



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 244 OF 2014

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND OR FUNDAMENTAL
FREEDOMS UNDER THE CONSTITUTION OF KENYA INCLUDING ARTICLE 20, 21 (1), 22,
10, 27 (1), 27(2) 28, 40, 47, 57**

BETWEEN

JUSTICE PHILIP K. TUNOI.....1ST PETITIONER

JUSTICE DAVID A. ONYANCHA.....2ND PETITIONER

-VERSUS-

JUDICIAL SERVICE COMMISSION.....1ST RESPONDENT

THE JUDICIARY.....2ND RESPONDENT

AND

COMMISSION OF ADMINISTRATIVE

JUSTICE.....INTENDED AMICUS CURIAE/APPLICANT

RULING

Introduction

1. The Petitioners in this petition are judges of the Superior Courts of Kenya. The first Petitioner is a Judge of the Supreme Court of Kenya while the 2nd Petitioner is a Judge of the High Court of Kenya.
2. These proceedings were triggered by letters dated 28th April, 2014 addressed to the Petitioners by the Chief Registrar of the Judiciary in which it was stated that the 1st Respondent had resolved that

all Judges retire at the age of seventy years.

3. This ruling however is in respect of a Notice of Motion dated 3rd July, 2014 brought by the **Commission of Administrative Justice** (hereinafter referred to as the CAJ), also known as the Office of the Ombudsman, in which the CAJ seeks the following orders:

1. **That this application be certified as urgent and heard *Ex parte* in the first instance.**
2. **That this Honourable Court be pleased to grant the Applicant leave to be joined in the Petition as *Amicus Curiae* or friend of the Court.**
3. **That upon the granting of prayer No. 2 above the Honourable 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.**
4. **That the costs of and incidental to this application be provided for.**

CAJ's Case

4. The application was supported by an affidavit sworn by **Otiende Amollo**, the Chairperson of the CAJ on 3rd July, 2014.
5. According to the deponent, the CAJ is a Constitutional Commission established under Article 59(4) of the Constitution of Kenya and Section 3 of the **Commission of Administrative Justice Act** of 2011, (hereinafter referred to as the Act) charged, *inter alia*, with the mandate of protecting the sovereignty of the people, securing the observance of the democratic values and principles by all state organs and promoting *constitutionalism* in Kenya and as bears a constitutional responsibility to ensure compliance with the Constitution including assisting this honourable court to arrive at fair, comprehensive and expeditious decisions.
6. It was contended that in its capacity as the Ombudsman, the CAJ is charged with ensuring proper public administration and that the National, County governments and state organs promote the rule of law while adhering to the fundamental principles of good governance and Constitutionalism. Further, the CAJ is also concerned that should any disputes or disagreements arise between the two levels of government or among state organs, the same should be resolved amicably through alternative dispute resolution mechanisms in the spirit of Articles 189 and 242(1) (b) of the Constitution, and Section 8(f) and (h) of the Act.
7. In the deponent's view, the issues for consideration in the Petition herein are matters that are essentially of administrative justice arising from the alleged premature retirement of judicial officers which matters the Commission deals with in its ordinary course of business hence the CAJ would be most obliged to participate in and assist in the amicable resolution of the existing dispute of alleged administrative injustice and discrimination through alternative dispute resolution mechanisms.
8. The deponent deposed that he had previously served as a member of the Committee of Experts which spearheaded the drafting of the Constitution of Kenya 2010 and therefore had considerable experience in both constitutional and administrative law and possess firsthand knowledge of the mind of the drafters of the Constitution which may assist towards resolution of the existing dispute hence the presence of the CAJ in the proceedings will therefore serve the purpose of prompting administration of justice and development of the law since the CAJ intends to render its expertise in an important and non-partisan manner.
9. In his submissions in support of the application, **Mr Chahale**, learned counsel for the CAJ while reiterating the foregoing submitted that since the decision by the Respondents is challenged on the ground of impropriety and unlawfulness, the CAJ's participation herein would be beneficial to the Court as the issue for determination would be whether the Respondent's decision accords with democratic values and principles in discharge of its constitutional obligations.
10. It was further submitted that the parties herein are of a unique nature since the petitioners are senior members of the bench while the 1st Respondent is the Judicial Service Commission and the 2nd Respondent is the judiciary. The Chief Justice, on the other hand is the Chair of the 1st

Respondent and the head of the 2nd Respondent by dint of his position as the head of the Supreme Court, the senior most court while the other two Superior Courts are represented in the 1st Respondent. In his view, the uniqueness may cause questions of incompatibility to so easily arise hence it would be helpful to the proceedings and the Court if an independent party with no direct interest is allowed to join the proceedings as a friend of the court and the CAJ would be that perfect party since the CAJ has statutory jurisdiction to deal with complaints arising out of administrative actions.

11. It was therefore submitted that the CAJ would provide assistance and expertise to the Court if allowed to join in these proceedings. According to learned counsel the CAJ has participated in several matters involving administration of justice, equality of treatment and fair administrative action in which the CAJ has presented its opinion in a neutral and balanced manner and it does not intend to deviate therefrom hence the application ought to be allowed.

The Petitioners' Case

12. The application was opposed by way of a replying affidavit sworn by the 1st Petitioner herein on 2nd October, 2014.
13. According to him, the adversarial proceedings filed herein raise constitutional issues which the Petitioners and the Respondents shall adequately argue during the hearing of the Petition.
14. To him, the rival positions taken by the parties are quite clear and do not require any additional input from the CAJ whose functions are set out in Section 8 of the Act hence the CAJ cannot claim to have legal expertise regarding the issues raised in the Petition.
15. He deposed that it is worrisome that the Chairman of the CAJ claims to know the “mind of the drafters of the Constitution” a claim which is not capable of verification and the contention is intended to alter the level field that the parties now have.
16. In his view, the Chairman shall advance his partisan position regarding the pending issues on the pretext that the view are what was in the mind of the drafters of the Constitution hence the Petitioners shall be placed at a great disadvantage which will be to the benefit of the Respondents.
17. On behalf of the 1st Petitioner, **Mr Ngatia**, SC submitted that the matter before the Court is an adversarial matter with clear pleadings by the parties unlike some of the opinions sought at the Supreme Court in which the CAJ participated. The test in adversarial proceedings, it was submitted is different. In this case, defences had been filed before the intervention by the CAJ whose intervention takes a very strange angle since in paragraph 9 of the supporting affidavit the deponent claimed that he knew the minds of the drafters of the Constitution. Consequently, it was submitted that if allowed to participate it would be at a platform of articulating the minds of the drafters of the Constitution and that would be the end of the matter. It was submitted that that position would put the petitioners at a disadvantage as it would tilt the level playing ground.
18. It was further submitted that before this Court is a similar petition filed by **Hon. Lady Justice Khaminwa** and **Hon. Mr Justice Njagi** yet the CAJ has not made a similar application in the said matters.
19. It was submitted that for one to be an *amicus* the first test is the ability to have expert knowledge of the issues in controversy and ordinarily a party ought to file an *amicus* brief to demonstrate the expertise to be presented to the Court by showing for example the studies undertaken yet that has not been presented before this Court. What is before the Court is that the CAJ occasionally investigates allegations of malpractices and occasionally metes alternative dispute resolution mechanisms in those complaints. In learned Senior Counsel’s view, none of the said activities equates even remotely to being scholarly briefs expected of *amicus curiae* hence there is no foundation for the application. What was expected of the CAJ, it was submitted was to show its understanding of the law in other jurisdictions which have dealt with the same issue of retirement of Judges without which there is want of expertise in that branch of the law rather than reliance on the minds of drafters which cannot be independently verified.
20. In support of his submissions **Mr Ngatia** relied on **Raila Odinga and Others vs. Independent Electoral and Boundaries Commission and 3 Others, Petition No. 5 of 2013, Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 Others, Petition No. 12 of 2013 and Judicial Service Commission vs. The Speaker of the National Assembly & Another Petition No. 518 of 2013.**

21. It was further submitted that an *amicus* does not descend to the facts which are left to the litigants. However here the CAJ claims to know the mind of the drafters of the Constitution hence puts him in a position adverse to one of the parties.
22. It was submitted that the emotive terms employed with respect to the petitioners' positions are irrelevant since the petitioners are entitled to approach this Court to adjudicate in accordance with the law.
23. On his part, **Mr Nowrojee, SC** who appeared with **Mr Ngatia**, added that the CAJ has not given any specific reason to intervene or identified a specified expertise not available to the Court which will justify intervention. It is not enough to make general observations on their powers. According to **Mr Nowrojee**, this is a matter which requires a decision on the Constitution and the Court is adequately able to discharge and which it has discharged in the past hence there is no compelling reason shown. According to him the best exemplification of lack of a compelling reason is the conduct of the CAJ by not explaining why it chose to intervene in this matter as opposed to similar petitions which are in the public domain with similar issues.
24. It was submitted that the allegation of the CAJ's role is not the criterion for joinder as an *amicus*. Having not given any advisory opinion to the **Hon. Chief Justice** which would have assisted the 1st Respondent, it was submitted that they ought not to claim that they have a role of giving advisory opinion for better administration of justice.
25. It was therefore submitted that since there is an ambiguity in the application, the same ought to be disallowed with costs.

Respondents' Case

26. On his part **Mr Issa**, learned counsel for the Respondents was of the view that the uniqueness of the parties is not new to the 1st Respondent which is an independent commission not influenced by the fact that some of the parties are judges or magistrates. Therefore the issue of incompatibility does not arise as the fact that the parties are Judges will not influence the position of the 1st Respondent which has been involved in proceedings some of which it has lost an indication that the Judges have been impartial and fair determination given hence the concerns do not arise.
27. The Petitioners therefore objected to the admission of the CAJ in these proceedings as *Amicus Curiae*.

CAJ's Rejoinder

28. In a rejoinder, **Mr Chahale** reiterated that if the CAJ is joined to these proceedings its opinion will only be that of an opinion which will not be binding and the Court will still render its decision. Secondly, the CAJ chose only to join one of the matters before the Court because its opinion would not be any different even if it joined all the matters. Thirdly, the CAJ cited its jurisdiction and its expertise in dealing with administrative justice rather than a display of powers. Fourthly, with respect to incompatibility, he clarified that it did not mean that the Court cannot arrive at a just determination but he meant that the uniqueness makes the case for joinder of an independent party since the CAJ is an independent body created by the Constitution and an Act of Parliament hence obligated to operate within the Constitution and the Act.
29. **Mr Chahale** was of the view that in our jurisdiction the procedure is first to seek leave before an *amicus* brief while with respect to the advisory opinion, he was of the view that the same could not have been given during the pendency of these proceedings.

Determinations

30. It is unfortunate that in this country, unlike in other jurisdictions with an advanced Constitution as ours, we do not have in place comprehensive rules which govern the admission of persons as *amici* in legal proceedings. May be it is 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.
31. 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*.
32. I have considered the application, the affidavits in support of and in opposition to the application as well as the submissions made and authorities relied upon.
33. In **Raila Odinga and Others vs. Independent Electoral and Boundaries Commission and 3 Others** (supra), 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.”

34. 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.”

35. As this Court held in **Judicial Service Commission vs. The Speaker of the National Assembly & Another** (supra):

“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.”

36. 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.”

37. 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*.”

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

1. **The application must be made timeously.**
2. **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.**
3. **The applicant ought to be neutral in the dispute where the dispute is adversarial in nature.**
4. **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.**
5. **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.**
6. **Whereas consent of the parties is a factor to be taken into consideration, it is not the determinant factor.**

39. In this case the CAJ contends that it is a Constitutional Commission established under Article 59(4) of the Constitution of Kenya and Section 3 of the Act charged, *inter alia*, with the mandate of protecting the sovereignty of the people, securing the observance of the democratic values and principles by all state organs and promoting constitutionalism in Kenya and as bears a constitutional responsibility to ensure compliance with the Constitution including assisting this

- honourable court to arrive at fair, comprehensive and expeditious decision. In my view this allegation does not evince any specific expertise by the CAJ in the matter in dispute in this petition. Rather it generally provides the Constitutional and Legislative mandate of the CAJ as opposed to specific expertise on the subject of this litigation. If that was the criteria to be applied then the CAJ would automatically be joined as *amicus* in all petitions where allegations of administrative fairness is made.
40. The deponent to the supporting affidavit has also deposed that having been a member of the Committee of experts, he is in a position to submit on the intention of the drafters of the Constitution. First and foremost, it ought to be remembered that the CAJ as an entity was not a member of the Committee of Experts. Rather it is its chair who was a member. Therefore to admit the CAJ to these proceedings would mean that in the event that for any reason its Chairperson is unable to give his input in the petition, the role of the CAJ in these proceedings would no longer be useful. Even if the Court was of the view that it required the assistance of the members of the Committee of Experts, it would have sought the same from them either collectively as the Committee of Experts or from individual Committee members. In other words I am not satisfied that the CAJ as an entity has any expertise to offer in these proceedings which the Court cannot enjoy from the submissions from the parties herein.
 41. The other issue is the submissions which are intended to be made by the CAJ. From the supporting affidavit, it would seem that the CAJ intends to urge the Court to consider the intention of the drafters of the Constitution. The perceived intention of the drafters clearly is a matter which would involve consideration of what took place in the Committee and may well be subjective. Accordingly, as was held in **Raila Odinga and Others vs. Independent Electoral and Boundaries Commission and 3 Others** Case (supra), the CAJ's position is likely to be biased or hostile to one or more of the parties herein. The question is not whether its position will affect the decision of the Court but whether the perception of bias and partisanship with regard to the parties exist and that cannot be ruled out.
 42. Apart from that the CAJ intends to bring to the attention of the Court the intention of the drafters of the Constitution. Whether or not such intention can be shown without adducing evidence of deliberations which took place before the Committee is another matter. If such deliberations are necessary then it would mean that the submissions of the CAJ will no longer be based on the data before the Court but on fresh data adduced by itself and that as the authorities show is unacceptable.
 43. With respect to the consideration of the intention of the drafters of legislation in interpretation of legislation, modern scholars are not agreeable on the weight to be attached to that principle since in most cases, it is not very easy to determine with precision what the drafters actually meant by enactment of certain legislation. The more appealable option is the "mischief rule". The Mischief Rule is a rule of interpretation of statutes, or put differently, an aid to interpretation. It lays down the proposition that before arriving at any particular interpretation of the statute, the Court will consider and be aided by establishing what the law was before the statute was enacted or amended, the injustice or mischief which existed before the enactment of the statute, and would the interpretation of the statute in the matter before Court perpetuate that injustice or mischief which existed before the enactment of the law? These propositions, though they have an archaic savour are still constantly recognised by the Courts as rules of practical importance, and these considerations will often be decisive in interpreting the effect of a statute. See **C K Allen, *Law in the Making*** 7th Edition Page 495; **In Re Mayfair Properties & Co [1898] 2 Ch. 28, 35; Hickman vs. Pracey [1945] AC 305, 315.**
 44. This is not to sound a death knell to the consideration of the legislative intent which is still relevant but just to say that legislative intent is in certain cases a very amorphous consideration.
 45. Whereas it is true that an *amicus* brief is not necessarily a requirement in an application for joinder as an *amicus*, it is my view that it is important that the intended *amicus* show briefly the nature of the case he intends to submit on and the scope of the participation to enable the Court determine whether such person is really an *amicus* and whether his participation in the relevant proceedings is necessary.
 46. Having considered the case as presented by the CAJ in these proceedings as well as the other parties' respective positions and the principles guiding the joinder of a person in legal proceedings as an *amicus*, I am not satisfied that the test for the joinder of the CAJ herein as *amicus* has been

met.

Order

47. Consequently, the Notice of Motion dated 3rd July, 2014 fails and is dismissed but taking into account the nature of these proceedings and the role the CAJ intended to play herein, there will be no order as to costs.

Dated at Nairobi this 3rd day of November, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nowrojee, SC and Mr Ngatia, SC for the Petitioners

Miss Mugo for Mr Issa for the Respondents

Miss Cherogony for Mr Otiende Amollo for the Ombudsman

Cc Patricia