



**Attorney General v David Ndii & others; Albert & another (Amicus Curiae)
(Petition E016 of 2021) [2021] KESC 16 (KLR) (Civ) (9 November 2021) (Ruling)**

Neutral citation: [2021] KESC 16 (KLR)

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

CIVIL

PETITION E016 OF 2021

PM MWILU, DCJ & VP, MK IBRAHIM, N NDUNGU, I LENAOLA & W OUKO, SCJJ

NOVEMBER 9, 2021

BETWEEN

ATTORNEY GENERAL PETITIONER

AND

DAVID NDII & 73 OTHERS RESPONDENT

AND

RICHARD ALBERT AMICUS CURIAE

YANIV ROZNAI AMICUS CURIAE

*(Being an application by Prof. Richard Albert and
Prof. Yaniv Roznai to be enjoined as Amici Curiae)*

**Principles that guided the Supreme Court in determining an application to be joined as amicus curiae
(friend of the court)**

The Supreme Court made determinations that highlighted caselaw about the guiding principles applicable to a decision on whether a party should be joined to the proceedings as amicus curiae. The court allowed an application for joinder as amici curiae by parties that claimed to have expertise in constitutional law.

Reported by John Ribia

Civil Practice and Procedure – parties to a suit – application for joinder – application for joinder as amicus curiae (friend of the Court) - what were the principles that guided the Supreme Court in determining an application for joinder as amicus curiae (friend of the court) - Supreme Court Rules, 2020, rule 19.

Brief facts

The applicants sought to be admitted as *amici curiae* (friends of the court). The applicants contended that they had expertise in constitutional law and sought to present *amici* briefs on whether the Constitution



of Kenya (Amendment) Bill 2020 was best understood as a constitutional amendment or a constitutional dismemberment and on the meaning and importance of constitutional amendments.

Issues

What were the principles that guided the Supreme Court in determining an application for joinder as *amicus curiae* (friend of the court)?

Relevant provisions of the Law

Supreme Court Rules, 2020

Rule 19 - Participation of friends of the Court

(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.*

Held

1. An applicant for joinder as *amicus curiae* had to satisfy the court that they had satisfied the legal requirements for joinder as stated under rule 19 of the Supreme Court Rules, 2020.
2. The guiding principles applicable in determining an application for joinder as *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 a reasonable time. Dilatory filing of such briefs tended to compromise their essence as well as the terms of the Constitution's call for the resolution of disputes without undue delay. The court could on a case-by-case basis, reject *amicus* briefs that did not comply.
 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. 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.
3. The admission of *amici curiae* was useful for achieving Kenya's constitutional mandate to develop the law with the assistance of input from parties appearing before the court. The applicants intended to address the court on the issue of constitutional amendments including questions touching on the basic structure, its scope, relevance, and applicability. The applicants' detailed *amici* briefs were useful to the court. No prejudice would be caused to any party if the applicants were admitted and no partiality expressed in their draft *amici* briefs.

Application allowed.



Orders

- i. *The notice of motion dated October 1, 2021 and lodged on October 6, 2021 by the intended amicus curiae was allowed.*
- ii. *The amici briefs attached to the application were deemed as filed and the applicants were not to make oral submissions at the hearing of the petitions.*
- iii. *Parties were to bear their own respective costs.*

Citations

Cases

1. Francis Karioko Muruatetu & another v Republic (Petition No. 15 as consolidated with Petition No. 16 of 2015, [2016] eKLR) — Explained
2. Odinga, Raila & 5 others v Independent Electoral and Boundaries Commission & 3 others (Petition Nos 5, 3 & 4 of 2013; [2013] eKLR (Consolidated)) — Mentioned
3. Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others (Sup Ct. Petition No. 12 of 2013 [2014] eKLR) — Explained

Statutes

1. Supreme Court (General) Practice Directions, 2020 — Rule 8,31,38 — Interpreted
2. Supreme Court Rules, 2020 (Act No 7 of 2011 Sub Leg) — Rule 3, 19(1), 19(2), 31, 50 — Interpreted

Advocates

None mentioned

RULING

1. Upon perusing the Notice of Motion application by the Applicants, Prof Richard Albert and Prof Yaniv Roznai, dated 1st October 2021 and lodged on 6th October 2021 brought under the provisions of rules 3, 19(1) and (2), 31 and 50 of the [Supreme Court Rules, 2020](#) and rule 8, 31 and 38 of the [Supreme Court \(General\) Practice Directions, 2020](#) and the supporting affidavit sworn by the applicants seeking to be admitted as *amici curiae* and they be allowed to present oral submissions beside their *amici* briefs and;
2. Upon considering the applicants grounds on the face of the application and their *amici* briefs wherein Prof Richard Albert intends to address the following questions:
 - i. Is the Constitution of Kenya (Amendment) Bill 2020 best understood as a constitutional amendment or a constitutional dismemberment?
 - ii. What follows when a court determines that a constitutional reform is a constitutional dismemberment?
 - iii. On what grounds may a court invalidate a constitutional reform
 - iv. Is the doctrine of unconstitutional constitutional amendment a globally accepted constitutional norm
 - v. If the Constitution of Kenya (Amendment) Bill 2020 is ultimately presented to voters in a national referendum does Chapter 16 of the Constitution of Kenya require the amendment bill or instead as a series of single subject amendment bills?



While Prof Yaniv Roznai intends to help the court address the questions:

- i. What is the meaning and importance of constitutional amendments
 - ii. What is the rationale for constitutional amendment rules
 - iii. How do we find the balance between rigidity and flexibility in constitutional amendments
 - iv. What is the distinction between popular and governmental amendment power
 - v. What is the significance of ‘the people’ as a constituted organ and;
3. Upon further arguments by the applicants in their written submissions that they have met the criteria for admission under rule 19 of the Supreme Court Rules, 2020 and the criteria for joinder as was set out in *Francis Kariuki Muruatetu & Another v Republic & 5 others*, Supreme Court Petition No. 15 as consolidated with Petition No 16 of 2015, [2016] eKLR and *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others Sup Ct Petition No 12 of 2013 [2014] eKLR*, the applicants contend that they have met the requirements to be admitted as *amici* on expertise, have demonstrated neutrality, have no relationship with any of the parties, and shown no pecuniary interest as they only intend to offer the scholarly expertise ;
4. And considering the submissions by the 14th respondent not opposing the joinder of the applicants as *amici* by submitting that the applicants will undoubtedly assist the court to develop the law in this area but leaving the question of joinder to the court and;
5. Further noting the submissions by the 18th respondent not opposing the joinder of the applicants subject to the court defining the precise roles and limits of their participation as *amici* by assigning specific questions of law to research on as was decided in *Raila Odinga & 5 Others v Independent Electoral Boundaries Commission & Others Sup Ct Petition No 5 of 2013 [2013] eKLR* and limiting the participation of the applicants as *amici* to their *amici* briefs and;
6. In the above context, We now opine as follows:
- i. An applicant for joinder as *amicus* has to satisfy this Court that they have satisfied the legal requirements for joinder. The relevant law is rule 19 of the Supreme Court Rules 2020. The said rule provides as follows:
 19. The court may on its own motion, or at the request of any party,
 - (1) permit a person with particular expertise to appear in any matter as a friend of the court. Participation of friends 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 was settled in *Trusted Society of Human Rights*



Alliance v Mumo Matemtu and 5 Others (supra) , where the court on this occasion, 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. We have considered the application in the context of the law as expressed in *Mumo Matemtu* where we stated that the admission of *amici curiae* is useful for achieving our constitutional mandate to develop the law with the assistance of input from parties appearing before us. We perceive from the application that the applicants intend to address the court on the issue of constitutional amendments including questions touching on the basic structure, its scope, relevance and applicability. In the circumstances, we are of the view that the applicants detailed *amici* briefs shall be useful to the court. It is also our view that no prejudice will be caused to any party if the applicants are admitted and we see no partiality expressed in their draft *amici* briefs. We therefore exercise our discretion and allow the application.

7. Having therefore considered the application, we make the following Orders;

- a. The notice of motion dated 1st October 2021 and lodged on 6th October 2021 by the intended *amicus curiae* is allowed.
- b. The *amici* briefs attached to the application are deemed as filed and the applicants shall not make oral submissions at the hearing of the petitions.
- c. Parties shall bear their own respective costs.



8. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF NOVEMBER 2021

P. M. MWILU

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

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**JUSTICE OF THE SUPREME COURT
NJOKI NDUNGU**

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

.....

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

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**JUSTICE OF THE SUPREME COURT
I certify that this is a true copy of the original
REGISTRAR
SUPREME COURT OF KENYA**

