**Katiba Institute v Judicial Service Commission, Speaker of the National Assembly, Attorney General, Aaron Gitonga Ringera, Jennifer Shamallah, Ambrose Otieno Weda, Mutua Kilaka, Commission on Administrative Justice & Law Society of Kenya (Civil Appeal 343 of 2014) [2017] KECA 478 (KLR) (9 June 2017) (Judgment)**

*Katiba Institute v Judicial Service Commission & 8 others [2017] eKLR*

Neutral citation: [2017] KECA 478 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL 343 OF 2014**

**DK MUSINGA, SG KAIRU & AK MURGOR, JJA**

**JUNE 9, 2017**

**BETWEEN**

**KATIBA INSTITUTE ..... APPELLANT**

**AND**

**JUDICIAL SERVICE COMMISSION ..... 1ST RESPONDENT**

**SPEAKER OF THE NATIONAL ASSEMBLY ..... 2ND RESPONDENT**

**ATTORNEY GENERAL ..... 3RD RESPONDENT**

**JUSTICE ( RTD) AARON GITONGA RINGERA ..... 4TH RESPONDENT**

**JENNIFER SHAMALLAH ..... 5TH RESPONDENT**

**AMBROSE OTIENO WEDA ..... 6TH RESPONDENT**

**MUTUA KILAKA ..... 7TH RESPONDENT**

**COMMISSION ON ADMINISTRATIVE JUSTICE ..... 8TH RESPONDENT**

**LAW SOCIETY OF KENYA ..... 9TH RESPONDENT**

***(eing an appeal from the Ruling and Order of the High Court of Kenya, Constitutional and Human Right Division ( Mwongo, Omondi, Meoli, Mumbi Ngugi & Chemitei, JJ) pronounced on 18th March, 2014 in Petition No. 518 of 2013)***

## JUDGMENT

### Judgment of Gatembu, JA

1. This appeal arises from the decision of the High Court rejecting the appellant's application for leave to be admitted as amicus curiae. The main issue is whether "partisanship" is a proper criterion for declining to grant leave for an applicant to be admitted as amicus curiae.

### Background

2. The 1st respondent, the Judicial Service Commission, petitioned the High Court, the Constitutional & Human Rights Division at Nairobi, by a petition dated 30th October 2013 that was amended on 3rd December 2013 seeking, among other reliefs; a declaration that as a constitutional commission, it is not subject to the control or direction of the National Assembly or any of its committees; an order of certiorari to quash proceedings before the committee on Justice and Legal Affairs of the National Assembly seeking the removal of members of the Judicial Service Commission; an order of certiorari to quash the appointment of a tribunal under Article 251(4) of the *Constitution* on the basis that the appointment by the President was null and void.

3. The petition was heard and allowed by the High Court in a judgment delivered on 15th April 2014.

4. During the pendency of the petition before the High Court, Katiba Institute, the appellant, applied to that court, by a notice of motion dated 26th February 2014 and presented to the court on 27th February 2014 for leave to be admitted as amicus curiae and for an opportunity, as such, to submit written and oral arguments and information in the petition.

5. The grounds on which the appellant sought to be admitted as amicus curiae were that it is an institution with expertise in constitutional, administrative and public international law; that it is "a non-partisan, charitable organization dedicated to the full and effective implementation of the Kenyan *Constitution*, 2010"; that the counsel and directors of the appellant "have ample experience in making submissions to Kenyan domestic courts and international human rights forums" regarding interpretation and application of national, foreign and international law; and that it has significant expertise in the various provisions of the *Constitution* referred to in the petition. The appellant asserted that given the exceptional importance of the case and the impact the determination of the case would have on the interpretation and enforcement of various provisions of the *Constitution*, its application should be allowed.

6. The application was supported by an affidavit of Lempaa Suyianka, a litigation counsel of the appellant, who expounded on the expertise of the directors of the appellant; the previous litigation history in which the appellant had been admitted as amicus curiae and the contribution it would make to the court in the determination of the matter given the substantial historical records it has on the making of the Kenyan Constitution and in terms of providing detailed analysis of comparative jurisprudence on relevant legal issues.

7. The 3rd respondent opposed that application and filed a replying affidavit sworn by Stella Munyi for the Solicitor General opposing the application on the grounds that the appellant was not a non-partisan party based on the "patently partisan positions" taken by the directors of the appellant in articles published in newspapers and blogs; that based on the publications, the appellant "has strongly held views as regards the very issues which are raised in the...petition"; that the partisan positions taken by the appellant were supportive of some of the parties and against others; that the appellant omitted

to disclose that it had been denied participation in previous proceedings with a view to misleading the court that it is "a neutral and non-partisan source of useful material"; that the appellant is not indifferent or disinterested in the outcome of the proceedings and was "likely to urge the court to make a determination favourable to its obvious partisan stake in the proceedings" and that allowing the appellant as amicus curiae would be prejudicial to the interests of the parties and the wider public interest as the appellant would be championing its own vested interests.

8. In a replying affidavit sworn by Lempaa Suyianka, the appellant expounded further on its expertise and also sought to demonstrate that it met the tests of independence and impartiality in order to be joined as amicus curiae.

9. The court considered the application and by an order given on 18th March 2014 declined to admit the appellant as amicus curiae.

The reasons for rejecting the application are contained in the judgment of the court that was subsequently delivered on 15th April 2014. The court considered the provisions of the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, decisions of the Supreme Court of Kenya in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* [2014] eKLR and *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* [2013] eKLR in arriving at its decision to reject the application. The court concluded thus:

> "22. Consequently, in considering whether to allow participation by a party as a friend of the Court, we must consider whether the party can be deemed „neutral? or „non-partisan.?
>
> 23. In the present case, while the expertise of Katiba and its Directors is not disputed, the same could not be said for their non-partisanship. A reading of the three newspaper articles clearly shows that the two Directors of Katiba have taken a position on the issues arising in this matter and expressed strongly their views thereon. Their expertise notwithstanding, given the precedent from the Supreme Court on the issue of who qualifies as a friend of the Court, we could not properly allow their participation in the matter."

**The appeal and Submissions by Counsel**

10. Although the petition proceeded for hearing and was finally determined by the court in its judgment delivered on 15th April 2014 and from which determination no appeal has been lodged, the appellant remains aggrieved by the decision of the court rejecting its participation in the case as amicus curiae and lodged the present appeal.

11. The appeal was heard before us on 30th November 2016 and on 4th April 2017. On 30th November 2016 learned counsel Mr. Waikwa Wanyoike appeared for the appellant. Mr. Mansur Issa appeared for the 1st respondent. Miss Wambui appeared for the 3rd to 7th respondents and Mr. Mwenesi appeared for the interested party, Law Society of Kenya. On 4th April 2017 Mr. Waikwa Wanyoike continued to appear for the appellant, Miss Muthoni Mugo held brief for Mr. Mansur Issa for the 1st respondent and Mr. Kepha Onyiso and Miss. F. M. Irari appeared for the 3rd to 7th respondents.

12. Relying on his written submissions, which he highlighted at length before us, Mr. Waikwa Wanyoike for the appellant argued that partisanship is not a ground for refusing amicus curiae; that although the substantive decision of the court on the petition has not been challenged, the issue before the Court in this appeal remains an important one and is not moot, given the centrality of the role of amicus

curiae in post 2010 Constitution litigation; that the appellant is apprehensive that it may, on account of the High Court decision, be excluded from participating as amicus curiae in future litigation. Citing a decision of the Constitutional court of South Africa in the case of *MEC for Education; Kwazulu-Natal and others v Navaneethum Pillay and others*: CCT 51/06, counsel submitted that a court can exercise jurisdiction where a matter is said to be moot if "any decisionwhich [it] may make will have some practical effect either on the parties or on others" having regard to the importance, complexity, fullness or otherwise of argument advanced and resolving disputes between different courts.

13. According to counsel, given the centrality of the important principles such as access to justice, public interest and public participation in the constitutional architecture, the Constitution envisages a permissive approach to amicus curiae and a test that is inimical to the Constitution should not be resorted to. Counsel argued that the Supreme Court case of *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* (above) that was decided by only two judges of the Supreme Court is neither a "decision" nor "a binding decision" for purposes of Article 163(3)(7) of the *Constitution*. As regards the case of *Raila Odinga & 5 others v IndependentElectoral and Boundaries Commission & 3 others* (above) on which the High Court also relied, counsel submitted that it should be borne in mind that that was a highly contested election dispute and the test of partisanship applied there should be seen in that context.

14. In any event, counsel argued, even if partisanship is a proper test, it was not demonstrated that the appellant was indeed partisan and the court did not indicate the parts of the articles on the basis of which it drew the conclusion that the appellant was partisan.

15. Counsel emphasized that expertise is the critical consideration in considering whether to admit amicus curiae, stressing that given the socio economic environment in Kenya, amicus curiae, may be able to bring resources to the aid of the court that an impecunious litigant may not be able to do.

16. Supporting the appeal, learned counsel Mr. Issa submitted that the Supreme Court case of *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* (above) on which the High Court relied is an exceptional case in that the Supreme Court was sitting in exercise of original jurisdiction in a highly contentious presidential election dispute that had to be determined within strict time lines and the test applied by the Supreme Court should be seen in that context. Counsel argued that the High Court should have looked at the appellant's expertise and the role it was to play to assist the court make an informed decision; that the court should have framed the issues that required to be addressed by amicus curiae. Given the liberal approach as exemplified by the provisions of Article 22 and 258 of the *Constitution* under which anyone can institute proceedings, an equally liberal approach should be adopted when considering an application to admit amicus curiae. The test should be whether amicus curiae seeking leave has the expertise and industry. Secondly, if there is perceived bias, the court should consider the extent of such bias, bearing in mind that the views of amicus curiae are not binding on the court. Counsel argued that in this case the High Court erred in the exercise of its discretion.

17. As regards the Supreme case of *Trusted Society of HumanRights Alliance v Mumo Matemu & 5 others* (above) counsel was of the view that that decision is binding for now in spite of it being a 2 judge decision.

18. Mr. Onyiso, learned counsel for the 3rd to 7th respondents relied on his written submissions and submitted that courts should not act in vain even where it has jurisdiction to do so; that considering that the appellant missed the opportunity to participate in the petition in the High Court and the substantive decision of the High Court was rendered and has not been challenged and or stayed, the current Appeal serves no useful purpose and should not be entertained and the court should not act

in vain. Counsel referred to the case of *Republic v The Tribunal of Inquiry to Investigate the Conduct of Puisne Judge Tom Mbaluto* [2013] eKLR.

19. If the court is however inclined to entertain the appeal, counsel argued that the High Court was correct in refusing to grant the appellant leave to participate in the petition as amicus curiae based on the principles established by the Supreme Court in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* (above) and *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* (above) in which the Supreme Court stated that an amicus ought not to be partisan. Counsel submitted that the appellant was clearly partisan in light of the publications on the subject matter of the petition that was before the court.

20. In reply, Mr. Wanyoike maintained that the appeal is not moot as the test of partisanship used by the High Court to exclude the appellant from participating in the petition is unconstitutional; that the question of constitutionality of that test cannot be moot as the issue still subsists. Counsel urged that all an applicant is required to demonstrate in order to be admitted as amicus curiae is expertise, independence and impartiality. According to counsel, implied bias cannot be a basis for denying participation by amicus curiae. Only actual bias should exclude. Counsel argued that expertise is drawn from articulation of opinions and there is bound, invariably, to be implied bias. Furthermore, the respondent did not demonstrate that the appellant was beholden to any of the parties.

**Determination**

21. I have considered the appeal and the submissions by counsel. The critical question, as already indicated, is whether the High Court erred by using the test of "partisanship" to deny the appellant participation as amicus curiae in the petition. In other words, whether "partisanship" is a proper criterion when considering an application to admit amicus curiae.

22. Article 22 of the *Constitution* on Enforcement of Bill of Right requires, under Article 22(3), the Chief Justice to make rules providing for the court proceedings relating to Bill of Rights satisfying the criteria, among other things, that "(e) an organizationor individual with particular expertise may, with the leave of the court, appear as a friend of the court."

23. Rule 6 of the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, (the Mutunga Rules) made under Article 22 of the *Constitution* provides for the procedure to be followed in respect of applications to join proceedings as amicus curiae. Rule 2 defines a friend of the court as "anindependentandimpartialexpert onan issue which is the subject matter of the proceedings but is not party to the case and serves to benefit the court with their expertise."

24. It is therefore correct, as submitted by the appellant, that the requirements under the *Constitution* and under Mutunga Rules that a person seeking leave to appear, as amicus curiae in any particular case should meet are expertise, independence and impartiality.

25. The grant or refusal of leave to be admitted as amicus curiae in any given case involves the exercise of judicial discretion. The circumstances under which this Court, as an appellate court, can interfere with the exercise of judicial discretion are circumscribed. In *Mbogo and Another v Shah* [1968] EA 93 this Court stated:

> " ...that this Court will not interfere with the exercise of...discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into

consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

26. The appellant has contended that the refusal to grant it leave to participate in the proceedings in the High Court as amicus curiae on the basis of partisanship is misdirection by the High Court; that the court thereby took into account an irrelevant consideration and its decision is clearly wrong.

27. In *Raila Odinga & 5 others v Independent Electoral andBoundaries Commission & 3 others* [2013] eKLR, the present appellant had applied for leave to be admitted as amicus curiae. When rejecting that application, the Supreme Court stated:

> "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." [Emphasis]

28. The Supreme Court went on to say:

> "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 in this matter exists."
>
> [Emphasis]

29. Although it is contended that the Supreme Court made those pronouncements within "a contested and highly adversarial election petition," those pronouncements are in my view pronouncements of general application in adversarial proceedings. Whereas each case must be decided on its own facts, I do not understand the test of "partisanship" to entail anything more than an inquiry as to whether an applicant is biased, partial or prejudiced.

30. In *Trusted Society of Human Rights Alliance v MumoMatemu & 5 others* [2015] eKLR the Supreme Court set out guidelines in relation to the role of amicus curiae. In doing so, that Court reaffirmed its position on partisanship as stated in *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* (above). It stated as follows:

> "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." [Emphasis]

31. The question whether "partisanship" is a proper factor or a relevant consideration when considering an application to admit amicus curiae is therefore settled by the Supreme Court. It is undoubtedly a relevant consideration. (See also the decision of the Supreme Court in *Francis Karioki Muruatetu & anotherv Republic & 5 others* [2016]eKLR).

32. Counsel for the appellant urged us to disregard the ruling of the Supreme Court in *Trusted Society of Human RightsAlliance v Mumo Matemu & 5 others* on the grounds that that ruling was rendered by two judges of that Court; that the Court in rendering that decision was not properly constituted in accordance with Article 163(2) of the Constitution and is therefore not binding under Article 163(7) of the *Constitution*. Counsel however pointed out that there is a matter pending hearing before the

Supreme Court in which that issue is live and I therefore decline the invitation to address that issue here.

33. For my part, I am satisfied that the High Court did not misdirect itself in considering "partisanship" as a factor or relevant consideration in the exercise of its discretion on whether or not to allow the appellant to be admitted as amicus curiae.

34. As to whether the evidence adduced did in fact establish that appellant was indeed partisan, I am in agreement with counsel for the 3rd to 7th respondent that that issue is moot. The petition was heard and determined. There is no appeal from the substantive decision and neither was that decision stayed. Even if we were to uphold the appellant's contention that it was not proved that it was partisan, that holding would be in vain. The matter will never be reheard and the appellant will never have an opportunity to participate in the case as amicus curiae. Our decision in that regard would have absolutely no practical effect. [See *MEC for Education; Kwazulu-Natal and others v Navaneethum Pillay and others* (above). It would be a decision in vain. I do not think the apprehension expressed by the appellant that it would never in future be able to participate as amicus curiae in other cases on account of the decision by the High Court is well founded. The determination by the court to reject the appellant's application in this case was based on the particular circumstances in the case, namely the material the appellant had published on the subject matter of the litigation.

35. For the foregoing reasons, I would dismiss the appeal. I would order each party to bear its own costs of the appeal.

**Judgment of D.K. Musinga, JA**

1. I have had the benefit of reading the draft opinion of Gatembu, JA. I entirely agree with his reasoning and the conclusions arrived at, and I have nothing useful to add. As Murgor, JA equally agrees with the opinion of Gatembu, JA, the final orders of the Court are that this appeal is dismissed.

   Each party shall bear its own costs of the appeal.

**Judgment Of A.K. Murgor, JA**

1. Having had the benefit reading the comprehensive opinion of Gatembu, JA, I am in agreement with the conclusions reached and have nothing further to accentuate. I would therefore dismiss the appeal, and order that each party bear its costs in view of the public interest element of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE, 2017.**

**S. GATEMBU KAIRU, FCIArb**

**.....**

**JUDGE OF APPEAL**

**D.K. MUSINGA**

**.....**

**JUDGE OF APPEAL**

**A.K. MURGOR**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**