



Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Information Communication Technology Association (ICTAK) (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 40 (KLR) (Election Petitions) (27 August 2017) (Ruling)

Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others & Information Communication Technology Association (ICTAK) (as Amicus Curiae) [2017] eKLR

Neutral citation: [2017] KESC 40 (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

RAILA AMOLO ODINGA 1ST PETITIONER

STEPHEN KALONZO MUSYOKA 2ND PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

**CHAIRPERSON OF THE INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION 2ND RESPONDENT**

UHURU MUIGAI KENYATTA 3RD RESPONDENT

AND

**INFORMATION COMMUNICATION TECHNOLOGY ASSOCIATION
(ICTAK) AMICUS CURIAE**

Guiding principles in determining an application to be enjoined as amicus curiae (friend of the court) in a presidential election petition.

Reported by John Ribia and Felix Okiri

Electoral Law – presidential election petition – application to be enjoined as amicus curiae - guiding principles applicable in determining an application to be enjoined as amicus curiae - whether an application to be enjoined



as amicus curiae that addressed points of law which were addressed by other parties in the petition was valid - Supreme Court Rules, Rule 54.

Civil Practice and Procedure – *application 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 to be enjoined as amicus curiae - whether an application to be enjoined as amicus curiae that addressed points of law which were addressed by other parties in the petition was valid - Supreme Court Rules, Rule 54.*

Brief facts

The applicant filed an application based upon rule 54 of the Supreme Court Rules, and other provisions of the law to be enjoined as *amicus curiae*.

The applicant relied on the grounds that: the intended *amicus curiae* had been greatly involved in ICT policy as well as technical matters in Kenya; had a legitimate interest in being enjoined in the petition, so as to make submissions on diverse election-technology questions which had a bearing on the determination of the matter; and that the participation of the intended *amicus curiae* in the proceedings would contribute substantially towards realizing a professionally-sound decision.

The petitioners opposed the application on grounds that the time frame for hearing and determining the petition was limited and as such the interests of justice would not be served by admitting the applicant. The 1st and 2nd respondents contested the proposed joinder on grounds that the applicant had not established any expertise or knowledge that would aid the court in determining the petition as required under rule 54(2) of the Supreme Court Rules, 2012. The 3rd respondent opposed the application on grounds that the applicant did not meet the legal threshold for admission as *amicus curiae*

Issues

- i. What were the guiding principles applicable in determining an application to be enjoined as *amicus curiae* in a presidential election petition?
- ii. Whether an application for admission as *amicus curiae* that addressed points of law that were addressed by other parties in the petition was valid.

Relevant provisions of the Law

Supreme Court (Presidential Election Petition) Rules, 2017

Rule 54

(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.

Held

1. To be allowed joinder, the applicant had to meet the legal requirements provided under rule 4(2) of the Supreme Court (Presidential Election Petition) Rules, 2017 as read with Rule 54 of the Supreme Court Rules, 2012.



2. An *amicus* brief should be:
 - a. 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 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.
3. The applicant had indicated that the *amicus* brief would be limited to legal arguments. However, the *amicus* brief addressed points of law already addressed by other parties.
4. The applicant had not demonstrated what specific question it sought to address. The applicant's propositions bore a general orientation that was not focused on a specific question falling for determination before the instant court. The application did not meet the requisite threshold.

Application dismissed with no orders as to costs.

Citations

Cases

Kenya

1. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Application 29 of 2014; [2014] KESC 6 (KLR) - (Explained)
2. *Muruatetu, Francis Karioko & another v Republic & 4 others* Petitions 15 & 16 of 2015; [2017] KESC 2 (KLR) (Consolidated) - (Explained)

Statutes

Kenya

1. Constitution of Kenya, 2010 articles 81, 86 - (Interpreted)
2. Elections (General) Regulations, 2012 (Act No 24 of 2011 Sub Leg) In general - (Cited)
3. Elections (Technology) Regulations, 2017 (Act No 24 of 2011 Sub Leg) In general - (Cited)
4. Elections Act, 2011 (Act No 24 of 2011) sections 39, 44, 44A - (Interpreted)
5. Societies Act (cap 108) In general - (Cited)
6. Supreme Court (Presidential Election Petition) Rules, 2017 (Act No 7 of 2011 Sub Leg) rule 4(2)- (Interpreted)
7. Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg) rule 54(2) - (Interpreted)

Advocates

None mentioned

RULING

A. The Application

1. The applicant's notice of motion, dated August 21, 2017, was filed on the same day. The application is supported by the affidavit of Adrian Kamotho Njenga, sworn on the same date. It is attended with an amicus brief, dated August 25, 2017. The application is based upon rule 54 of the [*Supreme Court Rules*](#), and other provisions of the law.
2. The orders sought are:
 - (a) That this application be heard and determined before the hearing of the election petition;



- (b) That the Information Communication Technology Association of Kenya (ICTAK), the applicant herein, be enjoined in the said petition as *amicus curiae*.
3. The grounds of the application are as follows:
- (a) That the intended *amicus curiae* has been greatly involved in ICT policy as well as technical matters in Kenya;
- (b) That the intended *amicus curiae* has a legitimate interest in being enjoined in the petition, so as to make submissions on diverse election-technology questions which have a bearing on the determination of the matter.
- (c) That the participation of the intended *amicus curiae* in the proceedings will contribute substantially towards realizing a professionally-sound decision, that incorporates the public interest.
4. The applicant submits that it had been registered by the Government of Kenya on the February 20, 2007 under the [Societies Act](#), and that it stands out as the prime association for ICT professionals, and industry players in Kenya.
5. The applicant states its objectives as: to extend the frontiers of knowledge and of application of ICT; to advance competence in the practice of ICT, and promote the formulation of effective policies in the application of ICT in society. It enumerates its programmes as including: ICT Policy Development and Advocacy; ICT Industry Research; ICT Value awards; Cyber Security Awareness and Training; ICT Systems Audit; Continuous Professional Development Programs; and hosting the International Conference on Future and Emerging Technologies (ICEFICT). In that context, the applicant contends that it will provide crucial insight such as to enlighten the court, as regards the contested Information Communication Technology (ICT) issues which are likely to arise.
6. The applicant further submits that it will, from a professional standpoint, advance the position that successful deployment of electoral systems is contingent upon the fulfilment of the conditions contemplated under the [Elections \(Technology\) Regulations, 2017](#).
7. It also submits that it will provide highlights from a balanced standpoint, as to whether transmission failure, if adjudged to have occurred, would have affected the results of the presidential election. The applicant states that it will offer an objective appraisal of the technology issues arising in the petition.
8. The applicant submits that at the hearing, it will urge the Supreme Court to assess whether the 1st respondent properly discharged its duty as prescribed under articles 81 and 86 of the [Constitution](#), as read with sections 39, 44 and 44A of the [Elections Act, 2011](#), regulations 82 and 87 of the [Elections \(General\) Regulations, 2012](#), and the provisions of the [Elections \(Technology\) Regulations, 2017](#).
9. This application is contested by the petitioners in their replying affidavit dated August 26, 2017. They urge that, given the limited time-frame for hearing and determining the petition, the interests of justice would not be served by admitting the applicant.
10. The 1st and 2nd respondents also filed a replying affidavit, as well as written submissions, both dated August 25, 2017, contesting the proposed joinder. It is their position that the applicant has not established any expertise or knowledge that would aid the court in determining the petition, as required under rule 54 (2) of the [Supreme Court Rules, 2012](#).



11. The 3rd respondent has also filed a replying affidavit, dated August 25, 2016, and written submissions, in opposition to the application. He contends that the applicant does not meet the legal threshold for admission as *amicus curiae*, quite apart from not assuring the court of an impartiality of views.

B. Admission to *Amicus Status*: The Law

12. To be allowed joinder, the applicant has to meet certain legal requirements. The relevant law is rule 4(2) of the [Supreme Court \(Presidential Election Petition\) Rules, 2017](#) as read with rule 54 of the [Supreme Court Rules, 2012](#).

13. Rule 4(2) of the [Supreme Court \(Presidential Election Petition\) Rules, 2017](#) provides:

"Where there is no applicable provision in the act or in these rules, the procedures set out in the [Supreme Court Rules, 2017](#) in so far as they are not inconsistent with the act or these rules, shall apply to an election petition."

14. 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."

15. In [Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others](#), Supreme Court Petition No 12 of 2013, [2015] eKLR, this court considered the role of *amicus curiae*, and set out the guiding principles applicable in determining an application to be enjoined in that capacity, as follows (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...

"(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."

16. These principles were further affirmed in [Francis Kariuki Muruatetu & another v Republic & 5 others](#) [2016] eKLR. Now applying these clear yardsticks to the applicant herein, we note, firstly, that the applicant indicates that the *amicus* brief will be limited to legal arguments. In the second place, however, we are not convinced that the *amicus* brief addresses points of law not already addressed by the other parties.

17. The petitioners' and the respondents' cases relate to, inter alia, the interpretation and application of articles 81 and 86 of the [Constitution](#), as read with sections 39, 44 and 44A of the [Elections Act, 2011](#), regulations 82 and 87 of the [Elections \(General\) Regulations, 2012](#), and provisions of the [Elections \(Technology\) Regulations, 2017](#) in so far as they bear upon the election of the President.



18. Each of the parties has relied on experts, speaking by way of affidavits; and each party has lodged submissions on the said provisions. The applicant has not demonstrated what aspect of such matter it seeks to address. The applicant's propositions bear a general orientation that is not focussed on a specific question falling for determination before this court. We are, in the circumstances, not satisfied that the application meets the requisite threshold, and we dismiss the same, with no orders as to costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 27TH 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.

