

THE REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA

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

PETITION NO. 9 (E011) OF 2021

–BETWEEN–

MARY NYAMBURA KANGARA.....APPELLANT

–AND–

PAUL OGARI MAYAKA.....RESPONDENT

–AND–

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

*(Being an application by Initiative for Strategic Litigation to be enjoined as
Amicus Curiae)*

RULING OF THE COURT

[1] UPON perusing the Notice of Motion application by the Applicant, Initiative for Strategic Litigation in Africa dated 17th January, 2022 brought under the provisions of Rule 19, 31 and 32 of the Supreme Court Rules, 2020 and the supporting affidavit sworn by the applicant seeking leave of the Court to appear as *amicus curiae* in the appeal and to present written and oral submissions by way of an *amicus* brief and;

[2] UPON considering the applicant’s grounds in support of its application, its intended *amicus* brief and the applicant’s written submissions dated 17th January,

2022 and filed on 20th January, 2022 where the applicant submits that it has the relevant expertise being a regional non-government organization which works within the African human rights system to advance the rights of women during and at the dissolution of marriage and also running a program that focuses the development of family law and contends that they intend to assist the Court in determining the legal basis for the protection of cohabitation relationships and the division of property upon dissolution of family forming unions and particularly in cohabitation relationships, unrecognized marriages or other unregistered unions that will aid the Court in:

- a) Appreciating the Kenyan legal framework for the recognition of cohabiting relationship;
- b) Determining the basis of the legal protection that the State should accord to all families, include those arising out of cohabitation or otherwise unrecognised marriages. This would protect families despite the manner in which they are formed and affirm that members of such families have rights during and at dissolution;
- c) Demonstrate the international human rights standards and comparative perspectives of the state to extend the principle of equitable sharing of property to property acquired in intimate relationships;
- d) Highlight the application of the right to equality and the gendered impact of division of property in different intimate relationships and;

[3] UPON further arguments by the applicant that this Court under Rule 19(1) of the Supreme Court Rules, 2020 allows for participation of *amicus curiae* in proceedings if the applicant's expertise is proven, demonstrated the independence and impartiality of the person and public interest and pointed out the relevant fundamental principles as was determined in ***Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others***, Sup. Ct. Petition No.12 of 2013; [2014] eKLR (***Mumo Matemu Case***);

[4] AND further considering the submissions by the respondent opposing the joinder of the applicant as amicus by submitting that this Court should not exercise its inherent discretionary power to admit the *amicus* for failure to meet the principles in *Mumo Matemu* as the intended *amicus* has failed to demonstrate independence and impartiality and that should the intended *amicus* be admitted as a friend of the court, their involvement should be confined to the issues before the Court and the material aiding the Court in its determination as was held in *Francis Kariuki Muruatetu & another v. Republic & 5 others*, Sup Ct. Petition Nos. 15 and 16 of 2015; [2016] eKLR (*Muruatetu Case*) to prevent the intended *amicus* from overshadowing the participation of the main parties and;

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

- i. An applicant seeking 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 were settled in *Mumo Matem* where the Court, pronounced itself on its inherent power to admit *amicus curiae* and emphasized that for one to be admitted as *amicus curiae*, one has to demonstrate their expertise in the subject matter before Court and how they will enrich and help the Court to reach a just determination with the Court giving the guiding principles for admission as *amicus curiae* as:

“(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 ***Muruatetu***.

- iii. The role of *amicus* in Court is to aid the Court to arrive at a determination based on the law. We take note that the applicant wishes to address the legal framework for the recognition of cohabiting relationships by providing a comparative analysis of other jurisdictions case law and statutes on the steps taken to recognize and protect the interests of parties in cohabiting relationships. There is no doubt that the applicant has substantial knowledge and experience in family law matters. The essence of the dispute turns around property acquired during cohabitation in a marriage not recognized by law and whether proceedings on the sharing of property acquired under such unions may be brought under the Married Women’s Property Act. We perceive from the applicant’s *amicus* brief that its submissions will be of valuable assistance to this Court in addressing this issue and the applicant has demonstrated expertise in its field relevant to this Court. We therefore find that the Applicant has met the criteria set out in ***Mumo Matemu*** on joinder of *amicus curiae*.

[6] **HAVING** therefore considered the application, we make the following Orders:

- a) *The application dated 17th January, 2022 and lodged on 20th January, 2022 by the intended amicus curiae is allowed.*
- b) *The amicus brief attached to the application is deemed as filed and the applicant shall not make oral submissions at the hearing of the petitions.*
- c) *Parties shall bear their costs.*

[7] It is so ordered.

DATED and DELIVERED AT NAIROBI this 19th day of May, 2022.

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P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE
PRESIDENT 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

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

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA