



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO. 324 OF 2016

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20(1)-(4), 21, 22, 33, 35, 47,166, 171, 172, 249,
253, 258 AND 259**

OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF FAILURE TO COMPLY WITH THE RULE OF
LAW PRINCIPLE & OF DENIAL OF THE RIGHT TO INFORMATION & EXPRESSION**

YASH PAL GHAI.....1ST PETITIONER

SAMWEL MOHOCHI.....2ND PETITIONER

VERSUS

JUDICIAL SERVICE COMMISSIONRESPONDENT

AND

ARTICLE 19-EASTERN AFRICA..... INTERESTED PARTY

RULING

Introduction

1. By a Notice of Motion dated 29th July, 2016, the applicant in the application the subject of this ruling, **Article 19-Eastern Africa** (hereinafter referred to as “the Applicant”) seeks the following orders:

- 1. That leave be granted to Article 10-Eastern Africa be admitted as Interested Party in the above petition filed in this honorable court.**
- 2. That the Interested Party be granted an opportunity to submit written and oral arguments in the above-petition**
- 3. That the Interested Party be allowed to submit with leave of court any other information it may deem important and relevant to allow for the just disposition of this matter**

4. That there be no costs in relation to this application

2 The application was based on the following grounds:

1. That the intended Interested Party is an institution with expertise in constitutional law and international human rights law especially those rights incidental to freedom of expression and the right to information.

2. That the intended Interested Party is an international human rights organization which defends and promotes freedom of expression and access on information around the world. We monitor, research, publish, lobby, campaign, set standards; and conduct strategic litigation for the promotion of the right to freedom of expression.

3. That Article 19-Eastern Africa “Global campaign for freedom of expression” takes its name from corresponding Article 19s of the Universal Declaration of Human Rights (UDHR) and the International Convention and Civil and Political Rights (ICCPR) which enshrine the freedom to seek, receive and impart information.

4. That the Interested Party seeks leave to assist the court in the above referenced case with the interpretation and application of relevant constitutional principles, comparative law and international law relied upon by the petitioner herein.

5. That the intended Interested Party recognizes that governments hold information not for themselves but, rather, on behalf of the public and that, as a result, public bodies should provide access to that information.

6. That the right to information is the oxygen of democracy. If people do not know what is happening in their society, if the actions of those who rule them are hidden, then they cannot take a meaningful part in the affairs of that society.

7. That information is not just a necessity for people – it is an essential part of good government. Bad government needs secrecy to survive. It allows inefficiency, wastefulness and corruption to thrive.

8. That information is essential to democracy at a number of levels. The ability of individuals to participate effectively in decision-making that affects them depends, in obvious ways, on information.

9. That the constitution and international law provides that the public has a right to scrutinise the actions of its leaders and to engage in full and open debate about those actions. It must be able to assess the performance of the government and this depends on access to information about the state of the economy, social systems and other matters of public concern as the Selection of the Chief Justice and the President of the Supreme Court, the Deputy Chief Justice and Judge of the supreme court .

10. That the Constitution and international and regional instruments provide for incidence where access to information may be limited. Article 19 will use these set standards to assist the court to elucidate whether or not the actions by the Judicial Service Commissions to deny information on the basis of short-listing of applicants met Article 24 of the Constitution of Kenya requirements on when and how fundamental rights can be limited.

11. That Article 19 will seek to administer Article 19 Principles set out a three-part test for exceptions as follows:

- i. the information must relate to a legitimate aim listed in the law:**

ii disclosure must threaten to cause substantial harm to that aim; and

iii the harm to the aim must be greater than the public interest in having the information.

12. That over the years, and in accordance with our expertise, Article 19 has published a set of principles, the public's Right to Know: Principles on Freedom of Information Legislation setting out best practice standards on freedom of information legislation. These principles are based on international and regional law and standards, and evolving state practice. They therefore provide a useful framework in which to elucidate the features of access to information mechanisms.

10. That the intended Interested Party believes its application should be granted because of the exceptional importance and impact that the determination this case will have the fundamental right to information

3 According to the applicant, it is duly registered Non-Governmental Organization (NGO) whose mandate is the implementation, promotion and protection of the fundamental rights of freedom of expression, opinion and access to information as contained in the corresponding Article 19s of the *Universal Declaration of Human Rights* (UDHR) and the *International Covenant of Civil and Political Rights* (ICCPR). The said Articles, according to the applicant provide that”.

“UDHR “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

ICCPR “19 (1) Everyone shall have the right to hold opinions without interference (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice (3) The exercise of the rights provided for in paragraph 2 of the article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary; (a) From respect of the rights or reputations of others; (b) For the protection of national security or public order; or the public health or morals.”

4 It was the applicant’s case that the said corresponding Article 19s of the UDHR and the ICCPR are part of Laws of Kenya by dint of Article 2(5) and (6) of the Constitution of Kenya.

5 The applicant contended that based on Article 19’s expertise, publications and past experience, it will enrich the Court with information on justifiable limitations to the right to information as per the Constitution of Kenya and International and Regional Instruments.

6 On behalf of the applicant, it was submitted by **Mr Kiprono**, its learned counsel that the outcome of this petition will set a precedent on how the right to information is handled. It was disclosed that the Applicant has litigated and made publications on the right to information in open democratic societies and the relationship between Governments and the people with respect to the right to information which right allows one to make informed decisions. It was therefore submitted that there cannot be a right to open government without the right to information.

7 According to learned counsel, the applicant has an identifiable interest in this case based on the decision in the Supreme Court in the case of **Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 Others [2014] eKLR.**

8 It was further submitted that Article 22 of the Constitution has expanded the *locus* not just to institute a case but also to join and participate therein if the applicant feels that its participation will affect the outcome of the case. It was the applicant’s case that it had demonstrated that it has an identifiable interest

based on its past participation in other petitions.

9 The application was supported by **Mr Lempaa** who appeared on behalf of the Petitioner. According to him, the respondent herein, the Judicial Service Commission, is a juridical person and not a private person hence the issue being canvassed herein are not private rights but the correct legal position under Article 35 of the Constitution. It was therefore submitted that the joinder of the applicant hereto will not occasion any prejudice to any person.

10 To learned counsel, the Respondent herein being a Constitutional Commission should be the last entity to deny a person the participation in legal proceedings. It was submitted that the mere fact that the 1st petitioner herein is an eminent professor of law ought not to be a ground for denying the applicant an opportunity of participating in these proceedings since the applicant may have a different perspective from that of the petitioners.

11 On behalf of the Respondent, **Mr Regeru** opposed the application. According to him, whereas it is true that the Constitution seeks to expand the capacity to litigate and join legal proceedings, certain standards have been set which ought to be complied with. Learned counsel identified the considerations as first, that the applicant must have an identifiable stake in the proceedings.

12 It was however learned counsel's view that such identifiable interest can only be established by way of an affidavit evidence. In this case, however, the affidavit in support of the application only dealt with what the applicant does without identifying its stake hence there was no material on the basis of which this Court can find that the applicant has identifiable stake in these proceedings.

13 The second consideration, according to learned counsel, is whether the applicant is likely to be affected by the Court's decision as a party. In this case it was submitted that the applicant seems to be interested in articulating noble aspirations but without showing how it stood to be affected by the decision of the Court.

14 Thirdly, it was submitted that the applicant needs to show that only it can articulate its interests and hence the necessity of its presence in the proceedings. In this case, it was submitted that there was no material adduced on the basis of which the Court can make such a finding.

15 Since the applicant had sought to come into these proceedings as an interested party as opposed to an *amicus curiae*, it was submitted that the issue of the applicant's experience is irrelevant.

16 **Mr Regeru's** submissions were supported by the submissions by **Mr Ochieng Oduol**, who appeared with **Mr Regeru**. According to learned counsel, Article 35 of the Constitution which deals with access to information employs the term "every citizen" as opposed to "every person". Accordingly, it was submitted that the Article contemplates that an application thereunder can only be made by a natural person as opposed to a juristic one. Accordingly, to allow the applicant to be joined to these proceedings when the applicant is not a natural person, it was submitted, would amount to this Court re-writing the Constitution.

Determinations

17 I have considered the foregoing.

18 The role of interested parties was discussed by the Supreme Court in **Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 Others [2014] eKLR** in which the said Court expressed itself as follows:

"Black's Law Dictionary, 9th Edition, defines "intervener" (at page 897) thus:

"One who voluntarily enters a pending lawsuit because of a personal stake in it" (emphasis provided);

and defines “Interested Party” (at p.1232) thus:

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

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. 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.”

19 It is therefore clear that in determining whether or not to join a person as an interested party certain criterion must be met by the applicant and these include:

a. Whether the Applicant has a ‘stake/interest’ directly in the case, in the sense that he or she is one who will be affected by the decision of the Court when it is made, either way.

b. Whether the applicant’s interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.

20 The word “direct” is defined by *Black’s Law Dictionary*, 9th Edn. page 525 as “straight; undeviating, a direct line, straightforward, immediate.”

21 The first question for determination is therefore the applicant’s interest in these proceedings. According to the applicant, it intends to assist the Court in the interpretation and application of relevant constitutional principles, comparative law and international law relied upon by the petitioners herein. In participating in these proceedings, the applicant contended that it intends to enrich the Court with information on justifiable limitations to the right to information as per the Constitution of Kenya and International and Regional Instruments.

22 When asked by this Court whether the applicant intended to advance a particular position taken by any of the parties to these proceedings, **Mr Kiprono** explained that that was not the applicant’s intention.

23 Having considered the material placed before me by the applicant herein, I am unable to find that the applicant has established that it has a direct interest or stake in the proceedings, or that will be affected by the decision of the Court when it is made, either way. If I understand the applicant’s case correctly, its interest in these proceedings seems to be geared towards ensuring that whatever decision this Court arrives at, the same will be well grounded in law as opposed to being in favour of any particular party to the proceedings. In other words, the applicant’s interests cannot be said to be “direct” in terms of *Black’s Law Dictionary* definition.

24 Whereas it is true that any Kenyan has a right to institute legal proceedings where the Constitution has been contravened or threatened with contravention, where proceedings have been commenced, any person who seeks to be joined to the proceedings must satisfy the Court that the issues he intends to address cannot be adequately addressed by or through the already existing parties to the proceedings.

25 Article 159(2)(b) dictates that the Court ought to be guided by *inter alia* the principle that justice shall not be delayed. In other words legal proceedings ought to be disposed of speedily and this is critical where the Court is dealing public law disputes such as constitutional petitions. Such proceedings, in my view cannot be determined speedily, if the Court readily permits persons whose participation will not add any value to the proceedings to participate therein. These being public law proceedings, dealing with the process rather than the merits of the case, it is the issues to be canvassed that determine whether parties ought to be joined as opposed to mere personal aggrandisement. It is therefore important that an applicant seeking to be joined to a petition as an interested party meets the conditions set out by the Supreme Court

in the Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 Others (supra).

26 What then is the position of an *amicus*? Majanja, J in Evans Odhiambo Kidero vs. Director of Public Prosecutions & 3 Others [2014] eKLR was of the view, which view I associate with that the court is at liberty to call upon *amicus curiae* to assist it should elucidation of specialized issues be required.

27 This Court has in the past decried lack of comprehensive rules which govern the admission of persons as *amici* in legal proceedings in this country, unlike in other jurisdictions with an advance Constitution as ours and has suggested that it may be time the Hon. The Chief Justice deemed it fit to put into motion a machinery through which the issue of the promulgation of such rules may be undertaken so as to give guidelines to the manner in which *amicus curiae* can be admitted to legal proceedings and the scope of their participation thereat.

28 Accordingly, it is my view that procedures adopted in other jurisdictions may only be a guide, but do not necessarily bind the Courts in determining whether or not a person or entity ought to be admitted into legal proceedings as such *amicus curiae*.

29 In Raila Odinga and Others vs. Independent Electoral and Boundaries Commission and 3 Others, Petition No. 5 of 2013, the Supreme Court expressed itself as follows:

“We are of the opinion that where in adversarial proceedings, parties allege a proposed applicant for *amicus curiae* is biased or hostile to one or more of the parties or where the applicant through previous conduct appears to be partisan on an issue before the Court, then we must consider such an objection seriously...Having listened to all arguments from counsel and studied the documentation submitted to the Court with regard to this Application, and even though we are unable to ascertain the veracity of every claim, the Court is convinced of the perception of bias and partisanship with regard to the applicant exists.”

30 The same Court in Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 Others (supra) pronounced:

“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.”

31 As this Court held in Judicial Service Commission vs. The Speaker of the National Assembly & Another Petition No. 518 of 2013:

“The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012, defines an interested party as “a person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation”. 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 a “an 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.” *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 clear 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.”

32 In Re: Certain Amicus Curiae Applications; Minister of Health and Others vs. Treatment Action Campaign and Others (CCT8/02) [2002] ZACC 13 (5 July 2002) the South African Constitutional Court expressed itself as follows:

“In the exercise of that discretion the Court will consider whether the submissions sought to be advanced by the amicus will give the Court assistance it would not otherwise enjoy. The requirements for admission as an amicus are set out in Rule 9 and, as this Court pointed out in *Fose v Minister of Safety and Security*:

“It is clear from the provisions of Rule 9 that the underlying principles governing the admission of an *amicus* in any given case, apart from the fact that it must have an interest in the proceedings, are whether the submissions to be advanced by the *amicus* are relevant to the proceedings and raise new contentions which may be useful to the Court. The fact that a person or body has, pursuant to Rule 9(1), obtained the written consent of all parties does not detract from these principles; nor does it diminish the Court's control over the participation of the *amicus* in the proceedings, because in terms of subrule (3) the terms, conditions, rights and privileges agreed upon between the parties and the person seeking *amicus* status are subject to amendment by the [Chief Justice].”

To this we would add that the application for amicus status must be made timeously and, failing that, condonation must be sought without delay... The role of an amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court. Ordinarily it is inappropriate for an amicus to try to introduce new contentions based on fresh evidence.”

33 Similarly, the same Court in Institute for Security Studies In Re S vs. Basson (CCT30/03B) [2005] ZACC 4; 2006 (6) SA 195 (CC) expressed itself as follows:

“In the exercise of its discretion whether or not to admit a person as an amicus this Court will have regard to the principles that govern the admission of an amicus. These principles are whether the submissions sought to be advanced are relevant to the issues before the court, will be useful to the court and are different from those of the other parties... the submission should raise new contentions and should “not repeat any matter set forth in the argument of the other parties.” It is the duty of this Court, in the exercise of its discretion to ensure that these principles are satisfied before a person can be admitted as an amicus. Where these principles are not satisfied, a person cannot be admitted as an amicus.”

34 From the forgoing this Court can glean the following principles for consideration in an application for admission or joinder of an *amicus*:

- a. **The application must be made timeously.**
- b. **The applicant ought not to raise any perception of bias or partisanship either from the documents filed, his submissions or conduct prior to the making of the application.**
- c. **The applicant ought to be neutral in the dispute where the dispute is adversarial in nature.**
- d. **The applicant ought to show that the submissions it intends to advance will give such assistance to the Court as would otherwise not have been enjoyed by the Court. He ought to draw attention of the Court to relevant matters of law or fact which would otherwise have not been drawn. Therefore the applicant ought to show that he does not intend to repeat the arguments already made by the parties but that he intends to raise new contentions. The new contentions however must be based on the data already before the Court and not on fresh evidence.**
- e. **The applicant ought to show that he has expertise in the field relevant to the matter in**

dispute. Therefore general expertise in law does not suffice.

- f. **Whereas consent of the parties is a factor to be taken into consideration, it is not the determinant factor.**

35 In this case I have considered the submissions made on behalf of the applicant and whereas I find that the applicant is not a proper person to be joined to these proceedings as an interested party, considering the importance of these proceedings to the public and the fact that the issues the subject of these proceedings may not be commonplace or routine issues, a person who evinces an intention to assist the Court arrive at a legally sound decision ought to be welcome as long as the application is not intended to impede the expeditious disposal of the petition.

36 Based on **Evans Odhiambo Kidero vs. Director of Public Prosecutions & 3 Others** (supra) it is my understanding the Court is perfectly entitled, even without an application by a person to be joined as an *amicus curiae*, to invite a befitting person to be joined in that capacity. In other words the mere fact that a person does not meet the criteria for joinder as an interested party does not necessarily bar the Court from joining the person as *amicus curiae* if the conditions for his joinder as the latter are met.

37 Having considered the case as presented by the applicant in these proceedings as well as the other parties' respective positions and the principles guiding the joinder of a person in legal proceedings, I am not satisfied that the test for the joinder of the applicant as an interested party has been met. I am however satisfied that the applicant fits the bill of being permitted to participate in these proceedings as an *amicus curiae*.

Order

38 Consequently, the applicant is hereby granted leave to participate in these proceedings as such *amicus curiae* and its participation will be limited to filing of submissions in accordance with the legal guidelines elucidated in this ruling.

39 There will be no order as to costs of this application.

Dated at Nairobi this 2nd day of August, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Lempaa for Mr Waikwa for the Petitioners

Mr Ochieng Oduol for the Respondent and holds brief for Mr Regeru for the same party

Mr Kirono for the applicant

Cc Patricia