



**Odinga & another v Independent Electoral and Boundaries  
Commission & 9 others (Presidential Election Petition E005 of 2022)  
[2022] KESC 46 (KLR) (Election Petitions) (29 August 2022) (Ruling)**

Neutral citation: [2022] KESC 46 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
ELECTION PETITIONS**

**PRESIDENTIAL ELECTION PETITION E005 OF 2022**

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

**AUGUST 29, 2022**

**BETWEEN**

**RAILA ODINGA ..... 1<sup>ST</sup> PETITIONER**

**MARTHA WANGARI KARUA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
RESPONDENT**

**WANYONYI WAFULA CHEBUKATI ..... 2<sup>ND</sup> RESPONDENT**

**BOYA MOLU ..... 3<sup>RD</sup> RESPONDENT**

**PROF ABDI YAKUB GULIYE ..... 4<sup>TH</sup> RESPONDENT**

**JULIANA WHONGE CHERERA ..... 5<sup>TH</sup> RESPONDENT**

**JUSTUS NYANGAYA ..... 6<sup>TH</sup> RESPONDENT**

**FRANCIS WANDERI ..... 7<sup>TH</sup> RESPONDENT**

**IRENE MASSIT ..... 8<sup>TH</sup> RESPONDENT**

**WILLIAM SAMOEI RUTO ..... 9<sup>TH</sup> RESPONDENT**

**AND**

**KENYAN SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS  
(ICJ) KENYA ..... AMICUS CURIAE**



***(Being an application by the Kenyan Section of The International Commission of Jurists (ICJ Kenya to be enjoined as Amicus Curiae)***

**Principles that guide the court for admission of a party as an amicus curiae**

Reported by John Ribia

**Electoral Law** - parties – joinder application – application to be joined as amicus curiae - circumstances when a party can be admitted as amicus – principles a court should consider on an application to be enjoined as an amicus curiae - whether the Kenyan Section of the International Commission of Jurists (ICJ Kenya) could be admitted as amicus curiae in a presidential election petition on grounds that they sought to address the court on the role of the Independent Electoral and Boundaries Commission (IEBC) vis-à-vis the role of its chairperson – Supreme Court (Presidential Election Petition) Rules, 2017, rule 17A; Supreme Court Rules, 2020, rule 19(1) - *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others [2014] eKLR* - *Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR*.

**Brief facts**

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) filed an application to be enjoined as *amicus curiae* in the presidential election petition. The petitioner contended that it was neutral and it was guided by fidelity to the law. They sought to address the court on the role of the Independent Electoral and Boundaries Commission (IEBC) vis-à-vis the role of its chairperson.

**Issues**

- i. What principles should a court consider on an application to be joined as an *amicus curiae*?
- ii. Whether the Kenyan Section of the International Commission of Jurists (ICJ Kenya) could be admitted as *amicus curiae* in a presidential election petition on grounds that they sought to address the court on the role of the Independent Electoral and Boundaries Commission (IEBC) vis-à-vis the role of its chairperson.

**Held**

1. Rule 17A of the Supreme Court (Presidential Election Petition) Rules 2017 made provision for admission of *amicus curiae* (a friend of the court) in a presidential election petition; and rule 19(1) of the Supreme Court Rules 2020, stated that the court could 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.
2. The principles below guided the Supreme Court in handling an application to be admitted as *amicus curiae*: -
  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 tends to compromise their essence as well as the terms of the Constitution's



call for resolution of disputes without undue delay. The court could, and on a case-by-case basis, reject *amicus* briefs that did not comply with the 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.
  5. The court could call upon the Attorney-General to appear as *amicus curiae* in a case involving issues of great public interest. In such instances, admission of the Attorney-General was not defeated solely by the subsistence of a State interest, in a matter of public interest.
  6. Where, in adversarial proceedings, parties alleged that a proposed *amicus curiae* was biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appeared to be partisan on an issue before the court, the court would consider such an objection by allowing the respective parties to be heard on the issue.
  7. An *amicus curiae* was not entitled to costs in litigation. In instances where the court requested the appearance of any person or expert as *amicus*, the legal expenses could be borne by the Judiciary.
  8. The court would regulate the extent of *amicus* participation in proceedings, to forestall the degeneration of *amicus* role into a partisan role.
  9. In appropriate cases and at its discretion, the court could assign questions for *amicus* research and presentation.
  10. An *amicus curiae* should not participate in interlocutory applications, unless called upon by the court to address specific issues.
3. The applicant was to confine itself to only addressing the court on the constitutional principles on election technology; the court's jurisdiction in determining criminal issues in the petition; appropriate reliefs in the context of a presidential election petition; and the roles of the IEBC *vis-a-vis* its chairperson in the management of a presidential election result.

*Application allowed.*

### **Orders**

- i. *The application dated August 27, 2022 and lodged on even date by Kenyan section of the International Commission of Jurists (ICJ Kenya) was allowed.*
- ii. *The amicus brief attached to the application was deemed as filed and the applicant was not to make oral submissions at the hearing of the petitions.*
- iii. *Parties were to bear their own costs.*

### **Citations**

#### **Cases**

##### **Kenya**

1. *Muruatetu, Francis Kariuki & another v Republic & 5 others* Petitions 15 & 16 of 2015; [2016] eKLR (Consolidated) - (Mentioned)
2. *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* Petition 12 of 2013; [2014] eKLR - (Applied)
3. *Wetangula, Moses Masika v Musikari Nazi Kombo & 2 others* Petition 12 of 2014; [2015] eKLR - (Explained)

#### **Statutes**

##### **Kenya**

1. Constitution of Kenya articles 10, 38, 81, 86, 138(3)(a)(b)(c) - (Interpreted)
2. Election Offences Act, 2016 (Act No 37 of 2016) In general - (Cited)
3. Elections Act, 2011 (Act No 24 of 2011) section 87 - (Interpreted)
4. Supreme Court Rules, 2020 (No 7 Sub Leg) rule 19 - (Interpreted)



5. Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) rule 17A - (Interpreted)

#### Advocates

None mentioned

### RULING

1. Upon perusing the notice of motion dated August 27, 2022, and lodged on even date by the Kenyan Section of the International Commission of Jurists (ICJ Kenya) pursuant to the provisions of rule 17A of the *Supreme Court (Presidential Election Petition) Rules 2017*, and rule 19 of the *Supreme Court Rules 2020*, seeking to be enjoined in the petition as a friend of the court; and
2. Upon reading the affidavit of Mr Christopher Gitari, Vice Chairperson of the Council of the Kenyan Section of the International Commission of Jurists (ICJ Kenya), sworn on the August 3, 2018; and
3. Upon considering the applicant's grounds in support of its application, its intended amicus brief and written submissions filed on August 27, 2022 wherein the applicant submits that it has the relevant expertise in rule of law, democracy and the intersection of law and electoral technology, and that it intends to assist the court in developing the law on novel legal aspects of the case, in relation to the following arguments:
  - i. What broad principles, consistent with 10 articles 10, 38, 81, 86, and 138(3)(a), (b), and (c) of *the Constitution*, govern the use of technology in elections?
  - ii. Considering legal reforms following the case of *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others* Petition 12 of 2014 [2015] eKLR (amending section 87 of the *Elections Act, 2011* and enacting the *Election Offences Act, 2016*) what is the requisite standard of proof in Kenyan election petitions? And what powers does an electoral court possess where 20 allegations imputing criminal conduct are pleaded in an election petition?
  - iii. What are "appropriate reliefs" in the context of a presidential election petition?
  - iv. What are the respective roles of the Commission and its Chairperson in presidential election result management under article 138(3)(c) and 10?
4. Upon considering the applicant's further arguments that it is neutral in this petition and guided by fidelity to the law that is consistent with this court's decision in the cases of *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* Sup Ct Petition No 12 of 2013 [2014] eKLR (*Mumo Matemu* Case) and *Francis Kariuki Muruatetu & another v Republic & 5 others* Sup Ct Petition No 15 and 16 of 2015 [2016] eKLR.
5. Noting that no party has filed a response to this application;
6. Further considering the provisions of rule 17A of the *Supreme Court (Presidential Election Petition) Rules 2017*, which makes provision for admission of a friend of the court in a presidential election petition; and rule 19(1) of the *Supreme Court Rules 2020*, which states that 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;
7. Noting the decision in *Mumo Matemu*, where this court considered the role of *amicus curiae*, and set out the guiding principles as follows:
  - 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.
  - v. The court may call upon the Attorney-General to appear as *amicus curiae* in a case involving issues of great public interest. In such instances, admission of the Attorney- General is not defeated solely by the subsistence of a State interest, in a matter of public interest.
  - 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 (see: *Raila Odinga & others v IEBC & others*; SC Petition No 5 of 2013- Katiba Institute's application to appear as *amicus*).
  - vii. An *amicus curiae* is not entitled to costs in litigation. In instances where the court requests the appearance of any person or expert as *amicus*, the legal expenses may be borne by the Judiciary.
  - viii. The court will regulate the extent of *amicus* participation in proceedings, to forestall the degeneration of *amicus* role in to partisan role.
  - ix. In appropriate cases and at its discretion, the court may assign questions for *amicus* research and presentation.
  - x. An *amicus curiae* shall not participate in interlocutory applications, unless called upon by the court to address specific issues” [emphasis supplied].
8. Upon considering that the applicant will confine itself to only addressing this court on the constitutional principles on election technology; the court's jurisdiction in determining criminal issues in the petition; appropriate reliefs in the context of a presidential election petition; and the roles of the Commission *vis-a-vis* its Chairperson in the management of a presidential election result;
  9. Having considered the application, the attached *amicus* brief and written submissions thereof, it is our decision that the same is merited and is for allowing. We therefore make the following orders:

**Orders:**

- a. The application dated August 27, 2022 and lodged on even date by Kenyan Section of the International Commission of Jurists (ICJ Kenya) is allowed.



- b. 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.
  - c. Parties shall bear their own costs.
10. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF AUGUST 2022**

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

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

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**C. WANJALA NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME**

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

**I certify that this is a true copy of the original**  
**REGISTRAR**

