

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Maraga, CJ & P; Ibrahim, Ojwang, Wanjala & Lenaola, SCJJ)

PETITION NO.3 OF 2018

–BETWEEN–

MITU-BELL WELFARE SOCIETY.....PETITIONER

–AND–

KENYA AIRPORTS AUTHORITY.....1ST RESPONDENT

–AND–

**INITIATIVE FOR STRATEGIC LITIGATION IN AFRICA
(ISLA).....APPLICANT/INTENDED AMICUS CURIAE**

(Being an appeal from the Judgment of the Court of Appeal at Nairobi in Civil Appeal No.218 of 2014 at Nairobi (E. M. Githinji, W. Karanja and J. Otieno-Odek, JJA) dated and delivered on 1st day of July 2016)

RULING OF THE COURT

A. APPLICATION

[1] The Applicant’s Notice of Motion, dated 5th March 2019 was filed on 7th March 2019. The Application is supported by the Affidavit of Sibongile Cherrol Ndashe sworn on the same date. It is attended with an *amicus* brief of even date and is premised on Articles 22(3)(e) and 163(8) of the Constitution as well as Rules 3(2), (4)(5), 54(1)(a) and (2) of the Supreme Court Rules, 2012.

[2] The Orders sought are:

1. *That Initiative for Strategic Litigation in Africa (ISLA), the Applicant herein, be granted leave to be admitted in these proceedings as Amicus Curiae.*
2. *That leave be granted to ISLA to present written and oral submissions by way of an amicus brief in these proceedings.*
3. *That upon granting leave to participate in the proceedings, the honourable Court give direction on how the amicus curiae shall participate in further proceedings herein on such other or further directions as this honourable Court may deem fit to give.*
4. *That there be no award of costs for or against the amicus curiae.*

[3] The grounds of the application are as follows:

1. *That the intended amicus curiae is a non-governmental organization established in 2014 based in Johannesburg, South Africa and uses the rule of law and African domestic and regional Courts to promote and protect women's human rights, inter alia.*
2. *That the intended amicus curiae has a legitimate interest in being enjoined in the Petition, so as to make submissions on the meaning of the right to remedy in the context of human rights' violations; demonstrate how remedies in human rights have evolved and present comparative jurisprudence on the subject.*
3. *That the intended amicus curiae will make submissions as an independent expert which action will assist the Court in the determination of the issues raised in the Petition.*

[4] In submissions filed on 7th March 2019, the intended *amicus curiae* has added that it has satisfied the criteria set by this Court in ***Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others***, Supreme Court Petition No. 12 of 2013, [2015] eKLR, and that it also filed its Application timeously.

[5] The application is not contested by the Petitioner but the 1st Respondent filed Grounds of Opposition on 27th March 2019 stating that the Applicant has not demonstrated any expertise in the matters to be addressed at the hearing; has not raised any novel point of law separate from what the Petitioner has raised; is not a neutral party and did not file its Application timeously.

[6] In submissions filed on 15th October 2019, the 1st Respondent has reiterated the above grounds but adds that the criteria for admission of an *amicus curiae* as set in ***Trusted Society of Human Rights Alliance*** (supra) has not been met and that the Application is misconceived and ought to be dismissed with costs.

B. DETERMINATION

[7] We have noted the submissions by the parties and further note that Rule 54 of the Supreme Court Rules, 2012 provides:

“(1) *The Court may –*

- (a) *in any matter allow amicus curiae;***
- (b) *appoint a legal expert to assist the Court in legal admissions;***
- (c) *at the request of a party or on its own initiative, appoint an independent expert to assist the court on any technical matter;***

(2) The Court shall before allowing an amicus curiae take into consideration the expertise, independence and impartiality of the person in question and it may take into account the public interest or any other relevant factor.”

[8] In expounding on the criteria for admission of an *amicus curiae*, in ***Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others***, Supreme Court Petition No. 12 of 2013, [2015] eKLR, we stated as follows:

“(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...

“(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.”

[9] Later, in ***Francis Kariuki Muruatetu & Another v Republic & 5 Others*** [2016] eKLR we affirmed the above guidelines and the parties herein have disagreed on whether the Applicant has met the criteria above. In that regard, we note that the Applicant has addressed its expertise and has filed an *amicus* brief limiting itself to the grounds of its intended participation in the hearing of the Petition of Appeal.

[10] We have furthermore noted that the Applicant has in its brief limited itself to legal arguments and although only 5 years old since its inception, it claims to have had extensive experience in human rights litigation particularly in the

protection of the rights of women. Not one case has been cited where that expertise has been applied.

[11] As regards its neutrality, although the 1st Respondent has challenged the Applicant on that issue, we have seen nothing in the *amicus* brief which points to a lack of impartiality on the part of the Applicant. Nothing also exists on the record as to whether the Applicant has any special relationship with the Petitioner or that its brief is deliberately skewed towards the Petitioner.

[12] In the circumstances, and despite our concern about lack of evidence of previous engagements in litigation by the Applicant, its *amicus* brief is detailed enough and useful to the Court and we shall therefore exercise discretion and grant the orders sought.

C. FINAL ORDERS

[13] For the above reasons, we shall allow the Application dated 5th March 2019 in the following terms:

- 1. *That Initiative for Strategic Litigation in Africa (ISLA), the Applicant herein, is hereby granted leave to be admitted in these proceedings as Amicus Curiae.***
- 2. *That leave is hereby granted to ISLA to present written and oral submissions by way of an amicus brief in these proceedings.***
- 3. *There shall be no order as to costs.***

[14] It is so ordered.

DATED and DELIVERED at NAIROBI this 29th day of November, 2019

.....
D. K. MARAGA
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

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

.....
J. B. OJWANG
JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
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