



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 295 OF 2018**

**HONOURABLE PHILOMENA MBETE MWILU.....PETITIONER**

**– VERSUS –**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS.....2<sup>ND</sup> RESPONDENT**

**THE CHIEF MAGISTRATE COURT**

**(ANTI-CORRUPTION) (NAIROBI).....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**AND**

**STANELY KIIMA MULUVI.....1<sup>ST</sup> INTERESTED PARTY**

**FEDERATION OF WOMEN**

**LAWYERS (FIDA) KENYA.....APPLICANT**

**ADRIAN KAMAOTHO NJENGA.....APPLICANT**

**INTERNATIONAL COMMISSION OF JURISTS**

**(KENYA CHAPTER).....APPLICANT**

**RULING**

1. We have before us three applications. The first two applicants, the Federation of Women Lawyers Kenya Chapter (FIDA-K) and Adrian Kamotho Njenga seek to be enjoined as interested parties in the petition. The third is an application by ICJ-Kenya seeking to be enjoined as an *Amicus Curiae* in the petition.

2. We have considered the applications before us and the submissions of the parties. The following is our decision on the three applications.

3. At the oral hearing of this application, so as to demonstrate interest, FIDA referred us to one of its main objectives, which is to achieve a society that is free from all forms of discrimination against women and to ensure that women are free from all forms of injustices based on gender, class, ethnic origin physical disability and religious beliefs. The court was told that the organisation on is dedicated to the faithful implementation for the constitution with emphasis on achieving increasing gender sensitivity in the legal system and ensuring the respect and protection of the laws therein. It was the argument by FIDA that it seeks to represent the interests of women in equal treatment and application of the law. It would then have an interest in this matter because the petitioner is a woman and the matter is of great public interest.

4. Confronted with an argument by the respondent that they are raising new issues, Counsel for FIDA argued that the issue of gender discrimination was discernible from Part C of the petition. We have read the entire petition and considered specifically part C in which the

petitioner makes reference to Article 27(1) and (2) of the Constitution, which provide that:

**27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.**

**(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.**

5. In our view, nowhere does the petitioner raise the issue of discrimination on the basis of gender. Article 27(1) and (2) contain the constitutional guarantee of equal protection of all before the law, and have no reference to the issue of discrimination on the basis of gender. We therefore agree with the respondents that the FIDA seeks to introduce new issues in order to bring itself within the definition of an interested party for purposes of this petition.

6. FIDA has also sought to be enjoined as an interested party in these proceedings on the basis that it is representing the petitioner in the case before the Magistrate's Court. It is not in dispute that Counsel who constitute the legal team representing the petitioner are also in the matter before the magistrate's court. FIDA has not demonstrated that the petitioner's interests in this petition will not be well articulated if it is not enjoined in these proceedings. It is one thing to be a party to proceedings as an interested party, and an entirely different thing to represent a party in those or other proceedings.

7. As we indicated earlier, a party seeking to be enjoined in proceedings as an interested party must, aside from showing an identifiable stake or interest, must also show that it will suffer prejudice in the event of non-joinder. In this case, FIDA has not satisfied us that it will suffer any prejudice if it is not party to the proceedings. We therefore decline to allow FIDA to participate in the proceedings as an interested party, and its application is accordingly dismissed.

8. Adrian Kamotho Njenga cites paragraph 15 of the Petition and 37(h) of the Petitioner's Verifying Affidavit to found his contention that he ought to be enjoined in these proceedings as an interested party. Paragraph 15 of the petition reads as follows:

***“On 26<sup>th</sup> February 2018, Adrian Kamotho Njenga petitioned Parliament for the removal of the Chief Justice and the Petitioner, among others, from the JSC”.***

9. Paragraph 37(h) of the Verifying Affidavit rehashes this statement. The respondents argue that the statement by the petitioner in the impugned paragraphs of the petition and verifying affidavit are statements of fact and in the public domain. We observe that Mr. Njenga has not denied or otherwise challenged the veracity of this statement. We would have expected him to seek to be enjoined in the proceedings in order to rebut or correct the statements. Instead, he has taken a totally different trajectory and now vigorously supports the petition, urging that it should be allowed summarily.

10. Mr. Njenga argues that there is incorrect information which he has a right of correction under Article 35 of the Constitution. First, the issue of the petition is set out in a pleading by the petitioner. It is not information held by the state or by any other person as envisaged under Article 35(1). However, should Mr. Njenga require correction of the information, then he has a right to seek such correction, and if appropriate action is not taken, lodge an appropriate petition under Article 35.

11. We have considered Mr. Njenga's other contentions that he has a duty to defend the constitution, and his allegations that the charges against the petitioner are in proper. With respect, we are unable to see how these arguments advance his identifiable personal stake or interest in these proceedings to justify his joinder as an interested party. His application is therefore dismissed.

12. ICJ seeks to be enjoined in the proceedings as an Amicus Curiae. It contends that it has experience in criminal, constitutional matters, and in a wide field of law. It further argues that it will restrict itself to points of law and will not delve into interlocutory applications, unless explicitly invited to. It cites the case of **The Kenya Section of the International Commission of Jurists v The AG & Others (2011) eKLR** and **Kalpana H Rawal v Judicial Service Commission & 4 Others (2015)eKLR** to demonstrate that it has the necessary expertise to qualify for admission as an amicus.

13. The 4<sup>th</sup> Respondent argued that the proposed amicus curiae has already taken sides by siding with the Petitioner on the issues before court on matters that are yet to be determined by this Honourable Court. The 4<sup>th</sup> respondent cites as an illustration page 14 of the applicant's brief. It further notes that ICJ has not demonstrated specific expertise over and above what is possessed by other parties, s. What it has done is demonstrate experience in other cases or instances where it has been admitted as amicus.

14. Rule 6 of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (The Mutunga Rules)** provides 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.”***

15. In **Trusted Society of Human Rights Alliance –vs- Mumo Matemo & 5 others [2014] eKLR**. The Supreme Court stated as follows with respect to an Amicus Curiae:

*[18]... 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."*

16. The law on amicus curiae was discussed in the case of **Katiba Institute –vs- Judicial Service Commission & 8 Others** (2017 eKLR, where the Court of Appeal held that:

*“Rule 6 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, (the Mutunga Rules) made under Article 22 of the Constitution provides for the procedure to be followed in respect of applications to join proceedings as amicus curiae. Rule 2 defines a friend of the court as “an independent and impartial expert on an issue which is the subject matter of the proceedings but is not party to the case and serves to benefit the court with their expertise.” It is therefore correct, as submitted by the appellant, that the requirements under the Constitution and under Mutunga Rules that a person seeking leave to appear, as amicus curiae in any particular case should meet are expertise, independence and impartiality. The grant or refusal of leave to be admitted as amicus curiae in any given case involves the exercise of judicial discretion.”* (Emphasis added)

17. The matter before us is, as all parties appreciate, a matter of great public interest which raises a novel and critical issue regarding the administration of justice. Ordinarily, the presence of the Attorney General in the matter would have served to assure the court of a neutral expert in the constitutional question before it. However, we note that the position taken by the AG is patently inclined to one side. In our view, the court requires the participation of a neutral party which can bring some legal expertise to the proceedings and assist the court in reaching a making a just determination.

18. We have considered the application by ICJ and the submissions of the parties with respect thereto. Whereas being admitted as an Amicus Curiae or being a party in previous proceedings is not sufficient ground for admission as an amicus curiae in subsequent suits as each case turns on its own merits and unique circumstances, we are persuaded that ICJ’s participation in previous matters involving constitutional and statutory interpretations is a demonstration that they possess expertise in constitutional questions which could benefit this court.

19. We have also considered the ICJ amicus brief and are satisfied that it is sufficiently neutral and meets the criteria for admission. We therefore admit the ICJ as an Amicus Curiae in these proceedings.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> OF FEBRUARY 2019**

**H.A.OMONDI**

**M.NGUGI**

**F.TUIYOTT**

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**JUDGE**

**JUDGE**

**JUDGE**

**W.MUSYOKA**

**E. C. MWITA**

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**JUDGE**

**JUDGE**