



**Initiative for Strategic Litigation in Africa (ISLA) v Federation of Women Lawyers Kenya (FIDA - Kenya) & another (Civil Appeal (Application) 238 of 2018) [2024] KECA 181 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KECA 181 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 238 OF 2018  
A ALI-ARONI, JM MATIVO & PM GACHOKA, JJA  
FEBRUARY 23, 2024**

**BETWEEN**

**INITIATIVE FOR STRATEGIC LITIGATION IN AFRICA (ISLA) .. APPLICANT**

**AND**

**FEDERATION OF WOMEN LAWYERS KENYA (FIDA - KENYA) ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

*(An application for leave to be enjoined as amicus curiae in an appeal from the Judgment of the High Court of Kenya at Nairobi, (Mativo, J.) delivered on 14th May, 2018 in Constitution Petition No. 164B of 2018)*

**RULING**

1. Before the court is a Notice of Motion dated 23<sup>rd</sup> November 2018, expressed to be brought under Articles 22(3)(e) of the Constitution of Kenya 2010 (Constitution) and rules 2 and 6 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga rules), seeking the following prayers:
  - a. That the Initiative for Strategic Litigation in Africa (ISLA), the applicant herein be granted leave to be enjoined in these proceedings as *amicus curiae*.
  - b. That leave be granted to ISLA to present its submissions by way of an amicus brief.
  - c. That upon granting leave to participate in the proceedings, the Honourable Court give directions on how the amicus curiae shall participate in further proceedings herein on such other or further directions as this Honourable Court may deem fit to give.



- d. That there be no award of costs for or against the amicus curiae.
2. The application is predicated on grounds that: the applicant is a regional non-governmental, public interest litigation organization that was established in 2014; it is African-based; provides legal representation and support to those who seek to hold States accountable for violation of women's human and sexual rights; it runs strategic litigation initiatives with a regional focus; participates in domestic and regional courts to promote and protect women's human rights; aims at contributing towards the growth of jurisprudence within the Continent of Africa by participating in domestic, regional and international human rights systems; one of its thematic areas is on women and property rights and it runs a program that uses the court to challenge discriminatory laws that adversely impact on women's ownership, control and access to land and property rights.
  3. Further, that the applicant had sought leave to be enjoined in Petition No. 164B of 2018 and was admitted as amicus curiae on 5<sup>th</sup> December 2017, that it intends to continue participating in this appeal that arose from the judgment thereof, and hence the instant application.
  4. The motion is further supported by the affidavit of Sibongile Cherrol Ndashe sworn on 13<sup>th</sup> November 2018, in her capacity as the Executive Director of the applicant. She reiterated the grounds in support of the application and in addition deposed that; the applicant has expertise in advancing and promoting women's rights to property drawn from its engagement with a variety of partners and its interactions with the special rapporteur on the rights of women at the African Commission, with a view of developing a general comment on Article 7(d) of the [Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa](#), and that, therefore would be of assistance on the issue before this Court; on the constitutionality of Section 7 of the [Matrimonial Property Act](#) 2013.
  5. Further it is deposed that the applicant intends to make submissions, subject to this Court's directions on the following areas; regional and international law on distribution of matrimonial property upon the dissolution of marriage; comparative jurisprudence on distribution of matrimonial property upon dissolution of marriage; relevant law reform initiatives in comparable jurisdictions and examine the proposed legislative changes, demonstrate that judicial pronouncements have had the effect of entrenching stereotypes and punishing "bad" women drawing attention to the inconsistencies in judicial pronouncements.
  6. Learned counsel for the applicant filed submissions dated 28<sup>th</sup> June, 2022. It is noted that learned counsel for the respondents did not file replying affidavits or submissions. At the hearing of the application learned counsel for the 1<sup>st</sup> respondent was absent though duly served with the application and hearing notice. Learned counsel for the 2<sup>nd</sup> respondent was present in court and did not oppose the application.
  7. Learned counsel for the applicant in support of her proposition that the applicant meets the criteria to be admitted as amicus curiae cited the case of [Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 Others](#) [2015] eKLR, in urging that the applicant has the expertise that will assist the court in determining the issues raised in the appeal; it is independent and impartial as it is not aligned to any of the parties presently before the court; and further that the issues coming up for determination are of great public importance.
  8. To contextualize the application, we shall give a background of the facts in summary. The petition before the trial court was filed by the 1<sup>st</sup> respondent herein, Federation of Women Lawyers Kenya (FIDA-K), and the 1<sup>st</sup> respondent was the Honourable Attorney General of the Republic of Kenya, the 2<sup>nd</sup> respondent, and the applicant was amicus curiae. In the petition the 1<sup>st</sup> respondent challenged the constitutionality of Section 7 of the Matrimonial Properties Act, on grounds that the said section



offended Article 45(3) of the 2010 Constitution (Constitution) which provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage; that the provision of Section 7 would be used to deprive women of their fundamental rights to property in violation of Articles 40, 60 and 68 of the *Constitution*; and that it offended Article 27 of the *Constitution*, in that it created unfair discrimination against women. It therefore sought a declaration that Section 7 of the *Matrimonial Properties Act*, to the extent that it bases division of matrimonial property upon contribution, is invalid; and for an order of mandamus compelling the 2<sup>nd</sup> respondent herein to publish a Statute Miscellaneous Amendment Act within thirty days of delivery of judgment deleting the aforesaid section and for costs of the suit. The 2<sup>nd</sup> respondent opposed the petition on grounds that the 1<sup>st</sup> respondent had not rebutted the presumption of constitutionality enjoyed by the impugned provision; and had failed to sufficiently demonstrate how the impugned section has denied, violated, infringed and threatened the rights of married women in Kenya and that, the 1<sup>st</sup> respondent had misunderstood and misapplied the nature of the constitutional concept of "equality of the rights" of parties to marriage regarding the right to own property.

9. The court dismissed the petition with no order as to costs, having found that the impugned section did not offend any of the provisions of the *Constitution* as alleged, nor did the section contradict any of the provisions of the Act. Aggrieved by that judgment, the 1<sup>st</sup> respondent lodged a notice of appeal dated 18<sup>th</sup> May 2018, which informs the current application.
10. We have carefully considered the application and submissions both oral and written. The single issue for our consideration is whether to admit the applicant in this appeal as amicus curiae. From the description given in both the application and the affidavit in support thereof, there is no doubt that the applicant has expertise and vast experience regionally and internationally on the subject of Women's Property Rights.
11. We also take note that the applicant wishes to restrict itself in addressing the issues raised in the brief already filed, limited to; regional and international law on the distribution of matrimonial property upon the dissolution of marriage; comparative jurisprudence on distribution of matrimonial property upon the dissolution of marriage; relevant law reform initiatives in comparable jurisdictions and proposed legislative changes, demonstrate how judicial pronouncements have had the effect of entrenching stereotypes and punishing "bad" women drawing attention to the inconsistencies in judicial pronouncements.
12. the *Constitution* mandates the courts to develop the law and jurisprudence. Courts in many jurisdictions including ours, where necessary invite a third party (friend of the court) with experience or knowledge on a subject before the court to present submissions on the area under focus. The Mutunga Rules define a 'friend of the court' as an independent and impartial expert on an issue that is the subject matter of proceedings but is not a party to the case and serves to benefit the court with its expertise.
13. the *Constitution* mandates the courts to develop the law on very specific terms:

Article 20(3) and 20(3) (a) of the *Constitution* provides that:

- (3) In applying a provision of the Bill of Rights, a court shall-
  - (a) develop the law to the extent that it does not give effect to a right or fundamental freedom;

...



Further Article 259(1) states that:

This Constitution shall be interpreted in a manner that—

- a. promotes its purposes, values and principles;
- b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- b. permits the development of the law; and

...

14. In the case of *Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 Others* (*supra*), the Supreme Court had this to say on the need to admit amicus curiae to proceedings:

“the *Constitution* of Kenya, 2010, by express terms, requires Courts to ‘develop the law to the extent that it does not give effect to a right or fundamental freedom’. (Art. 20(3)(a)). This is the very foundation for well-informed inputs before the Court, which inherently, justifies the admission of amici curiae. We have a duty to ensure that our decisions enhance the right of access to justice, as well as open up positive lines of development in jurisprudence, to serve the judicial system within the terms of the *Constitution*”.

15. Flowing from the analysis above, we are persuaded that the applicant has no personal interest nor will it derive any benefit from the proceedings before the court. Further, from the information provided to us, the applicant has participated in different courts within our jurisdiction due to its expertise and vast experience in various subjects of interest. The subject matter of this appeal is important to a large section of our society and no doubt the input of the applicant will assist the court in arriving at its determination in the all-important question of property rights of parties in the unfortunate event of the dissolution of their marriage.

16. Accordingly, we allow the Notice of Motion dated 23<sup>rd</sup> November 2018, and the intended amicus curiae is admitted to these proceedings. We order that its brief shall be limited to addressing the court on: -

- i. Regional and international law on the distribution of matrimonial property upon the dissolution of marriage;
- ii. Comparative jurisprudence on the distribution of matrimonial property upon dissolution of marriage;
- iii. Relevant law reform initiatives in comparable jurisdictions; and
- iv. Any judicial pronouncements that have had retrospective effect to the property rights of women.

17. This being a public interest matter we shall make no orders as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2024.**

**ALI-ARONI**

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**JUDGE OF APPEAL**

**J. MATIVO**



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**JUDGE OF APPEAL**

**M. GACHOKA CIArb, FCIArb**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

