REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSOLIDATED PETITIONS NO. 56, 58 & 59 OF 2019

BETWEEN

NUBIAN RIGHTS FORUM ……..…….....…… ….1ST PETITIONER

KENYA HUMAN RIGHTS COMMISSION ….....…….…2ND PETITIONER

KENYA NATIONAL COMMISSION ON

HUMAN RIGHTS ……..…… ….3RD PETITIONER

AND

THE HON. ATTORNEY-GENERAL ……..……..…1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF

INTERIOR & CO-ORDINATION OF

NATIONAL GOVERNMENT ...…….....……..2ND RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY

OF INTERIOR & CO-ORDINATION OF

NATIONAL GOVERNMENT …….....…..… 3RD RESPONDENT

THE DIRECTOR NATIONAL REGISTRATION ….....4TH RESPONDENT

THE CABINET SECRETARY, MINISTRY

OF INFORMATION,

COMMUNICATION & TECHNOLOGY ….....…….5TH RESPONDENT

THE SPEAKER, NATIONAL ASSEMBLY ……..….....…6TH RESPONDENT

KENYA LAW REFORM COMMISSION …….....…….....7TH RESPONDENT

AND

CHILD WELFARE SOCIETY ……...…..…….....…1ST INTERESTED PARTY

AJIBIKA SOCIETY ……..…….....…….……2ND INTERESTED PARTY

MUSLIMS FOR HUMAN RIGHTS

INITIATIVE ….....3RD INTERESTED PARTY

HAKI CENTRE ……....……..…….....4TH INTERESTED PARTY

LAW SOCIETY OF KENYA ……....……..…5TH INTERESTED PARTY

INFORM ACTION ……....…..……....6TH INTERESTED PARTY

BUNGE LA WANAINCHI ……....…..……7TH INTERESTED PARTY

INTERNATIONAL POLICY GROUP ….....…..….8TH INTERESTED PARTY

TERROR VICTIMS SUPPORT

INITIATIVE ….....9TH INTERESTED PARTY

AND

CENTRE FOR INTELLECTUAL

PROPERTY & INFORMATION

TECHNOLOGY …….....…PROPOSED *AMICUS CURIAE*

RULING NO. 1

1. The applicant, Centre for Intellectual Property and Information Technology Law (CIPIT) through the Notice of Motion dated 15th March 2019 filed in Petition No. 58 of 2019 seeks to be authorised to participate in these proceedings as an *amicus curiae*.

2. In its *Amicus* Brief, the applicant states that it seeks to be enjoined in the proceedings in order to fulfil its constitutional obligation, pursuant to Articles 22 and 258 of the Constitution, to assist the Court in matters involving complex constitutional and legal questions. It contends that it is an institution with expertise in the fields of data protection and development of information management systems and is in a position to assist the Court in making a decision on the constitutional, technical and legal issues raised in the petitions, bearing in mind that these issues are of great public interest.

3. The applicant states that it wishes to assist the Court with the interpretation and application of constitutional principles set out in Articles 10, 24, 31, 35, 258 and 259 of the Constitution which, in its view, have a bearing on the implementation of the National Integrated Information Management System (NIIMS) which is the subject of the petitions now pending before the Court. Specifically, the applicant avers that it will address the proper constitutional, legal and technical standards applicable to the implementation of NIIMS and will also highlight the standards of data protection and data privacy to be applied and the level of security required in the development of national information systems.

4. We invited responses to the application by the proposed *amicus curiae* only from those parties desirous of opposing the application. These were the Attorney General (the 1st Respondent); the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government (the 2nd Respondent); the Principal Secretary, Ministry of Interior and Co-ordination of National Government (the 3rd Respondent); and the Cabinet Secretary, Ministry of Information, Communication and Technology (the 5th Respondent).

5. In his submissions in support of the application, Counsel for CIPIT, Mr. Kiptinis, urged the Court to allow the application, asserting that the application has met all the requirements, as enunciated by the Supreme Court in **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others, Supreme Court Petition No. 12 of 2013; [2015] eKLR,** for admission of a party as a friend of the court. It was his submission that the applicant operates under the Strathmore Law School, a chartered academic institution operating under Strathmore University. That the applicant undertakes research on matters intellectual property and information technology which are some of the issues raised in the petitions. Further, that CIPIT is staffed by highly qualified research fellows as demonstrated by the briefs attached to the submissions.

6. According to the applicant, it raises very specific and technical issues for the consideration of the Court and those particular issues have not been raised by any party before the Court. It assures this Court that it is not seeking to duplicate issues and arguments that have been raised in the pleadings and submissions of any of the parties. Further, that in any case, this Court, in allowing the participation of an *amicus curiae* has the discretion to limit the areas in which the amicus can make submissions. The decision in the case of **Christopher Ndaru Kagina v Esther Mbandi Kagina & another [2016] eKLR; High Court Succession Cause No. 300 of 2013** is cited in support of this assertion.

7. The applicant also contends that its publication of scholarly briefs not only speaks to the relevancy of its expertise but boosts its application as was held in the cases of **SWK & 5 others v Medecins Sana Frontieres-France & 10 others [2016] eKLR** and **Justice**

Philip K. Tunoi & another v Judicial Service Commission & 2 others (citation not provided).

8. On the question of its neutrality, the applicant submits that its core mandate is research work done purely with a view to adding value to matters of public interest and in answering unanswered questions in the context of the law and the Constitution. The Applicant asserts that it resisted the option of joining this matter as an interested party or giving advice to the petitioners as an expert witness as that would have negated its role as a neutral research centre. It stresses that partiality and bias are an antithesis to any legitimate research centre as the quality of its research and research outcomes can easily be called into question and remain valueless.

9. Turning to the requirement for an application such as the instant one to be filed timeously, the applicant asserts that it submitted its application in a timeous fashion as the petitions are still in the preliminary stages and are yet to reach the substantive hearing stages. For this reason, the applicant contends that there is still time for it to be allowed to participate in these proceedings as a friend of the Court.

10. While stressing its assertion that it will be addressing novel issues, the applicant submits that although there is disagreement between the petitioners and the respondents as to whether or not the amendments impugned in the petitions violate the right to privacy, its perceived role is to guide the Court towards a new constitutional interpretation of privacy, linking it with the concepts of consent by the owner of the data. The applicant cites the decision in **Jack Mukhongo Munialo & 12 others v Attorney General & & 2 others [2017] eKLR** as speaking to the need for a wholesome interpretation of the Constitution. The applicant also points to the case of **Kenya Legal and Ethical Network on HIV & AIDS (KELIN) & 3 others v Cabinet Secretary Ministry of Health & 4 others [2016] eKLR** as emphasizing the need for developing privacy guidelines. The applicant further submits that it only seeks to address how the existing guidelines on privacy have been interpreted in the development of NIIMS.

11. On the importance of public interest and public participation in public affairs, the applicant submits that it intends to argue against the ambiguous nature of public participation and push for the development of new jurisprudence and consequently assist in the development of law in line with the role delineated for amicus in the case of **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others & Information Communication Technology Association (ICTAK) (as *Amicus Curiae*), Supreme Court Presidential Petition No. 1 of 2017; [2017] eKLR.** It is the applicant's case that it intends to guide this Court into developing jurisprudence that interlinks public interest and public participation. To the applicant, this will require further interpretation on the standard of reasonableness as a direct correlation between public participation and public interest.

12. Finally, the applicant submits that if admitted into this matter, it intends to focus on the requisite standards for developing policy relating to the development of information systems. It asserts that its aim is to enhance the principles of transparency, accountability and integrity as required by the Constitution and case law. The applicant cites the decision in **Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR** as a case speaking to those principles, and it urges that its application be allowed.

13. In response to the application, the 1st respondent filed grounds of opposition which can be summarised as follows:

i. The application is based on a deliberate misapprehension and misapplication of the law governing the joinder of a party as an *amicus curiae*;

ii. The application does not meet the set criteria and principles for the joinder of a party as *amicus curiae*;

iii. The applicant has not demonstrated any expertise that it has on the legal issues in question as its arguments are primarily based on general practice and research of the law;

iv. The issues and/or points of law that the proposed *amicus curiae* intends to canvass in its brief have already been well addressed by the parties herein;

v. The applicant has not demonstrated that it will be neutral and impartial in the proceedings and that the brief filed by the Applicant shows that it has aligned itself with the position taken by one of the parties;

vi. The issues raised in the petitions can be well and competently determined by this Court without the assistance of the applicant; and

vii. The application lacks merit and is thus an abuse of the due process of this Court.

14. In submissions made on behalf of the 1st respondent, Learned Counsel, Mr. Bitta, pointed out that the law governing the admission of an *amicus curiae* was clearly enunciated by the Supreme Court in the already cited case of **Mumo Matemo. Reference was also made to the case of Francis Karioko Muruatetu & another v Republic & 5 others [2016] eKLR (Ruling Dated 28th January, 2016) wherein the Supreme Court adopted and fortified the principles in Mumo Matemo.**

15. **In support of its position that the application is defective, the 1st respondent observed that the applicant had, in seeking joinder as *amicus curiae*, invoked the provisions of Articles 22 and 258 of the Constitution and Order 51 of the Civil Procedure Rules, 2010. The 1st respondent pointed out that** Article 22 of the Constitution deals with the issue of *locus standi* as to who may institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, whereas Article 258 of the Constitution, while also speaking to *locus standi*, refers to a person who may institute court proceedings claiming that the Constitution has been contravened, or is threatened with contravention.

16. The 1st respondent asserts that on the other hand Order 51 of the Civil Procedure Rules, 2010 provides guidelines on how a party may

approach the Court with respect to general applications. It is the 1st respondent's position that since none of the cited legal provisions govern the joinder of a party as an *amicus curiae,* it follows that the applicant herein intended to institute court proceedings claiming either a denial of a right or fundamental freedom or a violation of the Constitution by the respondents herein. The 1st respondent therefore concludes that the effect is that the applicant has misapprehended and misapplied the law on the joinder of a party as *amicus curiae*.

17. According to the 1st respondent, the points of law the proposed *amicus curiae* intends to canvass have already been well and comprehensively addressed by the parties herein, and there are no novel aspects of the legal issues in question that the applicant has identified that would aid the development of the law. It is submitted that the applicant's sentiments that it intends to provide additional information once enjoined is itself an admission that its brief is inadequate and incoherent.

18. The 1st respondent further submits that the applicant has not demonstrated the nature of expertise that it has with respect to the legal issues raised in the consolidated petitions.

19. Finally, the 1st respondent faults the applicant's affidavit in support of the application on the basis, first, that it does not disclose the academic background and professional qualifications of the deponent for the court to appreciate his level and field of expertise, other than mere averments of being a research fellow; that it does not disclose any paper that has been written and published by the deponent on the legal issues raised in the petitions before this court; that it does not disclose the nature of the information management systems that the applicant or any of its employees or associates have developed and how relevant they may be to the instant case; and finally, that the applicant has not annexed its certificate of registration to enable the court appreciate the real purpose for which it is registered.

20. The 1st respondent poked holes into the applicant's neutrality and impartiality for its failure to disclose the side its submissions is intended to support. The Court was therefore urged to dismiss the application for being an abuse of the court process.

21. The 2nd and 3rd respondents filed a replying affidavit sworn by Philip Lemarasia, the Project Co-ordinator of NIIMS, in response to the application. Through the said affidavit the application is opposed and at paragraph 4 it is averred that:

> ***"a) The identity and nature of the Proposed Amicus Curiae has not been disclosed with certainty.***
>
> ***b) The Proposed Amicus Curiae has not furnished the Court with a Certificate of Registration or any other relevant evidence to enable the Court to appreciate which party is before it.***
>
> ***c) The Proposed Amicus Curiae has not provided a constitutive document or any other relevant document as would disclose the nature of the organization and the purpose for which it was established.***
>
> ***d) Other than bare allegations that the Proposed Amicus Curiae possesses expertise in the area of Intellectual Property law and technology law, no evidence whatsoever has been tendered in that regard."***

22. It is also averred that the intended *amicus* did not make its application for joinder timeously whereas the opportunity to do so had repeatedly been availed by the Court. Further, that joinder of the applicant will not add any value to the proceedings herein but will instead duplicate other litigants' submissions and unnecessarily obfuscate issues. In conclusion, it is deposed that failure to enjoin the applicant to these proceedings will therefore not prejudice any person.

23. The 5th respondent filed a replying affidavit sworn by its Advocate, Mr. Ken Nyaundi, in opposition to the application by the intended *amicus curiae.* According to the 5th respondent, the applicant in its *Amicus Curiae* Brief has not demonstrated its neutrality in these proceedings as it displays bias against the respondents in its allegations of the possibility of the NIIMS negatively impacting data protection in the country. Further, that bias against the 5th respondent is manifest as the brief casts doubt on the existence of proper legislative measures and guidelines to ensure data protection and protection of the right to privacy.

24. It is further deposed on behalf of the 5th respondent that an intended *amicus* must demonstrate to the Court through its *amicus* brief that it has addressed points of law not already addressed by the parties to the suit so as to introduce only novel aspects of the legal issue in question that aid the development of the law. It is averred that the issues advanced in the *amicus* brief have been extensively covered by the parties to the petitions and no new points of law or legal expertise on the proposed issues has been advanced by the applicant. It is further averred that each of the respondents herein has relied on affidavits deposed by experts and filed submissions and there is nothing more the applicant can bring on board.

25. The 5th respondent further avers that the intended *amicus* ought to demonstrate that its submissions will give such assistance to the Court as would otherwise not have been available, which threshold the applicant has not met. It is therefore the 5th respondent's view that the enjoinment of the applicant as *amicus curiae* would be a mere repetition of the arguments already advanced by the respondents and petitioners.

26. The 5th respondent urged the court to consider its limited resources, including time, in determining the admission of the *amicus curiae* in the proceedings herein and as such the purported extension of the issues for determination by the applicant ought to be avoided as the matter before the Court must be expedited and finalized. The 5th respondent urged the Court to dismiss the application for failure to meet the threshold for admission as *amicus curiae*.

27. The advocates for the 2nd, 3rd and 5th respondents made extensive oral submissions in support of their pleadings. Their submissions mirror those of the 1st respondent which we have already set out above, and we do not find it necessary to restate them.

28. We have considered the application before us and the submissions made in support and opposition thereto. The sole issue for determination is whether to admit the applicant as an *amicus curiae* in the consolidated petitions.

29. In constitutional petitions, the law guiding the Court on matters relating to *amicus curiae* is found in **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, also known as the **'Mutunga Rules'**. At Rule 2 a *"friend of the court"* is defined 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."***

30. The applicable provisions with respect to the procedure for admission of an *amicus curiae* are found in Rule 6 of the said 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."***

31. In its decision in the **Mumo Matemo** case, the Supreme Court gave extensive guidelines and directions on how an application for joinder as an *amicus curiae* should be made and how it should be handled by the court. The Supreme Court stated that:

> ***"[41] From our perceptions in the instant matter, we would set out certain guidelines in relation to the role of amicus curiae:***
>
> ***i. An amicus brief should be limited to legal arguments.***
>
> ***ii. The relationship between amicus curiae, the principal parties and the principal arguments in an appeal, and the direction of amicus intervention, ought to be governed by the principle of neutrality, and fidelity to the law.***
>
> ***iii. An amicus brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tends to compromise their essence as well as the terms of the Constitution's call for resolution of disputes without undue delay. The Court may therefore, and on a case- by- case basis, reject amicus briefs that do not comply with this principle.***
>
> ***iv. An amicus brief should address point(s) of law not already addressed by the parties to the suit or by other amici, so as to introduce only novel aspects of the legal issue in question that aid the development of the law.***
>
> ***v. The Court may call upon the Attorney- General to appear as amicus curiae in a case involving issues of great public interest. In such instances, admission of the Attorney- General is not defeated solely by the subsistence of a State interest, in a matter of public interest.***
>
> ***vi. Where, in adversarial proceedings, parties allege that a proposed amicus curiae is biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appears to be partisan on an issue before the Court, the Court will consider such an objection by allowing the respective parties to be heard on the issue (see: Raila Odinga & Others v. IEBC & Others; S.C. Petition No. 5 of 2013-Katiba Institute's application to appear as amicus).***
>
> ***vii. An amicus curiae is not entitled to costs in litigation. In instances where the Court requests the appearance of any person or expert as amicus, the legal expenses may be borne by the Judiciary.***
>
> ***viii. The Court will regulate the extent of amicus participation in proceedings, to forestall the degeneration of amicus role to partisan role.***
>
> ***ix. In appropriate cases and at its discretion, the Court may assign questions for amicus research and presentation.***
>
> ***x. An amicus curiae shall not participate in interlocutory applications, unless called upon by the Court to address specific issues.***
>
> ***[42] In addition, we would adopt, with respect, certain guidelines which emerge from Mr. Justice Odunga's decision in the Justice Tunoi case (op.cit.):***
>
> ***xi. The applicant ought to raise any perception of bias or partisanship, by documents filed, or by his submissions.***

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

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

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

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

[43] In addition to these guiding principles, the following directions may be applied by a Court considering an amicus application:

i. A party seeking to appear in any proceedings as amicus curiae should prepare an amicus brief, detailing the points of law set to be canvassed during oral presentation. This brief should accompany the motion seeking leave to be enjoined in the proceedings as amicus.

ii. The Court may exercise its inherent power to call upon a person to appear in any proceedings as amicus curiae.

iii. In proceedings before the Supreme Court, the Bench as constituted by the President of the Court, may exercise its discretion to admit or decline an application from a party seeking to appear in any proceedings as amicus curiae, and denial or acceptance such of an application should have finality.

iv. The Court reserves the right to summarily examine amicus motions, accompanied by amicus briefs, on paper without any oral hearing.

v. The Court may also consider suggestions from parties to any proceedings, to have a particular person, State Organ or Organisation admitted in any proceedings as amicus curiae."

32. We need not look farther for the law applicable to the instant application. The respondents assailed the applicant for not bringing this application timeously. It is indeed correct that the applicant approached this Court outside the period that had been given for making applications for joinder. Nevertheless, we are of the view that it is not in the interest of the parties and this Court to turn away an expert who has stepped forward to assist the Court with technical and jurisprudential input solely on the basis that it did not make its application within a particular timeline. The applicant found this Court still addressing the preliminary issues and it cannot be said that its slight delay has been prejudicial to any of the parties to the petitions. We will therefore treat this application as having been timeously filed and prosecuted.

33. It has been argued, secondly, that the constitutional provisions cited by the applicant can only confirm its intention to join these proceedings as a party but not as a friend of the Court.

34. However, we note that the applicant explained itself through its pleadings and submissions. Its position is that it is neutral and it only wants to make some input into some of the issues before the Court. We cannot go outside their explanation to find that it is an interested party and not an expert desiring to share its expertise with the Court. The application speaks for itself notwithstanding the constitutional provisions cited in support thereof. In our view, this is the kind of application that should not arouse much ruckus, especially if the party making the application has a reputation for neutrality and is indeed an expert.

35. It has been said by those opposed to the application that the applicant intends to come and support the petitioners' case. This is a serious allegation which, if proved, would automatically disqualify the applicant from being admitted to these proceedings. Neutrality and expertise are the core characters that an *amicus curiae* must possess before even entertaining the thought of applying to join proceedings as a friend of the Court.

36. We have perused the brief filed together with the application for joinder by the applicant. Our understanding of the brief is that the applicant is making a pointer to the areas it intends to address and the direction it proposes to urge the Court to take. It is a roadmap of the jurisprudence it wants to propagate. In our view, any commonality between its opinion and that of the petitioners should not be treated as evidence of bias. In the circumstances we find no reason to disavow the applicant's claim of neutrality. There is also no evidence placed before this Court to support the alleged partiality of the applicant.

37. The final argument against the joinder of the applicant as *amicus curiae* and what remains for us to decide is whether the applicant has demonstrated to our satisfaction the expertise it claims to have.

38. Related to this issue is the submission by the respondents that the principal parties have, through their pleadings and submissions, comprehensively addressed all the issues and that the applicant, if admitted, will not add any value to these proceedings. We must state at the outset that we are not persuaded by the respondents' view in this regard. All the parties agree that one of the issues to be addressed in these proceedings is the security of the data to be collected from the citizenry. In our view, there would be no harm, and indeed it would be beneficial to the Court, if an expert on collection, storage, sharing and dispersal of digital data came on board to shed light on this area. Such

expertise would be useful both to the Court and the parties.

39. The respondents submit, however, and rightly so in our view, that the applicant has not placed sufficient information on record about itself and its expertise. In response to this argument, the applicant attempted to remedy this omission by attaching some write-ups to its submissions about some of its experts. The respondents once again correctly pointed out that the said information had not been formally placed on record.

40. If this was an ordinary application by a party seeking participation in the proceedings in any other capacity, we might not have, even fleetingly, looked at the said papers. However, this is a unique application in that we can overlook the formal application and *suo moto* invite the applicant to be a friend of the Court.

41. Based on the submissions by the applicant, we have debated as to whether we should not exercise our discretion donated by Rule 6(c) of the **Mutunga Rules** and invite the applicant to these proceedings as *amicus curiae*. This debate was informed by the disclosure by Counsel for the applicant at the time of highlighting submissions that the applicant is affiliated to the Law School of Strathmore University. The scholarly work done by Strathmore University cannot be overlooked. Nevertheless, in the end, we ruled out the possibility of inviting the applicant to join these proceedings for the simple reason that the applicant completely failed to exhibit any expertise in the issues before us.

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

43. For these reasons, we decline the applicant's request to join the proceedings as an *amicus curiae*. Its application dated 15th March 2019 is therefore dismissed.

44. With respect to the question of costs, and having carefully interrogated the application, we find no reason to attribute any mischief to the applicant's attempt to join these proceedings. We discern an honest and genuine intention to propagate certain ideas and in the process help the Court to develop jurisprudence. In the circumstances we make no orders as to costs, meaning that the parties who participated in this application will bear their own costs with regard to the application.

Dated Signed and Delivered at Nairobi this 1ST day of April 2019

P.NYAMWEYA MUMBI NGUGIJ W. KORIR

JUDGE JUDGE JUDGE