Legal Advice Centre t/a Kituo Cha Sheria & another v Cabinet Secretary Ministry of Interior and National Administration & 2 others; Kenya National Commission on Human Rights (Interested Party); Katiba Institute (Intended Interested Party); Global Strategic Litigation Council for Refugee Rights (Proposed Amicus Curiae) (Petition E046 of 2022) [2025] KEHC 13604 (KLR) (Constitutional and Human Rights) (2 October 2025) (Ruling)

Neutral citation: [2025] KEHC 13604 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E046 OF 2022

LN MUGAMBI, J

OCTOBER 2, 2025

BETWEEN

LEGAL ADVICE CENTRE T/A KITUO CHA SHERIA ..... 1ST PETITIONER

AMARTI SIMA ITICHA ..... 2ND PETITIONER

AND

CABINET SECRETARY MINISTRY OF INTERIOR AND NATIONAL ADMINISTRATION ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

DIRECTORATE OF IMMIGRATION SERVICES ..... 3RD RESPONDENT

AND

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS .... INTERESTED PARTY

AND

KATIBA INSTITUTE ..... INTENDED INTERESTED PARTY

AND

GLOBAL STRATEGIC LITIGATION COUNCIL FOR REFUGEE RIGHTS ..... PROPOSED AMICUS CURIAE

RULING

Introduction

1. The Petitioner, a human rights non-governmental organization, filed the Petition dated 10th February 2023 assailing the alleged failure by the Government to accord convention refugees the right to seek and be considered for citizenship and/or permanent residence status. The Petitioner contends that this violates the Constitutional principles and international laws that are binding on Kenya.

2. Upon the filing of this suit, the Intended Interested Party and the Proposed Amicus Curiae, filed Applications seeking to join the Suit.

3. On the other hand, the Petitioner filed an application for empanelment of a bench to hear the matter.

4. These are the Applications that are now the focus of this Ruling.

The 1st Application

5. The Intended Interested Party in its Notice of Motion Application dated 7th March 2023 seek orders that:

    i. Spent.

    ii. Leave be granted to the Intended Interested Party to be admitted in this Petition as Interested Party.

    iii. The intended Interested Party be granted an opportunity to submit Affidavits, written and oral arguments or any other information that may be relevant in this Petition.

    iv. There be no costs concerning this Application.

6. The Application is supported by the Intended Interested Party's affidavit, sworn on even date by Christine Nkonge and the grounds on the face of the Application.

7. She avers that the Intended Interested Party has litigated various constitutional questions before the High Court, Court of Appeal, and the Supreme Court. Further that its mandate and objectives are directly implicated in the questions raised before the Court in this Petition.

8. Particularly, she depones that the Intended Interested Party has participated in numerous cases that address the rights of refugees in Kenya such as Attorney-General v Kituo Cha Sheria & 7 Others, CA 108 of 2014 [2017] eKLR and Coalition for Reform and Democracy (CORD) & 2 Others v Republic & 10 Others, HC Pet. 628,630 of 2014 & 12 of 2015 (Consolidated) [2015] eKLR.

9. Moreover, it has been involved in cases regarding the application of international law under *the Constitution* such as Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others, SC Pet. 3 of 2018, [2021]eKLR, EG & 7 Others v Attorney-General, HC Pet. 150 & 234 of 2016 (consolidated), [2019] eKLR, Katiba Institute v Attorney-General & 3 Others, HC Const. Pet 7 of 2018 [2019] eKLR and Kamau v Attorney-General & 2 Others HC Const. Pet 244 of 2019 [2021] eKLR.

10. She asserts thus that the Intended Interested Party should be allowed to join the suit because of the identifiable stake, legal interest and duty it has concerning the dispute. Additionally, she states that no party will be prejudiced if its application is allowed.

Respondents' Case

11. The Respondents filed Grounds of Opposition dated 27th March 2023 on the basis that:

    i. The Application is merely an attempt to have the Petitioner's case heard twice, which not only creates an unequal opportunity against the Respondents, but also is a waste of precious judicial time, considering this is an election matter and the strict constitutional and statutory timelines that attach to the same.

    ii. The Applicants have not demonstrated that their purported interests will not be properly and accurately articulated unless the application is allowed.

    iii. As correctly pointed out by the Petitioners at paragraph 24 of the Petition, the instant Petition is a public interest case and not a claim for reliefs in personam.

    iv. The judgment to be rendered by this Court will be a judgement in rem thus the Applicants participation is of no significant effect.

    v. The Applicant does not demonstrate any exceptional conditions that would render their non-joinder prejudicial to their interests.

    vi. The Applicant herein merely indicates its litigation history, but does not outline the specific information it uniquely has, which is not availed by the Petitioner herein. It is key to note that both the Petitioner and Proposed Interested Party, are organizations which undertake Public Interest Litigation, and therefore there is no difference in the roles they play in this Petition.

    vii. The Applicants have not demonstrated a clearly identifiable interest proximate enough to be distinguished from anything that it merely peripheral to the matters in issue.

    viii. The Applicants have not demonstrated that their submissions will be useful to the Court and different from those of the Petitioners so that their non-joinder will result in the incomplete settlement of all the issues raised in the proceedings.

    ix. The Applicants' participation would only serve to delay the expeditious hearing of this petition and escalate litigation costs to the prejudice of the respondents.

Other Parties Case

12. The other Parties' responses to this Application are not in the Court file or Court Online Platform (CTS).

Intended Interested Party's Submissions

13. On 10th July 2023, this Party through its Counsel Eileen Imbosa filed submissions in this matter and highlighted the issue for discussion as:whether the Intended Interested Party has met the requirements to be admitted as an Interested Party.

14. Counsel relying in Rule 2 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and guidance in Francis Karioko Muruatetu & Another v Republic & 5 Others [2016] eKLR submitted that to be enjoined, three elements must be established: an identifiable stake or interest that must be clearly identifiable and must be proximate enough to stand apart from anything that is merely peripheral, the prejudice to be suffered by the Intended Interested party in case of non-joinder and the intended interested party must set out the case and or submissions

it intends to make before the court and demonstrate the relevance of those submissions, and that those submissions are not a replica of what the other parties will be submitting to the Court.

15. Counsel submitted that the Intended Interested Party satisfies all these elements as can be gleaned from the Party's Supporting Affidavit. Counsel stressed that considering the demonstrated interest in the case, the Intended Interested Party will be prejudiced if it is not allowed to uphold its mandate in defence of *the Constitution*.

16. Counsel noted that it was immaterial whether the Petitioner and the Intended Interested Party are both public interest litigation organizations as both have varied mandates and areas of expertise.

17. Counsel further submitted that this Party intends to submit that Sections 13(1)(b) and 37 of the (KCIA) are inconsistent with Article 15(2) of *the Constitution*, particularly concerning the additional burdens these sections impose on refugees. On this basis, Counsel urged that the Application should be allowed.

Respondents' Submissions

18. The Respondents through Principal State Counsel, Deborah Were filed submissions dated 5th May 2025.

19. Counsel equally relying on Rule 2 of *The Constitution* of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules, 2013 and the opine in Francis Karioki Muruatetu (supra) submitted that the Party had not demonstrated that its interest will not be properly articulated if their Application is not allowed. As such Counsel argued that the Party had not established a personal interest or stake that was proximate enough to occasion any prejudice to it.

20. Like dependence was placed in Attorney General v David Ndii & 73 others [2021] KESC 17 (KLR).

21. On the intended contribution, Counsel submitted that their intended contribution is the exact same position taken by the Petitioners which is contrary to the element that an interested Party's contribution should not merely be a replica of what the other parties will make in Court. To that end, Counsel argued that the Application does not meet the threshold to be joined as an interested party.

The 2nd Application

22. The Proposed Amicus Curiae in its Notice of Motion application dated 16th March 2023 seek orders that:

    i. Spent.

    ii. The Global Strategic Litigation Council For Refugee Rights, be joined to this proceeding as an Amicus Curiae.

    iii. Leave be granted to Global Strategic Litigation Council For Refugee Rights, to file its Amicus Brief, upon receiving the various pleadings as filed in the instant Petition.

    iv. Any other remedy that the court deems fit and just.

23. The Application is supported by the Proposed Amicus Curiae's affidavit, sworn on the same date by Prof. Ian Matthew Kysel and the grounds on the face of the Application.

24. He makes known that this party is an institution jointly formed by the Migration and Human Rights Program at Cornell University and Zolberg Institute.

25. He states that the Proposed Amicus Curiae seeks to participate in this suit as such as has been engaged in advisory and technical capacity building all over the world with regard to refugee rights.

26. He avers that on this basis this Party has satisfied the principles of being joined in the suit and further purposes to remain neutral at all times.

Respondents Case

27. The Respondents in reaction to this Application filed its Grounds of Opposition dated 4th April 2023 on the grounds that:

    i. The Applicant has failed to meet the test set out in the case of Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2015] eKLR for one to be admitted as amicus.

    ii. The Applicant merely pleads its impartiality, but has not attached the amicus brief for parties and the Court to establish the same. This is despite the fact that the Petition was already availed to them.

    iii. The Applicant has not highlighted any novel information or arguments that it will be raising in Court.

    iv. The Applicant has not demonstrated its expertise on the subject matter, but rather, merely mentioned that it has participated in similar litigation before various courts and Tribunals across the world, without citing any of the cases as a sphere of reference for its expertise.

    v. The Applicant is led by a Steering Committee comprised of Asylum Access, the Cornell Law School Migration and Human Rights Program, HIAS, Kituo Cha Sheria, the Migration and Asylum Project, Refugiados Unidos, and the Zolberg Institute on Migration and Mobility at the New School. From its composition, its clear that the Petitioner is in the Applicant's Steering Committee and therefore it is not possible for the Applicant to claim impartiality in the present Petition.

    vi. This is a shrewd attempt by the Petitioner to have a second bite at the cherry, by filing the Petition and influencing the amicus brief, which would be unfair and unjust to the Respondents.

    vii. The Application is merely an attempt to have the Petitioner's case heard twice, which not only creates an unequal opportunity against the Respondents, but also is a waste of precious judicial time, considering this is an election matter and the strict constitutional and statutory timelines that attach to the same.

    viii. The Applicants have not demonstrated that their submissions will be useful to the Court and different from those of the Petitioners so that their non-joinder will result in the incomplete settlement of all the issues raised in the proceedings.

    ix. The Applicants' participation would only serve to delay the expeditious hearing of this Petition and escalate litigation costs to the prejudice of the Respondents."

Other Parties Case

28. The other Parties' responses to this Application are not in the Court file or Court Online Platform (CTS).

Proposed Amicus Curiae Submissions

29. This Party through Prof. Migai Akech & Associates, Advocates filed submissions dated 5th December 2023. Counsel set out issues for discussion as:what ought to be canvassed in a Grounds of Opposition and whether the proposed Amicus Curiae has met the legal threshold for admission.

30. On the first issue, Counsel submitted that Grounds of Opposition are supposed to only raise matters of law as guided by the Court of Appeal in Kennedy Otieno Odiyo & 12 Others v. Kenya Electricity Generating Company Limited [2010] eKLR as follows:

> " The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus, what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant".

31. Like dependence was placed in Daniel Kibet Mutai & 9 others v. the Attorney General [2019] eKLR.

32. Counsel argued that the Respondents in the grounds had asserted that the 'Applicant is led by a Steering Committee comprised of Asylum Access, the Cornell Law School Migration and Human Rights Program, HIAS, Kituo Cha Sheria, the Migration and Asylum Project, Refugiados Unidos, and the Zolberg Institute on Migration and Mobility at the New School', a matter which is a fact and would require evidence to be substantiated. Following this, it was argued that the Respondents ought to have substantiated the same by adducing evidence.

33. On the second issue, Counsel stated that the Supreme Court in Trusted Society of Human Rights Alliance (supra) directed that the guidelines that the Court should consider in such an application are:

    a. 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.

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

    c. 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.

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

    e. 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.

34. Counsel further noted that the Supreme Court in Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission and Others & Ekuru Aukot, Presidential Petition No. 1 of 2017 held that joinder of a party is discretionary.

35. Counsel submitted that the Proposed Amicus Curiae's primary allegiance in this matter lies with the Court and pursuit of justice, thus an impartial party. Counsel noted that the party commits to a detachment from the parties in the case and their respective interests, thereby ensuring its independence, safeguarding against any undue influence that could compromise its analysis and recommendations. It was noted that this party had demonstrated its wealth of legal expertise in its affidavit which it seeks to bring on board in this matter.

36. As such, Counsel submitted that the Party's expertise will enhance the decision making in this matter by providing diverse perspectives and specialized knowledge that may not necessarily be available from the parties directly involved in the case.

Respondents' Submissions

37. In opposition, the Respondents filed submissions through State Counsel, Jackline Kiramana dated 4th February 2024 where the single issue identified was whether the Applicant has met the threshold for joinder as an Amicus.

38. Counsel equally relied in the guidelines set out in Trusted Society of Human Rights Alliance(supra) and echoed by the Supreme Court in Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Kanjama (Intended Amicus Curiae) [2017] KESC 27 (KLR) and Attorney General v Ndii & 73 others; Akech (Intended Amicus Curiae) [2021] KESC 20 (KLR).

39. Counsel relying in the assertion in the Grounds of Opposition submitted that this Party was not capable of being impartial as one of its partners is the 1st Petitioner. Counsel stressed that this fact had not been disputed by the Proposed Amicus Curiae.

40. Counsel submitted that it was evident that the Party's case can be advanced by the 1st Petitioner in this regard thus its joinder unnecessary and that the same would be in breach of the set principles for joinder of an amicus.

41. That said, Counsel submitted that the Party despite stating that it has expertise in the area did not adduce any evidence to confirm this. Considering this, it was argued that the instant Application fails to meet the threshold for joinder of a party as amicus curiae and thus ought to be dismissed.

The 3rd Application

42. The Petitioner in its Notice of Motion Application dated 1st September 2023 seeks orders that:

    i. This Court be pleased to certify that the Petition herein raises substantial questions of law and forthwith refer the case to her Ladyship the Chief Justice for appointment of a bench of an uneven number of judges being not less than three(3) pursuant to Article 165(4) of *the Constitution*.

    ii. The Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders if granted.

    iii. The costs of this Application be in the cause.

43. The Application is supported by the Petitioner's affidavit, sworn by Dr. Annette Mudola Mbogoh on 1st September 2023 and the grounds on the face of the Application.

44. She depones that the Petitioner has been running a forced migration program since 2008 through which it offers legal aid and psychological support to refugees in partnership with other organizations.

45. She avers that while Kenya has been hosting refugees since 1963, there was an influx of refugees and asylum seekers in the early 1990s from Somalia, Rwanda, Ethiopia and Sudan. As a result, the Government established Kakuma and Dadaab refugee camps in 1991 and 1992 respectively. By the end of 31st May 2023, Kenya had hosted 612,413 refugees and asylum seekers. It is noted that majority of the refugees and asylum seekers reside in the refugee camps with 16% residing in urban areas.

46. Furthermore, she depones that out of the 612,413 refugees and asylum seekers, only 97 have been granted resettlement in a third country while 68 have been repatriated to their Country of origin. It is stated that the delay in settlements of these parties, has caused donor fatigue and further, solutions for refugees have been deemed elusive.

47. It is asserted that owing to this and coupled with the interpretation of the *Kenya Citizenship and Immigration Act* by the 3rd Respondent, refugees have been denied access to durable solutions of local integration despite their stay in Kenya being lawful, permitted and regularized.

48. On this basis, it is alleged that the Petition raises novel issues on the immigration status of refugee status in Kenya. Moreover raises issues on whether there is discrimination against refugees in establishing lawful residence in Kenya, their eligibility to apply for citizenship by registration under Article 15(2) of *the Constitution*, Kenya's obligations and or duty to make an affirmative effort to enable refugees to meet the established requirements for naturalization under Article 34 of the 1951 Convention Relating to Refugee Status, whether there is good faith access to Class M work permits by refugees, whether failure to meet this duty by failing to provide reasons for refusal to grant Class M permits to most refugees who are eligible for such permits amount to presumptive breach of the duty to facilitate the assimilation and naturalization of refugees set by Art. 34 of the Refugee Convention, interpreted in line with contemporary international human rights law and that Section 13(1) (b) of the *Kenya Citizenship and Immigration Act* are inconsistent with Article 15(2), 27 and 28 of *the Constitution*.

49. She argues that these matters are complex and require a substantial amount of time to be disposed of. Additionally, she notes that the Petitioner will rely on an expert witness due to the complexity of this matter. Considering this, she urges that the Application be allowed.

Other Parties Case

50. The other Parties' responses to this Application are not in the Court file or Court Online Platform (CTS).

1st Petitioner's Submissions

51. The 1st Petitioner through its Counsel, Linet Opiyo filed submissions dated 9th August 2024.

52. Counsel submitted that Article 165(4) of *the Constitution* provides for certification of matters through empanelment of an uneven number of judges by the Chief Justice. Counsel submitted that the principles to be considered were set out in County Government Of Meru v Ethics And Anti-Corruption Commission [2014] KEHC 5287 (KLR) where it was held that:

> " The principles which govern the exercise of discretion in an application such as the one before the court can be distilled as follows;
>
> The grant of a certificate under Article 165(4) of *the Constitution* is an exception rather than the rule.
>
> The substantial question of law is a question to be determined in the circumstances of the case. Substantial issue of law is not necessarily a weighty one or one that raises a novel

issue of law or fact or even one that is complex. Many provisions of our Constitution are untested and bring forth novel issues yet is not every day that we call upon the Chief Justice to empanel a bench of not less than three judges.

Public interest may be considered but is not necessarily a decisive factor. It is in the nature of petitions filed to enforce the provisions of *the Constitution* to be matters of public interest generally."

53. Like dependence was placed in Martin Nyaga and others vs Speaker County Assembly of Embu and 4 others and Amicus Curiae [2014] eKLR and Okiya Omtatah Okoiti and another vs President Uhuru Muigai Kenyatta and 4 others (2015) eKLR.

54. Counsel submitted that refugees' issues are a matter of great public concern and interest. Moreover, this issue, is argued to be novel and complex hence warranting empanelment of a bench. Counsel further argued that the matter raises substantial questions of law which revolve around:

i. Whether section 13 (1) (b) of the *Kenya Citizenship and Immigration Act* is unconstitutional because its-purpose or effect -excludes refugees (despite their status being permitted, regularized stay of some duration, which is more and transit point) to be eligible to apply for citizenship and permanent residency that is available to other nationals who meet the residency requirement and hence violates Article 27 (1), (2) and (4) of *the Constitution*; Articles 2(6), 19(3) of *the Constitution* as read together with Articles 13 and 26, 15, 17 and 18 the Refugee Convention and Kenya's obligations thereunder.

ii. Whether section 13(1) (b) of the *Kenya Citizenship and Immigration Act* is unconstitutional owing to its discriminatory nature because it excludes refugees from eligibility to apply for citizenship and permanent residency that is available to other nationals and hence violates Articles 27(1) (2) and (4)1 of *the Constitution* as read together with Articles 13 and 26, 15, 17 and 18 the Refugee Convention and Kenya's obligations thereunder.

iii. Whether refugee status a good status for purposes of lawful residence contemplated in sections 13(1) (b) of the *Kenya Citizenship and Immigration Act* and hence the interpretation of those sections by 1st and 3rd Respondent that excludes refugees from eligible categories of status that constitute lawful residence contrary to the principle of rule of law under Article 10 of *the Constitution*.

iv. Whether sections 13{1) (b) of the *Kenya Citizenship and Immigration Act* unconstitutional because it is an illegal modification/ amendment to Article 15 (2) of *the Constitution* because its effect is to exclude refugees from eligibility to apply for citizenship.

v. Whether sections 13 and 37 of the *Kenya Citizenship and Immigration Act* through its implementation violates the right to equal protection and benefit of the law to the extent that failure to recognize refugee status as lawful under immigration law illegal and unfairly excludes them from being eligible to apply for permanent residency and citizenship

vi. Whether the endemic administrative blockages that beset the Class M (refugee) permit process are contrary to Article 7(1) of the Refugee Convention which enjoins Kenya to treat refugees at least as well as aliens generally and therefore discriminatory as non-refugees are thus positioned to meet the citizenship eligibility requirements of s.13{1)(b) of the *Kenya Citizenship and Immigration Act* and hence by extension the requirements of Article 15(2) of *the Constitution* in a way that refugees are not.

55. Based on these issues, Counsel submitted that the Petition meets the threshold for certification.

Respondents' Submissions

56. Counsel for the Respondents, Jackline Kiramana filed submissions dated 4th September 2024.

57. In like fashion, Counsel submitted that what constitutes a substantial question of law was discussed in J. Harrison Kinyanjui V Attorney General & Another [2012] eKLR as follows:

> " Therefore, giving meaning to "substantial question" must take into account the provisions of *the Constitution* as a whole and need to dispense justice without delay particularly given a specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of *the Constitution*, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges."

58. Additional dependence was placed in Wycliff Ambetsa Oparanya & 2 Others vs Director of Public Prosecutions 7 Anor (2016) Eklr, Chunilal V. Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314 and Santosh Hazari vs. Purushottam Tiwari (2001) 3 SCC 179 and County Government of Meru (supra).

59. Counsel emphasized that on a strict application of the test for empanelment, every case dealing with the interpretation of *the Constitution* or application of the bill of rights would be a substantial question of law, however such strict application would occasion grave burden to the already threatened judicial resources to the extent that the value of obtaining justice without delay under Article 159(2) (b) would never be realized. That said, Counsel submitted that the burden to prove such a matter falls squarely on the 1st Petitioner.

60. According to Counsel, the issues raised herein are capable of being fully determined by a single Judge and thus does not meet the test set out under Article 165(4) of *the Constitution*.

Analysis and Determination

61. Three issues commend themselves for determination in this Ruling, namely:

    i. Whether the Application for joinder of the Intended Interested Party should be allowed.

    ii. Whether the Proposed Amicus Curiae Application for joinder should be allowed.

    iii. Whether the Petitioners' Application for empanelment of a bench has met the requisite threshold.

Whether the Application for joinder of the Intended Interested Party should be allowed

62. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 has provided an explicit meaning of 'Interested Party' under Rule 2 which states:

    'a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation'.

63. An interested party may be added as provided under Rule 5 (d) (ii) which states:

(i) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

(ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.

64. The Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR) discussed joinder of an interested party as follows:

> "(22) In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court's Ruling in the Mumo Matemo case where the Court (at paragraphs 14 and 18) held:
>
> "[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..."
>
> (23) Similarly, in the case of Meme v. Republic,[2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:
>
> "(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
>
> (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
>
> (iii) joinder to prevent a likely course of proliferated litigation."
>
> (24) We ask ourselves the following questions:
>
> (a) what is the intended interested party's stake and relevance in the proceedings? And;
>
> (b) will the intended interested party suffer any prejudice if denied joinder?"
>
> 18. 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..."

65. Equally, the applicable principles in an application for joinder of an interested party were set by the Supreme Court in Muruatetu & another (supra) where it underscored as follows:

> "a. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

b. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.

c. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court."

66. Furthermore, at Paragraph 41, the Superior Court noted as follows:

> "(41) Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/ principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us."

67. From the principles emerging from authorities alluded to above; it is manifest that that joinder of a party is not an automatic right to be granted on demand to a Party. Rather, it is a discretionary matter that the Court must decide judiciously upon examination of facts and circumstances of every case. Further, it is feasible where the Court considers appropriate to make such an order even on its own motion.

68. The substratum of this Petition is to assert the fundamental human rights and freedoms of the refugees and asylum seekers in Kenya under the Kenyan Constitution and International laws. Human Rights Organizations such as the Petitioners and Intended Interested Party exist purely to advocate for defence of human rights in the society.

69. The Intended Interested Party contended that based on its mandate, it has a stake and a joinder in this suit will facilitate it to champion for the persons rights of refugees and asylum seekers.

70. The Application was opposed by the Respondents who argued that personal stake had not been established and that the 1st Petitioner being a human rights body can adequately execute that cause without a duplication of its case.

71. In my view, as a Human Right Organization, I have no hesitation in finding that the Intended Interested Party has a direct, identifiable and proximate interest in this matter. It is not in dispute that it has a mandate to protect, promote, and enforce human rights in Kenya which are the core issues this Petition directly address and to that extent therefore, the outcome of this case will have a direct and significant bearing on the Intended Interested Party's work and on the broader concept human rights framework in Kenya.

72. I am also persuaded that based on its work profile, the Intended Interested Party possesses specialized expertise in the field of human rights law, both locally and under international laws as can be seen in the numerous cases it has been involved in. Considering this, its participation will assist the Court in placing the issues in a broader constitutional and human rights context while ensuring the Court has the benefit of both domestic and international perspectives.

73. Lastly, the matter before this Court transcends the parties in this suit and implicates public interest, particularly the enforcement and protection of fundamental rights and freedoms. As such, enjoining this Party will ensure that the voice of the wider society and affected groups is represented. In any case, the Respondent did not persuade me on the prejudice they stand to face and suffer if this party is enjoined in this suit.

74. The Application for joinder of Interested Party is thus allowed.

Whether the Proposed Amicus Curiae Application for joinder should be allowed.

75. The law on joinder of an amicus curiae in constitutional petitions is set forth under Rule 6 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules as follows:

Friend of the Court.

6. 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.

76. The Supreme Court in Trusted Society of Human Rights Alliance (supra) guided as follows:

> " ...an amicus is defined in Black's Law Dictionary thus:
>
> "A person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter"
>
> (16) In the Presidential Election Petition No.5 of 2013 (The Raila Case), the role of amicus was clarified. The LSK was at that time denied admission on the ground that it had taken a partisan position. This means that an amicus ought not to be partisan. This is a 'neutral' party admitted into the proceedings so as to aid the Court in reaching an 'informed' decision, either way.
>
> (17) 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."

77. Furthermore, the Supreme Court in Attorney General v Ndii & 73 others (supra) opined as follows:

> " 6. In the above context, we now opine as follows:
>
> i. An applicant for joinder as amicus has to satisfy this court that they have satisfied the legal requirements for joinder. The relevant

law is rule 19 of the Supreme Court Rules 2020. The said rule provides as follows:

"19. (1) The court may on its own motion, or at the request of any party, permit a person with particular expertise to appear in any matter as a friend of the court. Participation of friends of the court.

(2) The court shall before admitting a person as a friend of the court, consider—

(a) proven expertise of the person;

(b) independence and impartiality of the person; or

(c) the public interest".

ii. The guiding principles applicable in determining an application to be enjoined in that capacity was settled in Trusted Society of Human Rights Alliance v Mumo Matemu and 5 Others (supra), where the court on this occasion, pronounced itself on its inherent power to admit amicus curiae and emphasized that;

"(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

"(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..."

We also affirmed the above guiding principles in Francis Karioki Muruatetu & another v Republic & 5 Others Sup Ct Petition No 15 and 16 of 2015 [2016] eKLR

ii. We have considered the application in the context of the law as expressed in Mumo Matemu where we stated that the admission of amici curiae is useful for achieving our constitutional mandate to develop the law with the assistance of input from parties appearing before us."

78. The Proposed Amicus Curiae Application contends it is an international civil society organization with a keen interest in refugees' rights and seeks to assist the Court in determination of the issues raised herein.

79. The application was opposed by the Respondents on the grounds that the Proposed Amicus Curiae lacks neutrality and was unable to establish the distinct expertise or that its participation will not prejudice and delay the expeditious disposal of this matter.

80. As discernible from the principles on the admission of amicus into proceedings, a proposed amicus must satisfy the strict criteria laid down in law and principles by demonstrating neutrality, expertise and relevance to the proceedings.

81. The Respondent contested the neutrality of proposed amicus without substantiating the fact. I will thus not take this against the amicus.

82. However, the proposed amicus did not attach any legal brief to enable the Court examine and weigh its arguments and determine on its own its acclaimed neutrality or if its intention to join is a ploy meant to advance a partisan agenda rather than offering unbiased expertise to the Court. Without the draft brief, I am of the view that the Proposed Amicus Curiae did not sufficiently demonstrate any unique expertise or specialized knowledge that is indispensable to the just determination of this matter.

83. An amicus curia would be justified where it is evident that it would introduce novel dimension into the matter in form of expertise as opposed to general or mundane submissions.

84. I am thus not satisfied the proposed amicus satisfies the stringent requirements for joinder as amicus hence the application is dismissed with no orders as to costs.

Whether the Petitioners' Application for empanelment of a bench has met the requisite threshold.

85. The law on empanelment of a bench is provided for under Article 165 (4) of *the Constitution* which states:

"Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice."

86. The phrase 'substantial question of law' is not defined in *the Constitution* but the Court in Kinyanjui v Attorney General & another (supra) explained as follows:

"8. Therefore, giving meaning to "substantial question" must take into account the provisions of *the Constitution* as a whole and need to dispense justice

without delay particularly given a specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter...

"10. A matter may raise complex issues of fact and law but this does not necessarily imply that the matter is one that raises substantial issues of law. Judges are from time to time required to determine complex issues yet one cannot argue that it means that every issue is one that raises substantial questions of law. Thus, there must be something more to the "substantial question" than merely novelty or complexity of the issue before the court. It may present unique facts not plainly covered by the controlling precedents. It may also involve important questions concerning the scope and meaning of decisions of the higher courts or the application of well-settled principles to the facts of a case."

87. Furthermore, the Court in Magare Gikenye J Benjamin v Salaries and Remuneration Commission & 146 others; Senate & 9 others (Interested Parties) [2021] KEHC 13290 (KLR) citing the set jurisprudence in this area as outlined in a number of authorities, rehashed as follows:

" 9. The application under consideration relates to certification in the High Court; that is under Article 165 (3) and (4) of *the Constitution*. The manner in which a single Judge of the High Court certifies that a matter raises a substantial question(s) of law so as to warrant the empanelment of an expanded bench has, on several instances, been dealt with by the Superior Courts.

10. The Supreme Court of Kenya in Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone [2013] eKLR established the principles for certification under Article 163(4)(b) of *the Constitution*. However, those principles were adopted, with modification, by the Court of Appeal in Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR when the Court of Appeal dealt with an appeal against a refusal by the High Court to certify a matter as raising substantial questions of law under Article 165(4) of *the Constitution*.

11. The Supreme Court summed up the principles as follows: -

i. In summary, we would state the governing principles as follows:

ii. for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;

iii. where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;

iv. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;

v. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

vi. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of *the Constitution*;

vii. the intending applicant has an obligation to identify and concisely set out the specific elements of "general public importance" which he or she attributes to the matter for which certification is sought;

viii. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.

12. As said, the Court of Appeal applied the above principles in Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR and expressed itself thus: -

> 42. In Hermanus Phillipus Steyn v Giovanni Gnechi- Ruscone [2013] eKLR the Supreme Court of Kenya pronounced governing principles for purposes of certification under Article 163(4)(b) some of which are relevant in the context of certification under Article 165(4). Drawing therefrom, we adopt, with modification, the following principles:
>
> For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;
>
> The applicant must show that there is a state of uncertainty in the law;
>
> The matter to be certified must fall within the terms of Article 165 (3)(b) or (d) of *the Constitution*;
>
> The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.
>
> 43. It is our judgment therefore, that whether a matter raises a substantial point of law for purposes of Article 165(4) of *the Constitution* is a matter for determination on a case-by-case basis.

> The categories of factors that should be taken into account in arriving at that decision cannot be closed...”

88. The responsibility of determine whether a matter raises a substantial question of law is a judicious one and falls on the Judge as guided by the principles as enunciated in the foregoing authorities and not on the parties. In urging this Court to find the instant matter raises substantial question of law; the Petitioners identified a number of issues, including:

a) Whether section 13 (1) (b) of the *Kenya Citizenship and Immigration Act* is unconstitutional because its-purpose or effect -excludes refugees (despite their status being permitted, regularized stay of some duration, which is more and transit point) to be eligible to apply for citizenship and permanent residency that is available to other nationals who meet the residency requirement and hence violates Article 27 (1), (2) and (4) of *the Constitution*; Articles 2(6), 19(3) of *the Constitution* as read together with Articles 13 and 26, 15, 17 and 18 the Refugee Convention and Kenya's obligations thereunder.

b. Whether section 13(1) (b) of the *Kenya Citizenship and Immigration Act* is unconstitutional owing to its discriminatory nature because it excludes refugees from eligibility to apply for citizenship and permanent residency that is available to other nationals and hence violates Articles 27(1) (2) and (4)1 of *the Constitution* as read together with Articles 13 and 26, 15, 17 and 18 the Refugee Convention and Kenya's obligations thereunder.

c. Whether refugee status is a good status for purposes of lawful residence contemplated in sections 13(1) (b) of the *Kenya Citizenship and Immigration Act* and hence the interpretation of those sections by 1st and 3rd Respondent that excludes refugees from eligible categories of status that constitute lawful residence contrary to the principle of rule of law under Article 10 of *the Constitution*.

d. Whether sections 13{1) (b) of the *Kenya Citizenship and Immigration Act* unconstitutional because it is an illegal modification/ amendment to Article 15 (2) of *the Constitution* because its effect is to exclude refugees from eligibility to apply for citizenship.

e. Whether sections 13 and 37 of the *Kenya Citizenship and Immigration Act* through its implementation violates the right to equal protection and benefit of the law to the extent that failure to recognize refugee status as lawful under immigration law illegal and unfairly excludes them from being eligible to apply for permanent residency and citizenship

f. Whether the endemic administrative blockages that beset the Class M (refugee) permit process are contrary to Article 7(1) of the Refugee Convention which enjoins Kenya to treat refugees at least as well as aliens generally and therefore discriminatory as non-refugees are thus positioned to meet the citizenship eligibility requirements of s.13{1)(b) of the *Kenya Citizenship and Immigration Act* and hence by extension the requirements of Article 15(2) of *the Constitution* in a way that refugees are not.

89. It is manifest from the foregoing that the gravamen of this Petition is the constitutionality of the Respondents’ actions in regard to the manner in which it deals with refugees and asylum seekers desirous of getting permanent status in Kenya vis-à-vis the laid down constitutional principles as well as the constitutionality of the Section 13(1) of the *Kenya Citizenship and Immigration Act*, 2012.This is in actual fact reinforced by the nature of the reliefs sought, namely:

i. A declaration be issued that Section 37 is unconstitutional because - in purpose or effect - fails to include refugee status among the categories of status eligible for application of permanent

residence status contrary to Article 27(1), (2) & (4) of *the Constitution*; Articles 2(6) and 19(3) of *the Constitution* as read together with Articles 13 and 26, 15, 17 and 18 of the 1951 Refugee Convention.

ii. A declaration be issued declaring that Section 13 (1) (b) of the *Kenya Citizenship and Immigration Act* is inconsistent with or in contravention of Articles 15 (2) and 27, 28 of *the Constitution* in so far as it does not recognize refugee status as a lawful residence and or stay for purposes of conferment of citizenship and permanent residence status.

iii. A declaration be issued declaring that the requirements set out in Section 13 (1) (b) of the *Kenya Citizenship and Immigration Act* 2012 discriminates against the refugees in contravention of Article 27 of *the Constitution* and International Rules in so far as it fails to recognize the Refugee Status as being a "Current Legal Immigration Status" in Kenya.

iv. A declaration be issued declaring that refugee status constitutes lawful residence for purposes of qualification for applying for citizenship by registration and permanent residence under Sections 13 (1) (b) and 37(b) of the *Kenya Citizenship and Immigration Act*.

v. A reading in order that refugee status constitutes lawful residence for purpose of eligibility for permanent residence and citizenship under Sections 37 and 13(1)(b) of the *Kenya Citizenship and Immigration Act*.

vi. There be no order as to costs as this is a matter brought in public interest.

vii. Such other or further Orders as this Court may deem just and expedient in the circumstances in protection of *the Constitution* and protection against violation of fundamental rights.

90. It is crystal clear that what the Petitioner wants is interpretation to be given by the Court on consistency or otherwise of the statutory provisions vis-à-vis the constitutional principles. The question of whether the provisions of statutory law align with the Constitutional principles may evoke public interest but does not amount to substantial question of law, as these are matters that this Court ordinarily grapples with almost on a daily basis.

91. The factual account that informs the filing of the Petition may be novel but the legal principles and rules to apply in deciding the issues raised are not, neither is the matter a complex one. As framed, this Petition will require application of established constitutional principles, which a single Judge can suitably handle.

92. As was held in Wycliffe Ambetsa Oparanya (supra)

> "... the mere fact that a matter is novel or jurisprudentially challenging does not ipso facto elevate it to a substantial question of law for the purposes of Article 165(4) of *the Constitution*. With due respect any judge worth his or her salt must be prepared to deal with and determine novel questions whether complex or otherwise since the Court cannot abdicate its duty of determining disputes to another organ...
>
> To me it is a matter of the application of such principles to the matter at hand. Such application, in my view does not constitute a substantial question of law for the purposes of Article 165(4) of *the Constitution*... Whereas *the Constitution* permits certain matters to be heard by a numerically enlarged bench, that is an exception to the general legal and constitutional position and it is in my view an option that ought not to be exercised lightly."

93. Consequently, the application for empanelment is declined. Costs shall be in the cause.

94. The upshot of the foregoing therefore is that:

a. The Intended Interested Party Notice of Motion Application dated 7/3/2023 is allowed. The Interested Party is granted leave to file responses to the petition the within the next 14 days.

b. Proposed Amicus Curiae Notice Motion Application dated 16th March, 2023 seeking to be joined in these proceedings is rejected.

c. The Petitioner's Application for empanelment of the bench, that is, Notice Motion dated 1/9/2023 is disallowed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF OCTOBER, 2025.

.....

L N MUGAMBI

JUDGE