



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

REFERENCE (APPLICATION) NO. E001 OF 2025

COMMISSION ON ADMINISTRATIVE JUSTICE.....APPLICANT

-AND-

KISUMU COUNTY GOVERNMENT..... 1STRESPONDENT

MOMBASA COUNTY GOVERNMENT..... 2NDRESPONDENT

JUDICIAL SERVICE COMMISSION..... 3RD RESPONDENT

(Being an oral application for admission of the Law Society of Kenya and Katiba Institute as Participants/Interveners in the Reference)

Representation:

Mr. Ochiel Dudley

(Advocate for Commission on the Administrative Justice-the Applicant)

No appearance for the 1st, 2nd & 3rd Respondents

RULING OF THE COURT

[1] **NOTING** that the applicant, Commission on Administrative Justice (CAJ), by way of **Reference No. E001 of 2025**, dated 12th March 2025 and filed on 17th March 2025, seeks to invoke this Court's advisory opinion jurisdiction under Article 163(6) of the Constitution on the following questions:

- i. *What is the extent of the CAJ's mandate, functions, and powers under Article 59(2) and 252 of the Constitution concerning county government officers, state officers, or constitutional commissioners?*

- ii. In the **Vision 2030 Delivery Board Case**, was the Supreme Court to, or did it consider, or interpret the extent of CAJ's mandate, functions, and powers under Article 59(2) of the Constitution? In that case, was the **Vision 2030 Delivery Board Case** decided *per incuriam*? Could a narrow reading of the **Vision 2030 Delivery Board Case** affect CAJ's ability to give binding directives that remediate complaints against county government officers, state officers, or constitutional commissioners?
- iii. What are the limits under Article 252(3)(a) of the Constitution and sections 26,27, and 29 of the Commission on Administrative Justice Act, Cap 71, on CAJ's power to issue summons to a witness from county government offices, state officers, or constitutional commissioners?
- iv. What are the limits under section 23 (1)(a) of the Access to Information Act, 2016 on CAJ's power to issue summons or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission over county government officers, state officers, or constitutional commissioners?
- v. Exercising the powers in (iii) and (iv) can the CAJ summon county government officers, state officers, or constitutional commissioners? and;

[2] TAKING INTO ACCOUNT that, at paragraph 84 of the Reference, the applicant proposed that the Law Society of Kenya and Katiba Institute be admitted as Participants/ Intervenors, based on their respective statutory and expert standing, to assist the Court in the administration of justice and provide subject matter expertise and;

[3] FURTHER NOTING that, when the Reference came up for directions on 3rd April 2025 before the Deputy Registrar of the Court, learned counsel for the applicant, Mr. Ochiel, orally and without a formal application on record,

urged the Court to consider admitting the Law Society of Kenya and Katiba Institute as Participants/Interveners in the Reference and;

[4] NOTING that, on that date, the Deputy Registrar referred the determination of the oral application for admission of the proposed Participants/Interveners to the Court hence this Ruling. And aware that the oral application has not been opposed, **WE NOW OPINE AND DETERMINE AS FOLLOWS:**

- i. Ordinarily, all applications to this Court ought to be made in writing and filed under the relevant Rules of the Court. Oral applications may only be made in limited circumstances and mostly in open Court and where a formal written, reasoned Ruling of the Court supported by the law and authorities may not be required.
- ii. An applicant seeking the admission of a participant to a Reference must comply with Rule 51 of the Supreme Court Rules, 2020 which provides that an applicant may propose such admission or the Court may on its own motion identify persons whose participation is required for purposes of a fair determination of the questions posed in a Reference.
- iii. Whereas no specific procedure is outlined in Rule 51 aforesaid, it would be expected that an applicant, in making a proposal for admission of a participant to a Reference, ought to disclose the purpose for which the proposal is made, by way of a formal application with the intended participant(s) served, and expected to appear and indicate their willingness or otherwise to participate in a Reference.
- iv. Rule 51 does not envisage a situation where an applicant may name any party as a respondent or interested party or even an intervener because Advisory Opinion References are not ordinary civil or adversarial proceedings hence the edict in Rule 51(5) that applications for joinder of interested parties shall not be allowed.

- v. In References before this Court, precedent has shown that parties with proven expertise on the subject of a Reference may apply to be joined as *amicus curiae* but such a party has to satisfy this Court that he or she has satisfied the legal requirements for such an application. In this context, Rule 19 of the Supreme Court Rules, 2020 provides that, before admitting a person as a friend of the court, the court must consider the proven expertise of the person, their independence and impartiality, and the public interest involved. This position was emphasized by this Court in ***Cabinet Secretary for National Treasury and Planning & 4 Others Vs Okoiti & 52 Others; Bhatia (Intended Amicus Curiae) Petition(Application)*** E031 OF 2024 & Petition E032 & E033 of 2024 (consolidated) [2024] KESC 55 (KLR) wherein we stated thus:

“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.”

vi. 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*** SC 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 an 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....”

vii. In the present Reference, and noting the above guiding principles, we note that Mr. Ochiel, learned counsel for the applicant stated before the Deputy Registrar of this Court that, the Law Society of Kenya and Katiba Institute have statutory and/or expert subject mandates that would assist this Court in answering the questions posed by the applicant in the Reference. On our part, such a bare proposal and

without a clear juxtaposition of the mandates of the two agencies with the issues in the Reference will not attract a favorable exercise of our discretion. Further, without highlighting their relationship, if any, with the applicant and the direction of their participation, then the guiding principles for admission of subject experts as *amici curiae* in References would not have been met as enumerated in ***Trusted Society of Human Rights Alliance (supra)***.

- viii. Should the proposed participants be mindful of joining as *amici curiae* in this matter, as seems to be the proposal by the applicant, then they ought to file a formal application setting out their expertise, independence, impartiality, and neutrality in the matter.
- ix. Although the issue was not raised by the applicant, we note that in the Reference, Kisumu County Government, Mombasa County Government and the Judicial Service Commission have been listed as 1st, 2nd and 3rd respondents. For reasons given above, and noting Rule 51 aforesaid, parties called *respondents* are not known to the nomenclature of References in as far as the Rules of this Court is concerned.

[5] CONSEQUENTLY, and for the reasons aforesaid, we make the following orders:

- i. *The applicant's oral proposal to admit the Law Society of Kenya and Katiba Institute as participants/interveners in the Reference dated 12th March 2025 and filed on 17th March 2025 is hereby dismissed;***
- ii. *The 1st, 2nd and 3rd respondents are hereby struck-off from the Reference and;***
- iii. *We make no orders as to costs.***

It is so ordered.

DATED and DELIVERED at NAIROBI this 15th day of August, 2025

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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

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

REGISTRAR,
SUPREME COURT OF KENYA

