



**Attorney General v Ndi & 73 others; Fombad & another (Amicus Curiae)  
(Petition E016 of 2021) [2021] KESC 18 (KLR) (9 November 2021) (Ruling)**

Neutral citation: [2021] KESC 18 (KLR)

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

**CHARLES FOMBAD ..... AMICUS CURIAE**

**ADEM K. ABEBE ..... AMICUS CURIAE**

*(Being an application by Prof. Charles Fombad and  
Dr. Adem K. Abebe to be enjoined as Amici Curiae)*

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

*The applicants claimed that they had scholarly expertise on constitutional matters in the African and international context. They applied to be joined to the proceedings as amicus curiae in order to address the court on whether the basic structure doctrine, constitutional un-amenable and eternity clauses doctrines were applicable to the intended amendment of the Constitution of Kenya, 2010. Among other holdings, the court held that the admission of amici curiae was useful in the achievement of the constitutional mandate to develop the law and allowed the application.*

Reported by Ribia John

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



## Brief facts

The applicants sought to be enjoined as *amici curiae* (friends of the court). They contended that they had scholarly expertise in constitutional matters in the African and international context and that they were authors of several books and numerous articles. Further, they stated that they intended to address the court on whether the implied limitations based on the basic structure doctrine, constitutional un-amenability and eternity clauses doctrines were applicable to the intended amendment of the Constitution of Kenya, 2010.

## Issues

What were the principles that guided the Supreme Court in determining an application to be enjoined 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 to be enjoined 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 applicability of the basic structure doctrine and the approach adopted by African countries as well as the amendment of the Constitution, its implied limitations and risks to constitutionalism, rule of law and democracy. In the circumstances, the applicants' detailed *amicus*



briefs were to be useful to the court. No prejudice would be caused to any party if the applicants were admitted. There was no partiality expressed in their draft *amicus* briefs.

*Application allowed.*

### **Orders**

- i. *The notice of motion dated October 20, 2021 and lodged on October 25, 2021 by the intended amici 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 Kariuki Muruatetu & Another vs. Republic & 5 others ([2016] eKLR) — Explained
2. Raila Odinga & 5 Others v Independent Electoral Boundaries Commission & Others
3. Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others (Sup Ct. Petition No. 12 of 2013 [2014] eKLR) — Explained
4. Raila Odinga & 5 Others v Independent Electoral Boundaries Commission & Others Sup. Ct. Petition No. 5 of 2013

#### **Statutes**

1. Appellate Jurisdiction Act (Cap. 9) — section 3, 3A,, 3B — Interpreted
2. Constitution of Kenya, 2010 — article 1, 2, 3, 10, 48, 159, 160, 164, 259 — Interpreted
3. Supreme Court Rules, 2020 (No 7 of 2011 Sub Leg) — Rule 1991)(2) — Interpreted

#### **Advocates**

None mentioned

## **RULING**

1. Upon perusing the notice of motion by the applicants, Prof Charles Manga and Dr Adem K Abebe, dated 20<sup>th</sup> October, 2021 and lodged on 25<sup>th</sup> October 2021 brought under the provisions of articles 1, 2, 3, 10, 48, 159, 160, 164 and 259 of the Constitution, section 3, 3A, 3B of the [Appellate Jurisdiction Act](#) and rules 19 (1) and (2) of the [Supreme Court Rules](#) and the supporting affidavit sworn by Sally Omoto, Advocate on record for the applicants seeking leave of the court to appear as *amici curiae* in the appeal and to present written and oral submissions by way of an *amicus* brief and;
2. Upon considering the applicants grounds in support of their application and their intended *amicus* briefs wherein the applicants contend that they have scholarly expertise in constitutional matters in the African and International context and authors of several books and numerous articles with Prof Charles Fombad intending to address the court on:
  - i. Whether the implied limitations based on the basic structure doctrine, constitutional un-amendability and eternity clauses doctrines apply to the amendment of the Kenyan Constitution
  - ii. The risks to constitutionalism, the rule of law and democracy posed by implying such limitations to the amendment of the Kenyan Constitution
  - iii. The limits of global comparative experiences in determining the applicability to the amendment of the Kenyan Constitution of implied limitations based



on the basic structure, constitutional unamendability and eternity clauses doctrine

While Dr Adebe seeks to address the issues on:

- i. Why a judicially enforceable basic structure doctrine is not applicable in Kenya
  - ii. Why courts should be hesitant to outline specific constitutional amendment procedures
  - iii. Why courts should be hesitant to establish a general rule regarding the form of constitutional referendum questions and;
3. Upon further arguments by the applicants in their written submissions dated 21<sup>st</sup> October 2021 where they submit to have filed their application timeously, have demonstrated their relevant expertise, restricted themselves to brief legal questions, are impartial and independent as well as met all the requirements for admission to *amici curiae* as was set out 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 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 18<sup>th</sup> 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* 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. We have considered the application in the context of the law as expressed in *Mumo Matem* 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 applicability of the basic structure doctrine and the approach adopted by African countries as well as amendment of the Constitution, its implied limitations and risks to constitutionalism, rule of law and democracy. In the circumstances, we are of the view that the applicants detailed *amicus* 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 see no partiality expressed in their draft *amicus* 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 20<sup>th</sup> October 2021 and lodged on 25<sup>th</sup> October 2021 by the intended *amici 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.



It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF NOVEMBER 2021

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**P. M. MWILU**

**DEPUTY CHIEF JUSTICE & VICE**

**PRESIDENT OF THE SUPREME COURT**

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**M. K. IBRAHIM**

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**JUSTICE OF THE SUPREME COURT**

**NJOKI NDUNGU**

.....

**JUSTICE OF THE SUPREME COURT**

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**I. LENAOLA**

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**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**

