



Kenya Tea Growers Association & 2 others v National Social Security Fund Board of Trustees & 13 others; Law Society of Kenya (Intended Amicus Curiae) (Petition (Application) E004 of 2023 & Petition E002 of 2023 (Consolidated)) [2023] KESC 63 (KLR) (14 July 2023) (Ruling)

Neutral citation: [2023] KESC 63 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION (APPLICATION) E004 OF 2023 & PETITION E002 OF 2023 (CONSOLIDATED)
MK KOOME, CJ, PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA & W OUKO, SCJJ
JULY 14, 2023**

BETWEEN

**KENYA TEA GROWERS ASSOCIATION 1ST APPELLANT
AGRICULTURAL EMPLOYERS ASSOCIATION 2ND APPELLANT
COUNTY PENSIONERS ASSOCIATION 3RD APPELLANT**

AND

**THE NATIONAL SOCIAL SECURITY FUND BOARD OF
TRUSTEES 1ST RESPONDENT
THE CABINET SECRETARY FOR LABOUR, SOCIAL SECURITY AND
SERVICES 2ND RESPONDENT
THE RETIREMENT BENEFITS AUTHORITY 3RD RESPONDENT
THE COMPETITION AUTHORITY 4TH RESPONDENT
THE HON ATTORNEY GENERAL 5TH RESPONDENT
KENYA COUNTY GOVERNMENT WORKERS UNION 6TH RESPONDENT
KENYA UNION OF ENTERTAINMENT AND MUSIC INDUSTRY
EMPLOYEES 7TH RESPONDENT
KENYA BUILDING, CONSTRUCTION, TIMBER, FURNITURE & ALLIED
TRADES EMPLOYEES UNION 8TH RESPONDENT
UNION OF NATIONAL RESEARCH INSTITUTES STAFF OF KENYA
(UNIRISK) 9TH RESPONDENT
KENYA GLASS WORKERS UNION 10TH RESPONDENT
NKAURAKI EDWIN LESIDAI & 89 OTHERS 11TH RESPONDENT**



CENTRAL ORGANISATION OF TRADE UNIONS (COTU) 12TH
RESPONDENT

FEDERATION OF KENYA EMPLOYERS (FKE) 13TH RESPONDENT

KENYA QUARRY AND MINE WORKERS UNION 14TH RESPONDENT

AND

LAW SOCIETY OF KENYA INTENDED AMICUS CURIAE

*(Being an application for admission of the Law Society of Kenya as an amicus curiae
in SC Petition No. E004 of 2023 as consolidated with SC Petition No. E002 of 2023.)*

Circumstances in which a party can be admitted as amicus curiae in court proceedings.

*The Law Society of Kenya sought to be enjoined as a friend of the court in the instant suit. Their brief was on the constitutionality of the Employment and Labour Relations Court to determine disputes that did not emanate from the employer-employee relationship; in particular the constitutionality of the NSSF Act, 2013. The Supreme Court held that the amicus brief by the LSK did not meet the standards set out in rule 19 of the Supreme Court Rules, 2020 and in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2015] eKLR amici briefs made in the public interest.*

Reported by John Ribia

Civil Practice and Procedure – suit - parties to a suit – amicus curiae (friend of the court) – role – conditions precedent - form of an amicus brief - what was the role of the amicus curiae (friend of the court) in court proceedings - what conditions did an amicus brief need to fulfil for one to be enjoined as amicus curiae (friend of the court) - whether the principle that costs followed the event applied to applications to be enjoined as amicus curiae (friend of the court) that were made in public interest - 2020 rule 19;

Brief facts

The Law Society of Kenya sought to be enjoined as *amicus curiae* in the instant suit. The crux of the petition revolved around the jurisdiction of the Employment and Labour Relations Court (ELRC) vis-à-vis the jurisdiction of the High Court to entertain disputes that did not emanate from an employer-employee dispute. In particular, the question was whether the determination of the constitutionality of the , 2013 was the mandate of the High Court or the ELRC. LSK proposed an *amicus* brief that related to the question of the jurisdiction of the ELRC to determine the aforementioned issues.

Issues

- i. What was the role of the *amicus curiae* (friend of the court) in court proceedings?
- ii. What conditions did an *amicus* brief need to fulfill for one to be enjoined as *amicus curiae* (friend of the court)?
- iii. Whether the principle that costs followed the event applied to applications to be enjoined as *amicus curiae* (friend of the court) that were made in the public interest.



Held

1. 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; and the guiding principles for admission of an *amicus curiae* as set out by rule 19 of the 2020 and in the following terms:
 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 '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 the instant 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.
2. The points of law set out above, which Law Society of Kenya (LSK) intended to advance related to the question of the Employment and Labour Relations Court's (ELRC's) jurisdiction to determine the constitutionality of the , 2013. The arguments in the proposed amicus brief had largely been addressed in one way or another by the parties to the consolidated appeal through their pleadings and/ or submissions.
3. The proposed *amicus* brief did not introduce novel aspects of the legal issue in question. The motion was not brought within reasonable time. LSK had not met the conditions which would warrant its admission as *amicus curiae* in the consolidated appeal.
4. Whereas costs generally followed the events, each party was to bear their own costs. That would serve the ends of justice. To order otherwise would have the effect of barring *bona fide* applications for admission of persons who would assist the court as *amicus curiae*. The applicant was motivated by public interest to advance the law save that the issues it intended to raise were well covered by the pleadings and submissions on record

Application dismissed.

Orders

Each party was to bear its own costs.

Citations

Cases

1. Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai Estate of & 4 others (Petition 4 of 2012) — Explained
2. Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015; [2021] KESC 31 (KLR)) — Mentioned
3. Raila Amolo Odinga & Stephen Kalonzo Musyoka v. Independent Electoral and Boundaries Commission, Chairperson Independent Electoral and Boundaries Commission, Uhuru Muigai Kenyatta & Law Society of Kenya (Petition 1 of 2017; [2017] KESC 35 (KLR)) — Mentioned
4. Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 others (Petition No. 12 of 2013) — Mentioned

Statutes

1. Constitution of Kenya, 2010 (Const2010) — Article 43,162(2)(a) — Interpreted
2. Law Society of Kenya Act (No. 21 of 2014) — Section 4 — Interpreted
3. National Social Security Fund Act (No. 45 of 2013) — In general — Cited
4. Supreme Court Rules, 2020 (No. 7 of 2011 Sub Leg) — Rule 19 — Interpreted



Advocates

Mr. Ochiel Dudley & Ms. Julia Wachira for Applicant

Mr. Geoffrey Orai Obura for 1st and 2nd appellants

Dr. Muthomi Thiankolu for 3rd appellant

Mr. Fred Ngatia, SC for 1st respondent

Mr. Oscar Eredi for 2nd, 4th and 5th respondents

Mr. Kelvin Kimathi b/b for Mr. Charles Agwara for 3rd respondent

Ms. Mwamboa Naazi b/b for Mr. George Kithi for 6th respondent

Mr. Dickens Ouma for 13th respondent

RULING

1. Upon perusing the notice of motion dated May 15, 2023 and lodged before this court on May 16, 2023 by the Law Society of Kenya (LSK) seeking *inter alia* orders that-
 - a. Leave be granted for admission of LSK as *amicus curiae* in the consolidated appeal.
 - b. Leave be granted to the *amicus curiae* to make written and oral arguments limited to the following points of law:
 - i. What are the constitutional and statutory contours of the Employment and Labour Relations Court's (ELRC) jurisdiction under article 162(2)(a) of the [Constitution](#) and more specifically its jurisdiction to interpret and apply the [Constitution](#);
 - ii. What approach should a court adopt in interpreting and applying the phrases 'disputes relating to employment and labour relations' under article 162(2)(a) and 'any other written law which extends jurisdiction to the court relating to employment and labour relations including...' under section 12 of the [ELRC Act](#); and
 - iii. Are disputes over validity of pension statutes a category of 'disputes relating to employment and labour relations' under article 162(2)(a) of the [Constitution](#)? What are the general principles governing pension and pension schemes as a social security measure under article 43 of the [Constitution](#)?
 - c. There be no orders as to costs for this application.
2. Taking into account the affidavit in support of the motion sworn by Florence Muturi, the Chief Executive Officer of LSK, on May 15, 2023 and LSK's written submissions dated June 29, 2023 to the effect that; firstly, the crux of the consolidated appeal revolves around the uncertainty of the ELRC's jurisdiction as defined in the [Constitution](#), and its resolution is in public interest. Secondly, that LSK's request for admission as *amicus curiae* is in line with its statutory mandate, as was recognized by this



court in *Raila Amolo Odinga & Stephen Kalonzo Musyoka v Independent Electoral and Boundaries Commission, Chairperson Independent Electoral and Boundaries Commission, Uhuru Muigai Kenyatta & Law Society of Kenya*, Presidential Petition No 1 of 2017; [2017] KESC 35 KLR; and

3. Moreover, under section 4 of the *LSK Act*, the applicant is required to assist courts in matters relating to legislation, the administration of justice and the practice of law in Kenya; that, LSK's mandate extends to upholding the *Constitution*, advancing the rule of law as well as protecting and assisting members of the public in legal matters. Thirdly, the points of law (set out herein above) which LSK seeks to advance are geared towards assisting the court in arriving at an informed decision and developing the law. Further, none of the parties to the consolidated appeal have addressed those points of law. Fourthly, LSK is neutral and governed by fidelity to the law; and it possesses expertise, experience and knowledge relevant to the determination of the dispute. All in all, as per its submissions, it is urged that LSK has met the principles for admission as *amicus curiae* as appreciated by this court in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others*, SC Petition No 12 of 2013; [2015] eKLR; and
4. Cognizant of the fact that when the motion was mentioned before the Deputy Registrar of this court on June 5, 2023, advocates for the appellants and the Federation of Kenya Employers (the 13th respondent) indicated that their clients had no objection to LSK's admission; and
5. Upon considering the National Social Security Fund (NSSF) Board of Trustees' (the 1st respondent) response dated June 9, 2023 opposing the motion on the grounds that; the main issues in controversy are whether the ELRC has jurisdiction to entertain suits challenging constitutionality of a legislation without any employer- employee dispute; whether the NSSF Bill, as it was, ought to have been tabled before the Senate; and whether the NSSF Act, 2013 gives monopoly to NSSF in provision of pension and social security services. Nonetheless, LSK has not addressed the aforementioned issues in its proposed *amicus* brief and therefore, its participation in the matter will not be of any assistance in resolution of the dispute. Furthermore, the legal issues it intends to raise have been exhaustively addressed by the parties to the consolidated appeal; and in any event, LSK has not met the threshold for admission as *amicus curiae*; and
6. Noting that the Cabinet Secretary for Labour, Social Security and Services, the Competition Authority and the Attorney General (the 2nd, 4th and 5th respondents) *vide* their grounds of objection and written submissions, both dated June 9, 2023, opposed the motion on similar grounds as the 1st respondent. In addition, they argued that LSK is guilty of inordinate delay taking into account that Petition No E002 of 2023 and E004 of 2023 were lodged on 17th and February 28, 2023 respectively and the pleadings were closed in March 2023. Besides, they urged that the dispute has been pending before the superior courts below for a period of over ten (10) years yet LSK did not seek to be admitted before those courts. Be that as it may, LSK has also not offered any explanation as to why it seeks to be admitted at this tail end of litigation. What is more, LSK has not demonstrated any expertise in the issues it seeks to advance and has taken sides by advancing the appellants' position; and
7. Further noting that the Kenya County Government Workers Union (the 6th respondent) *vide* its response dated June 9, 2023 opposed the motion on the same grounds as the 1st, 2nd, 4th and 5th respondents; and
8. Bearing in mind that the Retirement Benefits Authority (the 3rd respondent) failed to file its response by close of business of June 12, 2023 despite the directions of the Registrar of this court on even date; and
9. Appreciating 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 the guiding principles



for admission of an amicus curiae as set out by rule 19 of the Supreme Court Rules, 2020 and this court in the Mumo Matemu case 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."

10. We now determine as follows:

- i. It is common ground that the crux of the dispute in the consolidated appeal pertains to the parameters of the ELRC's *vis-à-vis* the High Court's jurisdiction as far as the determination of the constitutionality of NSSF Act, 2013 is concerned; the particular issues being; a determination of whether ELRC has jurisdiction to entertain a dispute which does not arise from an employer-employee dispute; and whether the determination of the constitutionality of the NSSF Act, 2013 was the mandate of the High Court under article 165(3)(d)(i) or the ELRC under article 162(2)(a) of the Constitution.
- ii. Having appraised the proposed amicus brief we note that the points of law set out above, which LSK intends to advance, relate to the question of the ELRC's jurisdiction to determine the constitutionality/validity of the NSSF Act, 2013.
- iii. Nonetheless, we cannot help but note that the arguments in the proposed amicus brief have largely been addressed in one way or another by the parties to the consolidated appeal through their pleadings and/or submissions. As such, the proposed amicus brief does not introduce novel aspects of the legal issue in question. See Francis Kariuki Muruatetu & Another v Republic & 5 others, SC Petition No 15 of 2015 as consolidated with Petition No 16 of 2015 [2016] eKLR. In addition, we are not convinced that the motion was brought within reasonable time. For those reasons, we find that LSK has not met the conditions which would warrant its admission as *amicus curiae* in the consolidated appeal.
- iv. While costs should generally follow the event, guided by this court's decision in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others, SC Petition No 4 of 2012; [2013] eKLR, we find that in these circumstances, an order that each party to bear their own costs is just and will serve the ends of justice. This is because to order otherwise may have the effect of barring bona fide applications for admission of persons who would assist the court as *amicus*



curiae. We also recognize that the applicant was motivated by public interest to advance the law save that the issues it intends to raise are well covered by the pleadings and submissions on record.

11. Consequently and for the reasons afore-stated, we make the following orders:
- i. The notice of motion dated May 15, 2023 and lodged on May 16, 2023 by LSK is hereby dismissed.
 - ii. Each party shall bear their own costs.

It is so ordered

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY, 2023.

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M. K. KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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W. OUKO

JUSTICE OF THE SUPREME COURT

