



**Cabinet Secretary for the National Treasury and Planning & 4 others v Okioti & 52 others; Bhatia (Intended Amicus Curiae) (Petition (Application) E031 of 2024 & Petition E032 & E033 of 2024 (Consolidated)) [2024] KESC 55 (KLR) (30 August 2024) (Ruling)**

Neutral citation: [2024] KESC 55 (KLR)

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

**PETITION (APPLICATION) E031 OF 2024 &  
PETITION E032 & E033 OF 2024 (CONSOLIDATED)**

**MK KOOME, CJ & P, PM MWILU, DCJ & VP, MK IBRAHIM,  
SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ**

**AUGUST 30, 2024**

**BETWEEN**

**THE CABINET SECRETARY FOR THE NATIONAL TREASURY AND  
PLANNING ..... 1<sup>ST</sup> APPELLANT**  
**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> APPELLANT**  
**THE NATIONAL ASSEMBLY ..... 3<sup>RD</sup> APPELLANT**  
**THE SPEAKER OF THE NATIONAL ASSEMBLY ..... 4<sup>TH</sup> APPELLANT**  
**KENYA REVENUE AUTHORITY ..... 5<sup>TH</sup> APPELLANT**

**AND**

**OKIYA OMTATAH OKOITI ..... 1<sup>ST</sup> RESPONDENT**  
**ELIUD KARANJA MATINDI ..... 2<sup>ND</sup> RESPONDENT**  
**MICHAEL KOJO OTIENO ..... 3<sup>RD</sup> RESPONDENT**  
**BENSON ODIWOUR OTIENO ..... 4<sup>TH</sup> RESPONDENT**  
**BLAIR ANGIMA OIGORO ..... 5<sup>TH</sup> RESPONDENT**  
**VICTOR OKUNA ..... 6<sup>TH</sup> RESPONDENT**  
**FLORENCE KANYUA LICHORO ..... 7<sup>TH</sup> RESPONDENT**  
**DANIEL OTIENO ILA ..... 8<sup>TH</sup> RESPONDENT**  
**RONE ACHOKI HUSSEIN ..... 9<sup>TH</sup> RESPONDENT**  
**HON SENATOR EDDY GICHERU OKETCH ..... 10<sup>TH</sup> RESPONDENT**



CLEMENT EDWARD ONYANGO .....	11 <sup>TH</sup> RESPONDENT
PAUL SAOKE .....	12 <sup>TH</sup> RESPONDENT
LAW SOCIETY OF KENYA .....	13 <sup>TH</sup> RESPONDENT
AZIMIO LA UMOJA ONE KENYA COALITION PARTY .....	14 <sup>TH</sup> RESPONDENT
KENYA HUMAN RIGHTS COMMISSION .....	15 <sup>TH</sup> RESPONDENT
KATIBA INSTITUTE .....	16 <sup>TH</sup> RESPONDENT
THE INSTITUTE FOR SOCIAL ACCOUNTABILITY (TISA) ....	17 <sup>TH</sup> RESPONDENT
TRANSPARENCY INTERNATIONAL KENYA .....	18 <sup>TH</sup> RESPONDENT
INTERNATIONAL COMMISSION OF JURISTS-KENYA (ICJ KENYA) .....	19 <sup>TH</sup> RESPONDENT
SIASA PLACE .....	20 <sup>TH</sup> RESPONDENT
TRIBELESS YOUTH .....	21 <sup>ST</sup> RESPONDENT
AFRICA CENTER FOR OPEN GOVERNANCE .....	22 <sup>ND</sup> RESPONDENT
ROBERT GATHOGO KAMWARA .....	23 <sup>RD</sup> RESPONDENT
TRADE UNIONS CONGRESS OF KENYA .....	24 <sup>TH</sup> RESPONDENT
KENYA MEDICAL PRACTITIONERS' PHARMACISTS AND DENTIST UNION .....	25 <sup>TH</sup> RESPONDENT
KENYA NATIONAL UNION OF NURSES .....	26 <sup>TH</sup> RESPONDENT
KENYA UNION OF CLINICAL OFFICERS .....	27 <sup>TH</sup> RESPONDENT
FREDRICK ONYANGO OGOLA .....	28 <sup>TH</sup> RESPONDENT
NICHOLAS KOMBE .....	29 <sup>TH</sup> RESPONDENT
WHITNEY GACHERI MICHENI .....	30 <sup>TH</sup> RESPONDENT
STANSLOUS ALUSIOLA .....	31 <sup>ST</sup> RESPONDENT
HERIMA CHAO MWASHIGADI .....	32 <sup>ND</sup> RESPONDENT
DENNIS WENDO .....	33 <sup>RD</sup> RESPONDENT
MERCY NABWIRE .....	34 <sup>TH</sup> RESPONDENT
BENARD OKELO .....	35 <sup>TH</sup> RESPONDENT
NANCY OTIENO .....	36 <sup>TH</sup> RESPONDENT
MOHAMED B. DUB .....	37 <sup>TH</sup> RESPONDENT
UNIVERSAL CORPORATION LIMITED .....	38 <sup>TH</sup> RESPONDENT
COSMOS LIMITED .....	39 <sup>TH</sup> RESPONDENT
ELYS CHEMICAL INDUSTRIES .....	40 <sup>TH</sup> RESPONDENT



REGAL PHARMACEUTICALS .....	41 <sup>ST</sup> RESPONDENT
BETA HEALTHCARE LIMITED .....	42 <sup>ND</sup> RESPONDENT
DAWA LIMITED .....	43 <sup>RD</sup> RESPONDENT
MEDISEL KENYA LIMITED .....	44 <sup>TH</sup> RESPONDENT
MEDIVET PRODUCTS LIMITED .....	45 <sup>TH</sup> RESPONDENT
LAB AND ALLIED LIMITED .....	46 <sup>TH</sup> RESPONDENT
BIOPHARM LIMITED .....	47 <sup>TH</sup> RESPONDENT
BIODEAL LABORATORIES LIMITED .....	48 <sup>TH</sup> RESPONDENT
ZAIN PHARMA LIMITED .....	49 <sup>TH</sup> RESPONDENT
THE SPEAKER OF THE SENATE .....	50 <sup>TH</sup> RESPONDENT
CONSUMERS FEDERATION OF KENYA (COFEK) .....	51 <sup>ST</sup> RESPONDENT
KENYA EXPORT FLORICULTURE HORTICULTURE, AND ALLIED WORKERS UNION .....	52 <sup>ND</sup> RESPONDENT
DR MAURICE JUMAH OKUMU .....	53 <sup>RD</sup> RESPONDENT

AND

DR GAUTAM BHATIA ..... INTENDED AMICUS CURIAE

*(Being an application for Admission of Dr. Gautam  
Bhatia as Amicus Curiae in the Consolidated Appeals)*

### **Guiding principles for admission of an amicus curiae in a suit**

*The applicant sought to be admitted in the instant appeals as amicus curiae. The court reiterated the guiding principles for admission of an amicus curiae in a suit.*

Reported by Kakai Toili

*Civil Practice and Procedure – parties to a suit – amicus curiae - what were the guiding principles for admission of an amicus curiae in a suit - Supreme Court Rules, 2020, rule 19.*

### **Brief facts**

The applicant sought to be admitted in the instant appeals as *amicus curiae*. The applicant contended that; he was an expert in comparative constitutional law, and a practicing constitutional lawyer before the Supreme Court of India; and he possessed and had demonstrated his scholarly expertise with regards to the questions that formed the subject matter of the appeal, in particular the doctrine, history, practice and theory of public participation that would assist the court in answering the questions raised in the appeal. The applicant submitted that he was impartial, had no professional relationship with any of the parties involved in the appeal, nor did he have any personal or pecuniary interest in the appeal and its outcome.

### **Issues**

What were the guiding principles for admission of an *amicus curiae* in a suit?



## Held

1. An applicant seeking to be enjoined as *amicus curiae* had to satisfy the court that he or she had satisfied the legal requirements for such an application. In that context, rule 19 of the Supreme Court Rules, 2020 provided that, before admitting a person as a friend of the court, the court had to consider;
  1. the proven expertise of the person;
  2. independence and impartiality of the person; or
  3. the public interest involved.
2. The role of an *amicus curiae* in any proceedings was to aid a court in arriving at a legal, pragmatic and legitimate decision, anchored on the tenets of judicial duty. The guiding principles for admission of an *amicus curiae* were:
  1. An *amicus* brief should be limited to legal arguments.
  2. 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.
  3. An *amicus* brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tended 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 did not comply with that principle.
  4. 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.
3. The applicant had, with the necessary precision, set out germane points of law that he intended to address the court on and they resonated with the issues in dispute in the consolidated appeal. The *amicus* brief would be of valuable assistance to the court in addressing the issues raised in the consolidated appeal and the applicant had demonstrated expertise in the field of comparative constitutional law which was relevant to the appeal. None of the parties to the appeal had raised any issue of bias in the intended brief and there was none on the court's part and should any arise, the court was quite capable of identifying and rejecting it made its final decision on the appeal.

*Application allowed.*

## Orders

- i. *The amicus brief attached to the application was deemed as filed and the applicant shall not make oral submissions at the hearing of the petitions.*
- ii. *No orders as to costs.*

## Citations

### Cases

#### Kenya

*Attorney-General & 2 others v Ndii & 79 others; Dixon & 7 others (Amicus Curiae)* Petition 12, 11 & 13 of 2021 (Consolidated); [2022] KESC 8 (KLR) - (Applied)

*Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* Petition 12 of 2013; [2015] KESC 26 (KLR); [2015] eKLR - (Applied)

## Statutes

### Kenya

Supreme Court Rules, 2020 (cap 9B Sub Leg) rule 19 — (Interpreted)

## Texts

Bhatia, G., (2019) *The transformative Constitution: a Radical Biography in Nine Acts* Gurgaon: Harper Collins Publishers



## Advocates

None mentioned

## RULING

1. Upon perusing the notice of motion dated and lodged before this court on August 22, 2024, by Gautam Bhatia seeking, orders *inter alia* that-
  - a. Dr Gautam Bhatia, the applicant herein, be granted leave to be admitted in the Appeals as *amicus curiae*.
  - b. Dr Gautam Bhatia, the applicant herein, be granted leave to present written and oral submissions by way of an Amicus brief in the Appeals.
  - c. Upon granting leave to participate in the proceedings, the honourable court give directions on how the *amicus curiae* shall participate herein on such other or further directions as this honourable court may deem fit to give.
  - d. There be no order on costs for or against the *amicus curiae*.
2. Taking into account the affidavit in support of the motions sworn by Dr. Gautam Bhatia and his written submissions dated August 21, 2024 to the effect that; the applicant is an expert in comparative constitutional law, and a practicing constitutional lawyer before the Supreme Court of India; he possesses and has demonstrated his scholarly expertise with regards to the questions that form the subject matter of the appeal, in particular the doctrine, history, practice and theory of public participation that will assist the court in answering the questions raised in the appeal; he is the author of The [\*Transformative Constitution: A Radical Biography in Nine Acts\*](#), and of numerous scholarly articles in peer-reviewed comparative constitutional law journals; he has engaged with Kenyan constitutional law in a comparative context for some years and has been previously admitted as *amicus curiae* before this Court in [\*Attorney-General and Others v David Ndi and Others\*](#) [“the BBI Case”]; he is the author of *Law Making, Political Process, and the State: Transformative Constitutionalism in Kenya – 2010 – 2025* (James Currey 2025, forthcoming), and of ‘*The Hydra and the Sword: Constitutional Amendments, Political Process, and the BBI Case in Kenya*’ (*Global Constitutionalism 2025, forthcoming*). In addition to his scholarly work, the applicant has also submitted that he has participated in legal proceedings involving the subject of public participation before the Supreme Court of India and the High Court of Bombay.
3. Further, it has been submitted that the applicant is impartial, has no professional relationship with any of the parties involved in this appeal, nor does he have any personal or pecuniary interest in the appeal and its outcome. That, he only seeks to provide his scholarly expertise in the service of the Court on the questions raised in the appeal that are of great importance to the people and the future of the Republic of Kenya. Specifically, he has urged the point that, if admitted as *amicus curiae*, he will make submissions, subject to this court’s directions, on the following issues:
  - a. Whether the national value of public participation entails an obligation upon State organs to give reasons in the event that they choose to reject the suggestions that have emanated from the public.
  - b. If, after one round of public participation, a Bill is substantively amended by the National Assembly, whether there is an obligation to subject the amended provisions and/or new provisions to further public participation.



4. Noting that none of the parties in the consolidated appeals have opposed the application, We now opine and determine as follows;
- i. An applicant seeking to be enjoined as *amicus curiae* has to satisfy this Court that he or she has satisfied the legal requirements for such an application. In that context, rule 19 of the [Supreme Court Rules 2020](#) provides that, before admitting a person as a friend of the court, this court has to consider the proven expertise of the person; independence and impartiality of the person; or the public interest involved.
  - ii. The role of an *amicus curiae* in any proceedings is to aid a court in arriving at a legal, pragmatic and legitimate decision, anchored on the tenets of judicial duty and in [Trusted Society of Human Rights Alliance v Mumo Matemu & 4 Others](#) SC Petition No 12 of 2023, this Court set out the guiding principles for admission of an *amicus curiae* in the following terms:  

“ ....

    - 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....”
  - iii. Amongst the issues in dispute in the consolidated appeal are the place and extent of public participation in the legislative process; whether Parliament can amend bills after they have been subjected to public participation; the parameters and considerations of a declaration of the unconstitutionality of a statute; the orders to be issued upon such a declaration including whether to allow or disallow suspension or otherwise of the declaration to enable remedial action by the offending party.
  - iv. Having considered the proposed amicus brief we note that the applicant has, with the necessary precision, set out germane points of law that he intends to address this court on and they clearly resonate with the issues in dispute in the consolidated appeal. We also perceive that the *amicus* brief will be of valuable assistance to this Court in addressing the issues raised in the consolidated appeal and that the applicant has demonstrated expertise in the field of comparative constitutional law which we find relevant to the appeal. We further note that none of the parties to the appeal has raised any issue of bias in the intended brief and we see none on our part and should any arise, we are quite capable of identifying and rejecting it as we make our final decision on the appeal. We therefore find that the Applicant has met the criteria set out in [Mumo Matemu](#) on admission of *amicus curiae*.



5. Consequently and for the reasons afore-stated, we make the following Orders:
- i. The applicant’s notice of motion dated and filed on August 22, 2024 by the intended *amicus curiae* is allowed.
  - ii. The *amicus* brief attached to the application is deemed as filed and the applicant shall not make oral submissions at the hearing of the petitions.
  - iii. As the motion was not opposed, we make no orders as to costs.
- It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF AUGUST, 2024**

.....

**M. K. KOOME**  
**CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT OF KENYA**

.....

**P.M. MWILU**  
**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT**

.....

**M. K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....

**S. C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA W. OUKO**  
**JUSTICE OF THE SUPREME COURT**

