



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

**PETITION (APPLICATION) NO. E031 OF 2024 AS CONSOLIDATED
WITH PETITIONS NOS. E032 & E033 OF 2024**

– BETWEEN –

**THE CABINET SECRETARY FOR THE NATIONAL
TREASURY AND PLANNING 1ST APPELLANT**
THE ATTORNEY GENERAL 2ND APPELLANT
THE NATIONAL ASSEMBLY 3RD APPELLANT
**THE SPEAKER OF THE
NATIONAL ASSEMBLY 4TH APPELLANT**
KENYA REVENUE AUTHORITY 5TH APPELLANT

– AND –

OKIYA OMTATAH OKOITI 1ST RESPONDENT
ELIUD KARANJA MATINDI 2ND RESPONDENT
MICHAEL KOJO OTIENO 3RD RESPONDENT
BENSON ODIWOUR OTIENO 4TH RESPONDENT
BLAIR ANGIMA OIGORO 5TH RESPONDENT
VICTOR OKUNA 6TH RESPONDENT
FLORENCE KANYUA LICHORO 7TH RESPONDENT
DANIEL OTIENO ILA 8TH RESPONDENT
RONE ACHOKI HUSSEIN 9TH RESPONDENT

HON. SENATOR EDDY GICHERU OKETCH	10TH RESPONDENT
CLEMENT EDWARD ONYANGO	11TH RESPONDENT
PAUL SAOKE	12TH RESPONDENT
LAW SOCIETY OF KENYA	13TH RESPONDENT
AZIMIO LA UMOJA ONE	
KENYA COALITION PARTY	14TH RESPONDENT
KENYA HUMAN RIGHTS COMMISSION	15TH RESPONDENT
KATIBA INSTITUTE	16TH RESPONDENT
THE INSTITUTE FOR SOCIAL	
ACCOUNTABILITY (TISA)	17TH RESPONDENT
TRANSPARENCY INTERNATIONAL KENYA	18TH RESPONDENT
INTERNATIONAL COMMISSION OF	
JURISTS-KENYA (ICJ KENYA)	19TH RESPONDENT
SIASA PLACE	20TH RESPONDENT
TRIBELESS YOUTH	21ST RESPONDENT
AFRICA CENTER FOR OPEN GOVERNANCE	22ND RESPONDENT
ROBERT GATHOGO KAMWARA	23RD RESPONDENT
TRADE UNIONS CONGRESS OF KENYA	24TH RESPONDENT
KENYA MEDICAL PRACTITIONERS'	
PHARMACISTS AND DENTIST UNION	25TH RESPONDENT
KENYA NATIONAL UNION OF NURSES	26TH RESPONDENT
KENYA UNION OF CLINICAL OFFICERS	27TH RESPONDENT
FREDRICK ONYANGO OGOLA	28TH RESPONDENT
NICHOLAS KOMBE	29TH RESPONDENT
WHITNEY GACHERI MICHENI	30TH RESPONDENT
STANSLOUS ALUSIOLA	31ST RESPONDENT
HERIMA CHAO MWASHIGADI	32ND RESPONDENT
DENNIS WENDO	33RD RESPONDENT
MERCY NABWIRE	34TH RESPONDENT
BENARD OKELO	35TH RESPONDENT

NANCY OTIENO	36 TH RESPONDENT
MOHAMED B. DUB	37 TH RESPONDENT
UNIVERSAL CORPORATION LIMITED	38 TH RESPONDENT
COSMOS LIMITED	39 TH RESPONDENT
ELYS CHEMICAL INDUSTRIES	40 TH RESPONDENT
REGAL PHARMACEUTICALS	41 ST RESPONDENT
BETA HEALTHCARE LIMITED	42 ND RESPONDENT
DAWA LIMITED	43 RD RESPONDENT
MEDISEL KENYA LIMITED	44 TH RESPONDENT
MEDIVET PRODUCTS LIMITED	45 TH RESPONDENT
LAB AND ALLIED LIMITED	46 TH RESPONDENT
BIOPPHARM LIMITED	47 TH RESPONDENT
BIODEAL LABORATORIES LIMITED	48 TH RESPONDENT
ZAIN PHARMA LIMITED	49 TH RESPONDENT
THE SPEAKER OF THE SENATE	50 TH RESPONDENT
CONSUMERS FEDERATION OF KENYA (COFEK)	51 ST RESPONDENT
KENYA EXPORT FLORICULTURE HORTICULTURE, AND ALLIED WORKERS UNION	52 ND RESPONDENT
DR. MAURICE JUMAH OKUMU	53 RD RESPONDENT
- AND -	
DR. GAUTAM BHATIA.....	APPLICANT/INTENDED AMICUS CURIAE

(Being an application for Admission of Dr. Gautam Bhatia as Amicus Curiae in the Consolidated Appeals)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion dated and lodged before this Court on 22nd August 2024, by Gautam Bhatia seeking, orders *inter alia* that-

- a. *Dr. Gautam Bhatia, the applicant herein, be granted leave to be admitted in the Appeals as Amicus Curiae.*
- b. *Dr. Gautam Bhatia, the Applicant herein, be granted leave to present written and oral submissions by way of an Amicus brief in the Appeals.*
- c. *Upon granting leave to participate in the proceedings, the Honourable Court give directions on how the Amicus Curiae shall participate herein on such other or further directions as this Honourable Court may deem fit to give.*
- d. *There be no order on costs for or against the Amicus curiae.*

[2] TAKING INTO ACCOUNT the affidavit in support of the Motion sworn by **Dr. Gautam Bhatia** and his written submissions dated 21st August 2024 to the effect that; the applicant is an expert in comparative constitutional law, and a practicing constitutional lawyer before the Supreme Court of India; he possesses and has demonstrated his scholarly expertise with regards to the questions that form the subject matter of the Appeal, in particular the doctrine, history, practice and theory of public participation that will assist the court in answering the questions raised in the appeal; he is the author of *The Transformative Constitution: A Radical Biography in Nine Acts*, and of numerous scholarly articles in peer-reviewed comparative constitutional law journals; he has engaged with Kenyan constitutional law in a comparative context for some years and has been previously admitted as *amicus curiae* before this Court in *Attorney-General and Others vs David Ndi and Others* [**“the BBI Case”**]; he is the author of *Law Making, Political Process, and the State: Transformative Constitutionalism in Kenya – 2010 – 2025* (James Currey 2025, forthcoming), and of *The Hydra and the Sword: Constitutional Amendments, Political Process, and the BBI Case in Kenya* (Global Constitutionalism 2025, forthcoming). In addition to his scholarly work, the applicant has also submitted that he has participated in legal proceedings involving

the subject of public participation before the Supreme Court of India and the High Court of Bombay.

[3] Further, it has been submitted that the applicant is impartial, has no professional relationship with any of the parties involved in this appeal, nor does he have any personal or pecuniary interest in the appeal and its outcome. That, he only seeks to provide his scholarly expertise in the service of the Court on the questions raised in the appeal that are of great importance to the people and the future of the Republic of Kenya. Specifically, he has urged the point that, if admitted as *amicus curiae*, he will make submissions, subject to this Court's directions, on the following issues:

- a. *Whether the national value of public participation entails an obligation upon State organs to give reasons in the event that they choose to reject the suggestions that have emanated from the public.*
- b. *If, after one round of public participation, a Bill is substantively amended by the National Assembly, whether there is an obligation to subject the amended provisions and/or new provisions to further public participation.*

[4] NOTING that none of the parties in the consolidated appeals have opposed the application, **WE NOW OPINE AND DETERMINE** as follows;

- i. An applicant seeking to be enjoined as *amicus curiae* has to satisfy this Court that he or she has satisfied the legal requirements for such an application. In that context, Rule 19 of the Supreme Court Rules 2020 provides that, before admitting a person as a friend of the court, this Court has to consider the proven expertise of the person; independence and impartiality of the person; or the public interest involved.
- ii. The role of an *amicus curiae* in any proceedings is to aid a court in arriving at a legal, pragmatic and legitimate decision, anchored on the tenets of judicial duty and in ***Trusted Society of Human Rights Alliance vs.***

Mumo Matemu & 4 Others S.C. Petition No. 12 of 2023, this Court set out the guiding principles for admission of an *amicus curiae* in the following terms:

“.....

- 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. ...”***

- iii. Amongst the issues in dispute in the consolidated appeal are the place and extent of public participation in the legislative process; whether Parliament can amend bills after they have been subjected to public participation; the parameters and considerations of a declaration of the unconstitutionality of a statute; the orders to be issued upon such a declaration including whether to allow or disallow suspension or otherwise of the declaration to enable remedial action by the offending party.

- iv. Having considered the proposed *amicus* brief we note that the applicant has, with the necessary precision, set out germane points of law that he intends to address this court on and they clearly resonate with the issues in dispute in the consolidated appeal. We also perceive that the *amicus* brief will be of valuable assistance to this Court in addressing the issues raised in the consolidated appeal and that the applicant has demonstrated expertise in the field of comparative constitutional law which we find relevant to the appeal. We further note that none of the parties to the appeal has raised any issue of bias in the intended brief and we see none on our part and should any arise, we are quite capable of identifying and rejecting it as we make our final decision on the appeal. We therefore find that the Applicant has met the criteria set out in *Mumo Matemu* on admission of *amicus curiae*.

[5] CONSEQUENTLY and for the reasons afore-stated, we make the following Orders:

- i. The Applicant's Notice of Motion dated and filed on 22nd August 2024 by the intended amicus curiae is allowed.***
- ii. 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.***
- iii. As the motion was not opposed, we make no orders as to costs.***

It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of August, 2024

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M. K. KOOME
CHIEF JUSTICE & PRESIDENT OF
THE SUPREME COURT OF KENYA

.....
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

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

