



**Mwangi v Mochama & another; Initiative for Strategic Litigation
In Africa (Intended Amicus Curiae) (Civil Appeal 507 of 2019)
[2022] KEHC 15332 (KLR) (Civ) (11 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15332 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL 507 OF 2019
JK SERGON, J
NOVEMBER 11, 2022**

BETWEEN

WAMBUI MWANGI APPLICANT

AND

TONY MOCHAMA 1ST RESPONDENT

SHAILJA PATEL 2ND RESPONDENT

AND

**INITIATIVE FOR STRATEGIC LITIGATION IN AFRICA INTENDED
AMICUS CURIAE**

RULING

1. Through the notice of motion application dated July 13, 2022 supported by the affidavit of its Executive Director, Sibongile Ndashe the applicant, Initiative for Strategic Litigation in Africa seek leave to join these proceedings as *amicus curiae*.
2. The applicant's case as gleaned from the grounds in support of the application and the supporting affidavit is that it is a non-profit organization duly registered in South Africa and that it is a regional non-governmental organization which was established in 2014 and based in Johannesburg, South Africa.
3. The applicant avers that it has a regional focus and expertise on women's human rights and sexual rights and uses the system to contribute to the development of jurisprudence on women's human rights on the African continent.



4. The applicant states that its work has enabled it to develop its expertise on violence against women and therefore uses its expertise to make submissions to this court that will enrich jurisprudence on best practices in the protection of women from violence.
5. The applicant further states that if admitted as *amicus curiae*, it will develop its submissions and provide information on the need to consider and expand the defences of truth and public interest in defamation cases brought against victims of sexual violence when they speak up on their experiences of abuse.
6. The applicant avers that it's not aligned to either of the parties before the court and has been admitted on previous occasions to provide independent and impartial guidance in the following proceedings before the Kenya and regional courts:
 - a. *Dr Tatu Kamau v The Attorney General and the Anti -FGM Board* (High Court Petition 244 of 2019) where it provided guidance to the High Court of Kenya on the obligation of the state to enact gender sensitive legislation to prevent, protect against and respond to violence against women.
 - b. *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others ,Initiative for Strategic Litigation in Africa (Amicus Curiae)*2011 eKLR where it made submissions to guide the Supreme Court of Kenya on the question of development of appropriate remedies under article 23 (3) of the *Constitution of Kenya ,2010*.
 - c. *Federation of Women Lawyers Kenya FIDA v Attorney General & another* (2018) eKLR (Petition 164B of 2016) where the High Court of Kenya was considering the constitutionality of section 7 of the *Matrimonial Property Act*.
7. In opposing the said motion, the 1st respondent filed a replying affidavit dated July 28, 2011.
8. The 1st respondent avers that it should be noted that the applicant has not shown that it has the *locus standi* to not only institute the said application but to participate in the current appeal and that the applicant has never been a party to the dispute before court having not participated in the hearing by way of *viva voce* evidence.
9. The 1st respondent further avers that the grounds of the applicant indeed it's already made up its mind and therefore has personal interest in the matter and cannot qualify to be *amicus curiae* as it is biased and being led by ulterior motive.
10. The 1st respondent stated that the applicant has taken the position that the appellant is a victim of sexual violence and as such needs to be protected and assisted in her litigation.
11. The 1st respondent further stated that if the applicant feels that it needs to expand the law on women's human rights and sexual rights and defences for alleged sexual assault then it can do so through a separate suit in the Constitution and Human Rights Division wherein it can advance its case and its position and not in the current civil dispute between the parties herein.
12. The question for the determination of the court is whether Initiative for Strategic Litigation in Africa (ISLA) has met the test for admission into these proceedings as *amicus curiae*.
13. The law governing the admission of a friend of the court to proceedings is found in rule 6 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* which states as follows:

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.
14. The legal principles applicable to the admission and participation of a friend of the court in proceedings were stated by the Supreme Court in [Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others](#) [2015] eKLR as follows:

- “(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](#); SC Petition No 5 of 2013-Katiba Institute’s application to appear as amicus).
 - vii. An *amicus curiae* is not entitled to costs in litigation. In instances where the court requests the appearance of any person or expert as amicus, the legal expenses may be borne by the judiciary.



- viii. The court will regulate the extent of amicus participation in proceedings, to forestall the degeneration of amicus role to partisan role.
- ix. In appropriate cases and at its discretion, the court may assign questions for amicus research and presentation.
- x. An amicus curiae shall not participate in interlocutory applications, unless called upon by the court to address specific issues."

- 15. Applying the stated legal principles to the instant application, I find that the neutrality of ISLA has not been questioned by the parties to this suit. ISLA has demonstrated through evidence that it has previously participated in human and sexual rights petitions as a petitioner and as friend of the court.
- 16. It is therefore clear that the applicant has met all the requirements for admission into these proceedings as a friend of the court.
- 17. In Nairobi HC Petition No E266 of 2060 *Okoya Okotti v Director of Public Prosecutions & others*, I opined on the role of *amicus curiae* thus:

“The impression I get from the jurisprudence cited by the parties in this matter is that one of the roles of amicus curiae is to fill in the gaps left by the principal parties to the case. A friend of the court highlights areas of law neglected by the parties to the case but which may aid the court in reaching a sound decision. Therefore, the role of an *amicus curiae* can only be adequately discharged after it accesses and assesses the pleadings and submissions of the parties to the case. That role cannot be properly discharged without the benefit of the pleadings and submissions of all the parties to the case.”

- 18. In the end, the Initiative for Strategic Litigation in Africa is admitted to join these proceedings as *amicus curiae*.
- 19. The Initiative for Strategic Litigation in Africa shall file its amicus brief after all the other parties have filed and exchanged their pleadings and submissions.
- 20. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 11TH DAY OF NOVEMBER, 2022.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the 1st Respondent

..... for the 2nd Respondent

..... for the Applicant/Intended Amicus Curiae

