



Odinga & another v Independent Electoral & Boundaries Commission & 2 others; Law Society of Kenya (Intended Amicus Curiae) (Petition 1 of 2017) [2017] KESC 35 (KLR) (Election Petitions) (27 August 2017) (Ruling)

Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others & Law Society of Kenya (as Amicus Curiae) [2017] eKLR

Neutral citation: [2017] KESC 35 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
ELECTION PETITIONS
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 & BOUNDARIES COMMISSION 1ST
RESPONDENT**

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

H.E. UHURU MUGAI KENYATTA 3RD RESPONDENT

AND

LAW SOCIETY OF KENYA INTENDED AMICUS CURIAE

Considerations for one to be enjoined as amicus curiae (friend of the court) in a presidential election petition.

Reported by Ribia John and Reson Sheila

***Election Law** – presidential election petition - application to be enjoined as amicus curiae in the presidential election petition – considerations for one to be enjoined as amicus curiae in a presidential election petition - where a party had applied and failed to be enjoined as amicus curiae in a previous presidential election petition - whether*



previous denial of a party's application to be enjoined as amicus curiae in a presidential election petition would automatically invalidate the party's future application to be enjoined as amicus curiae in presidential election petitions.

Civil Practice and Procedure – *application to be enjoined as amicus curiae in the presidential election petition - considerations for one to be enjoined as amicus curiae in a presidential election petition - where a party had applied and failed to be enjoined as amicus curiae in a previous presidential election petition - whether previous denial of a party's application to be enjoined as amicus curiae in a presidential election petition would automatically invalidate the party's future application to be enjoined as amicus curiae in presidential election petitions – Supreme Court Rules, 2012 rule 54.*

Brief facts

Law Society of Kenya (LSK) filed an application seeking to be admitted to the instant petition as *amicus curiae* (friend of the court), pursuant to rule 17 of the Supreme Court (Presidential Election Petition) Rules, 2017, and the Practice Directions issued by the court.

The application was premised on grounds that LSK had significant expertise and knowledge on constitutional and electoral law matters which were relevant to the instant petition; and that the LSK would assist the court in the interpretation and application of relevant constitutional and statutory provisions, Kenyan jurisprudence and comparative foreign law.

An advocate of the High Court and a council member, filed a replying affidavit in opposition of the application on grounds that the LSK did not qualify for admission as *amicus curiae* for lack of impartiality and the fact that it was an election observer. Though its chairperson, it had issued a statement after the election that the voting process was largely free, fair and credible. The opposing council member also alleged that LSK Council was split on the decision whether to seek admission in the petition as *amicus* and that some of the LSK members participated in the election.

Issues

- i. What were the considerations for one to be admitted as *amicus curiae* in a presidential election petition?
- ii. Whether the objectives of the LSK as listed out under section 4 of the Law Society of Kenya Act was a panacea by which the LSK could be admitted as *amicus curiae* in all cases.
- iii. Whether previous denial of a party's application to be enjoined as *amicus curiae* in a presidential election petition would automatically invalidate the party's future application to be enjoined as *amicus curiae* in a presidential petition.

Relevant provisions of the Law

Supreme Court Rules, 2012

Rule 54

(1) *The court may—*

(a) *in any matter allow an amicus curiae;*

(b) *appoint a legal expert to assist the court in legal submissions; or*

(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.*

(3) *The fees and expenses of an advocate or expert appointed by the court on its own initiative shall be paid out of the Judiciary Fund in accordance to the scale of fees set by the Chief Justice from time to time.*

Supreme Court (Presidential Election Petition) Rules, 2017

Rule 17 - Interlocutory applications



- (1) Any interlocutory application at the close of pleadings shall be filed together with written submissions, made in accordance with these Rules, and not exceeding five pages.
- (2) Within twenty-four hours of filing the interlocutory application, the applicant shall serve the application on every respondent.
- (3) The respondent shall file a response to the application together with written submissions not exceeding five pages within twenty-four hours of service.
- (4) There shall be no rejoinder from the applicant in an interlocutory application.
- (5) The court may deliver the ruling on an interlocutory application by way of electronic communication to the parties.
- (6) In delivering a ruling under sub rule (5), the court may defer the giving of reasons for the decision to a later date.

Held

1. The legal framework and principles for admission of *amicus* were statutory embodied in rule 54 of the Supreme Court Rules, 2012. As a friend of the court, a party was not to be partisan as it had no personal stake in the matter save for fidelity to the Constitution and assisting the court reach a legally sound determination. The decision whether to admit a party was at the discretion of the court, though parties on record could be invited to respond to such an application.

2. LSK was a statutory body whose objectives were provided for in section 4 of the Law Society Act. Key among them their objectives being: assisting the Government and the courts in matters relating to legislation, the administration of justice and the practice of law in Kenya; and in upholding the Constitution of Kenya and advancing the rule of law and administration of justice. One of the ways the Society assisted courts in the administration of justice, was when it acted as *amicus* in matters before those courts. However, that position was not a panacea for admission of the Society as *amicus* in all cases. Leave had to be sought and a basis satisfactorily laid.

3. While the applicant was previously denied admission as *amicus curiae* in a similar petition in 2013, that could not be a ground for subsequent denial. Neither could the fact that the LSK was previously admitted, be a ground for admission in subsequent proceedings. Each matter before the court was unique and raised unique issues for determination and legal questions under different circumstances. Subsequently, an application had to be determined on its merit, on a case to case basis so as to determine whether an intended applicant possessed the expertise relevant to assist the court. The court could not take judicial notice of an *amicus*' expertise. It was a matter of fact to be pleaded and proved.

4. Divergent positions of the LSK members were matters which needed proper contextualization given that every citizen was entitled to his/her political right in article 38 of the Constitution. When such an application was filed before the court, it had to be evaluated on the basis of the LSK's objectives and not individual LSK members.

5. The core of the instant petition was the interpretation and application of articles 81 and 86 of the Constitution. That placed the matter squarely within the LSK's objectives. The instant petition also raised the question as regards the validity or otherwise of the people's exercise of their sovereign power. Nothing could be of great public interest, so as to invite the safeguarding from the LSK than a question that touched on the people's exercise of their sovereign power.

Application allowed.

Orders

- i. LSK was admitted as *amicus curiae*.
- ii. LSK was directed to restrict its submissions on the single issue contained in its brief, being the rightful interpretation of section 83 of the Elections Act in relation to the Constitution.



Citations

Cases

Kenya

1. *Kuria & 5 others v Hassan & 4 others* Petitions 3, 4 & 5 of 2013; [2013] KESC 14 (KLR) (Consolidated) - (Explained)
2. *Muruatetu, Francis Karioko & another v Republic & 5 others* Petitions 15 & 16 of 2015; [2016] KLR; [2016] KESC 12 (KLR) (Consolidated) - (Mentioned)
3. *Rai & 3 others v Rai & 5 others* Petition 4 of 2012; [2013] KESC 21 (KLR); [2013] 1 KLR 685 - (Explained)
4. *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* Petition 12 of 2013; [2015] KESC 26 (KLR) - (Applied)

Statutes

Kenya

1. Constitution of Kenya articles 38, 81, 86 - (Interpreted)
2. Elections Act (cap 7) section 83 - (Interpreted)
3. Evidence Act (cap 80) section 106(4)(B) - (Interpreted)
4. Law Society of Kenya Act (cap 18) section 4 - (Interpreted)
5. Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) rule 17- (Interpreted)
6. Supreme Court Act (cap 9B) section 14 - (Interpreted)
7. Supreme Court Rules, 2012 (cap 9B Sub Leg) rule 54 - (Interpreted)

RULING

1. This is a notice of motion application dated and filed on August 25, 2017 by the Law Society of Kenya (LSK) seeking to be admitted to this petition as *amicus curiae*, or friend of the court.
2. Pursuant to rule 17 of the [Supreme Court \(Presidential Election Petition\) Rules, 2017](#), and the Practice Directions issued by the court, this application is determined on the basis of written submissions only.
3. The applicant, LSK, prays that upon such admission being granted, it be granted an opportunity to submit written and oral arguments, and with leave of court, any information that the court may deem important and relevant to allow for the just disposition of the petition.
4. The application is premised on grounds that LSK is a public body established under the [Law Society of Kenya Act](#), No 21 of 2014, with various objects and function, *inter alia*: assist the Government and the courts in matters relating to legislation, the administration of justice and the practice of law in Kenya; and uphold the [Constitution of Kenya](#) and advance the rule of law and administration of justice.
5. It is urged that because of its mandate and leadership, the LSK has significant expertise and knowledge on constitutional and electoral law matters which are relevant to the resolution of the underlying petition. That it will assist the court with the interpretation and application of relevant constitutional principles, Kenyan jurisprudence and comparative foreign law. Particularly, that it will assist the court by submitting on the following issues framed by the petitioners:
 - (a) Whether the presidential election was conducted in accordance with the [Constitution](#) and the electoral laws existing electoral jurisprudence, particularly, the constitutional obligations that IEBC is required to meet under article 81 and 86 of the [Constitution](#); and what interpretation or clarification ought to be made by this court in regard to the meaning of section 83 of the [Elections Act](#); and



- (b) Whether the total number of rejected votes should be considered in ascertaining whether any candidate met the constitutional threshold.
6. The application is supported the affidavit of Isaac Okero, the president of the LSK, in which he reiterates the grounds in the body of the application. He cites the case of [*Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others*](#) [2013] eKLR and urges that LSK has been previously admitted as an amicus before this court and that it has observed principles of impartiality whenever it has been admitted as an *amicus*.
 7. He urges that the Society meets criteria for admission of amicus curiae as pronounced in [*Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others*](#) [2015] eKLR and that it will abide by the guidelines set out in [*Francis Karioko Muruatetu & another v Republic & others*](#) [2016] eKLR.
 8. On record is also the applicant's *amicus* brief, particularly on the constitutionality of section 83 of the [*Elections Act*](#). He avers that no prejudice will be occasioned to any party were the application to be granted.
 9. In response to the application, there is a replying affidavit sworn by Alex Gatundu, an advocate of the High Court and a council member of the applicant, LSK. The affidavit is filed in opposition of the application by the 3rd respondent. The deponent is a senior member of the Society.
 10. He deposes to the centrality of impartiality on the part of a party seeking admission as *amicus curiae* and refers to the case [*Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others*](#) [2013] eKLR where the applicant herein was denied admission on the ground of lack of impartiality. He avers that equally, in this petition, LSK does not qualify for admission as *amicus* for lack of impartiality.
 11. He avers that LSK participated in the elections, subject of the petition before court, as an accredited observer, and that its President, Isaac Okero issued a press release on August 10, 2017 in which it was observed, *inter alia* that: "the Electronic Voter Identification Devices (EVID) largely functioned correctly and the process was completed without substantial disruptions in most of the polling stations. The KIEMS appears to have functioned without any operational flaws and the voting process was largely free, fair and credible".
 12. Mr Gatundu further avers that the LSK Council was split on the decision whether to seek admission as amicus or not. He avers that some council members were actively involved in the election as candidates and/or nominated members to various parliamentary positions such as Edwin Sifuna and Allan Kosgey. Further, that Ms Faith Waigwa, the applicant's Vice-President chaired the Jubilee Party's National Elections Appeals Tribunal.
 13. There is also produced screen shots of WhatsApp Text communication images and transcriptions of some council members, with a certificate of production under section 106(4)(B) of the [*Evidence Act*](#), by Brian Gichana Omwenga, a technology advisor of Jubilee Party, as a demonstration of the partisan positions of some council members.

Determination

14. The legal framework for admission of amicus is statutory embodied in rule 54 of the [*Supreme Court Rules, 2012*](#). This court, as rightly observed by the applicant, has set out the principles in the case of [*Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others*](#) [2015] eKLR.
15. Most important, as a friend of the court, a party must not be partisan as he has no personal stake in the matter save for fidelity to the [*Constitution*](#) and assisting the court reach a legally sound determination.



The decision whether to admit apart is also as the discretion of the court, though parties on record may be invited to response to such an application. In this regard, we note that the petitioners and the 1st and 2nd respondents have not filed responses to this application.

16. The Law Society of Kenya is a statutory body whose objectives are provided for in section 4 of the [Law Society of Kenya Act](#), key among them, as rightly put by the applicant, being: assisting the Government and the courts in matters relating to legislation, the administration of justice and the practice of law in Kenya; and uphold the [Constitution of Kenya](#) and advance the rule of law and administration of justice. One of the way the Society assists courts in the administration of justice, is when it acts as amicus in matters before those courts. However, this position is not a panacea for admission of the Society as *amicus* in all cases. Leave must be sought and a basis satisfactorily laid.
17. In the application before this court, while the applicant was previously denied admission before this court as *amicus curiae*, in a similar petition in 2013 that cannot be a ground for subsequent denial as urged by the 3rd respondent. Neither can the fact that Society was previously admitted by a ground for admission in subsequent proceedings as urged by the applicant. Each matter before the court is unique and raises unique issues for determination and legal questions under different circumstances. This is the reason why an application has to be determined on its merit on a case to case basis so as to determine whether an intended applicant possesses the expertise relevant to assist the court. The court cannot take judicial notice of an amicus' expertise. It is a matter fact to be pleaded and proved.
18. For instance, the constitutional question, unconstitutionality of section 14 of the [Supreme Court Act](#), in the [Jasbir Rai](#) case cited by applicant is not the issue now raised in this petition. Hence it cannot be a basis for admission in this matter. We have to evaluate this application on its own merit.
19. Regarding the impartiality of the applicant, we note the contents of the replying affidavit of Alex Gatundu and the reference to the LSK President's Press Release of August 10, 2017. This court would not delve into the internal functioning of the Society when determining applications like the one before it. Save to say that the otherwise divergent positions of the council members as averred in the affidavit are matters which need proper contextualization given that every citizen is entitled to his/her political right in article 38 of the [Constitution](#). This court is not ready to pronounce that a council member cannot vie for a political office.
20. We take note that when such an application is filed before the court, it has to be evaluated on the basis of the Society's objectives and not individual Society members.
21. At the core of this petition is the interpretation and application of articles 81 and 86 of the [Constitution](#). This places the matter squarely within the Society's objectives. In this petition is also the question as regards the validity or otherwise of the people's exercise of their sovereign power. We find that nothing can be of great public interest, so as to invite the safeguarding from the LSK than a question touching on the people's exercise of their sovereign power.
22. Consequently, we find and hold that the Law society of Kenya has made a case for its admission as *amicus curiae* in this matter. As the court reserves the right to direct the *amicus* on how to proceed, we direct that the Society restricts its submissions on the single issue contained in its brief, particularly: the rightful interpretation of section 83 of the [Elections Act](#) in relation to the [Constitution of Kenya 2010](#).
23. The upshot is that the application for admission as *amicus curiae* is allowed.
Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF AUGUST 2017.

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

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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
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JUSTICE OF THE SUPREME COURT

S. C. WANJALA
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S. NJOKI NDUNGU
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I. LENAOLA
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JUSTICE OF THE SUPREME COURT

