



Law Society of Kenya v Communications Authority of Kenya & 5 others; Privacy International (Amicus Curiae) (Petition 8 of 2020) [2021] KESC 6 (KLR) (Constitutional and Human Rights) (8 October 2021) (Ruling)

Neutral citation: [2021] KESC 6 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 8 OF 2020**

**PM MWILU, DCJ & V-P, MK IBRAHIM, SC WANJALA, NS NDUNGU & I LENAOLA, SCJJ
OCTOBER 8, 2021**

BETWEEN

LAW SOCIETY OF KENYA PETITIONER

AND

COMMUNICATIONS AUTHORITY OF KENYA 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

AIRTEL NETWORKS KENYA LTD 3RD RESPONDENT

SAFARICOM LTD 4TH RESPONDENT

REFORMS AND DEMOCRACY 5TH RESPONDENT

ARTICLE 19- EAST AFRICA 6TH RESPONDENT

AND

PRIVACY INTERNATIONAL AMICUS CURIAE

(Being an application by Privacy International to be enjoined as Amicus Curiae)

RULING

1 UPON perusing the Notice of Motion Application by the Applicant, Privacy International, dated 8th October 2020 and filed on 15th October 2020 and the Supporting Affidavit sworn by Ian Hosein, the Executive Director of the Applicant on the 5th October 2020 seeking to be enjoined in these proceedings as amicus curiae and;



- 2 UPON considering the Applicant’s intended amicus brief dated 8th October 2020 and its written submissions dated 8th October 2020 and filed on 15th October 2020 in support of the Application, wherein the Applicant contends that it intends to assist the Court with regard to the compatibility of the Device Management System (DMS) with international human rights standards in relation to the following matters:
- i. Comparative human rights framework applicable to violations of privacy.
 - ii. The intrusive nature of the data captured.
 - iii. The unregulated and discriminate nature of privacy interference and;
 - iv. Necessary safeguards.
 - v. The impact on the right to freedom of expression of human rights defenders, lawyers and journalists and;
- 3 UPON considering the Applicant’s submission on its expertise in defending the right to privacy around the globe by conducting research and investigation into Government and corporate surveillance activities; is non partisan in the matter and only seeks to aid the Court in arriving at a just determination by providing relevant comparative framework on the issue; that because of the public interest and nature of the appeal, it would be prudent to admit the Applicant as amicus curiae as admission would outweigh any possible prejudice;
- 4 AND considering the 1st Respondent’s Replying Affidavit deponed on 19th October 2020 contesting the intended admission as amicus curiae and the written submissions dated 19th October, 2020 and filed on 22nd October, 2020 submitting that the Applicant has not satisfied the criteria set out by this Court in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others*, Sup. Ct. Petition No. 12 of 2013, [2015] eKLR; that the Applicant has not demonstrated any expertise in the matters to be addressed; has not raised any novel point of law; has demonstrated impartiality and bias by taking a partisan stance hence not a neutral party and did not file its application timeously and;
- 5 FURTHER, noting the 6th Respondent’s Grounds of Opposition and written submissions, both dated 27th October 2020 and filed on 5th November 2020 in opposition to the Application wherein, the 6th Respondent contends that the Applicant does not meet the legal threshold for admission as amicus curiae as set out in the *Mumo Matemu case* (supra) and the principles set out in *Francis Kariuki Muruatetu & Another v Republic & 5 others*, Sup. Ct. Petition No. 15 as consolidated with Petition No. 16 of 2015, [2016] eKLR; that the Applicant has not established any expertise or knowledge that would aid the Court in determining the Appeal; that the Applicant has not demonstrated neutrality and impartiality and;
- 6 FURTHERMORE, noting the written submissions by the 11th Respondent dated 19th October 2020 and filed on 23rd October 2020 in support of the Application and wherein they submit that the Applicant has met the criteria for admission as set out in *Mumo Matemu* as the amicus curiae brief is limited to legal arguments; has demonstrated neutrality and fidelity to the law; the Application has been filed timeously; that the Applicant has presented a novel perspective on the issue of privacy and that it is in the public interest that the Applicant be admitted to lend its global expertise on the issues arising as well as protect the general public from violation of their rights.



7 In the above context, WE NOW OPINE as follows:

- i. An Applicant for joinder as amicus curiae has to satisfy this Court that it has met the legal requirements for joinder. The relevant law in that regard is Rule 19 of the *Supreme Court Rules, 2020*. The said Rule provides as follows:

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.
- ii. The guiding principles applicable in determining an Application to be enjoined in that capacity were settled in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others* (supra), where the Court pronounced itself on its inherent power to admit amicus curiae and emphasized that;

- “(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...
- (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...”

We also affirmed the above guiding principles in The Muruatetu Case.

iii. The Applicant’s knowledge and expertise in the field of privacy in general is not doubted. However, its stance that it will take an impartial stand based on the arguments laid before the Court is debatable. Our perception is that a position seeking to set out the detriment of the DMS system seeks to advance a position favoring the Appellant and is inclined towards sustaining the High Court decision to the detriment of some of the Respondents. We are therefore not convinced that the Applicant has demonstrated impartiality and agree with the 1st and 6th Respondents that the Applicant does not satisfy the threshold for admission as amicus curiae in these proceedings.

8 HAVING therefore considered the Application and submissions by the respective parties, we find no merit in this application and we accordingly choose not to exercise discretion, and accordingly, dismiss it.

9 There shall be no order as to costs.

10 It is so ordered.

DATED and DELIVERED AT NAIROBI this 8th Day of October, 2021

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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

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S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU
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

