that it is non-partisan and only keen to aid the Court in interpreting and applying constitutional principles on the issues arising for determination. Additionally, that it has no special interest in the matter, personal or commercial, and its sole motivation is fidelity to the law.

25. In its Written Submissions dated 5<sup>th</sup> February, 2016, it has reiterated the contents of its Affidavit in support of its Application and submits that being the institution established by law to promote and protect the rights of the most vulnerable in society and while its Application is merited, no prejudice will be occasioned to any of the Parties herein by its joinder and instead, the ends and interests of justice will prevail should the leave sought be granted. Further, that it will not be seeking the costs of the proceedings and shall comply with any such conditions as may be issued by the Court.

26. The National Gender and Equality Commission has therefore urged the Court to allow its Application and grant the orders sought therein.

### **Application by International Community of Women Living with HIV (ICW)**

27. The International Community of Women Living with HIV (ICW) filed a Notice of Motion Application dated 28<sup>th</sup> July, 2015 together with an Affidavit in support sworn on the same date by its Director, Ms. Rebecca Matheson. In the Application, it seeks the following orders:

***“a) The International Community of Women Living with HIV (ICW), the Applicant herein, be granted leave to be enjoined as an Interested Party in this suit.***

***b) That upon granting Prayer No.1 above, the Honourable Court do give directions on how the intended Interested Party shall participate in further proceedings herein on such other or further directions as the Court may deem fit to give.***

***c) There be no award of costs for or against the Interested Party.”***

28. Its Application is premised on the grounds that it is a global network run by women living with HIV with a membership of over 15, 000 and that it is the only network of its kind globally, and represents the voices of women living with HIV in all their diversity. That it operates and works in 120 countries through ten regional networks of women living with HIV in the Asia Pacific, the Caribbean, Central Africa, Eastern Africa, Eastern Europe and Central Asia, Latin America, the Middle East and North Africa (MENA), North America, Southern Africa, and West Africa regions and through the ICW Chapter of Young Women and Girls (CYWAG).

29. It is its submission that it operates through country networks such as ICW-Kenya, whose membership consists of Kenyan women living with HIV and has been at the forefront of advocating against the practice of forced and coerced sterilization of women living with HIV and continues to mobilize and document the practice around the world and that, its compelling interest and stake in securing access to justice for all women living with HIV, who have experienced human rights violations, including forced and coerced sterilization, is based on its founding objectives and its core intervention areas.

30. It is ICW’s view that the outcome of the present Petition will have a significant impact on the lives of women living with HIV, not just in Kenya, but around the world and could have a powerful effect on the efforts of women living with HIV in its member networks around the world and as such, it has a compelling interest in advancing jurisprudence that secures the human rights of women living with HIV. Further, that it has unique information to provide regarding the global phenomena of forced and coerced sterilization of women with HIV based on experience garnered in the course of its work around the world for over 20 years and that it therefore seeks to respectfully ensure that this Court is fully apprised of the

pervasive and persistent nature of the practice, and the stigma and discrimination experienced by women with HIV.

31. In addition, it is its plea that if granted leave as prayed above, it intends to develop its submission, subject to the Court's directions, to provide information on the experience of women living with HIV around the world who have suffered forced and coerced sterilization, the experiences of stigma, discriminatory practices and human rights abuses arising from such forced and coerced sterilization forming a pattern experienced by women living with HIV, international public health and human rights standards, including the sexual and reproductive rights of women living with HIV and the right to be free from torture, and the impacts of forced and coerced sterilization on the lives of women living with HIV. In that regard, it has argued that its perspective is directly relevant and necessary to the issues arising in the instant Petition and as such, it is just, fair and in the interest of the wholesome determination of the issues herein that it be granted leave to come on record as an Interested Party.

## **The Responses**

### **The Petitioners' Case**

32. The Petitioners, through their Written Submissions dated 19<sup>th</sup> February, 2016, were in support of the above Applications for joinder.

### **The 1<sup>st</sup> Respondent's Case**

33. The 1<sup>st</sup> Respondent, Medecins Sans Frontieres- France opposed the joinder of the Parties as per the Applications detailed above and filed two sets of Grounds of Opposition respectively dated 9<sup>th</sup> July, 2015 and 2<sup>nd</sup> November, 2015, as well as Written Submissions dated 13<sup>th</sup> April, 2016.

34. In regard to the Application by the International Community of Women Living with HIV (ICW), the 1<sup>st</sup> Respondent objected to its joinder on the grounds that the Applicant is guilty of delay owing to the fact that the Petition herein was filed some months prior to the filing of the Application and that the Applicant has not demonstrated that it will introduce new arguments different from those advanced by the Parties in the Petition. Further, that the issues raised in the Petition are matters of fact and the Applicant has not shown that it has any other or further relevant evidence to adduce than what is already on record. Accordingly, that the Applicant's experience or interpretations of international standards, policies and recommendations regarding HIV are irrelevant to the issues raised in the Petition and that the Application is therefore an abuse of the Court process.

35. As regards the Application by the UNAIDS Secretariat, it is its argument that the same ought to be dismissed because it has been brought under the wrong provisions of the law and has not been made timeously as it was filed after a considerable delay and long after directions on the hearing date had been duly given. In addition, that the Applicant therein has not shown that the submissions it intends to advance will give such assistance to the Court as would otherwise not have been given by any other Party and that it has not further demonstrated that it will introduce new arguments different from those advanced by the Parties in the Petition. That in any event, the existing Parties have addressed the Court in detail on the international standards and principles applicable and it is not therefore necessary to have it enjoined in the present suit.

36. In addition, according to the 1<sup>st</sup> Respondent, the issues raised in the Petition and the responses thereto are primarily evidentiary and not concerned with the interpretations of international standards, policies and recommendations regarding HIV. That the Application by ICW-K also raises perceptions of bias or partisanship in the Petition and hence it is bad in law and an abuse of the Court process and ought to be dismissed.

37. In its Written Submissions dated 13<sup>th</sup> April, 2016, the 1<sup>st</sup> Respondent has also contended that the Application by the UNAIDS Secretariat has been brought under the **Civil Procedure Act** as opposed to

the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules)** and ought therefore to be dismissed. It relies on the decision in **Joel K. Yegon and 4 Others vs John Rotich and 4 Others [2004] eKLR** in support of that proposition.

38. While placing further reliance on **Raila Amollo Odinga and Others vs The Independent Electoral and Boundaries Commission and Others [2013] eKLR**, the 1<sup>st</sup> Respondent submits that an Amicus Curiae ought not to be partisan and ought instead to be neutral so as to aid the Court in reaching an informed decision. In that regard, it argues that there is need to establish whether the UNAIDS Secretariat and Prof. Ely are neutral Parties on the issues that have been raised in the Petition and should it turn out that they are neutral, then the Court will have to satisfy itself that their expertise will be of benefit to it.

39. The 1<sup>st</sup> Respondent has also argued that the UNAIDS Secretariat has taken a bi-partisan position in this matter based on its arguments in its Application that informed consent, as opposed to coercion, in relation to access to health services, including family planning, is fundamental to international human rights standards, and is crucial to effective HIV programmes. In that regard, it is its further argument that UNAIDS will not be objective and neutral if enjoined herein as it has failed to state its motivation for taking that position.

40. Furthermore, according to the 1<sup>st</sup> Respondent, the Application by the National Gender and Equality Commission was brought in too late in the day as it was filed in 2016 and yet the Petition was filed in 2014. This, it has argued, will only contribute to delay in determining the Petition on its merits.

41. The 1<sup>st</sup> Respondent has further taken the position that the proposed Amici have suggested that they will address the Court on international standards and treaties that touch on the issues raised in the Petition and yet, the same shall not be of any benefit to the Court as the Petitioners and the Respondents have already addressed the same in their respective pleadings. That the issue before the Court is whether any Respondent coerced the 1<sup>st</sup>-4<sup>th</sup> Petitioners to undergo forced sterilization and that remains a question of evidence which can be addressed by the Petitioners and the Respondents and that in any event, the Petition does not in any way concern individual experience, publications and effective HIV control programmes to warrant the joinder of the proposed Interested Parties. That therefore, the experiences and expertise of the proposed Amici will not be of any benefit to the Court and their Applications ought to be dismissed.

42. As regards the Application by ICW-K, the 1<sup>st</sup> Respondent has raised an objection in regard to the Affidavit sworn therein in support of it arguing that the same is undated and ought to be dismissed as it violates **Section 5** of the **Oaths and Statutory Declarations Act**, and that the defect is incurable even in light of **Article 159** of the **Constitution** as was held by the Court in **Charles Muturi Mwangi vs Invesco Assurance Co. Ltd [2014] eKLR**.

43. While further relying on **Walter Osapiri Barasa vs Cabinet Secretary Ministry of Interior and National Co-ordination and 6 Others [2013] eKLR** and the **Trusted Society of Human Rights Alliance vs Mumo Matemu case (S. C. Petition No.12 of 2013)**, its submission was that a party that seeks to be enjoined as an Interested Party must demonstrate that it has an identifiable and not a trifling interest in a matter which is the subject of litigation and that the interest must be over and above the normal interest any person may have in litigation which is of a public nature.

44. The 1<sup>st</sup> Respondent has therefore reiterated that ICW's Application ought to be dismissed as it fails to establish any stake it has in the proceedings and the manner in which it will be affected by the Court decision and it has further failed to demonstrate the possibility of its interest not being articulated by the Parties to the Petition. Additionally, that ICW-K asserted that it is ICW's national branch and on that basis, the 1<sup>st</sup> Respondent has argued that there is a real likelihood that the two will duplicate their arguments and submissions on the matters before the Court and that in the event that if the Court is minded to allow the joinder, it was unnecessary to enjoin ICW-K separately as it is a branch of ICW.

45. The 1<sup>st</sup> Respondent finally concluded that the intended joinders have already delayed the hearing of the Petition and the joinders will further occasion great delay and that the additional costs that will be incurred are not justifiable as the Parties will not bring anything before the Court that has not been brought or cannot be brought and that **Article 22 of the Constitution** allows the Applicants to bring actions on their own behalf and on behalf of others claiming that constitutional rights have been violated and as such, in the circumstances, they have the option to do so if they want the Court to address issues of their separate experiences in relation to HIV control programmes. In addition, that there is a real risk that there will be duplication of submissions and arguments by the Parties to the Petition and the proposed Amici and Interested Parties.

### **The 3<sup>rd</sup> Respondent's Case**

46. The 3<sup>rd</sup> Respondent, Maries Stopes International, in response to the Applications filed Written Submissions dated 3<sup>rd</sup> March, 2016. It did not oppose the joinder of the intended Amici but has argued that their joinder ought to be restricted to making submissions on their areas of expertise on matters of law only and they should not be indulged by the Court if they delve into facts and merits of the case. Furthermore, that they are expected to be non-partisan and to enable the Court get a clear picture of the issues in dispute and in order for the Court to arrive at an informed and just decision as was held by the Court in the **Raila Amolo Odinga vs Independent Electoral and Boundaries Commission Case (supra)**.

47. It is further its argument that if the Court allows ICW's Application, it should restrict its role to submitting purely on points of law and the Court should not entertain them on any matters that required delving into the facts and the merits of the case. Further, that if an Interested Party is entertained on matters that touch on the merits of the case, the same will be an abuse of the Court process as the Interested Party does not have a claim against the Respondents in the present Petition.

48. While relying on **Benjamin Kipkulei vs County Government of Mombasa and Another, Petition No. 9 of 2014** it maintains that in the present matter, the Interested Parties ought to be properly restricted to file submissions on the legal matters arising in the dispute.

49. The 3<sup>rd</sup> Respondent finally supported the Applications by the National Gender and Equality Commission, ICW-K, UNAIDS Secretariat and Prof. Ely and stated that their joinder to the proceedings would actively contribute to the resolution of matters of law only.

### **The 2<sup>nd</sup> and 4<sup>th</sup> Respondents' Case**

50. The 2<sup>nd</sup> and 4<sup>th</sup> Respondents did not file and submissions in relation to the Applications.

### **The 5<sup>th</sup> and 6<sup>th</sup> Respondents' Case**

51. The 5<sup>th</sup> and 6<sup>th</sup> Respondents represented by Learned State Counsel Mr. Njoroge and who appeared on the record for them, did not file any submissions in respect to the Applications.

### **Determination**

52. The Applications before me primarily require the determination of two key issues namely, whether the Parties therein should be enjoined as either Interested Parties or Amici as per their respective Applications.

### **The Law in Regard to Joinder of Parties in Constitutional Petitions**

53. The **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 ("the Mutunga Rules")** make provisions in regard to who may be enjoined in constitutional Petitions as *amici curiae* or Interested Parties. The said Rules define a "friend of the Court"

as *“an independent and impartial expert on an issue which is the subject matter of proceedings but is not party to the case and serves to benefit the court with their expertise”*.

54. The Rules further define an “Interested Party” as *“a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation”*.

55. **Rule 6** therein specifically provides then that:

*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.*

56. **Rule 7** goes further to state that:

*(1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party.*

*(2) A court may on its own motion join any interested party to the proceedings before it.*

57. In addition to the above, **Black’s Law Dictionary, 9<sup>th</sup> Edition**, defines *“Interested Party”* (at p.1232) as:

*“A party who has a recognizable stake (and therefore standing) in a matter.”*

58. On the other hand, an *“Amicus”* is defined in the same **Black’s Law Dictionary** as:

*“A person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter”*

59. In our realm, the Supreme Court in the case of **Trusted Society of Human Rights Alliance vs Mumo Matemo and 5 others, Petition No. 12 of 2013** considered at length the question of who an Amicus and an Interested Party is and their respective roles. The Court made the following observation in that regard:

*“[16] ... An amicus ought not to be partisan. This is a ‘neutral’ party admitted into the proceedings so as to aid the Court in reaching an ‘informed’ decision, either way.*

*[17] Suffice it to say that while an interested party has a ‘stake/interest’ directly in the case, an amicus’s interest is its ‘fidelity’ to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.*

*[18] Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. On the other hand, an amicus is only interested in the Court making a decision of professional integrity. An amicus has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a ‘friend’ of the Court, his cause is to ensure that a legal and legitimate decision is achieved.”*

60. Further, in **Khalef Khalifa vs Republic and 3 Others, Criminal Revision No. 484 of 2012**, the Court while citing with approval the decision in **Meme vs Republic [2004] 1 EA 124** made the following observation in regard to the position of an interested party:

**“[15] ... the clear criteria that must be established by a party seeking to be enjoined as an interested party is to show that it has an identifiable stake or legal interest or duty in the proceedings. Other factors that the Court may consider were enunciated by the Court in the Meme v Republic, [2004] 1 EA 124, as follows:**

*‘(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;*

*(ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;*

*(iii) joinder to prevent a likely course of proliferated litigation’.”*

61. I also note that in the case of **Judicial Service Commission vs Speaker of the National Assembly and Another (2013) eKLR**, the Court, while making reference to the **Mutunga Rules** expressed the view that:

***“From the foregoing it is clear that an interested party as opposed to an amicus curiae or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non-partisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings.”***

*Amicus curiae on the other hand is defined as “an expert on an issue which is the subject matter of proceedings but is not a party to the case and serves to benefit the court with their expertise.” Amicus curiae is therefore a person who shows that he is possessed of some expertise relevant to the matters for determination before the court. Such a person as is expected of experts is required to be non-partisan and his role is meant to enable the court get a clearer picture of the issues in dispute in order for the court to arrive at an informed and just decision. Therefore the mere fact that the applicant herein may be partisan does not necessarily render him unsuitable to be joined in these proceedings as an interested party.*

*It is however a requirement that a person who intends to be joined to existing legal proceedings ought to show that he has “an identifiable stake or legal interest in the proceedings before the court”. (Emphasis added)*

62. The effect of the foregoing is that an **“Interested Party”** is one who has an identifiable stake or legal interest in a matter while an **Amicus Curiae**, is an expert who plays the role of a guide to the Court by bringing in his/her expertise so as to ensure that the Court reaches a just and fair decision. Any joinder to proceedings is however a discretionary power and each case has to be examined on its own merits and circumstances.

63. Applying the above principles to the Applications before me, I note that, ICW and ICW-K seek to be enjoined as Interested Parties while the National Gender and Equality Commission, Prof. Ely, and the UNAIDS Secretariat seek to be enjoined as *Amici*.

64. The first question that I wish to dispose of is whether the Application by UNAIDS Secretariat is incurably defective owing to the fact that it has been brought under the provisions of the **Civil Procedure Act**. In that context, whereas the applicable law in regard to joinder of Parties in constitutional Petitions is the **Mutunga Rules** as read with **Article 22 (3) (e)** of the **Constitution**, the mere fact that a party brings an Application for joinder under the provisions of the **Civil Procedure Act**, in my view, is a curable

defect and a Court of law should not be technical on the question. I appreciate that the **Civil Procedure Act** is the general law that governs the conduct of civil matters and the **Mutunga Rules** are a special set of Rules governing constitutional litigation under the Bill of Rights and the latter makes express provisions in regard to the filing of Applications such as the present ones. While that is the correct procedural position therefore this Court is alive to the provisions of **Article 159 (2) (d)** of the **Constitution** whose effect is that justice is to be administered without undue regard to procedural technicalities and that is why even in civil cases such as that of **Nancy Nyamira and Another vs Archer Dramond Morgan Ltd [2012] eKLR** it was stated thus:

*“Next, the Defendant argues that the Plaintiffs’ application must fail because it cites the wrong provisions of law. The Enforcement Application cites Order XLIV, Rule 17. The Defendant correctly points out that there is no such rule. As many cases have now held, and notwithstanding Sir Udoma’s remarks *Salume Namukasa v Yozefu Bukya (1966) EA 433, invoking the wrong provision of law does not necessarily spell doom to an otherwise meritorious application. This was the holding in Gitau v Muriuki [1986] KLR 211 which I now follow to hold that in as long as a party’s invocation of the wrong provision of law is not in bad faith, meant to mislead or otherwise causes injury or prejudice to the other side, the Court will not dismiss an application solely on account of wrong invocation of a provision of the law on which the application is grounded.*”* (Emphasis added)

65. Further, in **Thomas Ratemo Ongeri and 2 Others vs Zachariah Isaboke Nyaata and Another, Kisii High Court Environment and Land Civil Case No. 95 of 2004**, the Learned Judge made the observation that:

*“On the Defendants’ argument that the application has been brought under the wrong provisions of the law, I am fully in agreement. That however is a procedural technicality that this court would overlook for the sake of substantive justice pursuant to Article 159 (2) (d) of the Constitution of Kenya.”* (Emphasis added)

66. I am in agreement with the reasoning in these authorities and I do not see any reason to depart from the same. It is indeed true therefore that invoking the wrong provision of the law weighed against the need to do substantive justice does not necessarily spell doom to an otherwise meritorious Application and as such, I find the defect in the Application by the UNAIDS Secretariat curable.

67. The second issue that I must dispose of is whether the Application by ICW-K is defective and as such ought to be struck out for the failure by the Applicant therein to date the Affidavit in support of the Application. In that regard, other than recognizing Affidavits as pleadings that may be used, the **Mutunga Rules** are silent on whether it is mandatory that Affidavits be dated or not. I have made that rather Mundane point because **Rule 10(3)** in fact allows the filing of all manner of informal documents as evidence. However, under **Section 5** of the **Oaths and Statutory Declarations Act**, it is a mandatory provision of the law that Affidavits should be dated. The Section stipulates *inter alia* that:

*“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”*

68. In **Peter Ndeya and Others vs Samuel Nyoike t/a SAME Agencies, Civil Suit 1277 of 2001**, an earlier decision on the question, it was observed that:

*“... Section 5 does indeed require that the Commissioner oaths would state the date and the place the oath was made. In this case the verifying affidavit does provide the date that is 28<sup>th</sup> July, 2001 but fails to state the place that the oath was taken. That is a mandatory requirement of the statute and it therefore ought to be complied with. It is correct to say that failure to comply with such a requirement would render the verifying affidavit to be defective. The end results therefore, would be that the verifying affidavit would be struck out.”* (Emphasis added)

69. Further, the rationale for the dating of Affidavits was explained by the Court in **Mulusiah Land Consultants and Another vs Industrial Development Bank Ltd and 2 Others**, Civil Case No.211 of 2004 where the Learned Judge stated that:

*“Dating of such documents is not a cosmetic requirement. The purpose for such requirement is very clear. Situations and circumstances do change leading to different legal positions. In the absence of such dates, the court is left to guess as to when the Affidavits were made, and hence their worthlessness in both law and fact. Counsel for the applicant/plaintiffs submitted, with vigour, that the errors could be cured and amended under Order 6A of the Civil Procedure Rules.”* (Emphasis added)

70. In addition to the above, our Courts in the past have maintained that the requirement under the **Oaths and Statutory Declarations Act** must be adhered to and in the case of **Charles Muturi Mwangi vs Invesco Assurance Co. Ltd (supra)**, in a decision made while the **Constitution, 2010** was in place, the Court rendered the position thus:

*“[18] These are mandatory provisions. There is no discretion for this court to wary these provisions as these are statutory provisions with regard to what constitutes a valid disposition to matters before court. The omission to indicate the date of swearing of the affidavit attached to the application before court renders the same defective and should be struck out which leaves the current application unsupported with regard to averment of ..... Auma Okoth. This was the holding in Jayantkumar Vrajilal Shah versus Chandulal Mchanlal Shar and another, HCCC 1280 of 1997. The defect on the affidavit is not a mere technicality that can be addressed under Article 159 of the Constitution. The undated affidavit violates a statutory mandatory provision and thus the striking out. The claimant’s advocate stated that the affidavit in his possession was dated, however the affidavit in the court file and the one served on the respondent’s advocate is undated a fact that was noted by the respondent’s advocate. The court record should be taken as it is and in this case, the official record indicates the supporting affidavit is undated as held in Duncan Mwangovya versus Meena Bhangwandas Patel, HCCC 196 of 2005.”* (Emphasis added)

71. I find it very difficult to fault the foregoing decisions and applying the same principles to the present matter, I am inclined to strike out the Affidavit in support of the Application by ICW-K. Can the Application then fail on the basis that it has no Affidavit in support? My answer to this question is in the negative. I say so because an Application for one to be enjoined as an Interested Party can be made orally by dint of **Rule 7 of the Mutunga Rules** and as such, the striking out of the Affidavit in Support does not in any way render the Notice of Motion Application by ICW-K fatally defective and I shall therefore proceed to determine it on its merits. The foregoing then leads me to the key question whether I should allow the Applications herein.

### **The Amici Applications**

72. As regards the Amici Applications, I have looked at the respective mandates of the UNAIDS Secretariat, the National Gender and Equality Commission and Prof. Ely. I appreciate their expertise and experiences in matters pertaining to human rights and the right to health among others. I also note that the key grievance in the Petition herein revolves around the question of alleged violation of the 1<sup>st</sup>-4<sup>th</sup> Petitioners’ constitutional rights and based on the materials before this Court, the 5<sup>th</sup> Petitioner, Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN), is a non-profit organization committed to the protection, promotion and enhancement of enjoyment of the right to health and HIV related human rights for all through public interest litigation, advocacy and law reform. On the other hand, the 6<sup>th</sup> Petitioner, African Gender and Media Initiative Trust is a non-profit organization that works to advance gender equality through research and action on women’s human rights and was founded against the backdrop of the need for evidence based programming in women’s human rights work in Kenya. Accordingly, that its priority issues include sexual and reproductive health and rights of women, violence against women, economic justice and new media activism.

73. The above background is important because I have elsewhere above also reproduced the respective

mandates of all the intended *Amici Curiae*. Their expertise in their respective fields has not been denied but the only strong objection I have heard is that the said expertise is irrelevant to the issues raised in the Petition and that their joinder will add no value to the determination of the Petition. I beg to disagree with the 1<sup>st</sup> Respondent in the above regard. Although the Petition, on the facts may be restricted to the issue whether the 1<sup>st</sup>-4<sup>th</sup> Petitioners were coerced into sterilization because of their HIV status, other consequential and relevant issues of law would necessarily transcend that issue. The expertise, experiences, comparative studies, global trends and issues of rights generally are what the Applicants *Amici* will be expected to bring to the proceedings. Those are not irrelevant matters and are certainly useful to this Court in reaching a just determination of the Petition herein. I need not say more.

74. Having therefore found as I have done above, it is my view that the *Amici* Applications ought to be granted as prayed.

### **The Interested Parties' Applications**

75. As I have stated elsewhere above, an Interested Party must be one that has a stake in a matter and who, may in one way or the other, be affected by the decision that shall be rendered by the Court in the proceedings at hand. In my view, the key consideration in such an application is the evaluation of the prejudice to be suffered if such an Application is denied. In the present case, ICW-K is a national branch of the ICW and therefore both undertake similar mandates. I note however, that the former has been fully involved with the issues raised by the 1<sup>st</sup> – 4<sup>th</sup> Petitioners herein and has also participated in various fora in trying to support the said Petitioners and other women suffering from the same predicament as them. Accordingly, its mandate exclusively revolves around the rights and interests of Kenyan women facing predicaments similar to those of the Petitioners. Based on the foregoing, I am inclined to allow the Application by ICW-K as the decision that shall be rendered by this Court on the Petition may also affect its members who are also under its care and protection. Once I have joined ICW-K as an Interested Party, it follows that ICW would have the same interests and ought to be joined as well.

### **Conclusion**

76. In joining the *Amici* and Interested Parties, it is my direction that they should all adhere to the principles set out in **Trusted Society for Human Rights (supra)** and the directions to be given herebelow.

### **Disposition**

77. Based on my findings above, the following are the orders I deem appropriate in the circumstances:

- a) The Notice of Motion Application dated 15<sup>th</sup> May, 2015, by the Secretariat of the United Nations Programme on HIV/AIDS (UNAIDS Secretariat), is hereby allowed and the Applicant is enjoined as the 1<sup>st</sup> Amicus Curiae in these proceedings.
- b) The Notice of Motion Application dated 22<sup>nd</sup> October, 2015, by Prof. Alicia Ely Yamin, is hereby allowed and the Applicant is enjoined as the 2<sup>nd</sup> Amicus Curiae in these proceedings.
- c) The Notice of Motion Application dated 18<sup>th</sup> January, 2016, by the National Gender and Equality Commission, is hereby allowed and the Applicant is enjoined as the 3<sup>rd</sup> Amicus Curiae in these proceedings.
- d) The Notice of Motion Application dated 28<sup>th</sup> July, 2015 by the International Community of Women Living with HIV (ICW), is hereby allowed and the Applicant is enjoined as the 1<sup>st</sup> Interested Party to these proceedings.
- e) The Notice of Motion Application dated 27<sup>th</sup> October, 2015 by the International Community of

Women Living with HIV, Kenya Chapter (ICW-K), is hereby allowed and the Applicant is enjoined as the 2<sup>nd</sup> Interested Party to these proceedings.

f) The Amici's role shall be limited to the filing of submissions only.

g) The Interested Parties are at liberty to file such Affidavits and Submissions as shall be directed by this Court.

h) Let each Party bear their own costs of these Applications.

i) The Petition be set down for hearing as soon as possible.

78. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JULY, 2016**

**ISAAC LENAOLA**

**JUDGE**

**In the presence:**

Mr. Ranja holding brief for Miss Ndongai for Prof. Alicia

Mr. Odunga holding for Mr. Ndeche for Petitioner

Miss Oduor for ICW

**Order**

Ruling duly delivered.

**ISAAC LENAOLA**

**JUDGE**

**Further Orders**

Responses to be filed and submissions to be exchanged for directions on 7/10/2016.

**ISAAC LENAOLA**

**JUDGE**