



**Attorney General v Ndi & 73 others; Dixon & 2 others (Amicus Curiae)  
(Petition E016 of 2021) [2021] KESC 19 (KLR) (9 November 2021) (Ruling)**

Neutral citation: [2021] KESC 19 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA**

**PETITION E016 OF 2021**

**PM MWILU, MK IBRAHIM, N NDUNGU, I LENAOLA & W OUKO, SCJJ**

**NOVEMBER 9, 2021**

**BETWEEN**

**ATTORNEY GENERAL ..... PETITIONER**

**AND**

**DAVID NDII & 73 OTHERS ..... RESPONDENT**

**AND**

**PROF. ROSALIND DIXON ..... AMICUS CURIAE**

**PROF. DAVID E. LANDAU ..... AMICUS CURIAE**

**PROF. GAUTAM BHATIA ..... AMICUS CURIAE**

*(Being an application by Prof. Rosalind Dixon, Prof. David E. Landau and Prof. Gautam Bhatia to be enjoined as Amici Curiae)*

**Principles that guide the Supreme Court in determining an application to be joined as an amicus curiae (friend of the Court)**

*The applicants sought joinder as amicus curiae in the proceedings in order to offer their expertise on constitutional issues. The court elaborated that the applicants had to satisfy the requirements of rule 19 of the Supreme Court Rules 2020 and the applicable guiding principles for an application for joinder of a party as amicus curiae as set out in the case of Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others, Supreme Court Petition 12 of 2013, [2015] eKLR. The court allowed the application and held that it would bring addition material on the constitutional issues before the court and aid the court in arriving at a judicious determination.*

Reported by Ribia John

**Civil Practice and Procedure** – parties to a suit – application for joinder as amicus curiae – where the applicant sought to offer expertise on constitutional issues - what were the principles that guided the Supreme Court in determining an application to be joined as amicus curiae (friend of the court) - Supreme Court Rules 2020, rule 19.



## Brief facts

The applicants sought to be joined as *amici curiae* (friends of the court). The applicants contended that they had expertise and intended to submit to the court on constitutional issues.

## Issues

What were the principles that guided the Supreme Court in determining an application to be joined as *amicus curiae* (friend of the court)?

## Relevant provisions of the Law

### *Supreme Court Rules, 2020*

#### **Rule 19 - Participation of friends of the Court**

- (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.*
- (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.*
- (3) *Any fees or expenses incurred by a person appointed by the Court as a friend of the court on its own motion, shall be paid out of the Judiciary Fund, in accordance with a scale determined by the President.*
- (4) *An application to be admitted as an amicus or a friend of the Court shall be done within 7 days upon filing of a response in any proceedings before the Court.*

## Held

1. An applicant for joinder as *amicus* had to satisfy the Supreme Court that they had satisfied the legal requirements for joinder under rule 19 of the Supreme Court Rules 2020.
2. The guiding principles applicable in determining an application to be joined as *amicus curiae* were:
  1. An *amicus* brief should be limited to legal arguments.
  2. 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.
  3. An *amicus* brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tended to compromise their essence as well as the terms of the Constitution of Kenya, 2010's call for resolution of disputes without undue delay. The court could, therefore, and on a case-by-case basis, reject *amicus* briefs that did not comply with the principle of timeous filing.
  4. 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.
  5. Where, in adversarial proceedings, parties alleged that a proposed *amicus curiae* was biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appeared 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.
3. At the core of the petition was the application and interpretation of articles 255, 256 and 257 of the Constitution on amendment of the Constitution. The applicants had demonstrated scholarly expertise in constitutional law. The submissions advanced by the applicants would be of valuable assistance to the Supreme Court.
4. The court was not convinced by the arguments by the 20<sup>th</sup> and 23<sup>rd</sup> respondents on bias and lack of neutrality as the respondents had not provided anything which pointed to a lack of impartiality on the part of the applicants. With no evidence pointing to lack of impartiality on the applicants,



the applicants had met the criteria set out in *Mumo Matemu* on joinder of *amici curiae*. Their participation would bring on board the much needed additional material on the subject of the petition; and that would aid the court in arriving at a judicious determination.

*Application allowed.*

#### **Orders**

- i. *The notice of motion dated October 1, 2021 and lodged on October 4, 2021 by the intended amici curiae was allowed.*
- ii. *The amici briefs attached to the application were deemed as filed and the applicants were not to make oral submissions at the hearing of the petitions.*
- iii. *Parties were to bear their own respective costs.*

#### **Citations**

##### **Cases**

1. Francis Kariuki Muruatetu & another v. Republic & 5 Others (Petition No. 15 and 16 of 2015 ;[2016] eKLR) — Followed
2. Raila Odinga & 5 others v Independent Electoral Boundaries Commission & others ([2013] eKLR) — Explained
3. Raila Odinga & 5 Others v Independent Electoral Boundaries Commission & Others (Petition No. 5 of 2013 [2013] eKLR) — Explained
4. Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others ([2015] eKLR)
5. Raila Odinga & 5 Others v Independent Electoral Boundaries Commission & Others Sup. Ct. Petition No. 5 of 2013

##### **Statutes**

1. Constitution of Kenya, 2010 — article 255, 256, 257 — Interpreted
2. Supreme Court (General) Practice Directions, 2020 — Rule 8, 31, 38 — Interpreted
3. Supreme Court Rules, 2020 (Act No 7 of 2011 Sub Leg) — Rule 3, 19(1)(2), 31, 38 — Interpreted

##### **Advocates**

None mentioned

## **RULING**

1. UPON perusing the notice of motion dated 1<sup>st</sup> October, 2021 and filed on 4<sup>th</sup> October, 2021 by the three applicants, Prof Rosalind Dixon, Prof David E Landau and Prof Gautam Bhatia brought under the provisions of rules 3, 19 (1) and (2), 31 and 38 of the [Supreme Court Rules 2020](#) and rule 8, 31 and 38 of the *Supreme Court (General) Practice Directions, 2020* seeking leave to be admitted as *amici curiae*, to present written and oral submissions by way of an *amici* brief and that upon leave being granted, the court do give directions on how the *amici curiae* shall participate in the proceedings and;
2. Upon considering the grounds therein and the affidavits in support sworn by the applicants wherein the applicants contend to singularly and collectively possess scholarly and professional expertise on the appeal claiming that they intend to assist this Court determine the questions raised in the appeal namely: a focus on the scope of the powers of constitutional amendment under articles 255-257 of the Constitution of Kenya as they relate to comparative doctrinal and theoretical developments and understandings, the question of protection of fundamental democratic commitments that is the democratic minimum core, and the basic structure doctrine in a comparative constitutional law context and the scope and place of referendums in a comparative constitutional context and the single subject rule with regards to amendments and;



3. Upon considering the applicants written submissions dated 1<sup>st</sup> October 2021 and filed on 4<sup>th</sup> October 2021 and their *amici* briefs annexed to the application where they submit to have filed the application timeously, demonstrated independence, impartiality and neutrality, shown to have no professional relationship with any of the parties involved, no personal or pecuniary interest in the appeal or its outcome and further submit to have met the guidelines set out by the court in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others*, Supreme Court Petition 12 of 2013, [2015] eKLR by restricting themselves to legal arguments and that their intervention on the issues is novel and;
4. Further considering the submissions by the 14<sup>th</sup> respondent not opposing the joinder of the applicants as *amici* by submitting that they will undoubtedly assist the court to develop the law in this area but leaving the question of joinder to the court and;
5. Furthermore noting the submissions by the 18<sup>th</sup> respondent not opposing the joinder of the applicants subject to the court defining the precise roles and limits of their participation as *amici* by assigning specific questions of law to research on as was decided in *Raila Odinga & 5 Others v Independent Electoral Boundaries Commission & others* Sup Ct Petition No 5 of 2013 [2013] eKLR and limiting the participation of the applicants as *amici* to their *amici* briefs;
6. And considering the 20<sup>th</sup> and 23<sup>rd</sup> respondents grounds of opposition dated 11<sup>th</sup> October, 2021 opposing the applicants motion for being a mere afterthought, not filed timeously, ill-conceived with the intention to convolute the hearing of the appeal, an afterthought to the applicants as they were aware of the proceedings from the High Court but made no attempt to be joined, fails to raise any novel issue, failed to demonstrate an urgency to warrant their joinder, demonstrated bias and failing to draw the attention of the court to relevant matters of law or fact and;
7. 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...”

8. We also affirmed the above guiding principles in [Francis Kariuki Muruatetu & another v. Republic & 5 Others](#) Sup Ct Petition No 15 and 16 of 2015 [2016] eKLR

iii. Having considered the application, at the core of the petition is the application and interpretation of articles 255, 256 and 257 of the Constitution on amendment of the Constitution. The applicants have demonstrated scholarly expertise in constitutional law. It is therefore clear to us that the submissions advanced by the applicants will be of valuable assistance to this court. We are not convinced by the arguments by the 20<sup>th</sup> and 23<sup>rd</sup> respondents on bias and lack of neutrality as the respondents have not provided anything which points to a lack of impartiality on the part of the applicants. With no evidence pointing to lack of impartiality on the applicants, part we find that the applicants have met the criteria set out in [Mumo Matemu](#) on joinder of *amici curiae*. We believe that their participation will bring on board the much needed additional material on the subject of the petition; and this will aid the court in arriving at a judicious determination.

9. Having therefore considered the application, we make the following Orders:

- a. The notice of motion dated 1<sup>st</sup> October 2021 and lodged on 4<sup>th</sup> October 2021 by the intended *amici curiae* is allowed.
- b. The *amici* briefs attached to the application are deemed as filed and the applicants shall not make oral submissions at the hearing of the petitions.
- c. Parties shall bear their own respective costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF NOVEMBER 2021**



.....  
**P. M. MWILU**  
**DEPUTY CHIEF JUSTICE & VICE**  
**PRESIDENT OF THE SUPREME COURT**

.....  
**M. K. IBRAHIM**

.....  
**JUSTICE OF THE SUPREME COURT**  
**NJOKI NDUNGU**

.....  
**JUSTICE OF THE SUPREME COURT**  
**I. LENAOLA**

.....  
**JUSTICE OF THE SUPREME COURT**  
**W. OUKO**

.....  
**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR,**  
**SUPREME COURT OF KENYA**

