



Patrick Thoithi Kanyuira v Kenya Airports Authority; National Land Commission (Intended Amicus) (Petition 7 of 2017) [2018] KESC 28 (KLR) (19 September 2018) (Ruling)

*Patrick Thoithi Kanyuira v Kenya Airports Authority;
National Land Commission (Intended Amicus) [2018] eKLR*

Neutral citation: [2018] KESC 28 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 7 OF 2017
PM MWILU, DCJ & V-P, MK IBRAHIM, JB OJWANG, SC WANJALA & NS NDUNGU, SCJJ
SEPTEMBER 19, 2018**

BETWEEN

PATRICK THOITHI KANYUIRA APPELLANT

AND

KENYA AIRPORTS AUTHORITY RESPONDENT

AND

NATIONAL LAND COMMISSION AMICUS CURIAE

*(An application by National Land Commission to
be enjoined in the Proceedings as amicus curiae)*

The criteria for one to be admitted as a friend of the court (amicus curiae)

An amicus brief should focus on legal arguments, maintain neutrality, and adhere to timely submission. It should introduce novel legal aspects not covered by the parties or other amici, aiding in legal development. The Attorney-General may be called upon in cases of public interest, irrespective of State interest. The Court may reject biased amici or those with previous partisan conduct. Amici were not entitled to costs and their role should not become partisan. Participation in interlocutory applications was limited unless specified by the court.

Reported by Kakai Toili

Civil Practice and Procedure - applications - applications to be enjoined as amicus curiae - criteria for admission as an amicus curiae - role of amicus curiae - nature and extent of the role of an amicus curiae - what was the criteria for one to be admitted as an amicus curiae - what was the nature and extent of the role of an amicus curiae



Words and Phrases - *amicus* - definition of *amicus* - person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter- *Black's Law Dictionary, 8th edition page 93*

Brief facts

The Appellant was contesting the Judgment of the Court of Appeal which had affirmed the finding of the High Court, that the Respondent acted within its statutory powers, when it declined to approve the construction of 24 mansionettes in a plot adjacent to Wilson Airport, in Nairobi. The Appellant subsequently filed a suit in the High Court seeking a declaration that the Respondent's notice and order of September 30, 2008, stood in violation of his constitutional rights, he also sought compensation in damages. The suit was dismissed with the Court holding that the Respondent had asserted no ownership over the suit property and had only placed a restriction on the activities that could be exercised on that property.

The Appellant, thereafter, moved the Court of Appeal on the ground that the Trial Court erred in not sustaining safeguarded property rights founded upon the Constitution. The Appellate Court upheld the High Court's decision, underlining the propriety of securing requisite approvals before the Appellant could effect any developments on the suit land. Aggrieved by the decision, the Appellant petitioned the Court, seeking a declaration that the Appellate Court's decision stood in derogation of his rights, as embodied in the constitutional principles and safeguards in place.

Issues

- i. What was the nature and extent of the role of a friend of the court (*amicus curiae*)?
- ii. What was the criteria for one to be admitted as an *amicus curiae*?

Held

1. As Kenyan law on the *amicus* role, by the common law method of judicial law-making, the Court had made signals, by specifying the main considerations.
 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's call for 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 that principle.
 4. An *amicus* brief should address points 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. The Court could call upon the Attorney-General to appear as *amicus curiae* in a case involving issues of great public interest. In such instances, admission of the Attorney-General was not defeated solely by the subsistence of a State interest, in a matter of public interest.
 6. 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
7. An *amicus curiae* was not entitled to costs in litigation. In circumstances where the Court requested the appearance of any person or expert as *amicus*, the legal expenses could be borne by the Judiciary.
 8. The Court would regulate the extent of *amicus* participation in proceedings, to forestall the degeneration of *amicus* role into partisan role.
 9. In appropriate cases and at its discretion, the Court could assign questions for *amicus* research and presentation.
 10. An *amicus curiae* could not participate in interlocutory applications, unless called upon by the Court to address specific issues.
2. The Applicant had to ascertain before the Court that it would limit itself to legal argument and abide by the principle of neutrality that it would introduce no new evidence and that it would not address points of law already canvassed by parties to the cause.
 3. The Applicant had substantial knowledge and experience in land matters in general and the instant Application was timeously lodged. The essence of the dispute turned around private land-investment claims, on the one hand and the larger question of security for aircraft operations, on the other. A resolution of the more direct issues of party-interest, would override any abstract argument entailing the detailed technicality.
 4. Any abstract argument entailing a detailed technicality, ought to be based on the data already laid before the Court and new evidence was not to be a factor. There was no distinct relationship between the issues marked for the Applicant's contribution and the specific questions and data attending the case in its motions as from the stage of original trial. A question such as productive and sustainable use of land or prospects for land planning or change of user or state regulation of land were not part of the case from the very beginning. Important as those issues could be, in terms of modalities of governance, introducing them into the scheme of litigation at that stage, would have the negative effect of shifting the attention of the Court from the true issues on appeal.

Application dismissed, no order as to costs.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

A. Background

1. In the main appeal cause, the appellant is contesting the Judgment of the Court of Appeal (Visram, Karanja & Azangalala, JJ.A.) dated 24 March 2017, which had affirmed the finding of the High Court, that the respondent did indeed act within its statutory powers, when it declined to approve the construction of 24 maisonnettes in a plot adjacent to Wilson Airport, in Nairobi.
2. It had been the appellant's intent to develop the said plot of his, L.R. No. 209/11444, held in leasehold of 99 years as from 1 July 1991. After commencing the construction process in 2007, the appellant in January 2008, sought the respondent's approval, and notwithstanding refusal, he proceeded with construction, and even made arrangements with Kenya Commercial Bank, to sustain the same. This



- prompted the respondent to issue a cessation order on 30 September 2008, on the basis that the suit land fell within the protected zone of airport runway.
3. The appellant, thereafter, initiated judicial review proceedings seeking the High Court's Orders of Certiorari and Prohibition (R v. Managing Director, Kenya Airports Authority ex parte Patrick Thoithi Kanyuira, H.C. Misc. No. 86) against the respondent. On 14 October 2010, Wendoh, J., dismissed the application, holding that continued property development by the appellant would undermine the safety and security of aircraft.
 4. The appellant did not seek a review or reversal of the High Court decision, but instead, filed suit (ELC No. 98 of 2011) against the respondent, in the Environment and Land Court. Attendant on the said suit was an application of 9 March 2011, seeking temporary injunction to restrain the respondent from demolishing, entering, or in any manner interfering with the suit property. The application, however, was withdrawn on 20 September 2011. Thereafter, by an application of 18 October 2011, the respondent sought mandatory orders for demolishing the construction on the suit property. Before that application could be heard, the appellant withdrew his suit in the Environment and Land Court, thus effacing the substratum of the respondent's application.
 5. That was not the end of the dispute. The appellant subsequently filed a suit in the High Court (Patrick Thoithi Kanyuira v. Kenya Airports Authority, Nairobi High Court Petition No. 83 of 2012), seeking a declaration that the respondent's notice and order of 30 September 2008, stood in violation of his constitutional rights; he also sought compensation in damages.
 6. The suit was heard before Lenaola, J who dismissed it, holding that the respondent had asserted no ownership over the suit property, and had only placed a restriction on the activities that may be exercised on that property. The Court held that the respondent had properly acted within its statutory powers.
 7. The appellant, thereafter, moved the Court of Appeal (Patrick Thoithi Kanyuira v. Kenya Airways Authority, Civil Appeal No. 308 of 2014), on the basis of as many as 19 grounds of appeal, the main thread of which was that the trial Court erred in not sustaining safeguarded property rights founded upon the Constitution.
 8. The Appellate Court, in its Judgment of 24 March 2017, upheld the High Court decision, underlining the propriety of securing requisite approvals before the appellant could effect any developments on the suit land. The Court held, inter alia, that the respondent's action was distinct from an exercise of powers of compulsory acquisition; that compensation to the appellant would merit consideration only if the respondent's consent had been sought and obtained, but subsequently withdrawn; that the public interest in safe use of Wilson Airport would trump the appellant's individual right of ownership and enjoyment of private property, in the instant case.
 9. The appellant is not convinced, and he disagrees with the decisions of the first two superior Courts. He petitions the Supreme Court, seeking a declaration that the Appellate Court's decision stands in derogation of his rights, as embodied in the constitutional principles and safeguards in place, under Articles 10(a), 24 and 40 of the Constitution. He seeks an Order setting aside the entire Judgment and Decree of the Appellate Court; and he prays for costs incidental to the petition.

B. Amicus Curiae: Application by the National Land Commission

10. Upon institution of the petition of appeal, the National Land Commission lodged an application by way of notice of motion (11 July 2017), seeking joinder as amicus curiae. This application comes



under Articles 22(3)(e) and 163(8) of the Constitution; and Rules 3(2), (4), 54(1)(a) and 54(2) of the Supreme Court Rules, 2012.

11. Since this Court’s task at the moment is that of resolving the issues on appeal, its interest and concern now, is to see whether a scope for reinforcement stands to come forth from the amicus role, and whether the applicant is a potentially meritorious amicus curiae.
12. The Court has considered the terms of the application, the essence of which is summarized as follows:
 - (a) the applicant is an independent commission under Article 67 of the Constitution, bearing the mandate of managing public land on behalf of national and county governments;
 - (b) by virtue of Section 32 of the National Land Commission Act, 2012, the Commission has inherited all assets, rights and liabilities, obligations, agreements and arrangements vested in the Ministry of Lands;
 - (c) the applicant is vested with expertise in land management and administration, land use as well as dispute resolution;
 - (d) the proceedings will have a direct bearing on land management and administration in the country;
 - (e) it is in the interest of justice, and no party stands to suffer any prejudice if the application is allowed.
13. Such affirmations stand to be assessed on their own merits, as neither the petitioner nor the respondent has stated their position regarding the amicus application: and we will apply the established yardsticks of principle freely, in resolving the question.
14. Amicus, by Black’s Law Dictionary, 8th ed. (Bryan A. Garner) (St. Paul, MN: West, 2004), (p.93), is:
 - “(a) person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.”
15. As Kenyan law on the amicus role, by the common law method of judicial law-making, this Court has made signals, by specifying the main considerations. The most significant decision in this regard is *Trusted Society of Human Rights Alliance v. Mumo Matemu and 5 Others*, Supreme Court Petition No. 12 of 2013; [2015] eKLR, in which we thus stated (para.41):
 - “(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.

- “(v) The Court may call upon the Attorney-General to appear as amicus curiae in a case involving issues of great public interest. In such instances, admission of the Attorney-General is not defeated solely by the subsistence of a State interest, in a matter of public interest.
- “(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....
- “(vii) An amicus curiae is not entitled to costs in litigation. In circumstances where the Court requests the appearance of any person or expert as amicus, the legal expenses may be borne by the Judiciary.
- “(viii) The Court will regulate the extent of amicus participation in proceedings, to forestall the degeneration of amicus role into partisan role.
- “(ix) In appropriate cases, and at its discretion, the Court may assign questions for amicus research and presentation.
- “(x) An amicus curiae shall not participate in interlocutory applications, unless called upon by the Court to address specific issues.”

16. Has the applicant met the criteria for admission as amicus curiae? As already stated herein, the applicant would have to ascertain before the Court that it will limit itself to legal argument, and abide by the principle of neutrality; that it will introduce no new evidence; and that it will not address points of law already canvassed by parties to the cause.
17. All such factors inherently stand to be assessed by the Court, on a case-by-case basis. It follows that the Court’s exercise of discretion is all-important – a factor that bears upon the instant matter, even though it runs against no contest by parties.
18. We have addressed our minds to the issues which the applicant seeks to take up before this Court:
 - (i) the requirement that the suit property be not developed, on grounds of public safety: how does it comport with productivity, and with sustainable use?
 - (ii) should there be fresh planning for the suit land?
19. It is not doubted that the applicant has substantial knowledge and experience in land matters in general, and that the application for amicus status was timeously lodged.
20. While it is the applicant’s case that it would limit its representations to points of law, and would take an impartial stand, we have addressed our minds to the essence of the dispute, which turns around private land-investment claims, on the one hand, and the larger question of security for aircraft operations, on the other. Our perception is that a resolution of the more direct issues of party-interest, will override any abstract argument entailing the detailed technicality, such as the applicant appears to be contemplating.
21. Such matter as the applicant seeks to advance, ought to be based on the data already laid before the Court, and new evidence is not to be a factor. In the High Court, as the record shows, the petitioner



had sought a declaration that the respondent's notice and order of 30 September 2008, inhibiting his request to construct 24 maisonnettes, constituted a breach of his constitutional rights. At the Court of Appeal, consideration was accorded the issue, whether or not there had been compulsory acquisition of the appellant's property, and whether the respondent had any mandate in respect of property development in lands abutting the airport.

22. To what extent are the issues marked for the applicant's contribution, related to the specific questions and data attending the case, in its motions as from the stage of original trial? We are unable to find any distinct relationship, in that regard. A question such as productive and sustainable use of land; or prospects for land planning; or change of user; or state regulation of land – these were not, in our view, part of the case, from the very beginning. Important as those issues may be, in terms of modalities of governance, we believe that, introducing them into the scheme of litigation at this stage, would have the negative effect of shifting the attention of the Court from the true issues on appeal.
23. We must, in the circumstances, disallow the application for admission to the status of amicus curiae.
24. We so order; and we order as well that there shall be no Order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 19TH OF SEPTEMBER, 2018.

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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

.....

J.B. OJWANG

JUSTICE OF THE SUPREME COURT

S.C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

