



**Attorney General v Ndi & 73 others; Akech (Intended Amicus Curiae) (Petition E016 of 2021) [2021] KESC 20 (KLR) (Civ) (9 November 2021) (Ruling)**

Neutral citation: [2021] KESC 20 (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**

**MIGAI AKECH ..... INTENDED AMICUS CURIAE**

*(Being an application by Prof. Migai Akech to be enjoined as Amicus Curiae)*

**Principles that guide the Supreme Court when determining applications to be joined as amicus curiae (Friend of the Court).**

*The applicant sought joinder as an amicus curiae in the court proceedings. He sought to offer his expertise on the history of the making of the Constitution vis-à-vis the basic structure doctrine. The court considered the requirements of rule 19 of the Supreme Court Rules 2020 on joinder and the applicable guiding principles from caselaw on joinder of amicus curiae. In allowing the application, the court held that the applicant had demonstrable expertise that was relevant to the Supreme Court.*

Reported by Ribia John

**Civil Practice and Procedure** – parties to a suit – amicus curiae (friend of the court) -application to be joined as amicus curiae - what were the principles that guided the Supreme Court when determining applications to be joined as amicus curiae - Supreme Court Rules, 2020, rule 19.

**Brief facts**

The applicant sought to be joined as *amicus curiae* (friend of the court). The applicant contended that he had the expertise and intended to submit to the court on the history of the making of the Constitution *vis-à-vis* the basic structure doctrine and its application.



## Issues

What were the principles that guided the Supreme Court in determining an application to be joined 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* had to satisfy the Supreme Court that they had satisfied the legal requirements for joinder under rule 19 of the Supreme Court Rules 2020.
2. The guiding principles applicable in determining an application to be joined 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 reasonable time. Dilatory filing of such briefs tended to compromise their essence as well as the terms of the Constitution of Kenya, 2010's call for the resolution of disputes without undue delay. The court could, therefore, and on a case-by-case basis, reject *amicus* briefs that did not comply with the principle of timeous filing.
  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 role of *amici* in court was to aid the court to arrive at a determination based on the law. The applicant wished to restrict himself to only addressing the history of the making of the Constitution *vis-à-vis* the basic structure doctrine and its application. The applicant was neutral on the dispute, and he would restrict his submissions to the issues raised in his *amicus* brief.
4. The applicant's *amicus* brief would be of valuable assistance to the court and the applicant had demonstrated expertise in his field relevant to the Supreme Court.

*Application allowed.*



### **Orders**

- i. *The application dated October 20, 2021 and lodged on October 22, 2021 by the intended amicus curiae 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 would bear their own respective costs.*

### **Citations**

#### **Cases**

1. Francis Kariuki Muruatetu & another v. Republic & 5 Others (Petition No. 15 and 16 of 2015 [2016] eKLR) — Followed
2. Raila Odinga & 5 Others v Independent Electoral Boundaries Commission & Others (Petition No. 5 of 2013 [2013] eKLR) — Explained

#### **Statutes**

1. Supreme Court (General) Practice Directions, 2020 — Rule 8, 31, 38 — Interpreted
2. Supreme Court Rules 2020 — Rule 3, 19(1) (2), 31, 50 — Interpreted

#### **Advocates**

None mentioned

## **RULING**

1. Upon perusing the notice of motion application by the applicant, Prof Migai Akech, dated October 20, 2021 and filed on October 22, 2021 brought under the provisions of rules 3, 19(1) and (2), 31 and 50 of the [Supreme Court Rules 2020](#) and rules 8, 31 and 38 of the [Supreme Court \(General\) Practice Directions, 2020](#) and the supporting affidavit sworn by the applicant seeking leave of the court to appear as *amicus curiae* in the appeal and to present written and oral submissions by way of an *amicus* brief and;
2. Upon considering the applicant's grounds in support of his application, his intended *amicus* brief and the applicant's written submissions filed on October 22, 2021 wherein the Applicant submits that he has the relevant expertise as a professor of law and author of several books and articles on the history of the making of the Constitution and contends that he intends to assist the Court to carefully consider the history of the making of the Constitution given that the history formed the primary basis of the determinations of the High Court and the Court of Appeal on the applicability of the basic structure doctrine in Kenya and the implications of this doctrine for the amendment of the Constitution and in relation to the following arguments:
  - i. That the Court of Appeal endorsed the High Court's selective and erroneous reading of the history of the making of the 2010 Constitution without interrogating it, thereby denigrating the role that political compromise and the political elites played in the attainment of the 2010 Constitution
  - ii. That it is vital for this honourable court to embrace a holistic account of the history of the making of the [Constitution of Kenya 2010](#) given the implications of this history for the applicability of the basic structure doctrine in Kenya and the amendment of this Constitution and;
3. Upon further arguments by the applicant that he has filed his application timeously, has demonstrated the relevant qualifications, is neutral in the appeal and has potentially pointed out the relevant



fundamental principles as was determined in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others* Sup Ct Petition No 12 of 2013 [2014] eKLR;

4. And considering the submissions by the 14<sup>th</sup> respondent not opposing the joinder of the Applicant as *amicus* by submitting that he will undoubtedly assist the court to develop the law in this area but leaves the question of joinder to the court and;
5. Further noting the submissions by the 18<sup>th</sup> respondent not opposing the joinder of the applicant subject to the Court defining the precise roles and limits of his participation as *amicus* 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 applicant as *amicus* to his *amicus* brief 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. (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. 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 Matemu 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 *Francis Kariuki Muruatetu & another v Republic & 5 others* Sup Ct Petition No 15 and 16 of 2015 [2016] eKLR

- iii. The role of *amici* in court is to aid the court to arrive at a determination based on the law. We take note that the applicant wishes to restrict himself to only addressing the history of the making of the Constitution *vis-à-vis* the basic structure doctrine and its application. We perceive from the application and submissions that the applicant is neutral on the dispute, and he will restrict his submissions to the issues raised in his *amicus* brief. We are also of the view that the applicant’s *amicus* brief will be of valuable assistance to this court and the applicant has demonstrated expertise in his field relevant to this court. We therefore find that the applicant has met the criteria set out in *Mumo Matemu* on joinder of *amicus curiae*.
8. Having therefore considered the application, we make the following Orders:
- a) The application dated October 20, 2021 and lodged on October 22, 2021 by the intended *amicus curiae* 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 respective costs.
9. It is so ordered.

**DATED and DELIVERED AT NAIROBI this 9<sup>TH</sup> day of NOVEMBER 2021**

.....  
**P. M. MWILU**

**DEPUTY CHIEF JUSTICE & VICE  
PRESIDENT OF THE SUPREME COURT**

.....  
**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

.....  
**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

.....  
**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

.....  
**W. OUKO**

**JUSTICE OF THE SUPREME COURT**

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



**REGISTRAR,  
SUPREME COURT OF KENYA**

