



**Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Attorney General (Intended Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 36 (KLR) (Election Petitions) (27 August 2017) (Ruling)**

*Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR*

Neutral citation: [2017] KESC 36 (KLR)

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

**PRESIDENTIAL ELECTION PETITION 1 OF 2017**

**DK MARAGA, CJ & P, PM MWILU, DCJ & VP, MK IBRAHIM,  
JB OJWANG, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ**

**AUGUST 27, 2017**

**BETWEEN**

**H. E RAILA AMOLO ODINGA ..... 1<sup>ST</sup> PETITIONER**

**H. E STEPHEN KALONZO MUSYOKA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
RESPONDENT**

**CHAIRPERSON OF THE INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**H. E UHURU MUIGAI KENYATTA ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**ATTORNEY GENERAL ..... INTENDED AMICUS CURIAE**

*(Being an Application by the Hon. Attorney General to be enjoined as Amicus Curiae pursuant to Articles 156 (5) & (6), 140 of the Constitution; Section 6(2) (a) of the Office of the Attorney -General Act; Section 24 (1) of the Supreme Court Act, 2012; Rules 23, 54 (1) (a), (2) of the Supreme Court Rules, 2012 and Rule 17 (1) & (2) of the Supreme Court (Presidential Election Petition) Rules, 2017)*



## Conditions precedent for one to be enjoined as an amicus curiae (friend of the court).

Reported by Amazon Koech

**Constitutional law**- *Office of the Attorney General - Powers of the Attorney General - right of audience of the Attorney General in proceedings that raised matters of public interest - Constitution of Kenya, (2010) article 156; Office of the Attorney General Act, section 7.*

**Election Law** - *presidential election petition – joinder of parties – application by the Attorney General to be enjoined as amicus curiae – right of audience of the Attorney General in matters of public interest - authority of the Attorney General to be enjoined in suits which a government was not a party - what were the factors the Office of the Attorney General had to satisfy so as to be enjoined as amicus curiae in a suit - Constitution of Kenya, (2010) article 156; Office of the Attorney General Act, section 7.*

**Civil Practice and Procedure** – *joinder of parties – application by the Attorney General to be enjoined as amicus curiae – application to be enjoined as amicus curiae in a presidential election petition – guiding principles applicable in determining an application by the Attorney General to be enjoined as amicus curiae.*

### Brief facts

The Attorney General sought to be enjoined to the proceedings as *amicus curiae* in the presidential election petition on the basis that he had both a constitutional and statutory obligation to assist the court in matters involving complex and legal questions and to place materials and expert research that would aid in fair, just and impartial adjudication of the issues in dispute.

The petitioners opposed the application on grounds that the applicant having been admitted as *amicus* in the 2013 presidential petition took a partisan view supporting the 1<sup>st</sup> and 3<sup>rd</sup> respondent's case.

### Issues

- i. What were the guiding principles applicable in determining an application to be enjoined as *amicus curiae*?
- ii. Whether the Attorney General could raise the issue about how the IEBC conducted the election in an *amicus* brief; an issue which he had previously raised and which had been determined by the Court of Appeal in the case of *IEBC v Maina Kiai & 4 Others* [2017] eKLR

### Relevant provisions of the Law

#### Constitution of Kenya, 2010

**Article 156** (1) There is established the office of Attorney-General.

(2) The Attorney-General shall be nominated by the President and, with the approval of the National Assembly, appointed by the President.

(3) The qualifications for appointment as Attorney-General are the same as for appointment to the office of Chief Justice.

(4) The Attorney-General—

(a) is the principal legal adviser to the Government;

(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and

(c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.

(5) The Attorney-General shall have authority, with the leave of the court, to appear as a friend of the court in any civil proceedings to which the Government is not a party.

(6) The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest.

(7) The powers of the Attorney-General may be exercised in person or by subordinate officers acting in accordance with general or special instructions.



## **Office of the Attorney General Act, 2012**

### **Section 7**

#### **Audience by Attorney-General in matters of public interest,**

(1) Despite the provisions of any written law to the contrary or in the absence of any other written law, the Attorney-General shall have the right of audience in proceedings of any suit or inquiry of an administrative body which the Attorney General considers—

- (a) to be of public interest or involves public property; or
- (b) to involve the legislature, the judiciary or an independent department or agency of the Government.

(2) In the exercise of the powers of the Attorney-General under subsection (1), the Attorney-General shall—

- (a) notify any court, tribunal or any other administrative body of the intention to be enjoined to the suit, inquiry or administrative proceedings; and
- (b) satisfy the court, tribunal or any other administrative body of the public interest or public property involved, and comply with any direction of the court, tribunal or any such other administrative body on the nature of pleadings or measures to be taken for purposes of giving effect to the effective discharge of the duties of the Office.

(3) Where a suit, inquiry or any other proceedings is pending before a court, tribunal or any other administrative body to which the Attorney-General does not have a right of audience, it shall be sufficient for the Attorney-General to file a certificate of the intention of the Attorney-General to be joined in the proceeding.

(4) The court, tribunal or any such administrative body shall, upon receipt of a certificate under subsection (3), enjoin the Attorney-General in the proceedings.

#### **Held**

1. The role played by the Attorney General as an institution within the Executive Arm of Government in Kenya was an important one as enumerated by article 156 of The Constitution of Kenya, 2010 which established the office of the Attorney General and gave the office of the Attorney General the authority to appear as a friend of the court in civil proceedings to which the Government was not a party with leave of the court.
2. Article 156(4)(c) of the Constitution and the Office of the Attorney General Act, 2012, outlined the function and powers of the Attorney General. Key among them being the right of audience of the Attorney General before the courts in matters of public interest. Section 7 of the Office of the Attorney General Act granted the Attorney-General the right of audience in proceedings of any suit, that involved the legislature, the judiciary or an independent department or agency of the government. The Attorney General also had the power to notify any court, tribunal or any other administrative body of the intention to be enjoined to the suit, inquiry or administrative proceedings; and satisfy the court, tribunal or any other administrative body of the public interest or public property involved, and comply with any direction of the court, tribunal or any such other administrative body on the nature of pleadings or measures to be taken for purposes of giving effect to the effective discharge of the duties of the office.
3. The instant proceedings involved issues of great public interest. The complex interplay of law and fact presented in the instant case touched on the sovereignty of the people and the inalienable right of every Kenyan citizen to determine the form of governance for Kenya. Millions of Kenyan citizens participated in the General Elections held on August 8, 2017. Despite being one of Kenya's highest voter outcome statistically, it preceded a lengthy period of electoral law reform culminating in Chapter Seven of the Constitution of Kenya, 2010. Elections, properly conducted, represented the people's will and it enabled the exercise of their sovereign power through democratically elected representatives. The Office of the Attorney General was an integral part of the National Executive and it bore the privilege of executive authority but was bound by the necessary and sacred strictures of exercise of that power.



- It had to be exercised in a manner compatible with the principle of service to the people of Kenya, for their well-being and benefit pursuant to article 129(2).
4. The Attorney General satisfied the Supreme Court that issues of public interest were involved in the instant suit. The Attorney General elected to be enjoined in the proceedings as a friend of the court. The Attorney General's mandate was to be assessed against the following principles:
- a. An *amicus* brief should be limited to legal arguments.
  - b. 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.
  - c. 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 may therefore, and on a case-by-case basis, reject *amicus* briefs that did not comply with this principle.
  - d. 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.
  - e. 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.
  - f. 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.
  - g. An *amicus curiae* was not entitled to costs in litigation. In instances where the court requested the appearance of any person or expert as *amicus*, the legal expenses may be borne by the Judiciary.
  - h. The Court would regulate the extent of *amicus* participation in proceedings, to forestall the degeneration of *amicus* role to partisan role.
  - i. In appropriate cases and at its discretion, the court could assign questions for *amicus* research and presentation.
  - j. An *amicus curiae* was not to participate in interlocutory applications, unless called upon by the court to address specific issues.
  - k. The applicant ought to raise any perception of bias or partisanship, by documents filed, or by his submissions.
  - l. The applicant ought to be neutral in the dispute, where the dispute is adversarial in nature.
  - m. The applicant ought to show that the submissions intended to be advanced will give such assistance to the court as would otherwise not have been available. The applicant ought to draw the attention of the court to relevant matters of law or fact which would otherwise not have been taken into account. Therefore, the applicant ought to show that there was no intention of repeating arguments already made by the parties. And such new matter as the applicant sought to advance, had to be based on the data already laid before the court, and not fresh evidence.
  - n. The applicant ought to show expertise in the field relevant to the matter in dispute, and in that regard, general expertise in law did not suffice.
  - o. Whereas consent of the parties to the proposed *amicus* role was a factor to be taken into consideration, it was not the determining factor.
5. The court, which was the custodian of rules of validity, propriety, and fair play under the Constitution and the law, remained in charge, in regulating the precise role the Attorney-General could play if admitted as *amicus curiae*. While the Attorney General would enrich the material placed before the



- instant court, on issues of law, relevant in determining the petition, the court had to guard against granting the Attorney General leave to address all issues proposed.
6. Permitting the Attorney General to address the issue of how the IEBC conducted the presidential election, which the Attorney General had addressed as *amicus curiae* in the case of *IEBC v Maina Kiai & 4 Others* [2017] eKLR would, with respect, be allowing the Attorney General to re-litigate issues in a matter to which he was an active party to the adversarial proceedings and in which he preferred a clear position for or against a party which was also before the instant court, directly or by association. That bore the risk of prejudicing the parties concerned negating the core principle that justice must not only be done, but be seen to be done.
  7. 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.
  8. Due to the strict bounds of time within which the court was to hear and determine the petition, the parties did not have adequate time to respond to the Attorney General's brief before the petition was determined. To avert the risk, the specific issue of how the IEBC conducted the presidential election, was to be expunged from the *amicus* brief.
  9. The other questions addressed in the Attorney General's *amicus* brief were pertinent to the instant case. Since the 2013 General Elections, the electoral jurisprudence set by the Supreme Court and other courts inspired electoral law reform in various aspects. The Attorney General was part of that process and brought a critical originalism perspective regarding the process to the proceedings, as a friend of the court. The *amicus* brief addressed itself to pure issues of law and in a clear, concise way. The role of interpretation and application of the law to the facts in the case however rested with the court.

*Application allowed.*

## **Citations**

### **Cases**

#### **Kenya**

1. *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* Civil Appeal 105 of 2017; [2017] KECA 477 (KLR) - (Explained)
2. *Kuria & 5 others v Hassan & 4 others* Petition 3, 4 & 5 of 2013; [2013] KESC 14 (KLR) (Consolidated) - (Explained)
3. *Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* Petition 5, 4 & 3 of 2013; [2013] KESC 8 (KLR) - (Explained)
4. *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* Petition 12 of 2013; [2015] KESC 26 (KLR) - (Explained)

#### **Trinidad and Tobago**

*Peters v Attorney General* [2002] 3 LRC 32 - (Explained)

### **Statutes**

#### **Kenya**

1. Constitution of Kenya, 2010 articles 81, 86, 156(4)(c)(5)(6); Chapter seven - (Interpreted)
2. Office of the Attorney General Act, 2012 (Act No 49 of 2012) sections 6(2)(a); 7 - (Interpreted)

### **Advocates**

*Attorney General*



## RULING

1. By an application dated August 25, 2017, the Attorney General of the Republic of Kenya seeks to be enjoined to these proceedings as *amicus curiae* on the basis that he has both a constitutional and statutory obligation to assist the court in matters involving complex and legal questions and to place materials and expert research that will aid in fair, just and impartial adjudication of the issues in dispute. In particular, that:
  - a) The Attorney General is authorized under article 156 (5) of the [Constitution](#) to appear with leave of the court, as a friend of the court in any civil proceedings to which the government is not a party;
  - b) Article 156(6) of the [Constitution](#) obligates the Attorney- General to promote, protect and uphold the rule of law and defend the public interest; and
  - c) Under section 6(2)(a) of the [Office of the Attorney General Act, 2012](#), the Attorney-General is also authorized, with leave of the court, to appear in any civil proceedings:
  - d) The Attorney General, having been part of the post 2013 electoral reform process in the context of article 81 of the [Constitution](#), bears special knowledge to aid the court in the determination of the Petition.
  - e) The conduct of presidential elections is a matter of great public interest necessitating the participation of the Attorney-General as the principal legal advisor to the Government; and as the promoter, and protector of the rule of law, and defender of the public interest.
  - f) The petition raises pertinent issues involving the interpretation of the [Constitution](#).
2. The Attorney General proposes to aid the court in determining the following issues:
  - (a) What is the proper constitutional and legal standard applicable to the conduct of presidential elections in Kenya as envisaged under both articles 81 and 86 of the [Constitution](#)?
  - (b) What were the effects as regards the use of technology in presidential election introduced by the Elections Laws (Amendment) Act No 36 of 2016 and Elections Laws (Amendment) Act No 1 of 2017?
  - (c) What was the effect of the jurisprudence enunciated by the Court of Appeal in the case of [IEBC v Maina Kiai & 4 others](#) (Civil Appeal No 105 of 2017) on how IEBC conducted the presidential election in issue?
  - (d) How should the Supreme Court treat rejected/spoilt votes in determining the total votes cast under article 138 (4) of the [Constitution](#)?
  - (e) What is the proper constitutional and legal threshold for invalidating or upholding a presidential election under article 140 of the [Constitution](#)?
  - (f) What remedies can the court grant in determining a presidential election petition under article 140 of the [Constitution](#)?
3. The Attorney General submits that his joinder to these proceedings will enhance the right of access to justice in terms of the qualitative normative content of the political rights. This he argues, will open positive lines of development in electoral law jurisprudence: a prerogative guided by this court in the



case of *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others*, Supreme Court Petition No 12 of 2013 (the Mumo Matemu case) in the following terms:

“The *Constitution of Kenya, 2010* by express terms, requires courts to develop the law to the extent that it does not give effect to a right of fundamental freedom. (Art 20 (3)(a). This is the very foundation for well-informed inputs before the court, which inherently justifies the admission of amicus curiae. We have a duty to ensure that our decisions enhance the right of access to justice as well as open positive lines of development in jurisdiction, to serve the judicial system within the terms of the *Constitution*. [Emphasis added]”

4. It is submitted that the presidential election petition raises questions of great public interest revolving around the application and interpretation of the *Constitution*. Citing the Trinidad and Tobago case of *Peters v Attorney-General* [2002] 3 LRC 32 CA, the Attorney General submits that; (per Sharma, JA: )

“An election petition is not a matter in which the only persons interested are candidates who strive against each other in elections. The public are substantially interested in it and that it is an essential part of the democratic process. It is not a lis between two persons, but a proceeding in which the constituency itself is the principal party interested. The characteristics of an election petition are fundamentally different from civil proceedings. Hence for example there was the need for special rules concerning, for example, the notice and publication, which is outside the courts ordinary jurisdiction and procedures. An election petition is quite unlike any of the initiating proceedings in the High Court. It is not a writ, or originating summons, nor is it in any way close to say a petition in bankruptcy or a petition for divorce which respectively have their own rules of procedure. In a sense an election petition can be described as *sui generis*.”

5. The Attorney General admits that he has issued several legal advisory opinions to the 1<sup>st</sup> respondent on complex issues of law regarding the conduct of elections in Kenya in preparation for the proper conduct of Elections in Kenya. It is further urged that: (i) the Office of the Attorney-General made a professional legal input into the electoral law reform processes, specifically to the Joint Parliamentary Select Committee and in a report dated August 16, 2017 recommended reforms of the integrated electronic system of voter registration, identification and result transmission; (ii) contributed to parliamentary debates on electoral reforms at the Committee stages; (iii) participated in several court proceedings before the superior courts strictly on pure points of law regarding the preparation on the conduct of the elections in Kenya; and (iv) participated in the formulation and approval of several electoral laws including Acts of Parliament and the various subsidiary legislations which anchors the legal basis for the conduct of elections in Kenya.
6. The petitioner has filed a replying affidavit deponed to by Raila Amollo Odinga, on August 26, 2017 and filed on the August 26, 2017. He opposes the application as he believes that based on the past and previous conduct, the Attorney General is partisan and would be prejudiced by their admission. Having been admitted as amicus in the 2013 presidential petition, he avers that he took a partisan view supporting the 1<sup>st</sup> and 3<sup>rd</sup> respondents case.
7. It is his evidence that the Attorney General does not disclose any distinctive or novel aspects of the legal issues that he would address that are already not covered by the parties, and that there are no complex constitutional issues requiring his intervention. Consequently, the pray for the application to be dismissed.



8. The role played by the Attorney General as an institution within the Executive Arm of Government in Kenya is no doubt an important one. In this regard, article 156 of the [Constitution](#) which is the guiding compass provides:

“Attorney-General.

156. (1) There is established the office of Attorney-General.

- (2) The Attorney-General shall be nominated by the President and, with the approval of the National Assembly, appointed by the President.
- (3) The qualifications for appointment as Attorney-General are the same as for appointment to the office of Chief Justice.
- (4) The Attorney-General—
  - (a) is the principal legal adviser to the Government;
  - (b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and
  - (c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.
- (5) The Attorney-General shall have authority, with the leave of the court, to appear as a friend of the court in any civil proceedings to which the Government is not a party.
- (6) The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest.
- (7) The powers of the Attorney-General may be exercised in person or by subordinate officers acting in accordance with general or special instructions.” [Emphasis added]

9. Pursuant to article 156(4)(c) of the [Constitution](#), the [Office of the Attorney General Act, 2012](#), outlines the function and powers of the Attorney General, including audience before the courts, by the Attorney General in matters of public interest. Section 7 of this [Act](#) provides:

“Audience by Attorney-General in matters of public interest, etc.

- (1) Despite the provisions of any written law to the contrary or in the absence of any other written law, the Attorney-General shall have the right of audience in proceedings of any suit or inquiry of an administrative body which the Attorney General considers—
  - (a) to be of public interest or involves public property; or
  - (b) to involve the legislature, the judiciary or an independent department or agency of the Government.
- (2) In the exercise of the powers of the Attorney-General under subsection (1), the Attorney-General shall—



- (a) notify any court, tribunal or any other administrative body of the intention to be enjoined to the suit, inquiry or administrative proceedings; and
- (b) satisfy the court, tribunal or any other administrative body of the public interest or public property involved, and comply with any direction of the court, tribunal or any such other administrative body on the nature of pleadings or measures to be taken for purposes of giving effect to the effective discharge of the duties of the Office.
- (3) Where a suit, inquiry or any other proceedings is pending before a court, tribunal or any other administrative body to which the Attorney-General does not have a right of audience, it shall be sufficient for the Attorney-General to file a certificate of the intention of the Attorney-General to be joined in the proceeding.
- (4) The court, tribunal or any such administrative body shall, upon receipt of a certificate under subsection (3), enjoin the Attorney-General in the proceedings." [Emphasis added]

10. The proceedings before this court indeed involve issues of great public interest. The complex interplay of law and fact presented in this case touch on the sovereignty of the people and the inalienable right of every Kenyan citizen to determine the form of governance for our country. Millions of Kenyan citizens participated in the general elections held on August 8, 2017. Despite being one of Kenya's highest voter outcome statistics, it precedes a lengthy period of electoral law reform culminating in chapter seven of the *Constitution of Kenya, 2010*. Elections, properly conducted, represent the people's will and enable the exercise of their sovereign power through their democratically elected representatives. The Office of the Attorney General is an integral part of the National Executive and bears the privilege of Executive Authority but is bound by the necessary and sacred strictures of exercise of that power: it must be exercised in a manner compatible with the principle of service to the people of Kenya, for their well-being and benefit pursuant to article 129(2).
11. However, section 7(2) of the *Office of the Attorney General Act*, mandates the Attorney General to satisfy the court, tribunal or any other administrative body of the public interest or public property involved, and comply with any direction of the court, tribunal or any such other administrative body on the nature of pleadings or measures to be taken for purposes of giving effect to the effective discharge of the duties of the Office.
12. The Attorney General has satisfied this court, by the very nature of the proceedings, that issues of public interest are involved. He has also elected to be enjoined in these proceedings as a friend of the court. His mandate will therefore be assessed against the principles laid out by this court in the *Mumo Matemu* case (*op cit*), reproduced 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.
  - 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 (see: [\*Raila Odinga & others v IEBC & others\*](#); SC Petition No 5 of 2013-Katiba Institute's application to appear as *amicus*).
  - vii. An *amicus curiae* is not entitled to costs in litigation. In instances 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 to 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.
  - xi. The applicant ought to raise any perception of bias or partisanship, by documents filed, or by his submissions.
  - xii. The applicant ought to be neutral in the dispute, where the dispute is adversarial in nature.
  - xiii. The applicant ought to show that the submissions intended to be advanced will give such assistance to the court as would otherwise not have been available. The applicant ought to draw the attention of the court to relevant matters of law or fact which would otherwise not have been taken into account. Therefore, the applicant ought to show that there is no intention of repeating arguments already made by the parties. And such new matter as the applicant seeks to advance, must be based on the data already laid before the court, and not fresh evidence.
  - xiv. The applicant ought to show expertise in the field relevant to the matter in dispute, and in this regard, general expertise in law does not suffice.
  - xv. Whereas consent of the parties, to proposed *amicus* role, is a factor to be taken into consideration, it is not the determining factor.
13. In light of the foregoing provisions of the [\*Constitution\*](#), Legislation and guiding principles developed by this court in the Mumo Matemu case, we now evaluate the application by the Attorney General on issues proposed to be addressed in his *amicus* brief.



14. In the case of *Raila Odinga & others v Independent Electoral and Boundaries Commission & others*, SC Petition No 5 of 2013 [the Raila Odinga case], the Attorney General, in a ruling dated March 25, 2013 was enjoined to the proceedings as *amicus curiae* in the following terms:

“.....the Attorney-General, is the custodian of the legal instruments of the Executive Branch, and the recognised advisor of the State in matters of public interest. Secondly, and interlinked with the foregoing point, the said office is the main player in the performance of the Executive’s role vis-a-vis the operationalization of the *Constitution*. Thirdly, the *Constitution* expressly provides that, in certain instances, the Attorney-General may obtain the court’s permission to appear as *amicus*. Fourthly, the court, which is the custodian of rules of validity, propriety and fair play under the *Constitution* and the law, remains in charge, in regulating such precise role as the Attorney-General may play if admitted as *amicus curiae*.” [Emphasis added]”

15. While we appreciate that the Attorney General will enrich the material placed before this court, on issues of law, relevant in determining the petition, we find ourselves guarded against granting the Attorney General leave to address all the issues proposed and for good reason.
16. The Attorney General was the 4<sup>th</sup> respondent in the *Maina Kiai* case and opposed that petition in various respects. He has however listed the issue: what was the effect of the jurisprudence enunciated by the Court of Appeal in the case of *IEBC v Maina Kiai & 4 others* (Civil Appeal No 105 of 2017) on how IEBC conducted the presidential election in issue? as one of the proposed questions to be addressed in the amicus brief. We recognize that instances such as, call for intervention and guidance by courts, and this court in particular, while enforcing the provisions of article 156(5) of the *Constitution* and section 7(1) and (2) of the *Office of the Attorney General Act, 2012*. Such an intervention is indeed permissible under section 7(2) (b) of the *Office of the Attorney General Act*. Permitting the Attorney General to address us on this issue, would, with respect, be allowing the Attorney General to re-litigate issues in a matter to which he was an active party to the adversarial proceedings and in which he preferred a clear position for or against a party which is also before this court, directly or by association. This bears the risk of prejudicing the party (ies) concerned negating the core principle that justice must not only be done, but be seen to be done.
17. The following principle in the *Mumo Matemu* case applies in this matter: 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. Due to the strict bounds of time within which this court ought to hear and determine the petition, parties do not have adequate time to respond to the Attorney General’s brief in before a determination on it. To avert the risk, the specific issue relating to the *Maina Kiai* case, should therefore be expunged from the *amicus* brief.
18. The other questions addressed in the Attorney General’s amicus brief are pertinent to the case before this court. Since the 2013 general elections, the electoral jurisprudence set by this and other courts has inspired electoral law reform in various aspects. The Attorney General has been part of that process and brings a critical originalism’s perspective regarding this process to the proceedings, as a friend of the court. The amicus brief addresses itself to pure issues of law and in a clear, concise way. The role of interpretation and application of the law to the facts in this case however rests with this court.



**Orders**

19. The application is hereby allowed with orders that the question: “What was the effect of the jurisprudence enunciated by the Court of Appeal in the case of *IEBC v Maina Kiai & 4 others* (Civil Appeal No 105 of 2017) on how IEBC conducted the presidential election in issue?” be expunged from the *amicus* brief.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF AUGUST , 2017.**

**D K MARAGA**

.....

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

**P M MWILU**

.....

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

.....

**M K IBRAHIM**

.....

**JUSTICE OF THE SUPREME COURT**

**J B OJWANG**

.....

**JUSTICE OF THE SUPREME COURT**

**S C WANJALA**

.....

**JUSTICE OF THE SUPREME COURT**

.....

**N. S. NDUNGU**

.....

**JUSTICE OF THE SUPREME COURT**

**I LENAOLA**

.....

**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR**

**SUPREME COURT OF KENYA.**

