

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu (DCJ & VP), Ibrahim, Wanjala, Njoki, Lenaola, SCJJ)

PETITION(APPLICATION) NO. 11 OF 2020

– BETWEEN –

JOSEPH OMBOGI OGENTOTO.....PETITIONER

– AND –

MARTHA BOSIBORI OGENTOTO..... RESPONDENT

FEDERATION OF WOMEN LAWYERS.....INTENDED INTERESTED PARTY

LAW SOCIETY OF KENYA.....1ST INTENDED *AMICUS CURIAE*

**KENYA LEGAL AND ETHICAL
ISSUES NETWORK ON
HIV & AIDS (KELIN).....2ND INTENDED *AMICUS CURIAE***

**INITIATIVE FOR STRATEGIC LITIGATION
IN AFRICA(ISLA).....3RD INTENDED *AMICUS CURIAE***

**HUMAN RIGHTS
WATCH (HRW).....4TH INTENDED *AMICUS CURIAE***

*(Being applications for enjoinder as interested party and **amicus curiae**)*

RULING OF THE COURT

A. INTRODUCTION

[1] Before this Court are three applications severally seeking enjoinder in this matter.

[2] The first application by the Federation of Women Lawyers (FIDA Kenya) is dated 24th September 2020 and lodged on 6th October 2020. The same is anchored on Rule 24 and 31 of the Supreme Court Rules, 2020 and is supported by an

affidavit sworn by **Anne W. Ileri** on even date and seeks enjoinder as an interested party in the Petition.

[3] The Law Society of Kenya (LSK) has filed the second application dated 31st October 2020 and lodged on 1st December 2020, seeking enjoinder as *amicus curiae*. It is anchored on the provisions of Rule 19 and 31 of the Supreme Court Rules, 2020 and all other enabling provision of the law. The application is supported by the annexed affidavit of **Mercy Wambua**, the applicant's Chief Executive Officer.

[4] The third application dated 7th October 2020, and lodged on 19th October 2020, seeks to enjoin in this matter as *amici curiae*, the Kenya Legal & Ethical Issues Network on HIV and AIDS Network (KELIN), Initiative for Strategic Litigation in Africa (ISLA), and Human Rights Watch (HRW).

B. PARTIES RESPECTIVE SUBMISSIONS

(i) *The Intended Interested Party's submissions*

[5] In its submissions dated 24th September 2020, the 1st intended interested party states that it is involved in several cases touching on the interpretation of Article 45(3) of the Constitution whose spirit envisages equality of parties, including their propriety rights, before, during and at the dissolution of marriage. They argue that their submissions are different from those of the substantive parties as they intend to demonstrate that Article 45(3) of the Constitution speaks to equality and should be used as a distribution matrix for matrimonial property. Further, that they will proffer comparative jurisprudence from other jurisdictions and perspectives from international legal instruments that have been ratified by Kenya which support the 50:50 distribution matrix enshrined in Article 45(3) of the Constitution. Finally, they urge that the issues on appeal before this Court are

of great public interest whose judgement would affect those who are not party to this matter and this interest merits their participation.

(ii) The 1st Intended Amicus Curiae's submissions

[6] In its submissions dated 31st October 2020, the LSK contends that other than meeting the criteria laid out in Rule 19(2) of the Supreme Court Rules, 2020, it has significant experience and expertise on constitutional and family law due to its constant interaction with members of the public and the courts. They urge that their observations will be relevant in the interpretation and application of relevant constitutional principles, Kenyan jurisprudence, and comparative foreign law. It is their contention that the LSK has a proven track record of independence and impartiality, exercising only fidelity to the rule of law with no connection to either party in this matter.

(iii) The 2nd, 3rd and 4th Intended Amicus Curiae's submissions

[7] In their submissions dated 7th October 2020, the applicants contend that they meet the criteria set out in Rule 19 of this Court's Rules and the guidelines given by this Court. They submit that they are qualified and experienced in advocating for women, land, and property rights as evidenced in their participation in previously admitted matters as *amicus curiae* in proceedings before Kenyan Courts.

(iv) The Appellant/Respondent

[8] The appellant is opposed to the application by FIDA and have on record submissions dated and filed on 8th October 2020. He argues that the application is incompetent and defective as the supporting affidavit is sworn without the authority of the applicant. Further, that the application lacks merit as it does not meet the conditions set out under Rule 24 of the Supreme Court Rules, 2020, fails

to show what prejudice the applicant will suffer if the application is denied, and how the proposed submissions by the applicant will be useful and different from those of the principal parties.

[9] The appellant urges that the only reason advanced by the applicant are the ongoing matrimonial property cases, which they should not be allowed to litigate through the instant petition. They argue that those cases will be guided by the decision this Court on the issues pleaded and that the applicant ought not to be enjoined in these proceedings merely because similar questions have been raised in other unrelated matters, they are involved in. The appellant seeks the Court to dismiss the application.

[10] He is similarly opposed to the application by **2nd, 3rd & 4th intended amici curiae** vide submissions dated 8th October 2020, contending that it lacks merit as it does not meet the conditions set out under Rule 19 (2) of the Supreme Court Rules, 2020 as well as those outlined by this Court. He argues that applicants have not demonstrated their expertise, impartiality, or that their intended submissions are novel and address issues not yet covered by the principal parties. He contends that the applicants deal with women's sexual rights, right of inheritance and interests in land which are not issues for determination in this petition.

[11] The appellant has not opposed the application by the Law Society of Kenya.

[12] We have taken note that the Respondent in the Petition, Martha Bosibori Ogentoto, did not file her response to any of the three applications.

[13] The Supreme Court Rules, 2020 provide that:

“24. (1) A person may, within seven days of filing a response in any proceedings, apply for leave to be joined as an interested party.

- (2) An application under sub-rule (1) shall include—
- (a) a description of the interested party;
 - (b) a depiction of such prejudice as the interested party would suffer if the intervention was denied; and
 - (c) the grounds or submissions to be advanced by the interested party, their relevance to the proceedings, and their departures from the standpoint of the parties.”

[14] This Court has laid down the principles for enjoinder as an interested party in the case of *Trusted Society of Human Rights Alliance v. Mumo Matemo & 5 others*, SC Petition (Application) No. 12 of 2013; [2014] eKLR where it was stated:

“[17] Suffice it to say that 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.

[18] 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 the proceedings, 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

cause is to ensure that a legal and legitimate decision is achieved.”

[15] Similarly, in the case of *Francis Kariuki Muruatetu & another v Republic & 5 others*, SC. Petition No. 15 as consolidated with SC. Petition No. 16 of 2013 [2016] eKLR (*Muruatetu Case*) at paragraph [37], the Court set out applicable principles where a party seeks to be enjoined in proceedings as an interested party as follows:

“... One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

(i) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

(ii) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.

(iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

[16] Applying these principles to the matter at hand, we find that while Federation of Women Lawyers (FIDA Kenya) has applied for enjoinment as interested party, they do not qualify in line with the criteria set out in the Supreme Court Rules, 2020 and the principles we have previously laid with relation to admission of interested parties. We therefore decline to admit them as such.

Nonetheless, having looked carefully at their submissions, we are convinced that they are more suited to the role of *amicus curiae*, and we state so believing that their participation will bring on board the much-needed additional material on the subject of the petition. Further, their involvement in public interest litigation in matters touching on issues related to the propriety rights of women and their active involvement in litigation in matters concerning the distribution of matrimonial property will aid the Court in arriving at a judicious determination. In finding so, we are guided by our decision in the ***Muruatetu Case*** where we looked into the Court's inherent power to admit *amicus curiae* and experts and admitted an intended interested party as *amicus curiae* stating:

“[61] Ordinarily, this Court will not enjoin a party in proceedings in a capacity different from that which they had sought. A party seeking to be enjoined as an interested party has to demonstrate having met the prerequisites of Rule 25 of the Supreme Court Rules, failing which they are not to be enjoined whether as interested parties or amicus curiae. Likewise, a party that applies to be enjoined as amicus curiae has to prove that they have complied with the requisite conditions set out in Mumo Matemu. An applicant should seek to be enjoined in a capacity that is suitable for him/her. It is in view of the unique, and public- interest nature of this matter, that we are inclined to enjoin those parties that sought joinder as interveners, in the capacity of amici curiae; it is not as a matter of course.”

[17] Consequently, we find that the applicant, FIDA, be enjoined in the capacity of *amicus curiae*.

[18] Through the other two applications, three parties seek to be enjoined in this matter as *amicus curiae*. The provisions of the law for joinder as *amicus curiae* is found under Rule 19 of the Supreme Court Rules, 2020, which 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.**
- (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.”**

[19] In the *Mumo Matemtu Case* the Court set guiding principles to be applied in consideration of an *amicus* application where it stated that the Court may exercise its inherent power to call upon a person to appear in any proceedings as *amicus curiae* reserving the right to summarily examine amicus motions, accompanied by amicus briefs without any oral hearing. In the *Muruatetu Case*, it was stated that admission as *amicus curiae* is a matter of discretion and a privilege granted to an intended *amicus*. Further, that such an *amicus* must show that it is neutral and should have no discernible direct or indirect interest in the matter.

[20] Guided by the foregoing principles we note that the LSK is mandated to assist the Courts in matters relating to law generally and that it is their intention to submit on apportionment and division of matrimonial property in the terms of Article 45(3) of the Constitution of Kenya. We are therefore satisfied that they will assist this Court in reaching a fair determination of the issues raised in the

Petition and that there is no prejudice to be caused to any party if LSK is admitted as *amicus curiae*.

[21] On their part, while the 2nd, 3rd and 4th intended *amici curiae* urge that they are experts in advocating for women, land, and property rights, and have participated in various platforms including experience in women's sexual rights, mediation before the Luo Council of Elders on Land Ownership, capacity building, and reforms in the Law of Succession in advancement of these rights, we do not see how their admission is crucial to the matter at hand.

[22] We must emphasize that admission as *amicus curiae* is a matter of privilege rather than of right and that the Court must always guard against diverting the proceedings in the matter. It is not automatic that every applicant is enjoined as *amicus curiae* or interested party. We are wary of crowding the primary parties to the matter by bringing on board many additional parties, to the extent that the time given to primary parties to make their case is taken up by parties on the periphery. We do not see how the 2nd, 3rd and 4th intended *amici curiae* applicants stand to be prejudiced should they not be enjoined, and in any event, should they wish to voice their opinions, they can always liaise with parties who have already been admitted as *amicus*.

C. ORDERS

[23] Having stated as above, we shall exercise discretion and make the following Orders:

- (i) ***The application by the intended interested party, Federation of Women Lawyers (FIDA Kenya) is partly disallowed to the extent that they seek to be enjoined as interested party.***

- (ii) *The Federation of Women Lawyers (FIDA Kenya), the intended interested party is hereby enjoined as 1st amicus curiae.***
- (iii) *The application by the Law Society of Kenya is allowed and the applicant is hereby admitted as the 2nd amicus curiae.***
- (iv) *The application by KELIN, ISLA and HRW as intended amici curiae is dismissed.***
- (v) *Participation by the enjoined parties shall be limited to the filing of written submissions.***
- (vi) *There shall be no Orders as to costs.***

DATED and DELIVERED at NAIROBI this 16th Day of July, 2021.

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

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

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

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

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

