



**Mitu-Bell Welfare Society v Kenya Airports Authority; Initiative for Strategic Litigation in Africa (ISLA) (Applicant) (Petition 3 of 2018) [2019] KESC 18 (KLR) (29 November 2019) (Ruling)**

*Mitu-Bell Welfare Society v Kenya Airports Authority; Initiative for Strategic Litigation in Africa (ISLA) [2019] eKLR*

Neutral citation: [2019] KESC 18 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
PETITION 3 OF 2018**

**DK MARAGA, CJ, MK IBRAHIM, JB OJWANG, SC WANJALA & I LENAOLA, SCJJ  
NOVEMBER 29, 2019**

**BETWEEN**

**MITU-BELL WELFARE SOCIETY ..... PETITIONER**

**AND**

**KENYA AIRPORTS AUTHORITY ..... RESPONDENT**

**AND**

**INITIATIVE FOR STRATEGIC LITIGATION IN AFRICA (ISLA) .. APPLICANT**

*(Being an appeal from the Judgment of the Court of Appeal at Nairobi in Civil Appeal No.218 of 2014 at Nairobi (E. M. Gitinji, W. Karanja and J. Otieno-Odek, JJA) dated and delivered on 1st day of July 2016)*

**Lack of previous engagements in litigation would not prevent an applicant from being admitted as a friend of the court**

*The applicant sought to be admitted as amicus curiae (friend of the court) so as to make submissions on the meaning of the right to remedy in the context of human rights violations, demonstrate how remedies in human rights had evolved and to present comparative jurisprudence on the subject. The court held that lack of previous engagements in litigation would not prevent an applicant from being admitted as a friend of the court.*

Reported by Moses Rotich

**Civil Practice and Procedure** – parties – parties to a suit- amicus curiae (friend of the court) – criteria for admission of an amicus curiae – whether an applicant who had no previous legal engagement in litigation could be admitted as an amicus curiae – Supreme Court Rules, 2012, rule 54.



## Brief facts

The applicant was a non-governmental organization established in the year 2014 and based in Johannesburg, South Africa. It averred that it was founded to, *inter alia*, promote and protect women's human rights in the African domestic and regional courts. It sought to be admitted as *amicus curiae* so as to make submissions on the meaning of the right to remedy in the context of human rights violations, demonstrate how remedies in human rights had evolved and to present comparative jurisprudence on the subject.

The petitioner did not contest the application. However, the 1<sup>st</sup> respondent argued that the applicant had not demonstrated any expertise in the matters to be addressed at the hearing, did not raise any novel point of law separate from what the petitioner had raised, was not a neutral party and did not file its application timeously.

## Issues

- i. What were the criteria to be met by an applicant seeking to be admitted as *amicus curiae* before the Supreme Court?
- ii. Whether an applicant who had no previous legal engagement in litigation could be admitted as *amicus curiae*.

## Relevant provisions of the Law

### Supreme Court Rules, 2012

#### Rule 54

1. *The Court may –*
  1. *in any matter allow amicus curiae;*
  2. *appoint a legal expert to assist the Court in legal admissions;*
  3. *at the request of a party or on its own initiative, appoint an independent expert to assist the court on any technical matter;*
1. *The Court shall before allowing an amicus curiae take into consideration the expertise, independence and impartiality of the person in question and it may take into account the public interest or any other relevant factor.*

## Held

1. Rule 54 of the Supreme Court Rules, 2012, provided that the court could allow an *amicus curiae* (friend of the court) in any matter before it. However, before allowing an *amicus curiae*, the court ought to consider the expertise, independence and impartiality of that applicant. The court was also required to take into account the public interest involved or any other relevant factor.
2. In its past decisions, the court had expounded on the criteria for admission of an *amicus curiae*;
  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; and,
  3. 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 would aid the development of the law.
3. The applicant had addressed its expertise and filed an *amicus* brief limiting itself to the grounds of its intended participation in the hearing of the petition of appeal. Although only 5 years old since its inception, the applicant claimed to have had extensive experience in human rights litigation particularly in the protection of the rights of women but failed to cite a case where that expertise had been applied. Nonetheless, the applicant had in its brief limited itself to legal arguments.
4. With regard to neutrality, there was nothing in the *amicus* brief which pointed to lack of impartiality on the part of the applicant. Nothing existed on the record as to whether the applicant had any special relationship with the petitioner or that its brief was deliberately skewed towards the petitioner. In the



circumstances, and despite lack of evidence of previous engagements in litigation by the applicant, its *amicus* brief was detailed enough and useful to the court.

*Application allowed with no order as to costs.*

#### **Citations**

#### **Statutes**

None referred to

#### **Advocates**

None mentioned

## **RULING**

### **A. Application**

1. The Applicant's Notice of Motion, dated 5<sup>th</sup> March 2019 was filed on 7<sup>th</sup> March 2019. The Application is supported by the Affidavit of Sibongile Cherrol Ndashe sworn on the same date. It is attended with an *amicus* brief of even date and is premised on Articles 22(3)(e) and 163(8) of the Constitution as well as Rules 3(2), (4)(5), 54(1)(a) and (2) of the Supreme Court Rules, 2012.
2. The Orders sought are:
  1. That Initiative for Strategic Litigation in Africa (ISLA), the Applicant herein, be granted leave to be admitted in these proceedings as Amicus Curiae.
  2. That leave be granted to ISLA to present written and oral submissions by way of an amicus brief in these proceedings.
  3. That upon granting leave to participate in the proceedings, the honourable Court give direction on how the amicus curiae shall participate in further proceedings herein on such other or further directions as this honourable Court may deem fit to give.
  4. That there be no award of costs for or against the amicus curiae.
3. The grounds of the application are as follows:
  1. That the intended amicus curiae is a non-governmental organization established in 2014 based in Johannesburg, South Africa and uses the rule of law and African domestic and regional Courts to promote and protect women's human rights, inter alia.
  2. That the intended amicus curiae has a legitimate interest in being enjoined in the Petition, so as to make submissions on the meaning of the right to remedy in the context of human rights' violations; demonstrate how remedies in human rights have evolved and present comparative jurisprudence on the subject.
3. That the intended amicus curiae will make submissions as an independent expert which action will assist the Court in the determination of the issues raised in the Petition.
4. In submissions filed on 7<sup>th</sup> March 2019, the intended amicus curiae has added that it has satisfied the criteria set by this Court in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others*, Supreme Court Petition No. 12 of 2013, [2015] eKLR, and that it also filed its Application timeously.
5. The application is not contested by the Petitioner but the 1<sup>st</sup> Respondent filed Grounds of Opposition on 27<sup>th</sup> March 2019 stating that the Applicant has not demonstrated any expertise in the matters to be



addressed at the hearing; has not raised any novel point of law separate from what the Petitioner has raised; is not a neutral party and did not file its Application timeously.

3. In submissions filed on 15<sup>th</sup> October 2019, the 1<sup>st</sup> Respondent has reiterated the above grounds but adds that the criteria for admission of an amicus curiae as set in *Trusted Society of Human Rights Alliance (supra)* has not been met and that the Application is misconceived and ought to be dismissed with costs.

## **B. Determination**

7. We have noted the submissions by the parties and further note that Rule 54 of the Supreme Court Rules, 2012 provides:

- (1) The Court may –
  - (a) in any matter allow amicus curiae;
  - (b) appoint a legal expert to assist the Court in legal admissions;
  - (c) at the request of a party or on its own initiative, appoint an independent expert to assist the court on any technical matter;
- (2) The Court shall before allowing an amicus curiae take into consideration the expertise, independence and impartiality of the person in question and it may take into account the public interest or any other relevant factor.”

8. In expounding on the criteria for admission of an amicus curiae, in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others*, Supreme Court Petition No. 12 of 2013, [2015] eKLR, we stated as follows:

- (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...”
  - “(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.”

9. Later, in *Francis Kariuki Muruatetu & Another v Republic & 5 Others* [2016] eKLR we affirmed the above guidelines and the parties herein have disagreed on whether the Applicant has met the criteria above. In that regard, we note that the Applicant has addressed its expertise and has filed an amicus brief limiting itself to the grounds of its intended participation in the hearing of the Petition of Appeal.

10. We have furthermore noted that the Applicant has in its brief limited itself to legal arguments and although only 5 years old since its inception, it claims to have had extensive experience in human rights litigation particularly in the protection of the rights of women. Not one case has been cited where that expertise has been applied.

11. As regards its neutrality, although the 1<sup>st</sup> Respondent has challenged the Applicant on that issue, we have seen nothing in the amicus brief which points to a lack of impartiality on the part of the Applicant.



Nothing also exists on the record as to whether the Applicant has any special relationship with the Petitioner or that its brief is deliberately skewed towards the Petitioner.

12. In the circumstances, and despite our concern about lack of evidence of previous engagements in litigation by the Applicant, its amicus brief is detailed enough and useful to the Court and we shall therefore exercise discretion and grant the orders sought.

**C. Final Orders**

13. For the above reasons, we shall allow the Application dated 5<sup>th</sup> March 2019 in the following terms:
  1. That Initiative for Strategic Litigation in Africa (ISLA), the Applicant herein, is hereby granted leave to be admitted in these proceedings as Amicus Curiae.
  2. That leave is hereby granted to ISLA to present written and oral submissions by way of an amicus brief in these proceedings.
  3. There shall be no order as to costs.
  4. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2019**

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**D. K. MARAGA**  
**CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT**

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**M. K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

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**J. B. OJWANG**  
**JUSTICE OF THE SUPREME COURT**

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**S. C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

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

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

**Registrar**  
Supreme Court of Kenya

