



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

REFERENCE (APPLICATION) NO. E004 OF 2024

– BETWEEN –

**INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION APPLICANT/RESPONDENT**

– AND –

**THE HONOURABLE ATTORNEY GENERAL INTERESTED PARTY
CENTRE FOR LEGAL AID AND CLINICAL
LEGAL EDUCATION (CLACLE) AT
KABARAK UNIVERSITY LAW SCHOOL INTENDED AMICUS CURIAE**

(Being an application for admission of Centre for Legal Aid and Clinical Legal Education (CLACLE) at Kabarak University Law School as amicus curiae in SC Reference No. E004 of 2024)

Representation:

Mr. Moses Kipkogei, Dr. Wilfred Mutubwa,
Mr. Edwin Mukele, Mr. Victor Liech & Ms. Lydia Aduke for the applicant
(*G & A Advocates LLP*)

Centre for Legal Aid & Clinical Legal Education (CLACLE)
(*Kabarak University Law School*)

No appearance for the interested party

RULING OF THE COURT

[1] COGNISANT that, His Excellency the President of the Republic of Kenya published a Gazette Notice No. 2641 dated 27th February 2023, appointing members

of the Selection Panel for the recruitment of nominees for appointment as Chairperson and Members of the Independent Electoral and Boundaries Commission (IEBC) following vacancies in the said positions. That subsequently, the Selection Panel placed a public advertisement in various local dailies, the Kenya Gazette, and on the Parliamentary Service Commission's website inviting applications for the said positions. However, before the recruitment process was completed, a suit was filed in the High Court, **Abdullahi vs. Attorney General & 2 Others** (Constitutional Petition E148 of 2023) [2024] KEHC 434 (KLR) (**Abdullahi Case**), wherein the petitioner therein contended that the Selection Panel and the Parliamentary Service Commission had deliberately slowed down the recruitment process; and by a judgment dated 26th January 2024, *Thande, J.* issued orders *inter alia* that -

“ ...

3. ***A mandatory order be and is hereby issued to the selection panel for the recruitment of nominees for appointment as the chairperson and members of the Independent Electoral and Boundaries Commission take immediate measures and/or steps to undertake the nomination exercise and to submit for appointment successful applicants for the positions of members and chairperson of the Independent Electoral and Boundaries Commission as to make it possible for the Commissioners to be in office.***

[2] **NOTING** that, the recruitment for nominees as well as the appointment of the Commissioners is still pending despite the aforementioned order; IEBC did on 6th March, 2012 vide Legal Notice No 14 of 2012 publish the National Assembly Constituencies and County Assembly Wards Order, 2012 (the delimitation order); and in line with Article 89 of the Constitution, IEBC was required to conduct the delimitation of constituencies and wards between 6th March, 2020 (being the minimum period of 8

years after the 6th March, 2012 delimitation order) and 6th March, 2024 (being the maximum period of 12 years after the 6th March, 2012 delimitation order). Nonetheless, IEBC has not been able to undertake the delimitation process within the set timelines; and

[3] FURTHER NOTING that the aforementioned circumstances led to IEBC filing the Reference herein which seeks this Court's Advisory Opinion on the following issues:

- a) *Whether IEBC can undertake the process of delimitation of electoral boundaries and other electoral processes in the absence of Commissioners or the requisite quorum of Commissioners;*
- b) *Whether IEBC can conduct a review of the names and boundaries of constituencies and wards when timelines envisaged under Article 89(2) and 89(3) as read with Section 26 of the County Governments Act have lapsed; and*
- c) *Whether the constitutional timelines envisaged under the provisions of Article 89(2) and 89(3) as read with Section 26 of the County Governments Act can be extended, and if so, by whom and under what circumstances.*

[4] MOREOVER, while the aforesaid Reference is pending, the instant Notice of Motion dated 25th July, 2024 was filed on 1st August, 2024 pursuant to Rule 19 of the Supreme Court Rules, 2020 seeking the following orders:

- i. *Leave be granted for admission of the Centre for Legal Aid and Clinical Legal Education (CLACLE) at Kabarak University Law School as amicus curiae in the Advisory Opinion.*
- ii. *Leave be granted for the intended amicus curiae to make oral and written submissions limited to the following point of law:*

a. *Whether the Secretariat of an Independent Office or Commission can undertake roles and functions assigned by the Constitution to the Commission or Office in cases of vacancies in the office of the Commissioners or the Office holder(s).*

[5] UPON CONSIDERING the affidavit sworn by Prof. John Osogo Ambani, the Dean of Kabarak University Law School, in support of the Motion and the intended *amicus*' submissions of even date to the effect that; Kabarak University Law School was established in 2010 and accredited by the Council of Legal Education; and the Law School's mission is to impact the universe through excellent legal education, cutting edge research and devoted community service based on ethical and biblical perspectives. The intended *amicus curiae* is a Centre at the said Law School whose objective includes conducting relevant legal research as well as enhancing clinical and experiential learning. Furthermore, that, the intended *amicus curiae*'s participation in the Reference will ensure that legal education institutions such as itself play a vital part in the complex process of evolution and development of the law; in point of fact, the single issue that the *amicus* seeks to address is geared towards assisting the Court in developing the law and addressing a novel question that confronts constitutional bodies like IEBC; the intended *amicus* is neutral and members of Faculty of the Law School possess the necessary expertise and experience with respect to the single issue it intends to submit on; and the Motion has been brought without delay; and

[6] CONSIDERING also IEBC's submissions dated 16th August, 2024 in response to the Motion, the tenor of which is; the intended *amicus* has met the requisite threshold and ought to be admitted in the Reference. However, that there are substantial inconsistencies in the draft *amicus* brief; in that, the intended *amicus* has taken the position that the Advisory Opinion sought is '*unnecessary*' yet in the same breath seeks to be admitted into the matter. What is more, that contrary to the draft *amicus*' brief, the issues upon which the Court's opinion is sought are not

settled; while the High Court (*Thande, J.*) by a judgment dated 26th January, 2024 in the ***Abdullahi Case*** directed the Selection Panel to complete the nomination exercise of persons for appointment as Commissioners of IEBC, the exercise is still pending; and besides, the High Court has on various instances directed the Chief Executive Officer of IEBC, notwithstanding the absence of Commissioners, to perform functions that would ordinarily have to be sanctioned by Commissioners. Towards that end, reference was made to the High Court decision in ***County Government of Kisii & 2 others vs. IEBC*** (Constitutional Petition E006 of 2024) [2024] KEHC 8477 (KLR) wherein the court issued orders *inter alia* directing the Secretary/Chief Executive Officer or any other person occupying that position to firstly, gazette the Returning Officer for Kisii County for the clearance and gazette of the Deputy Governor nominee for Kisii County; and secondly, to gazette the nominated Deputy Governor as the Deputy Governor of Kisii County. Therefore, the issues in question require this Court's Advisory Opinion as a guiding principle not only to the current predicament facing IEBC but for other constitutional offices that may face similar challenges in future; and the intended *amicus*, as a *bona fide* friend of the Court, should address all the issues raised since they are weighty and require its expertise; and

[7] UPON DELIBERATIONS on the Motion and the submissions by IEBC as well as the intended *amicus curiae*, **WE OPINE** as follows:

- i. It is well settled that admission of an *amicus curiae* in any proceedings lies within the discretion of the Court, and this is determined on a case-by-case basis. See ***Muruatetu & another vs. Republic; Kenya National Commission on Human Rights & 2 others*** (Interested Parties); Death Penalty Project (Intended Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated)) [2016] KESC 12 (KLR). Further, this Court in ***Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 others*** [2015] KESC 26 (KLR), aptly set out the following guiding principles in relation to an *amicus curiae*:

“ ...

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.*

...

viii. *The Court will regulate the extent of amicus participation in proceedings, to forestall the degeneration of amicus role to partisan role.*

ix. *In appropriate cases and at its discretion, the Court may assign questions for amicus research and presentation.*

...

xiii. *The applicant ought to show that the submissions intended to be advanced will give such assistance to the Court as would otherwise not have been available. The applicant ought to draw the attention of the Court to relevant matters of law which would otherwise not have been taken into account. Therefore, the applicant ought to show that there is no intention of repeating arguments already made by the parties. And such new matter as the applicant seeks to advance, must be based on the data already laid before the Court, and not fresh evidence.*

xiv. *The applicant ought to show expertise in the field relevant to the matter in dispute, and in this regard, general expertise in law does not suffice.*

...”

Rule 19(2) of the Supreme Court Rules also succinctly delineates matters that this Court should address its mind to in the following manner:

“19

(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. Equally, in considering admission of an *amicus curiae* in a Reference, such as the one before us, this Court must always remain alive to the nature of its jurisdiction under Article 163(6) of the Constitution in issuing an Advisory Opinion. More particularly, that the essence of the Court rendering an opinion is to settle matters of great public importance which may not be suitable for conventional mechanisms of justiciability and/or to unravel a legal uncertainty in such a manner as to promote the rule of law and the public interest. See ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*** (Advisory Opinion Application 2 of 2012) [2012] KESC 5 (KLR). Additionally, that an opinion rendered by the Court guides not only the conduct of the organ(s) that sought it, but all governmental or public action thereafter, as pronounced ***In the Matter of the Interim Independent Electoral Commission*** (Constitutional Application 2 of 2011) [2011] KESC 1 (KLR).

iii. Turning to the merits of the Motion, there is no dispute that the members of Faculty of Kabarak University Law School possess expertise and experience in research as well as different spheres of law as evinced by the list of members of Faculty and the publications annexed to the Motion. Nonetheless, it is the intended *amicus*, CLACLE, as opposed to the members of Faculty of Kabarak University Law School who seek to be admitted as an *amicus curiae* in the Reference. It follows therefore, that the intended *amicus* is required to

demonstrate its expertise in relation to the issues subject of the Reference. In this regard, we note that the intended *amicus* has not annexed any research papers or publications that would speak to its expertise and experience in the issues in question.

- iv. Moreover, upon perusal of the draft *amicus* brief, we find that the intended *amicus* has not demonstrated that the submissions it proposes to put forth will draw the attention of the Court to relevant matters of law which would otherwise not be taken into account.
- v. Consequently, we find that the intended *amicus curiae* has not met the threshold for admission in the Reference, and as such, the Motion lacks merit.
- vi. Taking into account the nature of this matter and this Court's decision in ***Rai & 3 others vs. Rai, Estate of & 4 others*** (Petition 4 of 2012) [2014] KESC 31 (KLR), we deem it just to order that each party bears its own costs.

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

- i. The Notice of Motion dated 25th July, 2024 and filed on 1st August, 2024 is hereby dismissed.***
- ii. Each party shall bear its costs of the Motion.***

It is so ordered.

DATED and DELIVERED at NAIROBI this 13th day of December, 2024.

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

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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

**I certify that this is a true copy
of the original**

REGISTRAR
SUPREME COURT OF KENYA

