



**County Assembly of Kericho County & another v Attorney General &
4 others; Law Society of Kenya (Intended Amicus Curiae) (Reference
3 of 2020) [2021] KESC 66 (KLR) (25 January 2021) (Ruling)**

In the matter of an Application by the County Assemblies of Kericho and Nandi Counties [2021] eKLR

Neutral citation: [2021] KESC 66 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

REFERENCE 3 OF 2020

PM MWILU, AG.CJ & AG. P, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

JANUARY 25, 2021

**IN THE MATTER OF AN APPLICATION BY THE COUNTY ASSEMBLIES
OF KERICHO AND NANDI COUNTIES FOR AN ADVISORY OPINION
UNDER ARTICLE 163(6) OF THE CONSTITUTION OF KENYA**

BETWEEN

THE COUNTY ASSEMBLY OF KERICHO COUNTY 1ST APPLICANT

THE COUNTY ASSEMBLY OF NANDI COUNTY 2ND APPLICANT

AND

ATTORNEY GENERAL 1ST INTERESTED PARTY

THE SENATE 2ND INTERESTED PARTY

THE NATIONAL ASSEMBLY 3RD INTERESTED PARTY

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 4TH
INTERESTED PARTY**

KATIBA INSTITUTE 5TH INTERESTED PARTY

AND

LAW SOCIETY OF KENYA INTENDED AMICUS CURIAE

Law Society of Kenya admitted as amicus in an Application by the County Assemblies of Kericho and Nandi counties for an advisory opinion under article 163(6) of the Constitution.

The case revolved around the circumstances in which a party would be admitted as an amicus curiae at the Supreme Court. The court held that such admission was a matter of discretion and a privilege granted to an



intended amicus. Such an intended amicus needed to show that it was neutral and that it had no discernible direct or indirect interest in the matter.

Reported by Diana Mutunga

Civil Practice & Procedure – parties – parties to a suit – application to be admitted as *amicus curiae* at the supreme court - claim where applicant (Law Society of Kenya) applied to be admitted as *amicus* in the proceedings before court in a matter seeking to invoke the jurisdiction of the Supreme Court to issue advisory opinions– circumstances under which a party can be admitted as *amicus* in a matter – whether the applicant could be admitted as *amicus* in the circumstances – Supreme Court Rules, rule 19; 31; 51(2)

Brief facts

This was an application filed by the Law Society of Kenya (LSK) seeking leave to be enjoined in the reference as *amicus curiae*. The applicant submitted that it had met the set criteria for admission as *amicus curiae* because it had the expertise, experience and knowledge relevant to determination of the Reference; was involved in the amendments of the former Constitution and was therefore familiar with Kenya’s constitutional amendment history; and was neutral and had no connection with either party to the Reference.

Issues

1. Whether Law Society of Kenya should be admitted to the proceedings before the Supreme Court as *amicus curiae* in a matter seeking to invoke the jurisdiction of the Supreme Court to issue advisory opinions.
2. What were the circumstances under which a party could be admitted as *amicus* in a matter?

Relevant provisions of the Law

Supreme Court Rules, 2020

Rule 19

- 1.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.
- 2.The Court shall before admitting a person as a friend of the Court, consider—
 - a. proven expertise of the person;
 - b. independence and impartiality of the person; or
 - c. the public interest.
- 3.Any fees or expenses incurred by a person appointed by the Court as a friend of the Court on its own motion, shall be paid out of the Judiciary Fund, in accordance with a scale determined by the President.
- 4.An application to be admitted as an *amicus* or a friend of the Court shall be done within 7 days upon filing of a response in any proceedings before the Court.

Rule 51(6)

- 51(6) Where a friend of the Court or an expert has been admitted in any proceedings, the Court shall give directions on whether such person shall—
- a. file written submissions; or
 - b. address the Court orally.

Held

1. On the criteria for admission of a party as *amicus curiae*, such admission was a matter of discretion and a privilege granted to an intended *amicus*. Such an intended *amicus* needed to show that it was neutral and that it had no discernible direct or indirect interest in the matter.
2. The court stated that admission of *amici curiae* was a useful tool in achieving the constitutional mandate to develop the law with the assistance of well informed inputs from parties appearing before court. Under Section 4 of the Law Society Act, the LSK was mandated to assist the Courts and the public in matters relating to the law generally and the administration of justice in particular and was therefore made up of, *inter alia*, experts in constitutional matters.



3. No prejudice would be caused to any party if LSK was admitted as amicus curiae and there was no partiality expressed in its draft amicus brief. The court was also satisfied that the brief would assist it in reaching a fair determination of the issues raised in the Reference.

Application allowed.

Orders

- i. *The Law Society of Kenya was admitted as an amicus curiae.*
- ii. *It was to file and serve its Amicus Brief, 7 days after responses were filed by all the Interested Parties.*
- iii. *The Law Society of Kenya's participation would be limited to the filing of the Amicus Brief aforesaid and it would not make oral submissions.*
- iv. *There would be no orders as to costs.*

Citations

Cases

Kenya

1. *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* Petition 15 & 16 of 2015 (Consolidated); [2017] KESC 2 (KLR) - (Applied)
2. *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* Petition 12 of 2013; [2015] KESC 26 (KLR) - (Applied)

Statutes

Kenya

1. Constitution of Kenya article 257(6)- (Interpreted)
2. Law Society of Kenya Act (cap 18) section 4- (Interpreted)
3. Supreme Court Rules, 2020 (cap 9B sub leg) rules 19, 31; 51(2)(6)- (Interpreted)

Advocates

None mentioned

RULING

A. Introduction

1. Before the court is an application dated December 8, 2020. It is premised on rules 19, 31 and 51(2) of the *Supreme Court Rules, 2020* and seeks the admission of the Law Society of Kenya (LSK) as amicus curiae in the present reference.
2. The LSK proposes to submit a brief and address the court on the following questions:
 - a. How is the theory of a wholistic interpretation and Kenya's constitutional amendment culture relevant to the Reference?
 - b. What is the link between constitutional supremacy and amendment?
 - c. What is the place of public participation in constitutional amendment?
 - d. What are the general principles governing a free and fair referendum?
 - e. What is the meaning and purpose of the "single-subject rule" and how does it impact the scope, and content of a constitutional amendment Bill?
3. A draft amicus brief has been attached to the affidavit of Mercy Wambua, Chief Executive Officer of the LSK and answers all the above question in detail.



B. The Law

4. Rule 19 of the [Supreme Court Rules, 2020](#) provides as follows:
 1. 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.
 2. The court shall before admitting a person as a friend of the court, consider—
 - a. proven expertise of the person;
 - b. independence and impartiality of the person; or
 - c. the public interest.
 3. Any fees or expenses incurred by a person appointed by the court as a friend of the court on its own motion, shall be paid out of the Judiciary Fund, in accordance with a scale determined by the President.
 4. An application to be admitted as an amicus or a friend of the court shall be done within 7 days upon filing of a response in any proceedings before the court.

Rule 51(6) then provides as follows:

51(6) Where a friend of the court or an expert has been admitted in any proceedings, the court shall give directions on whether such person shall—

- a. file written submissions; or
 - b. address the court orally.
5. On the criteria for admission of a party as *amicus curiae* in [Francis Karioko Muruatetu & anor v Republic & 5 others](#) [2016] eKLR, this court stated that such admission is a matter of discretion and a privilege granted to an intended amicus. Further, that such an amicus must show that it is neutral and should have no discernible direct or indirect interest in the matter.

C. Analysis and Determination

6. The LSK has submitted that it has met the set criteria for admission as *amicus curiae* because it has the expertise, experience and knowledge relevant to determination of the reference; was involved in the amendments of the former Constitution and is therefore familiar with Kenya's constitutional amendment history; and is neutral and has no connection with either party to the reference.
7. We note in the above context that the reference before us raises questions as to the manner in which the [Constitution 2010](#) can be amended including by way of a referendum. The applicants, the County Assemblies of Kericho and Nandi have thus framed a number of questions including:
 - i. What does the term “approves” in article 257(6) of the [Constitution](#) mean and specifically in the context of a County Assembly?
 - ii. What is the proper and correct procedure that Parliament must invoke in the consideration and passage of an Amendment Bill under article 257 of the [Constitution](#)?
 - iii. What is the requirement of the Constitution in regard to referenda including on whether the questions to be submitted to a referendum are single or multiple.



8. We have considered the application in the context of the law as expressed above and taking into account our decision in *Muruatetu (supra)* as well as *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* [2015] eKLR where in the latter we stated that admission of amici curiae is a useful tool in achieving our constitutional mandate to develop the law with the assistance of well informed inputs from parties appearing before us. We have furthermore noted that under section 4 of the *Law Society Act*, the LSK is mandated to assist the courts and the public in matters relating to the law generally and the administration of justice in particular and is therefore made up of, *inter alia*, experts in constitutional matters.
9. It is also our view that, looking at the reference before us, there is no prejudice to be caused to any party if LSK is admitted as amicus curiae and we see no partiality expressed in its draft amicus brief. We are also satisfied that the brief will assist this court in reaching a fair determination of the issues raised in the reference.

D. Disposition

10. Having stated as above, we shall exercise discretion and order as follows:
 - i. The Law Society of Kenya is admitted as an *amicus curiae*.
 - ii. It shall file and serve its *amicus* Brief, 7 days after responses are filed by all the Interested Parties.
 - iii. The Law Society of Kenya's participation shall be limited to the filing of the *amicus* Brief aforesaid and it shall not make oral submissions.
 - iv. There shall be no orders as to costs.
11. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY, 2021

.....
P. M. MWILU M. K. IBRAHIM

Ag. CHIEF JUSTICE &

Ag. PRESIDENT OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

