



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

JE & 42 others (Being Minors Suing Through Their Next Friend Legal Advise Centre t/ a Kituo Cha Sheria) v Tullow Kenya B.V. & 2 others; National Environment Management Authority & another (Interested Parties) (Environment and Land Constitutional Petition E001 of 2024) [2024] KEELC 7017 (KLR) (22 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7017 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT LODWAR
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E001 OF 2024

FO NYAGAKA, J

OCTOBER 22, 2024

**IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS
UNDER ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 40, 42, 43, 53, 56, 57,
69, 70, 162(2)(B) AND 258 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTIONS OF ARTICLES 2(5) & (6), 3(1),
10(2), 19, 20, 21(1), (2), (3), 22(1), (2), 23(1), (3), 24(1), (3), 26, 27, 28, 35(1), (3), 40, 42, 43(A),
(C), (D), 44(1), (2A), 53, 56, 57 AND 70 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 3(3) OF
THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE 1992**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION
OF ARTICLE 8(1) OF THE PARIS AGREEMENT 2015**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 16 AND
24 OF THE AFRICA CHARTER ON HUMAN AND PEOPLES RIGHTS (ACHPR) 1981**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 3(B), 112 OF
THE TREATY FOR THE ESTABLISHMENT OF THE EAST AFRICAN COMMUNITY 1999**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTION
3, 15, 19, 20 AND 23 OF THE CLIMATE CHANGE ACT NO. 11 OF 2016**

AND



IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTION 3 AND 56A OF
THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT NO. 8 OF 1999

AND

IN THE MATTER OF RULES 10(1), 11(1) & 13 OF THE CONSTITUTION
OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

JE 1ST PETITIONER
SA 2ND PETITIONER
EK 3RD PETITIONER
DE 4TH PETITIONER
KA 5TH PETITIONER
JE 6TH PETITIONER
DE 7TH PETITIONER
DE 8TH PETITIONER
SE 9TH PETITIONER
SE 10TH PETITIONER
JE 11TH PETITIONER
MN 12TH PETITIONER
AN 13TH PETITIONER

AND

ELKANAH ELIMLIM LOKIPEET DEFENDANT

AND

ILIKWEL LOREGAE EKUWOM 1ST PETITIONER
PAULINA AMUCHA ENULAN 2ND PETITIONER
JOSEPH EKALE EKARU 3RD PETITIONER
CHARLES ESINYEN ARIONG 4TH PETITIONER
LONYEITA IPORI 5TH PETITIONER
EKASKOUT LOMOSONG LOMOKORI 6TH PETITIONER
ISAAC KEBO EKUWAM 7TH PETITIONER
NILEMKES LOCHIYO 8TH PETITIONER
PAULO EMANI KURE 9TH PETITIONER



MUSA ESINYON EJORE	10 TH PETITIONER
DANIEL IMONI	11 TH PETITIONER
JAMES EMOIP ELOTU	12 TH PETITIONER
JAMES EKUTAN	13 TH PETITIONER
EKAALE EKWOM	14 TH PETITIONER
AKURETE EDOME	15 TH PETITIONER
LOPEM ETOOT EKWOM	16 TH PETITIONER
AMEYEN LOPOROCHO LOGALAN	17 TH PETITIONER
PAUL EMANIKOR EMURIA	18 TH PETITIONER
ELIM ARUPE	19 TH PETITIONER
JAPHETH EYANAE	20 TH PETITIONER
AJORE INGOLE LOWAAR	21 ST PETITIONER
LOTOME E. JOSEPH	22 ND PETITIONER
REBECA EKALE	23 RD PETITIONER
AKIRU LOMOJONG	24 TH PETITIONER
KLIKWEL LOREGAE	25 TH PETITIONER
LOSENY NGUOMO LODURIKO	26 TH PETITIONER
JOHN E. ENIPONO	27 TH PETITIONER
RAPHAEL AMODOI NAKOROT	28 TH PETITIONER
APURI LOKOMOLE	29 TH PETITIONER
BEING MINORS SUIING THROUGH THEIR NEXT FRIEND LEGAL ADVISE CENTRE T/A KITUO CHA SHERIA)	

AND

TULLOW KENYA B.V.	1 ST RESPONDENT
MINISTRY OF ENERGY & PETROLEUM DEVELOPMENT	2 ND RESPONDENT
THE HON. ATTORNEY GENERAL	3 RD RESPONDENT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY	INTERESTED PARTY
TURKANA COUNTY GOVERNMENT	INTERESTED PARTY



RULING

1. By a Notice of Motion dated 12/09/2024 the proposed two Amicus Curiae (pl. Amici Curiae) moved this Court to be enjoined in this Petition as such. They brought it under Article 22(3)(e) of the Constitution, Rules 2 and 6 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and all other enabling provisions of the law. They sought the following Orders:
 1. ...spent.
 2. ...spent.
 3. Kenya Legal & Ethical Issues Network on HIV and AIDS Network (KELIN), the 1st Applicant herein, and the Initiative for Strategic Litigation in Africa (ISLA), the 2nd Applicant herein be admitted into these proceedings as joint Amici Curiae
 4. Leave be granted to the joint amici curiae to provide information to this Court by way of a joint amici brief.
 5. The Honourable Court do give directions on how the joint amici curiae shall participate in further proceedings herein.
 6. There be no award of costs for or against the joint amici curiae.
2. The Amici brought the Application on the grounds that the Petition challenged the impacts of exploration and drilling oil in South Turkana Basin by Tullow Oil Plc, a multinational corporation specialized in oil and natural gas exploration. The claim was that in undertaking the exploratory development, the Respondents have caused harmful social and environmental degradation and degeneration through displacements of communities, excessive environmental devastations through clearing of vegetation, dumping of hazardous wastes, oil spills leading to health and human diseases, the spread of diseases due to water, soil and vegetation pollution; adulteration of underground and surface water quality, and destruction of the habitat through negligent acts of dumping extractive hazardous waste. Further, the actions of the Respondents have violated their rights to clean and healthy environment, clean and safe water in adequate quantities, right to the highest attainable standard of health, right to life, right to development and security of person.
3. The other grounds were that the Petition was important because it raised issues of grave importance on the impact of extractive activities on the host community and the nature and extent of state obligation to protect the host community from the harmful effects of extractives. Evidence increasingly demonstrated that historically large-scale mining, oil and gas extraction had highly gendered and deeply masculine issued yet whereas both men and women participate in the extractive industry, they had very different experiences of the impact of extractive activities - women are often more at risk of harmful social and environmental impacts of the extractive industry. It is important therefore for the Court to understand the gender perspectives of extractives in understanding the impact of resource extraction on a community because women and men have different social roles, rights, and opportunities and are differentially affected.
4. Thus, the intended Amici sought to intervene in the Petition to direct the Court's attention on the extent of disproportionate impact of extractive industries on women by demonstrating women's vulnerability and the extent to which women are unlikely to optimally participate and benefit from



the extractive activities. This information will be crucial to help the court appreciate the legal basis for protection which states should accord to women affected by extractives activities by demonstrating the nature and extent of State's obligation to eliminate discrimination against women. The information will further enable the court to engage with international law principles and standards that gives expression to gendered approach to addressing the impact of women human rights violations arising out of the impacts of extractives activities.

5. Further, the joint Applicants were independent non-governmental organizations working on the realization of human rights. The 1st Applicant, KELIN advocates for the realization of health and health related rights for all, with a focus on gender transformative approaches that ensure the realization of the right to health for all. As part of its mandate, the 1st Applicant has a thematic area on women, land and property, through which it engages in advocacy to ensure that land and property rights for women are respected, fulfilled and protected. Moreover, KELIN had been at the forefront of advocating for sound, constitutional, rights compliant policies and legislative frameworks on the land and property rights of women, and for increased engagement in activities that facilitate the realization of property rights of women.
6. Further, it was a member of the Land Sector Non-State Alliance and is part of its coordination framework through which it focuses on facilitating reforms in land management systems through the inclusion of women; using alternative justice systems as an avenue to address community land disputes including ensuring the participation of women in the exploitation of natural resources; developing educational material to ensure gender sensitivity in land registration processes; and engaging communities to enhance the protection of women. Also, its engagement geared towards securing land and property rights for women, KELIN has gained considerable experience and expertise in the context of land, natural resource use which it would offer to guide the Honourable Court in its determination.
7. The 2nd joint Applicant, ISLA, was a regional non-governmental organization established in 2014 and based in Johannesburg, South Africa and was based in that country. It ran strategic litigation initiative with a regional focus and expertise on women's human rights. It was a public interest litigation organization which provided legal representation and support to those who seek to hold states accountable for violations of women's human rights. It also fosters, facilitates and supports a culture of social justice lawyering by providing capacity strengthening with a view to developing a critical mass of lawyers on the African continent who can effectively undertake strategic interest litigation on gender and sexual rights. One of its thematic area focus on women socio-economic rights that seeks to use the law to achieve policy and legal outcomes which advance women's socio-economic rights within the African continent.
8. ISLA does this by using the Courts to challenge discriminatory laws and practices that adversely impact on women's socio-economic rights. ISLA's work on litigating women's socio-economic rights falls broadly into three categories: women's rights to land and property particularly on ownership, control of land and access to land. The NGO had cases on this area on women's rights to property following dissolution of marriages; women's rights in relation to the gendered impact of extractives industries and climate change. Further, since 2014, the NGO had built expertise working as *amicus curiae* and advisor to counsel in cases on women socio-economic rights before domestic courts in East, West and Southern Africa. It had also been involved in the promotion and protection of women socio-economic rights within the African Human Rights system (African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights).
9. In the cases mentioned above, it had filed *amicus curiae* briefs providing information on comparative legal analysis, international legal standards and principles on women economic justice demonstrating



emerging consensus on best practices to protect women socio-economic rights hence ISLA has been fundamental in the enrichment of jurisprudence and development of the law across the African continent. For that reason, it had gained extensive experience on women economic justice and application of gender equality. Due to this expertise, the NGO had previously been admitted as amicus curiae in various cases before the superior courts in Kenya (including the Supreme Court on three occasions) and at the African Court on Human and Peoples Rights where it has availed gendered perspectives and comparative law analysis on issues pertaining to women's socio-economic rights. Therefore, through its various interventions in various cases in the Kenyan courts as amicus curiae, it had built its expertise by prioritizing the use of the law to achieve policy and legal outcomes that advance socio-economic rights of women, eventually contributing to social change.

10. Further, that some of the cases it had been admitted in as an Amicus Curiae had been on the gendered impact of the legal requirement for proving contribution as a basis for sharing of matrimonial property; gendered impact of climate change on women where ISLA as amicus curiae is articulating how effects of climate change exacerbate women vulnerabilities particularly on their relations to land, biodiversity and the ecosystem especially when the loss of land, roads, schools, houses, health facilities adversely affects women's livelihood, health and security of person, cases seeking to hold the State accountable for its failure to protect and respond to violations experienced by Kenyan women migrating to the Middle East as domestic workers. It had helped the Superior Courts in Kenya develop jurisprudence on indirect discrimination against women hence contributing to the realization and promotion of gender equality.
11. Again, that the previous work of the joint Applicants had made them attain expertise on women's social economic rights that focuses on the development of gendered legal principles that protect women's socio-economic rights in natural resources exploitation and the extractive industry, through the application of constitutional rights and international human rights law and are in a position to assist the court determine the application legal standards and principles standards thus assist the court in determining the issues raised in this petition and offer guidance to this Court as it determines the petition. Their participation in the Petition was thus crucial in assisting the court nuance the nature and extent of State's obligation to develop a gendered approach in addressing the impact of women human rights violation in the extractive industries. In the end this information shall assist the Court reach a just determination.
12. Their intervention, based on their immense experience in strategic litigation on articulating gendered perspectives on women socio-economic rights would be most crucial in aiding the court in determining the issues arising in this petition and arriving at a just and fair determination. They intended to bring to the attention of this court novel issues that have not been raised by either of the parties. The issues identified by joint amici are not being canvassed by any other party yet they are central to the resolution of the petition and will help the court in the wholesome determination of the case in a fair and just manner by clarifying the impact of natural resource exploitation on women socio-economic rights. They shall only provide legal arguments by way of an amici brief and shall not factual arguments. They shall therefore not participate in the real controversy between the parties but shall only seek to develop their amicus brief in manner meant to help the court nuance the legal standards applicable in the protection of women in the extractives. They both were independent and impartial experts, not aligned to any of the parties presently before the Court, and are of the respectful view that they have the requisite expertise to present an amicus brief to this Honourable Court that will assist in the determination of the issues raised in this Petition. Thus, it was just, fair and in the interest of wholesome determination of issues in this Petition that they be granted leave to join the proceedings as joint amici curiae.



13. The Application was supported by the affidavits of Allan Maleche sworn on 13/09/2024 and Sibongile Ndashe sworn on 12/09/2024. Apart from reiterating the contents of the grounds in support of the Application but now in deposition form, they deponents added a few more facts.
14. The Affidavit of Sibongile Ndashe give a number of cases in which ISLA had been admitted as Amicus Curiae and given a wealth of legal resources and submissions on related issues. As for Allan Maleche, he added a number of Annextures, being a Certificate of Incorporation of KELIN, its Strategic Plan for 2021-2025, and a Report on Lake Region Economic Block (LREB) by KELIN in conjunction with the Government of Kenya and the National Land Commission.
15. The 1st Respondent opposed the Application on three grounds, namely:
 1. That the Application proposes to frame a new and additional course of action that does not arise from the pleadings filed by the petitioners. The Applicants admit as much by stating that they intend to raise issues that have not been raised by either of the parties.
 2. The Application is replete with instances of bias and partisanship, contrary to the principles set out by the Supreme Court decision of Justice Philip K. Tunoi & Another versus the Judicial Service Commission and others (2014) eKLR that guides this Court when admitting applications filed by parties intending to be enjoined as Amicus Curiae.
 3. Whereas the applicants have general expertise in law and public interest litigation, this does not suffice to show exceptional expertise relevant to the dispute in this matter, neither does it meet the requisite threshold to allow the application to be enjoined as Amicus Curiae especially at this stage of the proceedings.
 4. The evidence the Applicants intend to adduce before this court in seeking to substantiate their expertise on matters gender and exploration of natural resources have not been submitted by any other party or a data that is already judiciously noted by this Court in this matter and as such would amount to fresh evidence contrary to the guiding principles on joinder of Amicus Curiae.
 5. The applicants' experience in matters women's socio-economic rights further demonstrates that the applicants will invariably (be) partial in the course of the proceedings as opposed to assisting the court to reach a just determination of the matter once the questions are law and points of controversy are determined at the later stages of the proceedings.
 6. The joinder of the applicants would not provide this court with additional and independent expertise that this Honourable Court is not already seized with. On the contrary, they intend to enlarge and mutate an already multifaceted dispute in order to achieve an outcome favorable to them.
16. Although some of the Petitioners, being the ones represented by the firm of MOB Law Advocates indicated their intention to oppose the Application and file submissions, they did not.

SUBMISSIONS

17. The Application was disposed of by way of written submissions. The Applicants began their written submissions dated 30/09/2024 and filed the same date by submitting that the case was of great importance in the development of the law and jurisprudence on the correlation between extractives, environmental law, businesses and human rights. Further, it involved the application of international environmental law and human rights law in determining critical questions on the nature and extent of



State's legal obligations to prevent harmful social and environmental degradation and degeneration to a host community caused by the exploration and drilling of oil.

18. They delved into locating the constitutional framework of Amicus Curiae in Article 22 of *the Constitution*, justifies the admission of a friend of the court in claims for violation of human rights. They relied on the cases of *S W K & 5 others v Medecins Sans Frontieres France & 10 Others* [2016] eKLR and the Supreme Court decision of *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others* [2015] eKLR.
19. They then gave the criteria of admission as Amicus Curiae as given in the Mumo Matemo case where the Supreme Court set out the said principles. They then argued that they had satisfied the criteria by showing the expertise of they had. They summarized the detailed expertise they had given in the contents of the grounds in support of the Application.
20. Regarding their independence and impartiality, they argued that they were not aligned to any of the parties presently before this Court and their role was to seek to provide an independent and impartial submissions to aid the court in its role to develop the law and jurisprudence and good governance as stipulated in Article 259(1) of *the Constitution*; they had no specific interest in the outcome of this Petition as against any of the parties herein, and play no role in either advancing or defending the petition but only in the law and developing jurisprudence that ensured the protection and advancement of women's socio- economic rights in the context of extractives as stipulated in Article 20(3) of *the Constitution*;
21. About novel issues not being raised by any other party as set out in the Mumo Matemo case, they argued that they did not intend to regurgitate what the main parties have raised but novel information. They submitted they fulfilled this requirement due to their experience and expertise on social justice and interplay between gender and women socio-economic rights and natural resource extraction/ extractives are in a unique position to provide novel issues that have not been advanced by any of the parties in the petition. They submitted that they intended to give additional information on issues such as how women are disproportionately affected by social and environmental impacts of extractive industries and the nature and extent of state obligation to eliminate indirect discrimination against women in the extractive industries, which perspectives were critical because women and men have different social roles, rights, and opportunities in a community and are differentially affected by the extractive activities.
22. They argued that the additional information they sought to provide would help the court advance the rule of law, equality, social justice, protection of the marginalized, good governance, transparency, accountability and sustainable development as provided for in Article 10 of *the Constitution*. They also relied on the case of the *Independent Electoral and Boundaries Commission & 4 Others v David Ndi & 82 Others*; *Kenya Human Rights Commission & 4 Others (Amicus Curiae)* [2021] eKLR [2021] KECA 363 (KLR).
23. The First Respondent filed its submissions dated 02/10/2024. In them they submitted that this court should consider merits or demerits of the Application dated 12/09/2024 on three following aspects, namely:
 1. The Applicants were not independent and impartial;
 2. Novelty of issues and expertise of the applicant, and
 3. Presenting new issues and fresh evidence.



24. Regarding independence and impartiality, the 1st Respondent submitted that the Supreme Court in the case of Mumo Matemu case at paragraph 48 stated that an Amicus Curiae should not be partisan, and the test should be that of the ordinary litigant rather than of a legal expert examining the dictionary meaning between factual and legal matters. It added that the court stated that bias beckons when an ordinary litigant reads submissions and it appears to him that it reads favor of a partisan position in an adverse case. It then went on to submit that the Applicants by stating that women were more affected in the course of large-scale mining and extraction, it shows that they are biased already or they intend to direct the court on the extent of the disproportionate impact of extractive industries on women and have the court appreciate the legal basis for protection which should be accorded to women affected structures. It submitted, therefore, that the Applicants had shown that the first Respondent's activities had adverse effects on communities where it conducted activities and that such activities afflict women more in their rights.
25. It argued further that by their indication that they would be calling upon the Honourable Court to appreciate that element the Applicants were not saying that they would assist the Court to navigate the intricate issues arising from the disputes relating to extractive industry. Rather they were plainly saying that they had expertise and skills on matters involving women's rights and they would like to litigate on the protection of those rights vis-à-vis the presumed adverse aspects or effects of the first Respondent's activities. That this was evidence of bias. They relied on the case of *Okiya Omtata Okoit v Director of Public Prosecutions; Inspector General of National Police Service & Attorney General (Interested parties); International Commission of Jurists, Kenya Section & Law Society of Kenya (Proposed Amicus Curiae) (Petition E266 of 2020) [2020] KEHC 1824 KLR (Constitutional and Human Rights)*.
26. Regarding novelty of issues and the expertise of the Applicants, the first Respondent submitted that an Amicus Curiae must demonstrate the expertise that is being offered to the court. Further, they must demonstrate the relevance of their expertise on the matter before the court, as was highlighted in the case of *Nubian Rights Forum v Kenya Human Rights Commission and 6 Others; Child Welfare Society and 8 Others (Interested Parties); Center for Intellectual Property and Information Technology (Proposed Amicus Curiae) [2019] eKLR*.
27. It then went on to submit that the Applicants had indicated a number of cases they had been involved in where they had been admitted as Amicus Curiae, and that when it reviewed the cases, they showed the Applicants' general expertise on the law. It then submitted that the expertise that had been demonstrated by the Applicants in those matters they had been admitted as Amicus Curiae related to indirect discrimination of women and that such cannot be said to be specific expertise to address each of the issues raised in this matter, they relied on the case of *Okiya Omtatah (supra)* and submitted that the novel issues the Applicants proposed to address demonstrated bias and suitability of being enjoined as interested parties as opposed to friends of the Court.
28. About new issues and fresh evidence, the First Respondent submitted that at paragraph 18 of the application, the Applicants stated that they intended to bring to the attention of the court matters that had not been raised by any of the parties but are central to the resolution of the petition yet they maintained that the issues arise from the pleadings. It then submitted that the 43 petitioners and additional proposed co-petitions whose application was pending before the court included children, women and men. It was the 1st Respondent's submission that the petition had been pleaded on behalf of children, women and men hence anything additional to the Petition would be appreciated as raising new facts requiring supplementary evidence.



29. They submitted further that the petitioners having intimated that they had a significant wealth of resources in terms of time finances and expertise and resources or enough material that would enable the court to determine the issues the Petitioners intended to prosecute the Applicants who wanted to be admitted were intending to prosecute a claim of their own that had not been pleaded by the petitioners, and that claim was discrimination against women in extractive industries. The claim was therefore foreign to the various claims that had been advanced by the petition, and it would raise a new issue requiring new evidence as opposed to points of law. It prayed that the application be dismissed with costs.

Issue, Analysis and Determination

30. I have considered the application, the law and the rival submissions of the Applicants and the 1st Respondent. Only two issues commend themselves to me for determination. The first one is whether the application is merited. The second is who to bear the costs of the application.
31. It is not in dispute that the Petition herein raises weighty legal and factual matters. The Applicants and First Respondent agreed that the issues in dispute, particularly those relating to the oil and extractives industry affect the residents of the particular area where the exploration and extraction of petroleum and its products are carried out, whether on a large scale or small scale, such as the Turkana County which this Petition relates to. They are not only novel in Kenya but of monumental socio-economic and environmental impacts. They also agreed in the argument that such issues require not only great legal expertise but also enormous skills and resources. That notwithstanding, the 1st Respondent opposed the joinder of the proposed Amici on six (6) grounds, of which it gave three condensed issues.
32. At this point it is worth noting that the provisions on which the Application was brought were relevant, save for the meaningless phrase "... all other enabling provisions of the law:
- “ Article 22(3)(e) of *the Constitution* of Kenya 2010 provides that, “The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that-- (e) an organization or individual with particular expertise may, with the leave of the court, appear as a friend of the court.”
33. Rules 2 and 6 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, as published under Legal Notice No. 117 of 28/06/2013, respectively provide that “friend of the court” is an independent and impartial expert on an issue which is the subject matter of proceedings but is not party to the case and serves to benefit the court with their expertise;” and,
- “ Friend of the Court.
6. The following procedure shall apply with respect to a friend of the court-
- (a) The Court may allow any person with expertise in a particular issue which is before the Court to appear as a friend of the Court.
 - (b) Leave to appear as a friend of the Court may be granted to any person on application orally or in writing.
 - (c) The Court may on its own motion request a person with expertise to appear as a friend of the Court in proceedings before it.”



34. These provisions have been discussed in a number of decisions in Kenya, beginning from the Supreme Court to the Superior courts. This Court can only cite one or two as an example.
35. In *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others* Sup Ct Petition No 12 of 2013 [2014] eKLR, the Supreme Court held:

- “(41) From our perceptions in the instant matter, we would set out certain guidelines in relation to the role of amicus curiae:
- i. An amicus brief should be limited to legal arguments.
 - ii. The relationship between amicus curiae, the principal parties and the principal arguments in an appeal, and the direction of amicus intervention, ought to be governed by the principle of neutrality, and fidelity to the law.
 - iii. An amicus brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tends to compromise their essence as well as the terms of *the Constitution*'s call for resolution of disputes without undue delay. The Court may therefore, and on a case- by- case basis, reject amicus briefs that do not comply with this principle.
 - iv. An amicus brief should address point(s) of law not already addressed by the parties to the suit or by other amici, so as to introduce only novel aspects of the legal issue in question that aid the development of the law.
 - v. The Court may call upon the Attorney- General to appear as amicus curiae in a case involving issues of great public interest. In such instances, admission of the Attorney- General is not defeated solely by the subsistence of a State interest, in a matter of public interest.
 - vi. Where, in adversarial proceedings, parties allege that a proposed amicus curiae is biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appears to be partisan on an issue before the Court, the Court will consider such an objection by allowing the respective parties to be heard on the issue (see: *Raila Odinga & Others v. IEBC & Others*; S.C. Petition No. 5 of 2013-*Katiba Institute's* application to appear as amicus).
 - vii. An amicus curiae is not entitled to costs in litigation. In instances where the Court requests the appearance of any person or expert as amicus, the legal expenses may be borne by the Judiciary.
 - viii. The Court will regulate the extent of amicus participation in proceedings, to forestall the degeneration of amicus role to partisan role.
 - ix. In appropriate cases and at its discretion, the Court may assign questions for amicus research and presentation.



- x. An amicus curiae shall not participate in interlocutory applications, unless called upon by the Court to address specific issues.
- (43) In addition to these guiding principles, the following directions may be applied by a Court considering an amicus application:
- i. 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.
 - ii. The Court may exercise its inherent power to call upon a person to appear in any proceedings as amicus curiae.
 - iii. 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.
 - iv. The Court reserves the right to summarily examine amicus motions, accompanied by amicus briefs, on paper without any oral hearing.
 - v. The Court may also consider suggestions from parties to any proceedings, to have a particular person, State Organ or Organization admitted in any proceedings as amicus curiae.
36. Also, in *Justice Philip K. Tunoi & Another v. Judicial Service Commission & 2 Others*, High Court Petition No. 244 of 2014 [2014] eKLR, the learned Judge, Odunga J (as he then was) stated, and the Supreme Court in the *Mumo Matemu* case cited him at paragraph [42] with approval that:
- xi. “The applicant ought to raise any perception of bias or partisanship, by documents filed, or by his submissions.
 - xiii. The applicant ought to be neutral in the dispute, where the dispute is adversarial in nature.
 - xiii. The applicant ought to show that the submissions intended to be advanced will give such assistance to the Court as would otherwise not have been available. The applicant ought to draw the attention of the Court to relevant matters of law or fact which would otherwise not have been taken into account. Therefore, the applicant ought to show that there is no intention of repeating arguments already made by the parties. And such new matter as the applicant seeks to advance, must be based on the data already laid before the Court, and not fresh evidence.
 - xiv. The applicant ought to show expertise in the field relevant to the matter in dispute, and in this regard, general expertise in law does not suffice.
 - xv. Whereas consent of the parties, to proposed amicus role, is a factor to be taken into consideration, it is not the determining factor.”
37. The Supreme Court in *Muruatetu & Another v Republic; Kenya National Commission on Human Rights & 2 Others (Interested Parties); Death Penalty Project (Intended Amicus Curiae)* (Petition 15 & 16 of 2015 (Consolidated)) [2016] KESC 12 (KLR) (Civ) (28 January 2016) (Ruling), adopted the above principles.



38. Additionally, in *Attorney General v David Ndii & Others; Albert & another (Amicus Curiae) (Petition E016 of 2021)* [2021] KESC 16 (KLR) (Civ) (9 November 2021) (Ruling) the Supreme Court stated:

“In the above context, we now opine as follows:

- i. An applicant for joinder as amicus has to satisfy this Court that they have satisfied the legal requirements for joinder. The relevant law is rule 19 of the Supreme Court Rules 2020. The said rule provides as follows:
 19.
 - (1) The court may on its own motion, or at the request of any party, permit a person with particular expertise to appear in any matter as a friend of the court. Participation of friends of the court.
 - (2) The court shall before admitting a person as a friend of the court, consider—
 - (a) proven expertise of the person;
 - (b) independence and impartiality of the person; or
 - (c) the public interest”.
- ii. The guiding principles applicable in determining an application to be enjoined in that capacity was settled in *Trusted Society of Human Rights Alliance v Mumo Matemu and 5 Others (supra)*, where the court on this occasion, pronounced itself on its inherent power to admit amicus curiae and emphasized that;
 - i. An amicus brief should be limited to legal arguments.
 - ii. The relationship between amicus curiae, the principal parties and the principal arguments in an appeal, and the direction of amicus intervention, ought to be governed by the principle of neutrality, and fidelity to the law.
 - iii. An amicus brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tends to compromise their essence as well as the terms of *the Constitution*'s call for resolution of disputes without undue delay. The court may, therefore, and on a case-by-case basis, reject amicus briefs that do not comply with this principle.
 - iv. An amicus brief should address point(s) of law not already addressed by the parties to the suit or by other amici, so as to introduce only novel aspects of the legal issue in question that aid the development of the law...
- vi. Where, in adversarial proceedings, parties allege that a proposed amicus curiae is biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appears to be partisan on an issue before the court,



the court will consider such an objection by allowing the respective parties to be heard on the issue...”

We also affirmed the above guiding principles in the Muruatetu Case.

iii. We have considered the application in the context of the law as expressed in *Mumo Matem* where we stated that the admission of *amici curiae* is useful for achieving our constitutional mandate to develop the law with the assistance of input from parties appearing before us. We perceive from the application that the applicants intend to address the court on the issue of constitutional amendments including questions touching on the basic structure, its scope, relevance and applicability. In the circumstances, we are of the view that the applicants detailed amici briefs shall be useful to the court. It is also our view that no prejudice will be caused to any party if the applicants are admitted and we see no partiality expressed in their draft amici briefs. We therefore exercise our discretion and allow the application.”

39. This Court has considered the Applicants’ Application and the 1st Respondent’s contention. When the same are compared with the law as enunciated above, it is clear that the Applicants have summarized their case for the prayer for joinder as *Amicii*. They argue that they will not adduce any evidence. Also, they will not participate in the interlocutory proceedings. Additionally, they have no interest in the outcome of the case and are not leaning to any party’s case. They argue that they are independent and not biased or partial. Further, that the issues they intend to raise are not a regurgitation of the same as raised by the parties already in the Petition.
40. On its part the 1st Respondent is of the view that the fact that the proposed *Amici Curiae* state that they intend to show to the Court how oil extraction and the extractives sector affects women, it is a clear indication that the *Amici Curiae* are biased and lean towards the case for the Petitioners who already have much expertise and resources. Again, that the novel issues they want to raise are an entirely new matter which is not part of what the Petitioners’ case is about hence they would convolute the case or theirs would be a better position as Interested Parties rather than *Amici Curiae*.
41. In my humble view, the 1st Defendant’s view is misleading and a misconception of the case for the Applicants as *Amici Curiae*. The Applicants argue that theirs is only to expound on the law, both international and domestic, regarding the dispute herein, particularly on how oil extraction affects women’s rights in a diametrically different manner as men. This is a novel idea which is intricately intertwined with the issues that the Petitioners intend to bring before the Court. There is no evidence of bias, impartiality or leaning towards one side, as argued by the 1st Respondent. To explain that the *Amici Curiae* intend to show how women’s rights are affected by the processes of extraction of oil and that there are women who are Petitioners herein hence their case sufficiently covered in terms of expertise is to stretch the argument too far. The Petitioners who are described as women in the instant Petition have instituted the claim herein as individuals and not as those agitating issues specifically attendant to women’s rights such as discrimination.
42. It is my considered view that the Applicants have demonstrated that they meet the criteria of being enjoined as *Amici* herein. The fact that the *Kituo Cha Sheria* which represents some of the Petitioners has stated that it has legal expertise and resources to propound its clients’ cases is not enough ground to deny the proposed *Amici Curiae* joinder.
43. The upshot is that the Application dated 12/09/2024 is merited and succeeds. The *Amici Curiae* are directed to file their Appointment within the next seven (7) days and serve on all parties, including those that have not entered appearance or filed any Responses. They are neither permitted



to participate in interlocutory applications nor adduce any evidence. Further, their role will be limited to participating in final determination of the Petition by filing submissions and arguing on the legal matters or issues of law that pertain to the area of expertise in the aspects they have pointed out in their Application.

44. Since the law on participation of Amicii is settled, even though the Application has succeeded, each party will bear own costs
45. Also, the Petition will be mentioned on 24/10/2024 for the 1st Respondent to confirm whether or not it continues to oppose the Application dated 02/07/2024 seeking orders of joinder of more Petitioners
46. Orders accordingly.

RULING DATED SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM THE 22ND DAY OF OCTOBER, 2024

HON. DR. *JUR* F. NYAGAKA

JUDGE, ELC KITALE

In the presence of:

Mulekyo for the Petitioners

Nyokabi for proposed Amici Curiae

Kiumi for Onganyo for MOB Advocates

E. Wetangula for the 1st Respondent

