



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO. 11 OF 2016

PAUL CHEBIEGO.....1ST PLAINTIFF

JACOB BARMAO.....2ND PLAINTIFF

MICHAEL MAIYO.....3RD PLAINTIFF

VERSUS

KIPSAT AIYABEL.....1ST DEFENDANT

NATIONAL LAND COMMISSION.....2ND DEFENDANT

LAND REGISTRAR, UASIN GISHU COUNTY.....3RD DEFENDANT

RULING

This ruling is in respect of an application dated 22nd September 2020 seeking for the following orders:

a. Spent

b. That the East Africa Centre for Human Rights (EACHRights) the applicant herein be granted leave to be enjoined in this petition as an *Amicus Curiae*.

Counsel agreed to canvass the application vide written submissions.

APPLICANT'S SUBMISSIONS

Counsel for the applicant gave the description of the applicant and stated that East African Centre for Human Rights (also known as EACHRights) was established in May 2010 to undertake Human Rights work at a regional context. The organization is a non-partisan, Regional Non-Governmental Organization that seeks to initiate and undertake programmes that promote, protect, and enhance Economic, Social, and Cultural Rights (ECOSOC Rights) in Kenya, Uganda and Tanzania for vulnerable and marginalized groups. The organization employs the Rights Based Approach in its interventions.

Counsel submitted that the applicant has been greatly involved in promoting the realization of the right to education in Kenya and East Africa through research and advocacy, policy reform, community engagement and awareness creation, partnerships, and public interest litigation.

Further that its mandate is to assist the judiciary in protecting and promoting human rights, in particular the right to education by submitting on diverse questions touching on national, regional and international law & policy pertaining to the right to education and wishes to offer the court expertise in these areas.

Ms Oswago submitted that the role of an amicus curiae is a friend of the court in legal proceedings which is addressed in Rule 6 of the Constitution of Kenya(Protection of Rights and Fundamental Freedoms)Practice and Procedure rules.2013 and in criteria developed in the **Supreme Court case of Trusted Society of Human Rights Alliance v. Mumo Matemo & 5 others{2015}eKLR**. The Supreme Court's requirement for Amicus Curiae admission is as follows:-

- 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
 - 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.
- vi. Where in adversarial proceedings, parties allege that 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 v, IEBC 7 Others; S.C Petition No. 5 of2013-Katiba Institute 's application to appear as amicus).
 - vii. An amicus curia is not entitled to costs in litigation. In instances where the court requests the appearance.
 - 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 its discretion, the court may assign questions for amicus research and presentation.
 - x. An amicus curia shall not participate in interlocutory applications, unless called upon by the court to address specific issues. In addition, we would adopt, with respect, certain guidelines which emerge from 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

Counsel therefore urged the court to allow the application and enjoin the amicus to the suit.

1ST DEFENDANT'S SUBMISSIONS

Counsel for the 1st defendant opposed the application and submitted that the applicant has not demonstrated in the application any identifiable legitimate interest or stake which they have in LR. No. Plateau/ Chepkongony Block 2 (Sumbeiywo) / 65. Further that they have not demonstrated that their presence is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit land to merit the joinder.

Mr Ochieng gave a brief background to the case where he stated that the plaintiff instituted this suit vide a Plaint dated 21st February, 1998 in which the Plaintiff sought the following reliefs: -

- a. A declaration that LR. No. Plateau/ Chepkongony Block 2 (Sumbeiywo)/65 was fraudulently transferred to numbers Plateau/Chepkongony Block 2 (Sumbeiywo) 72 and 73 hence null and void and the 1st Plaintiff is the rightful owner. (b) Special damages as in paragraph 7 above.
- b. General damages
- c. Costs of and incidental to this suit together with interest thereon at court rates.
- d. Any further or other relief this Honourable Court deems fit and expedient to grant.

Counsel stated that judgement was delivered by Justice R. Nambuye on 27th April, 2003 in favour of the 1st Defendant which judgement was

subsequently quashed by the Court of Appeal on 25th June, 2015 on the basis that the judgement of the trial court was not signed thus referring the matter back for retrial between the same parties in the original trial. That it is the same matter which is due for re-trial that the Applicant wishes to join as an amicus.

Mr Ochieng submitted that the applicant ought to have disclosed its academic background and professional qualifications for the court to appreciate its level and field of expertise that necessitates its participation in these proceedings but did not do so.

Counsel relied on the **Supreme Court in the case of Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others & Michael Wainaina Mwaura (as Amicus Curiae) [2017] eKLR** (supra) where it set out the guiding principles applicable in determining an application to be enjoined in that capacity of Amicus Curiae which he submitted that the applicant has not met.

It was counsel's further submission that the applicant does not meet the criteria above as it has not tried to establish the relationship between itself and the principal arguments in the plaint and the direction of the amicus intervention to guide the court and the parties on the necessity of the amicus and their contribution to these proceedings. Further that an application for amicus ought to be made timeously yet this application is made 22 years after the suit was filed on the 21st of February 1998 which is dilatory and defeats the objectives of section 1A and 1B of the Civil Procedure Act.

Mr Ochieng submitted that there are no points of law identified by the applicant which are not already addressed by the parties to the suit which introduce novel aspects of the legal issue in question that will aid in development of the law and of the court to determine the matter.

Counsel urged the court to dismiss the application as it lacks merit.

ANALYSIS AND DETERMINATION

The main issue for determination is whether the applicant has met the requirements of being enjoined as Amicus Curiae.

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.

In the case of **Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others, Supreme Court Petition No. 12 of 2013, [2015] eKLR**, considered the role of *amicus curiae*, and set out the guiding principles applicable in determining an application to be enjoined in that capacity, as follows (para. 41):

- (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....
- (vii) An amicus curiae is not entitled to costs in litigation. In circumstances 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 into 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.”

It should be noted that the applicant sought that the application be heard before the petition dated 30th September which is not the current suit as this one was filed vide a plaint dated 21st February 1998. Could it be that the applicant has filed the application in the wrong file or is just an excusable mistake?

The application should also be filed timeously as per the guiding principles enunciated in the Trusted Society case above. This suit was filed in 1998 and the application herein was filed in 2020. Even though the applicant came into existence in 2010 no reason has been advanced for not filing the application as soon as they became aware of the case.

The most important consideration is what points of law the amicus intends to address which has not been addressed or will be addressed by the parties. What novel aspects of legal issues is the amicus going to address to aid the development of law. This is a land dispute where applicable law is known and there is nothing that the amicus is going to aid in determination of the issues that arise.

Fortunately, the Attorney General is already a party to this suit and the court is alive to the fact that it 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.

This makes the proposed Amicus 'enjoinment superfluous and if it strongly feels that its input is important then the enjoinment is not the way to go. The applicant has not established the relationship between itself and the principal parties to this suit. The fact that they champion the right to education does not make them entitled to be enjoined in all suits that touch on such a right. The applicant's stake in this matter is vague and their enjoinment may end up convoluting the matter further noting that this is a 1998 matter.

The applicant has not illustrated which areas of law it will address that have not already been addressed by the parties to the suit. Further, a perusal of annexure KA-2 indicates that the matter before the suit is a retrial of the matter as the judgment pronounced was not signed and therefore a retrial was ordered.

I have considered the application together with the submissions by counsel and find that the applicant has not met the threshold to be enjoined as amicus curiae. The same is dismissed with not orders as to costs.

DATED AND DELIVERED AT ELDORET THIS 15TH DAY OF APRIL, 2021

M. A. ODENY

JUDGE