Trusted Society of Human Rights Alliance v Matemo & 3 others (Petition 12 of 2013) [2015] KESC 26 (KLR) (17 June 2015) (Ruling)

Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2015] eKLR

Neutral citation: [2015] KESC 26 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 12 OF 2013

MK IBRAHIM & N NDUNGU, SCJJ

JUNE 17, 2015

BETWEEN

TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE ..... PETITIONER

AND

MUMO MATEMO ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

MINISTER FOR JUSTICE & CONSTITUTIONAL AFFAIRS 3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION ..... 4TH RESPONDENT

(Being an application by Katiba Institute to be enjoined in these proceedings as amicus curiae)

Supreme Court sets out circumstances where a party can be admitted as amicus in proceedings before court

The Supreme Court considered Katiba Institute's application to be admitted as amicus curiae in an appeal. The applicant argued that it would provide legal expertise and comparative analysis without bias. The Court outlined circumstances under which amicus participation was allowed, emphasizing neutrality, legal expertise, and timeliness. It held that amicus should aid the court without favoring any party and should not introduce new evidence. The court found that Katiba Institute had exhibited partiality and sought to influence the outcome. Additionally, the late application at the appellate stage was improper. Consequently, the court dismissed the application with no order as to costs.

Reported by Emma Kinya Mwobobia

Civil Practice & Procedure *– parties – parties to a suit – where applicant applied to be admitted as amicus in the proceedings before court – circumstances when a party can be admitted as amicus in a matter – what stage of the proceedings can a party be admitted as amicus – attributes of an amicus in the special context of the Kenyan legal system – whether the applicant could be admitted as amicus in the circumstances – Supreme Court Rules, rule 25*

Brief facts

This is a Notice of Motion filed by Katiba Institute seeking leave to be enjoined in the substantive appeal as *amicus curiae*. The applicant is an institution with expertise in constitution-making and design and would therefore contribute to the resolution of the issue at hand. Counsel submitted that the applicant was non-partisan in the matter and was only keen to aid the Court in interpreting and applying constitutional principles on the issues arising by proposing a comparative approach. Further, that the applicant had no special interest in the matter personal or commercial, and its sole motivation was fidelity to the law and the Constitution of Kenya, 2010. The applicant stated that it would assist the Court by providing the relevant historical context, constitutional design and principles relating to institutional comity, judicial and quasi-judicial processes, integrity, transparency and accountability, and comparative foreign law on the issues entailed.

Issues

1. Whether Katiba Institute should be admitted to the proceedings before the Supreme Court as *amicus curiae*
2. At what stage of the proceedings could the court admit a party as *amicus curiae*?
3. Whether a party could be enjoined as *amicus* at the final appellate stage especially where other parties had opposed the application
4. What were the attributes of *amicus* status in the special context of Kenya's legal system?

Relevant provisions of the Law

Supreme Court Rules

Rule 25

25. (1) A person may at any time in any proceedings before the Court apply for leave to be joined as an interested party.

(2) An application under this rule shall include–

(a) a description of the interested party;

(b) any prejudice that the interested party would suffer if the intervention was denied; and

(c) the grounds or submissions to be advanced by the person interested in the proceeding, their relevance to the proceedings and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

Held

1. Article 20 (3)(a) of the Constitution of Kenya, 2010, by express terms required Courts to develop the law to the extent that it did not give effect to a right or fundamental freedom. That was the very foundation for well -informed inputs before the Court which inherently justified the admission of *amici curiae*. The Court had a duty to ensure that its decisions enhanced the right of access to justice, as well as open up positive lines of development in jurisprudence to serve the judicial system within the terms of the Constitution.
2. The Constitution bestowed upon all State Organs and all public officers the duty to respond to the needs of vulnerable groups within the society under article 21(3). That obligation in the context of an enlarged *locus* in the enforcement of fundamental rights and freedoms (article 22(2), and of the enforcement of the Constitution itself (article 258), enjoined that a person seeking to canvass the values and principles under the Constitution, by applying legal expertise, materials, or information available was a potential friend of the Court. The role of a friend of the court could therefore, be characterised as one that assisted the courts in effectively promoting and protecting the rights enshrined in the Constitution.

3. There was a trend of applications by persons seeking *amicus* status to aid the Court in the execution of its duty. The Court approbated the inclination as the transformative cast of the Constitution invited due diligence on the part of all persons. Judicial authority flows from the people as the final arbiter, with the capacity to affect any settled precedent. It justified any person with special legal expertise in matters coming up before the Supreme Court, coming as a friend of the Court.
4. Rule 54 beckoned the invitation of persons as *amici curiae* and also recognized the need to allow from time to time and on a case-by-case basis, the appearance of legal or technical experts and advocates in proceedings before the court. The dichotomy of interest and expertise shredded any doubt as to the role of a party in any proceedings before the Court.
5. The expanded forum by the Constitution was a testament that the Court continued to witness various forms of legal mobilization in pursuit of a constitutionally engineered rights-based jurisprudence. However, that opening ought to be regulated in order to protect the rights of the parties to the causes before the Court. *Amicus* briefs ought to be carefully appraised so as not to interfere with the causes of the parties or the bounds of jurisdiction. While the Court may admit a motion to appear in any proceedings as *amicus*, there was the risk of the real interest of the *amicus* threatening the position of the original suitors whose rights and obligations stood to be upset by the outcome of the appeal.
6. The legitimacy of *amicus* briefs flows from their engagement with points of law. Cases involving matters of general public interest may occasion the Court inviting certain parties such as the Attorney - General to participate in proceedings as *amicus curiae*. Indeed the position of the Attorney - General as the custodian of the legal instruments of the Executive Branch, and as advisor in matters of public interest could not be challenged.
7. The Court considered the position of the Attorney - General in the performance of the Executive's role *vis-a-vis* the operationalization of the Constitution and the nature of the Supreme Court's discretion to regulate the extent of the Attorney - General's participation in the proceedings. The Attorney - General in a proper case therefore may be admitted to take part in proceedings as *amicus curiae* where great public interest was involved.
8. Section 5 (2) the Office of the Attorney General Act reinforced the centrality of the Supreme Court office in relation to the facilitation, promotion and monitoring the rule of law, the protection of human rights and democracy in Kenya. Section 7 of the Act gave a statutory right of audience in proceedings of any suit or inquiry in matters involving public interest and those concerning the legislature, Judiciary and any other independent department or agency in government. It was to be observed however, that despite the Attorney General's extraordinary role, certain exceptions, could be made by a Court in considering an application by the Attorney General seeking audience before it.
9. The evolution of the *amicus* role in Kenya was distinguishable from the position in jurisdictions such as the United States, Australia, South Africa and Ireland. While such jurisdictions require *amicus* to have *bona fide* interest in the matter the Kenyan practice was that *amicus* ought to come into the proceedings on a foundation of neutrality and by virtue of the express terms of the Constitution, parties with an interest in the proceedings were accommodated in the capacity of interveners.
10. *Amicus* participation was a matter of privilege rather than of right. Intervention in a case, as provided under Rule 25 of the Supreme Court Rules allowed parties with sufficient interest in the matter to apply to be enjoined as interveners or interested parties. That avenue was set apart from that of *amicus*. As opposed to *amicus*, interveners had an interest in the *res* of the suit as to be affected by the resulting Judgement of the Court. *Amicus curiae* on the other hand, were advisors to the Court and not to the parties, and were in no way bound by the resulting Judgement, except by way of precedent.
11. *Amici curiae* could not be perceived as an extension of the Court and they were not to advance any party's case and ought not to extend their participation to the realm of interveners in any legal proceedings. The interposition of *amici* in judicial proceedings was terminated when they had put forward the points of law outlined in their *amici* brief. There was, however, an exception in *amicus*

interventions, in the case of advisory-opinion proceedings before the Supreme Court as signalled in *Re the Matter of the Interim Independent Electoral Commission,* Sup. Ct. Const. Appl. No.2 of 2011. The absence of a live controversy in such proceedings opened a window for the *amicus* to steer the Court, by specific proposals, towards a definite legal position. The ultimate decision, however, lay with the Court.

12. The Court set out certain guidelines in relation to the role of *amicus curiae:*

    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 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.
    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 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 was not defeated solely by the subsistence of a State interest, in a matter of public interest.
    f. Where, in adversarial proceedings, parties allege that a proposed *amicus curiae* was 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 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 requests 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 may assign questions for *amicus* research and presentation.
    j. An *amicus* curiae shall not 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 was 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 seeks to advance, ought 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 this regard, general expertise in law did not suffice.
    o. Whereas consent of the parties, to proposed *amicus* role was a factor to be taken into consideration, it was not the determining factor.

13. In addition to the above guiding principles, the following *directions* may be applied by a Court considering an *amicus* application:
    a. A party seeking to appear in any proceedings as *amicus curiae* should prepare an *amicus* brief, detailing the points of law set to be canvassed during oral presentation. The brief should accompany the motion seeking leave to be enjoined in the proceedings as *amicus*.
    b. The Court may exercise its inherent power to call upon a person to appear in any proceedings as *amicus curiae*.
    c. In proceedings before the Supreme Court, the Bench as constituted by the President of the Court may exercise its discretion to admit or decline an application from a party seeking to appear in any proceedings as *amicus curiae* and denial or acceptance of such an application should have finality.
    d. The Court reserves the right to summarily examine *amicus* motions, accompanied by *amicus* briefs, on paper without any oral hearing.
    e. The Court may also consider suggestions from parties to any proceedings, to have a particular person, State Organ or Organisation admitted in any proceedings as *amicus curiae*.
14. Impartiality to a party's cause was one of the conditions for admission to the status of *amicus curiae***.** An evaluation of the submissions annexed to the *amicus* brief signalled that the intended *amicus curiae* inclined towards sustaining the decision of the High Court to the detriment of the 1st respondent.
15. Impartiality was a central tenet in the conduct of judicial proceedings. As counsellor before the Court, amicus *curiae* should not exhibit partiality towards any party's because otherwise some party would be prejudiced. Given the role of *amicus* as friend of the Court, impartiality was required of *amicus curiae*. The role of an *amicus* was to aid the Court to reach a legal, pragmatic and legitimate decision, anchored on the tenets of judicial duty. In an adversarial legal system such as in Kenya, impartiality on the part of the Court and all its agencies such as *amici curiae,* ought to withstand all compromise. The Court, in an adversarial system, was but an umpire, not to be seen to descend into the arena of conflict in the cause before it. An *amicus curiae* had to stay aloof, assisting the Court, without being seen to take sides.
16. Justice from the Court had to be assessed from the eyes of the ordinary litigant. When determining whether *amicus* was partisan, the test ought to be that of the ordinary litigant rather than of a legal expert examining the dichotomy between factual matter and legal matter. The applicant had scrutinized the decisions of the superior Courts, and taken the stand that the Court of Appeal erred in upsetting the finding of the High Court. A perception of bias beckoned, when the ordinary litigant read the submissions.
17. The only course open to an *amicus* was to aid the Court in arriving at a determination based on the law, and upon uncontroverted, scientific and verifiable facts. Whether the superior Courts erred in arriving at their determination was to be left to the value judgement of the Court, as the ultimate decision maker, following a conscientious evaluation of the parties' respective cases. It was not for an *amicus* to suggest to the Court whether a decision was wrong or right, nor to advise on which resolution to arrive at. The pursuit of a particular outcome was reserved to the parties to the controversy, including the interested parties or interveners. Consequently, the applicant had demonstrated partiality and did not satisfy the threshold of admission as *amicus* in the proceedings.
18. The intended *amicus curiae* had, besides, delayed in seeking admission into the instant case. The applicant neither sought to be enjoined as *amicus* in the matter at the High Court nor the Court of Appeal. For purposes of proper administration in the Supreme Court, applications seeking the exercise of discretionary powers were to be made within a reasonable time. It ensured expedition in the proceedings and gave fulfilment to parties' constitutional right of access to justice. That was a statement of principle and by no means attributes blame to the applicant, in this instance. The application failed not on the limb, but on that of alignment and partiality.

The application disallowed with no orders as to costs.

Citations

East Africa

1. *In the Matter of the Principle of Gender Representation in the National Assembly & the Senate* [2012] 3 KLR 720– (Followed)

2. Judicial *Service Commission v Speaker of the National Assembly & another* Petition No 518 of 2013- (Followed)

3. *Kuria, Moses Kiarie & 2 others v Ahmed Isaack Hassan & another* Petition No 3 of 2013 – (Explained)

4. *Muriu & others v Republic* (1955) 22 EACA 417 – (Mentioned)

5. *Odinga, Raila & 2 others v Independent Electoral & Boundaries Commission & 3 others* Petition 5, 4 & 3 of 2013 (Consolidated) – (Mentioned)

6. *Re the Matter of the Interim Independent Electoral Commission* Constitution Application No 2 of 2011 – (Followed)

7. *Trusted Society of Human Rights Alliance v Mumo Matemo& 5 others* Petition No 12 of 2013 – (Explained)

8. *Tunoi*, *Justice Philip K* & *another v Judicial Service Commission & 2 others* Petition No 244 of 2014 – (Followed)

South Africa

1. *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp & others (*CCT 69/12) [2012] ZACC 25; 2013 (1) BCLR 1 (CC) – (Followed)

2. *Re: Certain Amicus Curiae Applications; Minister of Health and others v Treatment Action Campaign & others*, (CCT 8/02) [2002] – (Followed)

3. *Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC) [2000] ZACC 19

Ireland

1. *I v Minister for Justice Equality and Law Reform,* [2004] 1 ILRM 27; [2003] IESC 38 – (Distinguished)

United States of America

1. *Florida v Georgia,* 58 US 17 How 478 (1854) - (Followed)

2. *State v Finley,* 242 Minn 288 (1954) – (Followed)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 20(3) (a); 21(3); 22(2); 258 - (Interpreted)

2. Office of the Attorney General Act, 2012 (No 49 of 2012) sections 5(2); 7 - (Interpreted)

3. Supreme Court Rules, 2012 (Act No 7 of 2012 Sub Leg) rule 3, 25, 54(1) - (Interpreted)

Texts & Journals

1. M Ssekaana, M., Ssekaana, SN., (Eds) (2010) *Civil Procedure and Practice in Uganda* Kampala: LawAfica Publishers p50

Advocates

1. Mr Waikwa, Mr Lempaa, Mr Mwongela for the Applicant,

2. Mr Muiruri for the 2nd and 3rd Respondents

3. Mr Okello for the 4th Respondent

4. Mr Nderitu, Kilonzo for the 1st and 2nd *amici curiae*

RULING

A.introduction

1. This is a Notice of Motion dated 3rd March, 2015, filed by Katiba Institute seeking leave to be enjoined in the substantive appeal as amicus curiae. The application is supported by affidavit sworn by Christine Nkonge, the applicant's litigation counsel.

Submissions Of The Parties

The Intended Amicus curiae/Applicant

2. Learned counsel for the applicant, Mr. Lempaa submitted that the applicant is an institution with expertise in constitution-making and design, and would therefore contribute to the resolution of the issue at hand. He urged that the applicant was non-partisan in the matter, and was only keen to aid the Court in interpreting and applying constitutional principles on the issues arising, by proposing a comparative approach. Mr. Lempaa submitted that the applicant had no special interest in the matter, personal or commercial, and its sole motivation was fidelity to the law and *the Constitution* of Kenya, 2010.

3. In its grounds in support of the application, the applicant stated that it would assist the Court by providing the relevant historical context, constitutional design and principles relating to institutional comity, judicial and quasi-judicial processes, integrity, transparency and accountability, and comparative foreign law on the issues entailed.

4 We were urged to admit the applicant as amicus curiae because of the public interest nature of the appeal before the Court. According to counsel, it was the first time Chapter 6 of *the Constitution* was coming up for consideration before the Court. Drawing from the supporting affidavit of Christine Nkonge, counsel submitted that the learning of the applicant's founder and director, Prof. Yash Pal Ghai, an expert in constitutional law, would benefit the Court in the resolution of this matter.

5 It was submitted that Katiba Institute's admission as amicus in this case would outweigh any possible prejudice to any of the parties. It was thus deponed in paragraph 10 of the applicant's affidavit:

> That even if any prejudice was to be occasioned to any party and /or the Court, we believe that given the importance of issues implicated by this litigation, their complexity, their public - interest nature, the importance of the case in engendering good governance, rule of law and constitutionalism vis - a- vis the information and arguments contained in our submissions, the value of admitting KI Katiba Institute as amicus curiae outweighs any prejudice that may be occasioned to any party."

6. On the issue of delay, counsel submitted that no prejudice would be occasioned to any party as a result of the time taken in filing application.

The 1st Respondent

7. The 1st respondent contested the application by way of a replying affidavit sworn on 16th March, 2015 and learned counsel Mr. Kilonzo, urged that the principles for admission of amicus curiae had already been set by this Court in Trusted Society of Human Rights Alliance v. Mumo Matemo& 5

Others, Sup. Ct. Pet. No. 12 of 2013, and that the applicant's case in this instance, fell short of the prescribed standard.

8 Learned counsel questioned the value of the applicant's amicus intervention, given that the 5th and 6th respondents had already been admitted as amici right from the trial Court. He urged that the intended amicus brief had no issues not already covered by the two amici on record.

9 Mr. Kilonzo submitted that a Court ought to consider its limited resources, including time, in determining the number of amici it should admit or engage. Counsel urged that an extension of the issues for determination by amici ought to be avoided, since matters before the Court must be expedited and finalized. Counsel urged the Court, in determining this matter, to consider the fact that this was a second and final appeal.

The Petitioner

10. Learned counsel for the petitioner, Mr. Mwongela submitted that his client had not taken a partisan position in this matter even though he had made reference to the High Court decision; and thus his case for amicus status was not compromised.

11. The 2nd and 3rd Respondents11 Learned counsel for the 2nd and 3rd respondents, Mr. Muiruri submitted that the draft submissions appended to the amicus brief portrayed a partial inclination by the applicant. He urged further, that it was apparent from the said brief, that the applicant would bring no new element to the issues of law. Counsel urged the Court to focus its attention on the live dispute between the real parties, in this adversarial system, in such a manner that the same is not overshadowed by a multiplicity of amici.

The 4th Respondent

12. Learned counsel for the 4th respondent, Mr. Okello submitted that the intended amicus was merely seeking to introduce a historical perspective to the cause, and had indeed taken a position in support of the High Court's stand.

13. 1st and 2nd Amici curiae 5th and 6th Respondents13 It is noted that the 1st and 2nd amici curiae were erroneously listed as the 5th and 6th respondents. The effect of describing an amicus curiae as a respondent is that, by default, such amicus gains the status of a respondent. Courts should always be mindful of party description, so as to protect the interests of the parties to the dispute, from a multiplicity of stakes crowding the litigation- forum. So in the instance matter, we amend the status of current amicus, to refer to 1st and 2nd amici curiae. At the hearing of the appeal, this Court will also regulate amicus interventions, to ensure that the amici do not assign to themselves the substance of the claims in the cause.

14. Learned counsel for the 1st and 2nd amici curiae, Mr. Nderitu urged the Court to reject the submissions that an amicus curiae ought not to take a particular position in a matter. He submitted that an amicus expresses an opinion, whether or not it would favour one side or the other. Counsel urged that as a matter of fact, a determination made by a Court assisted by amicus, would still favour one side. Counsel submitted that the disqualification of an amicus should only be for lack of adherence to relevant legal principles.

15. Counsel urged that the admission of the applicant as amicus curiae would serve the objects of the Court, as outlined in *the Constitution* and the *Supreme Court Act*.

16. The Applicant in Response16 Learned counsel, Mr. Waikwa for the applicant, submitted that there was no evidence to show that the instant application had occasioned any delay in the proceedings; for the main cause was yet to be cleared for hearing.

17. On the issue of partisanship, Mr. Waikwa submitted that this has two aspects: partisanship based on factual evidence; and partisanship based on legal interpretation. He urged that the category of partisanship raised by the 1st respondent was one of legal interpretation; and that all the authorities cited by parties beckoned legal, as opposed to factual evaluation. He submitted that the exclusion of the applicant in Moses Kiarie Kuria & 2 others v. Ahmed Isaack Hassan & Another, Petition No. 3 of 2013, 2013 eKLR from amicus status, was based on the applicant's proposed factual appraisal, which is distinguishable from the current instance. Counsel urged the Court to allow the application.

Issue For Determination

18. The single issue for determination in this application is whether Katiba Institute should be admitted to these proceedings as amicus curiae.

Analysis

Establishing Principles

19. This Court has previously made pronouncements regarding the participation of parties in proceedings as amici curiae. This matter, however, presents an opportunity to consolidate the principles previously developed on the subject, drawing on earlier decisions, as well as on comparative jurisprudence.

20. In this regard, certain specific questions emerge, calling for this Court's attention, as follows:

> at what stage can the Court admit a party as amicus curiae?can a party apply to be enjoined as amicus at the final appellate stage, especially where other parties have opposed the application?what are the attributes of amicus status, in the special context of Kenya's legal system.

21. *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 or fundamental freedom" Art. 203a. This is the very foundation for well -informed inputs before the Court, which inherently, justifies the admission of amici curiae. We have a duty to ensure that our decisions enhance the right of access to justice, as well as open up positive lines of development in jurisprudence, to serve the judicial system within the terms of *the Constitution*.

22 *The Constitution* further bestows upon all State Organs and all public officers the duty to respond to the needs of vulnerable groups within the society Art. 213. This obligation, in the context of an enlarged locus in the enforcement of fundamental rights and freedoms Article 222, and of the enforcement of *the Constitution* itself Article 258, enjoins that a person seeking to canvass the values and principles under *the Constitution*, by applying legal expertise, materials, or information available, is a potential friend of the Court. As observed by the Constitutional Court of South Africa in the case of Children's Institute v. Presiding Officer of the Children's Court, District of Krugersdorp and Others CCT 69/12 2012:

> ...the role of a friend of the court can, therefore, be characterised as one that assists the courts in effectively promoting and protecting the rights enshrined in our Constitution."

23 Rule 3 of the Supreme Court Rules, 2012 defines "amicus curiae" as "a person who is not party to a suit, but has been allowed by the Court to appear as a friend of the Court." Rule 541 vests the Court with the power to appoint amicus curiae in any proceedings, while sub-rule 2 sets out the criteria:

> The Court shall before allowing an amicus curiae take into consideration the expertise, independence and impartiality ofthe person in question and it may take into account the publicInterest, or any other relevant factor" emphasis supplied.

Rule 25 on the other hand outlines the admission of interested parties into the Court's proceedings.

25.

1 A person may at any time in any proceedings before the Court apply for leave to be joined as an interested party.

2 An application under this rule shall include–

a a description of the interested party;

b any prejudice that the interested party would suffer if the intervention was denied; and

c. the grounds or submissions to be advanced by the person interested in the proceeding, their relevance to the proceedings and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties." emphasis supplied.

24. We have in several cases, considered the role of amicus and outlined the difference between amici curiae and interveners. This guideline has been followed by other Courts in our jurisdiction, in cases such as Judicial Service Commission v. Speaker of the National Assembly and Another, High Court Petition No. 518 of 2013 2013eKLR; and Justice Philip K. Tunoi & Another v. Judicial Service Commission & 2 Others, High Court Petition No. 244 of 2014 2014eKLR. We elaborated the difference between interveners and amici curiae in the application to be enjoined as amicus by the Law Society of Kenya, in this matter, - Trusted Society of Human Rights Alliance v. Mumo Matemo & 5 Others, Sup. Ct. Pet. No. 12 of 2013 - at paragraphs 17 and 18 of the ruling:

> ..... while an interested party has a 'stake/interest' directly in the case, an amicus's interest is its 'fidelity' to the law: that an informed decision is reached by the Court, having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.
>
> 'Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in theproceedings, and champions his or her cause. On the other hand, an amicus is only interested in the Court making a decision of professional integrity. An amicus has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a 'friend' of the Court, his or her cause is to ensure that a legal and legitimate decision is achieved."

25 We have observed the trend of applications by persons seeking amicus status, to aid this Court in the execution of its duty. We approbate this inclination, as the transformative cast of *the Constitution*

invites due diligence on the part of all persons. Judicial authority flows from the people as the final arbiter, with the capacity to affect any settled precedent. It justifies any person with special legal expertise, in matters coming up before this Court, coming as a friend of the Court. Rule 54 beckons the invitation of persons as amici curiae and also recognizes the need to allow, from time to time, and on a case-by-case basis, the appearance of legal or technical experts and advocates in proceedings before us. The dichotomy of interest and expertise shreds any doubt as to the role of a party in any proceedings before us. In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Sup. Ct. Appl. No. 2 of 2012, we admitted certain organizations to appear as interested parties representing the interest of the public and went further to admit those with certain expertise to appear, including Charles Kanjama who was admitted as Advocate under this rule to enrich the legal submissions in the proceedings before the Court. The expanded forum by our Constitution is a testament that we continue to witness various forms of legal mobilization in pursuit of a constitutionally engineered rights-based jurisprudence.

26. However, this opening ought to be regulated, in order to protect the rights of the parties to the causes before us. Amicus briefs ought to be carefully appraised, so as not to interfere with the causes of the parties, or the bounds of jurisdiction. While the Court may admit a motion to appear in any proceedings as amicus, there is the risk of the real interest of the amicus threatening the position of the original suitors, whose rights and obligations stand to be upset by the outcome of the appeal.

27 This question has also been considered by the United States Supreme Court in the case of Florida v. Georgia, 58 U.S. 17 How. 478 1854. In that case, the Attorney - General of the United States sought to be heard in a case, on appeal, where the interests of the Federation were likely to be compromised. The Court considered the familiar practice of hearing the Attorney - General on behalf of the State, in suits between individuals involving matters of public interest; and if recognized that the Federation would be adversely affected by the decision, if it was accorded no opportunity to be heard. The Court acceded to the Attorney - General's request, granting the motion. There were, however, dissenting opinions by Justices Curtis and McLean which proceeded on the basis that the Supreme Court's jurisdiction had been compromised by the majority decision.

28 What should be this Court's position on amicus briefs inviting factual appraisal? The legitimacy of amicus briefs flows from their engagement with points of law.

29 Cases involving matters of general public interest may occasion the Court inviting certain parties, such as the Attorney - General, to participate in proceedings as amicus curiae. The special role of the Attorney - General as amicus, on behalf of the State, was considered in the case of Moses Kiarie Kuria & 2 others v. Ahmed Isaack Hassan & Another, Petition No. 3 of 2013, 2013 eKLR . In that case we contemplated various governing scenarios in admitting the Attorney - General's amicus brief. Indeed the position of the Attorney - General as the custodian of the legal instruments of the Executive Branch, and as advisor in matters of public interest cannot be challenged. We also considered the position of the Attorney - General in the performance of the Executive's role vis-à-vis the operationalization of *the Constitution*; and the nature of this Court's discretion to regulate the extent of the Attorney - General's participation in the proceedings. The Attorney - General, in a proper case, therefore may be admitted to take part in proceedings as amicus curiae, where great public interest is involved. The Office of the Attorney General *Act No. 49 of 2012* reinforces the centrality of this office in relation to the facilitation, promotion and monitoring the rule of law, the protection of human rights and democracy in Kenya S. 52. Section 7 of this Act gives a statutory right of audience in proceedings of any suit or inquiry in matters involving public interest and those concerning the legislature, Judiciary and any other independent department or agency in government. It is to be observed, however, that despite the

Attorney General's extraordinary role, certain exceptions, may be made by a Court in considering an application by the Attorney General seeking audience before it.

30. A comparative examination of amicus jurisprudence from other apex Courts is relevant in illuminating the practice of amicus briefs, in other jurisdictions.

31 The Supreme Court of Minnesota in the case of State v. Finley, 242Minn. 288 1954 rejected an amicus brief that suggested by implication, that an accused person was guilty. The Court delimited the remit of amicus in the following terms:

> The ordinary purpose of an amicus curiae brief in a civil action is to inform the court as to facts or situations which may have escaped consideration or to remind the court of legal matters which have escaped its notice and regarding which it appears to be in danger of making a wrong interpretation."

32. The Supreme Court of Ireland had occasion to examine the role and place of amicus curiae in appellate proceedings in the case of I v. Minister for Justice Equality and Law Reform, 2004 1 ILRM 27; 2003 IESC 38. The Court allowed the United Nations High Commissioner for Refugees to appear as amicus in a case involving an issue referred to the Supreme Court by the High Court, as involving great public interest. The Court adopted the definition of amicus curiae approved in the case of United States Tobacco Company v. Minister for Consumer Affairs and Others 83 ALR 79, which comes from Jowitt's Dictionary of English Law:

> A friend of the court, that is to say a person, whether a member of the bar not engaged in the case or any other bystander, who calls the attention of the court to some decision, whether reported or unreported, or some point of law which would appear to have been overlooked."

33. The amicus practice in South Africa has been to allow persons and organisations or entities that may not have a direct legal interest in a matter, to participate, where sufficient interest has been established. This follows the terms of the Rules of the Constitutional Court R. 10. The duty of amicus to the Court, in that country, was succinctly stated by the Constitutional Court in Re: Certain Amicus Curiae Applications; Minister of Health and Others v. Treatment Action Campaign and Others, CCT 8/02 2002 at paragraph 5 of the Judgement, in the following terms:

> The role of an amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court. Ordinarily it is inappropriate for an amicus to try to introduce new contentions based on fresh evidence."

34 Justice Sachs in the case of Government of the Republic of South Africa and Others v. Grootboom and Others 2001 1 SA 46 CC, noted the special merits brought by advocates who participated in the case as amici.

> I might mention that we were helped at the hearing in a most considerable way by the participation of the Human Rights Commission and the Community Law Centre of the University of the Western Cape. Counsel for the Legal Resources Centre appeared on their behalf and succeeded in broadening the debate so as to require the Court to consider the

right of all South Africans to shelter, whether they had children or not. The case showed the extent to which lawyers can help the poor to secure their basic rights".

35. Although there are no formal rules governing the role of amicus curiae in Uganda, the issue has been the subject of legal scholarship. M. Ssekaana and S. Ssekaana in their book, Civil Procedure and Practice in Uganda 2010 at page 50 have considered the role of amicus curiae as follows:

> In its ordinary use the term implies a friendly intervention of counsel to remind the court of some matter of law which has escaped its notice in regard of which it is in danger of going wrong. It seems that such a person is not a party to an action but one who calls the attention of the court to some decision or point of law which appears to have been overlooked... Where the intervention would only serve to widen the case between the parties or introduce a new cause of action, the intervention should not be allowed. An amicus curiae is not a party to an action, has no control over it and generally should not be allowed costs. The right of an amicus curiae to address the court is purely discretionary and is not dependent upon the consent of the parties to the proceedings" emphasis supplied

36 The evolution of the amicus role in Kenya is distinguishable from the position in jurisdictions such as the United States, Australia, South Africa and Ireland. This distinction surfaces in the light of the decision of the Supreme Court of Ireland, in I v. Minister for Justice, Equality and Law Reform op.cit.:

> .....the court is satisfied that it does have an inherent jurisdiction to appoint an amicus curiae where it appears that this might be of assistance in determining an issue before the court. It is an unavoidable disadvantage of the adversarial system of litigation in common law jurisdictions that the courts are, almost invariably, confined in their consideration of the case to the submissions and other materials, such as relevant authorities, which the parties elect to place before the court. Since the resources of the court itself in this context are necessarily limited, there may be cases in which it would be advantageous to have the written and oral submissions of a party with a bona fide interest in the issue before the court which cannot be characterised as a meddlesome busy body. As the experience in other common law jurisdictions demonstrates, such an intervention is particularly appropriate at the national appellate level in cases with a public law dimension.
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> It is, at the same time, a jurisdiction which should be sparingly exercised..."

37. While such jurisdictions require amicus to have bona fide interest in the matter, our practice is that amicus ought to come into the proceedings on a foundation of neutrality; and by virtue of the express terms of *the Constitution*, parties with an interest in the proceedings are accommodated in the capacity of interveners .

38. Amicus participation is a matter of privilege, rather than of right. And "intervention" in a case, as provided under Rule 25 of the Supreme Court Rules, 2012 allows parties with sufficient interest in the matter to apply to be enjoined as interveners or interested parties. This avenue is set apart from that of amicus. As opposed to amicus, interveners have an interest in the res of the suit, as to be affected by the resulting Judgement of the Court. Amicus curiae on the other hand, are "advisors to the Court", and not to the parties, and are in no way bound by the resulting Judgement, except by way of precedent. Amici curiae cannot be perceived as an extension of the Court; and they are not to advance any party's case, and ought not to extend their participation to the realm of interveners in any legal proceedings. The interposition of amici in judicial proceedings is terminated when they have put forward the points of law outlined in their amici brief.

39 There is, however, an exception in amicus interventions, in the case of advisory-opinion proceedings before this Court, as signalled in Re the Matter of the Interim Independent Electoral Commission, Sup. Ct. Const. Appl. No.2 of 2011. The absence of a live controversy in such proceedings opens a window for the amicus to steer the Court, by specific proposals, towards a definite legal position. The ultimate decision, however, lies with the Court.

40. In the High Court case, Justice Phillip K. Tunoi & Another v. Judicial ServiceCommission & 2 Othersop. cit at para.30, Mr. Justice Odunga had aptly observed, in relation to amicus status in Kenya today, thus:

> It is unfortunate that in this country, unlike in other jurisdictions with an advanced Constitution such as ours, we do not have in place comprehensive rules which govern the admission of persons as amici in legal proceedings."

41. From our perceptions in the instant matter, we would set out certain guidelines in relation to the role of amicus curiae:

> An amicus brief should be limited to legal arguments.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.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.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.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.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; S.C. Petition No. 5 of 2013-Katiba Institute's application to appear as amicus.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.The Court will regulate the extent of amicus participation in proceedings, to forestall the degeneration of amicus role to partisan role.In appropriate cases and at its discretion, the Court may assign questions for amicus research and presentation. An amicus curiae shall not participate in interlocutory applications, unless called upon by the Court to address specific issues.42 In addition, we would adopt, with respect, certain guidelines which emerge from Mr. Justice Odunga's decision in the Justice Tunoi caseop.cit. :
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> The applicant ought to raise any perception of bias or partisanship, by documents filed, or by his submissions.The applicant ought to be neutral in the dispute, where the dispute is adversarial in nature.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.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.Whereas consent of the parties, to proposed amicus role, is a factor to be taken into consideration, it is not the determining factor.43 In addition to these guiding principles, the following directions may be applied by a Court considering an amicus application:

A party seeking to appear in any proceedings as amicus curiae should prepare an amicus brief, detailing the points of law set to be canvassed during oral presentation. This brief should accompany the motion seeking leave to be enjoined in the proceedings as amicus.The Court may exercise its inherent power to call upon a person to appear in any proceedings as amicus curiae.In proceedings before the Supreme Court, the Bench as constituted by the President of the Court, may exercise its discretion to admit or decline an application from a party seeking to appear in any proceedings as amicus curiae, and denial or acceptance such of an application should have finality.The Court reserves the right to summarily examine amicus motions, accompanied by amicus briefs, on paper without any oral hearing.The Court may also consider suggestions from parties to any proceedings, to have a particular person, State Organ or Organisation admitted in any proceedings as amicus curiae.44 We are guided by the foregoing principles as we resolve the question before us in the instant application.

Partiality to Petitioner's Cause?45 It is now clear that impartiality to a party's cause is one of the conditions for admission to the status of amicus curiae. Now, does the applicant in this case seek to advance a position favouring any of the parties in the petition? Our evaluation of the submissions annexed to the amicus brief signals at paragraphs 60-68, that the intended amicus curiae inclines towards sustaining the decision of the High Court, to the detriment of the 1st respondent.

46. The 1st respondent urged that the intended amicus curiae has taken a position of bias, by supporting the appeal. The applicant, on the other hand, has denied the 1st respondent's assertions of partiality. Learned counsel for the 2nd and 3rd respondents, Mr. Muiruri submits that the persuasive authorities cited by the applicant had already been placed before the Court and, in the circumstances, the applicant was introducing no new material to aid the Court in the resolution of the case before it. He is also of the view that the applicant is partisan, and should not be admitted to amicus status, except upon conditions. Learned counsel, Mr. Okello for the 4th respondent, agrees with Mr. Muiruri, and submits that the applicant's amicus brief brings no additional value to the proceedings. But Mr. Nderitu, learned counsel for the 1st and 2nd amici curiae, submits that the intended amicus curiae only presents its legal interpretation of the decision of the High Court, rather than delve into matters of fact. Mr. Waikwa, learned counsel for the applicant, disputes the submissions on partisanship, and urges that a dichotomy be drawn between factual and legal partisanship. He urges that the applicant's submissions are purely legal, and therefore sustainable.

47. Impartiality is a central tenet in the conduct of judicial proceedings. As counsellor before the Court, an amicus curiae should not exhibit partiality towards any party's cause; otherwise some party would be prejudiced. Given the role of amicus as friend of the Court, impartiality is required of an amicus curiae. The role of an amicus is to aid the Court so it may reach a legal, pragmatic and legitimate decision, anchored on the tenets of judicial duty. In an adversarial legal system such as ours, impartiality on the part of the Court, and all its agencies such as amici curiae, must withstand all compromise. The Court, in an adversarial system, is but an umpire, not to be seen to descend into the arena of conflict in

the cause before it see Muriu & Others v. R. 1955 22 EACA 417. An amicus curiae has to stay aloof, assisting the Court, without being seen to take sides.

48. In the amicus brief attached to this application, the applicant gives at paragraphs 59-65 an analysis of the decisions of the two earlier superior Courts. It is this analysis that Mr. Waikwa urges to be an impartial legal interpretation. Do these paragraphs disclose any impartiality? Justice from the Court has to be assessed from the eyes of the ordinary litigant. When determining whether amicus is partisan, the test should be that of the ordinary litigant, rather than of a legal expert examining the dichotomy between factual matter and legal matter. How will an ordinary litigant perceive the submissions of Katiba Institute, as presented in paragraphs 59 to 65 of the proposed draft submissions? The Court is of the opinion that the applicant has scrutinized the decisions of the superior Courts, and taken the stand that the Court of Appeal erred in upsetting the finding of the High Court. A perception of bias beckons, when the ordinary litigant reads these submissions. At paragraph 65 of the amicus brief, the applicant states:

> The Court of Appeal in fact proceeded to its own fact- based inquiry and held that the allegations against Mr. Matemu did not hold water. With respect, this does not deal with the finding of the High Court, which was saying that the Panel did not carry out inquiries that would have unearthed the allegations, which allegations would have been sufficiently serious to demand further investigations. Maybe those further investigations would have reached the same conclusion as the Court of Appeal. But the point is that they did not take place"

49. The only course open to an amicus is to aid the Court in arriving at a determination based on the law, and/or upon uncontroverted, scientific and verifiable facts. Whether the superior Courts erred in arriving at their determination is to be left to the value judgement of the Court, as the ultimate decision - maker, following a conscientious evaluation of the parties' respective cases. It is not for amicus to suggest to the Court whether a decision was wrong or right, nor to advise on which resolution to arrive at. The pursuit of a particular outcome is reserved to the parties to the controversy, including the interested parties or interveners. Consequently, we agree with the 1st respondent that the applicant has demonstrated partiality, and does not satisfy the threshold of admission as amicus in these proceedings.

> Delay in Seeking Admission asamicus?50 The intended amicus curiae had, besides, delayed in seeking admission into this case. The petition of appeal was filed on 2nd September, 2013. The matter had been scheduled for hearing on 22nd October, 2014 and 5th March, 2015 but could not proceed. We note that the applicant neither sought to be enjoined as amicus in this matter at the High Court nor the Court of Appeal. For purposes of proper administration in this Court, applications seeking the exercise of discretionary powers are to be made within reasonable time; this ensures expedition in the proceedings, and gives fulfillment to parties' constitutional right of access to justice. This is a statement of principle, and by no means attributes blame to the applicant, in this instance. The application fails not on this limb, but on that of alignment and partiality.
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> Order
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> The application for admission to the status ofamicus curiae is disallowed, with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JUNE, 2015

M.K IBRAHIM

JUSTICE OF THE SUPREME COURT

N.S. NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true Copy of the original

Registrar

Supreme Court Of Kenya