

**THE REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

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

**PETITION NO. 8 OF 2020**

**—BETWEEN—**

**LAW SOCIETY OF KENYA.....PETITIONER**

**—AND—**

**COMMUNICATIONS AUTHORITY OF KENYA.....1<sup>ST</sup> RESPONDENT  
BROADBAND COMMUNICATIONS**

**NETWORKS LTD.....2<sup>ND</sup> RESPONDENT**

**OKIYA OMTATAH OKOITI.....3<sup>RD</sup> RESPONDENT**

**KENYA HUMAN RIGHTS COMMISSION.....4<sup>TH</sup> RESPONDENT**

**CABINET SECRETARY, INFORMATION,  
COMMUNICATION AND TECHNOLOGY.....5<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL.....6<sup>TH</sup> RESPONDENT**

**ORANGE-TELKOM KENYA LTD.....7<sup>TH</sup> RESPONDENT**

**AIRTEL NETWORKS KENYA LTD.....8<sup>TH</sup> RESPONDENT**

**SAFARICOM LTD.....9<sup>TH</sup> RESPONDENT**

**COALITION FOR  
REFORMS AND DEMOCRACY.....10<sup>TH</sup> RESPONDENT**

**ARTICLE 19- EAST AFRICA.....11<sup>TH</sup> RESPONDENT**

**PRIVACY INTERNATIONAL.....INTENDED AMICUS CURIAE**

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*(Being an application by **Privacy International** to be enjoined as Amicus Curiae)*

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## **RULING OF THE COURT**

**[1] UPON** perusing the Notice of Motion Application by the Applicant, Privacy International, dated 8<sup>th</sup> October 2020 and filed on 15<sup>th</sup> October 2020 and the Supporting Affidavit sworn by Ian Hosein, the Executive Director of the Applicant on the 5<sup>th</sup> October 2020 seeking to be enjoined in these proceedings as *amicus curiae* and;

**[2] UPON** considering the Applicant's intended *amicus* brief dated 8<sup>th</sup> October 2020 and its written submissions dated 8<sup>th</sup> October 2020 and filed on 15<sup>th</sup> October 2020 in support of the Application, wherein the Applicant contends that it intends to assist the Court with regard to the compatibility of the Device Management System (DMS) with international human rights standards in relation to the following matters:

- i. Comparative human rights framework applicable to violations of privacy.
- ii. The intrusive nature of the data captured.
- iii. The unregulated and discriminate nature of privacy interference and;
- iv. Necessary safeguards.
- v. The impact on the right to freedom of expression of human rights defenders, lawyers and journalists and;

**[3] UPON** considering the Applicant's submission on its expertise in defending the right to privacy around the globe by conducting research and investigation into Government and corporate surveillance activities; is non partisan in the matter and only seeks to aid the Court in arriving at a just determination by providing relevant comparative framework on the issue; that because of the public interest and nature of the appeal, it would be prudent to admit the Applicant as *amicus curiae* as admission would outweigh any possible prejudice;

[4] **AND** considering the 1<sup>st</sup> Respondent's Replying Affidavit deponed on 19<sup>th</sup> October 2020 contesting the intended admission as *amicus curiae* and the written submissions dated 19<sup>th</sup> October, 2020 and filed on 22<sup>nd</sup> October, 2020 submitting that the Applicant has not satisfied the criteria set out by this Court in ***Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others***, Sup. Ct. Petition No. 12 of 2013, [2015] eKLR; that the Applicant has not demonstrated any expertise in the matters to be addressed; has not raised any novel point of law; has demonstrated impartiality and bias by taking a partisan stance hence not a neutral party and did not file its application timeously and;

[5] **FURTHER**, noting the 6<sup>th</sup> Respondent's Grounds of Opposition and written submissions, both dated 27<sup>th</sup> October 2020 and filed on 5<sup>th</sup> November 2020 in opposition to the Application wherein, the 6<sup>th</sup> Respondent contends that the Applicant does not meet the legal threshold for admission as *amicus curiae* as set out in the ***Mumo Matemu case*** (supra) and the principles set out in ***Francis Kariuki Muruatetu & Another v Republic & 5 others***, Sup. Ct. Petition No. 15 as consolidated with Petition No. 16 of 2015, [2016] eKLR; that the Applicant has not established any expertise or knowledge that would aid the Court in determining the Appeal; that the Applicant has not demonstrated neutrality and impartiality and;

[6] **FURTHERMORE**, noting the written submissions by the 11<sup>th</sup> Respondent dated 19<sup>th</sup> October 2020 and filed on 23<sup>rd</sup> October 2020 in support of the Application and wherein they submit that the Applicant has met the criteria for admission as set out in ***Mumo Matemu*** as the *amicus curiae* brief is limited to legal arguments; has demonstrated neutrality and fidelity to the law; the Application has been filed timeously; that the Applicant has presented a novel perspective on the issue of privacy and that it is in the public interest that the Applicant be admitted to lend its global expertise on the issues arising as well as protect the general public from violation of their rights.

[7] In the above context, **WE NOW OPINE** as follows:

- i. An Applicant for joinder as *amicus curiae* has to satisfy this Court that it has met the legal requirements for joinder. The relevant law in that regard 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.**

**(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 were settled in ***Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others*** (supra), where the Court 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. The Applicant's knowledge and expertise in the field of privacy in general is not doubted. However, its stance that it will take an impartial stand based on the arguments laid before the Court is debatable. Our perception is that a position seeking to set out the detriment of the DMS system seeks to advance a position favoring the Appellant and is inclined

towards sustaining the High Court decision to the detriment of some of the Respondents. We are therefore not convinced that the Applicant has demonstrated impartiality and agree with the 1<sup>st</sup> and 6<sup>th</sup> Respondents that the Applicant does not satisfy the threshold for admission as *amicus curiae* in these proceedings.

**[8] HAVING therefore considered the Application and submissions by the respective parties, we find no merit in this application and we accordingly choose not to exercise discretion, and accordingly, dismiss it.**

**[9] There shall be no order as to costs.**

**[10] It is so ordered.**

**DATED and DELIVERED AT NAIROBI this 8<sup>th</sup> Day of October, 2021**

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

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

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**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**

