REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mohammed Ibrahim & Njoki Ndungu, SCJJ)

PETITION NO. 12 OF 2013

–BETWEEN–

TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE……PETITIONER

–AND –

1. MUMO MATEMO ……
2. THE ATTORNEY GENERAL ……
3. MINISTER FOR JUSTICE & CONSTITUTIONAL AFFAIRS ……
4. DIRECTOR OF PUBLIC PROSECUTION……

RESPONDENTS

–AND–

1. THE KENYA SECTION OF INTERNATIONAL COMMISSION OF JURISTS……
2. KENYA HUMAN RIGHTS COMMISSION……

AMICI CURIAE

–AND–

KATIBA INSTITUTE ……INTENDED *AMICUS CURIAE*/APPLICANT

(Being an application by Katiba Institute to be enjoined in these proceedings as amicus curiae)

RULING

A. INTRODUCTION

[1] This is a Notice of Motion dated 3rd March, 2015, filed by Katiba Institute seeking leave to be enjoined in the substantive appeal as *amicus curiae*. The application is supported by affidavit sworn by Christine Nkonge, the applicant's litigation counsel.

B. SUBMISSIONS OF THE PARTIES

(i) The Intended Amicus curiae/Applicant

[2] Learned counsel for the applicant, Mr. Lempaa submitted that the applicant is an institution with expertise in constitution-making and design, and would therefore contribute to the resolution of the issue at hand. He urged that the applicant was non-partisan in the matter, and was only keen to aid the Court in interpreting and applying constitutional principles on the issues arising, by proposing a comparative approach. Mr. Lempaa submitted that the applicant had no special interest in the matter, personal or commercial, and its sole motivation was fidelity to the law and the Constitution of Kenya, 2010.

[3] In its grounds in support of the application, the applicant stated that it would assist the Court by providing the relevant historical context, constitutional design and principles relating to institutional comity, judicial and quasi-judicial processes, integrity, transparency and accountability, and comparative foreign law on the issues entailed.

[4] We were urged to admit the applicant as *amicus curiae* because of the public interest nature of the appeal before the Court. According to counsel, it was the first time Chapter 6 of the Constitution was coming up for consideration before the Court. Drawing from the supporting affidavit of Christine Nkonge, counsel submitted that the learning of the applicant's founder and director, Prof. Yash Pal Ghai, an expert in constitutional law, would benefit the Court in the resolution of this matter.

[5] It was submitted that Katiba Institute's admission as *amicus* in this case would outweigh any possible prejudice to any of the parties. It was thus deponed in paragraph 10 of the applicant's affidavit:

> *"THAT even if any prejudice was to be occasioned to any party and /or the Court, we believe that given the importance of issues implicated by this litigation, their complexity, their public - interest nature, the importance of the case in engendering good governance, rule of law and constitutionalism vis - a- vis the information and arguments contained in our submissions, the value of*

admitting KI (Katiba Institute) as amicus curiae outweighs any prejudice that may be occasioned to any party."

[6] On the issue of delay, counsel submitted that no prejudice would be occasioned to any party as a result of the time taken in filing application.

(ii) The 1st Respondent

[7] The 1st respondent contested the application by way of a replying affidavit sworn on 16th March, 2015 and learned counsel Mr. Kilonzo, urged that the principles for admission of *amicus curiae* had already been set by this Court in ***Trusted Society of Human Rights Alliance v. Mumo Matemo & 5 Others***, *Sup. Ct. Pet. No. 12 of 2013*, and that the applicant's case in this instance, fell short of the prescribed standard.

[8] Learned counsel questioned the value of the applicant's *amicus* intervention, given that the 5th and 6th respondents had already been admitted as *amici* right from the trial Court. He urged that the intended *amicus* brief had no issues not already covered by the two *amici* on record.

[9] Mr. Kilonzo submitted that a Court ought to consider its limited resources, including time, in determining the number of *amici* it should admit or engage. Counsel urged that an extension of the issues for determination by *amici* ought to be avoided, since matters before the Court must be expedited and

finalized. Counsel urged the Court, in determining this matter, to consider the fact that this was a second and final appeal.

(iii) The Petitioner

[10] Learned counsel for the petitioner, Mr. Mwongela submitted that his client had not taken a partisan position in this matter even though he had made reference to the High Court decision; and thus his case for *amicus* status was not compromised.

(iv) The 2nd and 3rd Respondents

[11] Learned counsel for the 2nd and 3rd respondents, Mr. Muiruri submitted that the draft submissions appended to the amicus brief portrayed a partial inclination by the applicant. He urged further, that it was apparent from the said brief, that the applicant would bring no new element to the issues of law. Counsel urged the Court to focus its attention on the live dispute between the real parties, in this adversarial system, in such a manner that the same is not overshadowed by a multiplicity of *amici*.

(v) The 4th Respondent

[12] Learned counsel for the 4th respondent, Mr. Okello submitted that the intended *amicus* was merely seeking to introduce a historical perspective to the cause, and had indeed taken a position in support of the High Court's stand.

(vi) 1st and 2nd Amici curiae [5th and 6th Respondents]

[13] It is noted that the 1st and 2nd *amici curiae* were erroneously listed as the 5th and 6th respondents. The effect of describing an *amicus curiae* as a respondent is that, by default, such *amicus* gains the status of a respondent. Courts should always be mindful of party description, so as to protect the interests of the parties to the dispute, from a multiplicity of stakes crowding the litigation- forum. So in the instance matter, we amend the status of current *amicus,* to refer to 1st and 2nd *amici curiae*. At the hearing of the appeal, this Court will also regulate amicus interventions, to ensure that the *amici* do not assign to themselves the substance of the claims in the cause.

[14] Learned counsel for the 1st and 2nd *amici curiae,* Mr. Nderitu urged the Court to reject the submissions that an *amicus curiae* ought not to take a particular position in a matter. He submitted that an *amicus* expresses an opinion, whether or not it would favour one side or the other. Counsel urged that as a matter of fact, a determination made by a Court assisted by *amicus,* would still favour one side. Counsel submitted that the disqualification of an *amicus* should only be for lack of adherence to relevant legal principles.

[15] Counsel urged that the admission of the applicant as *amicus curiae* would serve the objects of the Court, as outlined in the Constitution and the Supreme Court Act.

(vii) The *Applicant in Response*

[16] Learned counsel, Mr. Waikwa for the applicant, submitted that there was no evidence to show that the instant application had occasioned any delay in the proceedings; for the main cause was yet to be cleared for hearing.

[17] On the issue of partisanship, Mr. Waikwa submitted that this has two aspects: partisanship based on factual evidence; and partisanship based on legal interpretation. He urged that the category of partisanship raised by the 1st respondent was one of legal interpretation; and that all the authorities cited by parties beckoned legal, as opposed to factual evaluation. He submitted that the exclusion of the applicant in ***Moses Kiarie Kuria & 2 others v. Ahmed Isaack Hassan & Another****, Petition No. 3 of 2013, [2013] eKLR* from *amicus* status, was based on the applicant's proposed factual appraisal, which is distinguishable from the current instance. Counsel urged the Court to allow the application.

C. ISSUE FOR DETERMINATION

[18] The single issue for determination in this application is whether Katiba Institute should be admitted to these proceedings as *amicus curiae*.

D. ANALYSIS

(a) Establishing Principles

[19] This Court has previously made pronouncements regarding the participation of parties in proceedings as *amici curiae*. This matter, however, presents an opportunity to consolidate the principles previously developed on the subject, drawing on earlier decisions, as well as on comparative jurisprudence.

[20] In this regard, certain specific questions emerge, calling for this Court's attention, as follows:

(i) at what stage can the Court admit a party as ***amicus curiae****?*

(ii) can a party apply to be enjoined as ***amicus*** *at the final appellate stage, especially where other parties have opposed the application?*

(iii) what are the attributes of ***amicus*** *status, in the special context of Kenya's legal system.*

[21] The Constitution of Kenya, 2010, by express terms, requires Courts to "develop the law to the extent that it does not give effect to a right or

fundamental freedom" (Art. 20(3)(a)). This is the very foundation for well - informed inputs before the Court, which inherently, justifies the admission of *amici curiae*. We have a duty to ensure that our decisions enhance the right of access to justice, as well as open up positive lines of development in jurisprudence, to serve the judicial system within the terms of the Constitution.

[22] The Constitution further bestows upon all State Organs and all public officers the duty to respond to the needs of vulnerable groups within the society (Art. 21(3)). This obligation, in the context of an enlarged *locus* in the enforcement of fundamental rights and freedoms (Article 22(2), and of the enforcement of the Constitution itself (Article 258), enjoins that a person seeking to canvass the values and principles under the Constitution, by applying legal expertise, materials, or information available, is a potential friend of the Court. As observed by the Constitutional Court of South Africa in the case of ***Children's Institute v. Presiding Officer of the Children's Court, District of Krugersdorp and Others*** *(CCT 69/12) [2012]:*

> ***"...the role of a friend of the court can, therefore, be characterised as one that assists the courts in effectively promoting and protecting the rights enshrined in our Constitution."***

[23] Rule 3 of the Supreme Court Rules, 2012 defines *"amicus curiae"* as *"a person who is not party to a suit, but* ***has been allowed*** *by the Court to appear as a friend of the Court."* Rule 54(1) vests the Court with the power to appoint *amicus curiae* in any proceedings, while sub-rule 2 sets out the criteria:

> ***"****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"*** [emphasis supplied].

Rule 25 on the other hand outlines the admission of interested parties into the Court's proceedings.

> "25. (1) **A person may** at any time in any proceedings before the Court **apply for leave** to be joined as an **interested party**.
> (2) An application under this rule shall include–
> (a) a description of the interested party;
> (b) any **prejudice** that the interested party would suffer if the intervention was denied; and
> (c) the grounds or submissions to be advanced by the person interested in the proceeding, their relevance to the proceedings and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties." [emphasis supplied].

[24] We have in several cases, considered the role of *amicus* and outlined the difference between *amici curiae* and *interveners*. This guideline has been followed

by other Courts in our jurisdiction, in cases such as ***Judicial Service Commission v. Speaker of the National Assembly and Another,*** *High Court Petition No. 518 of 2013 [2013]eKLR;* and ***Justice Philip K. Tunoi & Another v. Judicial Service Commission & 2 Others****, High Court Petition No. 244 of 2014 [2014]eKLR*. We elaborated the difference between interveners and *amici curiae* in the application to be enjoined as *amicus* by the Law Society of Kenya, in this matter, - ***Trusted Society of Human Rights Alliance v. Mumo Matemo & 5 Others***, *Sup. Ct. Pet. No. 12 of 2013* - at paragraphs 17 and 18 of the ruling:

> ***"…… while an interested party has a 'stake/interest' directly in the case, an*** *amicus's* ***interest is its 'fidelity' to the law: that an informed decision is reached by the Court, having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.***
>
> ***'Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause*** *ab initio****. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the***

proceedings, and champions his or her cause. On the other hand, an *amicus* ***is only interested in the Court making a decision of professional integrity. An*** *amicus* ***has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a 'friend' of the Court, his [or her] cause is to ensure that a legal and legitimate decision is achieved."***

[25] We have observed the trend of applications by persons seeking *amicus* status, to aid this Court in the execution of its duty. We approbate this inclination, as the transformative cast of the Constitution invites due diligence on the part of all persons. Judicial authority flows from the people as the final arbiter, with the capacity to affect any settled precedent. It justifies any person with special legal expertise, in matters coming up before this Court, coming as a friend of the Court. Rule 54 beckons the invitation of persons as *amici curiae* and also recognizes the need to allow, from time to time, and on a case-by-case basis, the appearance of legal or technical experts and advocates in proceedings before us. The dichotomy of interest and expertise shreds any doubt as to the role of a party in any proceedings before us. ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate***, Sup. Ct. Appl. No. 2 of 2012, we

admitted certain organizations to appear as interested parties (representing the interest of the public) and went further to admit those with certain expertise to appear, including Charles Kanjama who was admitted as *Advocate* under this rule to enrich the legal submissions in the proceedings before the Court. The expanded forum by our Constitution is a testament that we continue to witness various forms of legal mobilization in pursuit of a constitutionally engineered rights-based jurisprudence.

[26] However, this opening ought to be regulated, in order to protect the rights of the parties to the causes before us. *Amicus* briefs ought to be carefully appraised, so as not to interfere with the causes of the parties, or the bounds of jurisdiction. While the Court may admit a motion to appear in any proceedings as *amicus*, there is the risk of the real interest of the *amicus* threatening the position of the original suitors, whose rights and obligations stand to be upset by the outcome of the appeal.

[27] This question has also been considered by the United States Supreme Court in the case of ***Florida v. Georgia, 58 U.S. (17 How.) 478 (1854).*** In that case, the Attorney - General of the United States sought to be heard in a case, on appeal, where the interests of the Federation were likely to be compromised. The Court considered the familiar practice of hearing the Attorney - General on behalf of the State, in suits between individuals involving

matters of public interest; and if recognized that the Federation would be adversely affected by the decision, if it was accorded no opportunity to be heard. The Court acceded to the Attorney - General's request, granting the motion. There were, however, dissenting opinions (by *Justices Curtis* and *McLean)* which proceeded on the basis that the Supreme Court's jurisdiction had been compromised by the majority decision.

[28] What should be this Court's position on *amicus* briefs inviting factual appraisal? The legitimacy of *amicus* briefs flows from their engagement with points of law.

[29] Cases involving matters of general public interest may occasion the Court inviting certain parties, such as the Attorney - General, to participate in proceedings as *amicus curiae*. The special role of the Attorney - General as *amicus,* on behalf of the State, was considered in the case of ***Moses Kiarie Kuria & 2 others v. Ahmed Isaack Hassan & Another****, Petition No. 3 of 2013, [2013] eKLR* . In that case we contemplated various governing scenarios in admitting the Attorney - General's *amicus* brief. Indeed the position of the Attorney - General as the custodian of the legal instruments of the Executive Branch, and as advisor in matters of public interest cannot be challenged. We also considered the position of the Attorney - General in the performance of the Executive's role vis-à-vis the operationalization of the Constitution; and the

nature of this Court's discretion to regulate the extent of the Attorney - General's participation in the proceedings. The Attorney - General, in a proper case, therefore may be admitted to take part in proceedings as *amicus curiae,* where great public interest is involved. The Office of the Attorney General Act (No. 49 of 2012) reinforces the centrality of this office in relation to the facilitation, promotion and monitoring the rule of law, the protection of human rights and democracy in Kenya (S. 5(2)). Section 7 of this Act gives a statutory right of audience in proceedings of any suit or inquiry in matters involving public interest and those concerning the legislature, Judiciary and any other independent department or agency in government. It is to be observed, however, that despite the Attorney General's extraordinary role, certain exceptions, may be made by a Court in considering an application by the Attorney General seeking audience before it.

[30] A comparative examination of *amicus* jurisprudence from other apex Courts is relevant in illuminating the practice of *amicus* briefs, in other jurisdictions.

[31] The Supreme Court of Minnesota in the case of ***State v. Finley, 242 Minn. 288 (1954)*** rejected an *amicus* brief that suggested by implication, that an accused person was guilty. The Court delimited the remit of *amicus* in the following terms:

> ***"The ordinary purpose of an*** *amicus curiae* ***brief in a civil action is to inform the court as to facts or situations which may have escaped consideration or to remind the court of legal matters which have escaped its notice and regarding which it appears to be in danger of making a wrong interpretation."***

[32] The Supreme Court of Ireland had occasion to examine the role and place of *amicus curiae* in appellate proceedings in the case of ***I v. Minister for Justice Equality and Law Reform,*** [2004] 1 ILRM 27; [2003] IESC 38. The Court allowed the United Nations High Commissioner for Refugees to appear as *amicus* in a case involving an issue referred to the Supreme Court by the High Court, as involving great public interest. The Court adopted the definition of *amicus curiae* approved in the case of ***United States Tobacco Company v. Minister for Consumer Affairs and Others*** (83 ALR 79), which comes from *Jowitt's Dictionary of English Law:*

> ***"A friend of the court, that is to say a person, whether a member of the bar not engaged in the case or any other bystander, who calls the attention of the court to some decision, whether reported or unreported, or some point of law which would appear to have been overlooked."***

[33] The *amicus* practice in South Africa has been to allow persons and organisations or entities that may not have a direct legal interest in a matter, to participate, where sufficient interest has been established. This follows the terms

of the Rules of the Constitutional Court (R. 10). The duty of *amicus* to the Court, in that country, was succinctly stated by the Constitutional Court in ***Re: Certain Amicus Curiae Applications; Minister of Health and Others v. Treatment Action Campaign and Others,*** (*CCT 8/02) [2002]*(at paragraph 5 of the Judgement), in the following terms:

> ***"The role of an*** *amicus* ***is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an*** *amicus* ***has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The*** *amicus* ***must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court. Ordinarily it is inappropriate for an*** *amicus* ***to try to introduce new contentions based on fresh evidence."***

[34] *Justice Sachs* in the case of Government of the ***Republic of South Africa and Others v. Grootboom and Others*** *2001 (1) SA 46 (CC)*, noted the special merits brought by advocates who participated in the case as *amici*.

> ***"I might mention that we were helped at the hearing in a most considerable way by the participation of the Human Rights Commission and the Community Law Centre of the University of the Western Cape. Counsel for the Legal***

Resources Centre appeared on their behalf and succeeded in broadening the debate so as to require the Court to consider the right of all South Africans to shelter, whether they had children or not. The case showed the extent to which lawyers can help the poor to secure their basic rights".

[35] Although there are no formal rules governing the role of *amicus curiae* in Uganda, the issue has been the subject of legal scholarship. M. Ssekaana and S. Ssekaana in their book, *Civil Procedure and Practice in Uganda (2010)* (at page 50) have considered the role of *amicus curiae* as follows:

"In its ordinary use the term implies a friendly intervention of counsel to remind the court of some matter of law which has escaped its notice in regard of which it is in danger of going wrong. It seems that such a person is not a party to an action but one who calls the attention of the court to some decision or point of law which appears to have been overlooked... ***Where the intervention would only serve to widen the case between the parties or introduce a new cause of action, the intervention should not be allowed. An*** *amicus curiae* ***is not a party to an action, has no control over it and generally should not be allowed costs. The right of an*** *amicus curiae* ***to address the court is purely discretionary and is not dependent upon the consent of the parties to the proceedings"*** [emphasis supplied]

[36] The evolution of the *amicus* role in Kenya is distinguishable from the position in jurisdictions such as the United States, Australia, South Africa and Ireland. This distinction surfaces in the light of the decision of the Supreme Court of Ireland, in ***I v. Minister for Justice, Equality and Law Reform*** *(op.cit.):*

> ***".....the court is satisfied that it does have an inherent jurisdiction to appoint an*** *amicus curiae* ***where it appears that this might be of assistance in determining an issue before the court. It is an unavoidable disadvantage of the adversarial system of litigation in common law jurisdictions that the courts are, almost invariably, confined in their consideration of the case to the submissions and other materials, such as relevant authorities, which the parties elect to place before the court. Since the resources of the court itself in this context are necessarily limited, there may be cases in which it would be advantageous to have the written and oral submissions of a party with a*** *bona fide interest* ***in the issue before the court which cannot be characterised as a meddlesome busy body. As the experience in other common law jurisdictions demonstrates, such an intervention is particularly appropriate at the national appellate level in cases with a public law dimension.***
>
> ***It is, at the same time, a jurisdiction which should be sparingly exercised..."***

[37] While such jurisdictions require *amicus* to have *bona fide* interest in the matter, our practice is that *amicus* ought to come into the proceedings on a foundation of neutrality; and by virtue of the express terms of the Constitution, parties with an interest in the proceedings are accommodated in the capacity of *interveners* .

[38] *Amicus* participation is a matter of privilege, rather than of right. And "intervention" in a case, as provided under Rule 25 of the Supreme Court Rules, 2012 allows parties *with sufficient interest in the matter* to apply to be enjoined as *interveners* or *interested parties*. This avenue is set apart from that of *amicus*. As opposed to *amicus*, interveners have an interest in the *res* of the suit, as to be affected by the resulting Judgement of the Court. *Amicus curiae* on the other hand, are "advisors to the Court", and not to the parties, and are in no way bound by the resulting Judgement, except by way of precedent. *Amici curiae* cannot be perceived as an extension of the Court; and they are not to advance any party's case, and ought not to extend their participation to the realm of interveners in any legal proceedings. The interposition of *amici* in judicial proceedings is terminated when they have put forward the points of law outlined in their *amici* brief.

[39] There is, however, an exception in *amicus* interventions, in the case of advisory-opinion proceedings before this Court, as signalled in ***Re the Matter of the Interim Independent Electoral Commission,*** Sup. Ct. Const. Appl. No.2 of 2011. The absence of a live controversy in such proceedings opens a

window for the *amicus* to steer the Court, by specific proposals, towards a definite legal position. The ultimate decision, however, lies with the Court.

[40] In the High Court case, ***Justice Phillip K. Tunoi & Another v. Judicial Service Commission & 2 Others*** *(op. cit)* (at para.30), *Mr. Justice Odunga* had aptly observed, in relation to *amicus* status in Kenya today, thus:

> ***"It is unfortunate that in this country, unlike in other jurisdictions with an advanced Constitution such as ours, we do not have in place comprehensive rules which govern the admission of persons as*** *amici* ***in legal proceedings."***

[41] From our perceptions in the instant matter, we would set out certain guidelines in relation to the role of *amicus curiae:*

(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.*

(v) *The Court may call upon the Attorney- General to appear as* ***amicus curiae*** *in a case involving issues of great public interest. In such instances, admission of the Attorney- General is not defeated solely by the subsistence of a State interest, in a matter of public interest.*

(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 (see:* ***Raila Odinga & Others v. IEBC & Others;*** *S.C. Petition No. 5 of 2013-Katiba Institute's application to appear as* ***amicus).***

(vii) *An* ***amicus curiae*** *is not entitled to costs in litigation. In instances where the Court requests the appearance of any*

person or expert as ***amicus,*** *the legal expenses may be borne by the Judiciary.*

(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.*

(x) An ***amicus curiae*** *shall not participate in interlocutory applications, unless called upon by the Court to address specific issues.*

[42] In addition, we would adopt, with respect, certain guidelines which emerge from *Mr. Justice Odunga's* decision in the ***Justice Tunoi case*** *(op.cit.)* :

(xi) *The applicant ought to raise any perception of bias or partisanship, by documents filed, or by his submissions.*

(xii) *The applicant ought to be neutral in the dispute, where the dispute is adversarial in nature.*

(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 or fact 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.*

(xv) *Whereas consent of the parties, to proposed* ***amicus*** *role, is a factor to be taken into consideration, it is not the determining factor.*

[43] In addition to these guiding principles, the following *directions* may be applied by a Court considering an ***amicus*** application:

(i) *A party seeking to appear in any proceedings as* ***amicus curiae*** *should prepare an* ***amicus*** *brief, detailing the points of law set to be canvassed during oral presentation. This brief should accompany the motion seeking leave to be enjoined in the proceedings as* ***amicus.***

(ii) *The Court may exercise its inherent power to call upon a person to appear in any proceedings as* ***amicus curiae.***

(iii) *In proceedings before the Supreme Court, the Bench as constituted by the President of the Court, may exercise its*

discretion to admit or decline an application from a party seeking to appear in any proceedings as ***amicus curiae,*** *and denial or acceptance such of an application should have finality.*

(iv) The Court reserves the right to summarily examine ***amicus*** *motions, accompanied by* ***amicus*** *briefs, on paper without any oral hearing.*

(v) The Court may also consider suggestions from parties to any proceedings, to have a particular person, State Organ or Organisation admitted in any proceedings as ***amicus curiae****.*

[44] We are guided by the foregoing principles as we resolve the question before us in the instant application.

(a) Partiality to Petitioner's Cause?

[45] It is now clear that impartiality to a party's cause is one of the conditions for admission to the status of *amicus curiae***.** Now, does the applicant in this case seek to advance a position favouring any of the parties in the petition? Our evaluation of the submissions annexed to the *amicus* brief signals (at paragraphs 60-68), that

the intended *amicus curiae* inclines towards sustaining the decision of the High Court, to the detriment of the 1st respondent.

[46] The 1st respondent urged that the intended *amicus curiae* has taken a position of bias, by supporting the appeal. The applicant, on the other hand, has denied the 1st respondent's assertions of partiality. Learned counsel for the 2nd and 3rd respondents, Mr. Muiruri submits that the persuasive authorities cited by the applicant had already been placed before the Court and, in the circumstances, the applicant was introducing no new material to aid the Court in the resolution of the case before it. He is also of the view that the applicant is partisan, and should not be admitted to *amicus* status, except upon conditions. Learned counsel, Mr. Okello for the 4th respondent, agrees with Mr. Muiruri, and submits that the applicant's *amicus* brief brings no additional value to the proceedings. But Mr. Nderitu, learned counsel for the 1st and 2nd *amici curiae,* submits that the intended *amicus curiae* only presents its legal interpretation of the decision of the High Court, rather than delve into matters of fact. Mr. Waikwa, learned counsel for the applicant, disputes the submissions on partisanship, and urges that a dichotomy be drawn between factual and legal partisanship. He urges that the applicant's submissions are purely legal, and therefore sustainable.

[47] Impartiality is a central tenet in the conduct of judicial proceedings. As counsellor before the Court, an *amicus curiae* should not exhibit partiality towards

any party's cause; otherwise some party would be prejudiced. Given the role of *amicus* as friend of the Court, impartiality is required of an *amicus curiae*. The role of an *amicus* is to aid the Court so it may reach a legal, pragmatic and legitimate decision, anchored on the tenets of judicial duty. In an adversarial legal system such as ours, impartiality on the part of the Court, and all its agencies such as *amici curiae,* must withstand all compromise. The Court, in an adversarial system, is but an umpire, not to be seen to descend into the arena of conflict in the cause before it **(see *Muriu & Others v. R. (1955) 22 EACA 417*).** An *amicus curiae* has to stay aloof, assisting the Court, without being seen to take sides.

[48] In the *amicus* brief attached to this application, the applicant gives (at paragraphs 59-65) an analysis of the decisions of the two earlier superior Courts. It is this analysis that Mr. Waikwa urges to be an impartial legal interpretation. Do these paragraphs disclose any impartiality? Justice from the Court has to be assessed from the eyes of the ordinary litigant. When determining whether *amicus* is partisan, the test should be that of the ordinary litigant, rather than of a legal expert examining the dichotomy between factual matter and legal matter. How will an ordinary litigant perceive the submissions of Katiba Institute, as presented in paragraphs 59 to 65 of the proposed draft submissions? The Court is of the opinion that the applicant has scrutinized the decisions of the superior Courts, and taken the stand that the Court of Appeal erred in upsetting the finding of the High

Court. A perception of bias beckons, when the ordinary litigant reads these submissions. At paragraph 65 of the *amicus* brief, the applicant states:

> ***"The Court of Appeal in fact proceeded to its own fact-based inquiry and held that the allegations against Mr. Matemu did not hold water. With respect, this does not deal with the finding of the High Court, which was saying that the Panel did not carry out inquiries that would have unearthed the allegations, which allegations would have been sufficiently serious to demand further investigations. Maybe those further investigations would have reached the same conclusion as the Court of Appeal. But the point is that they did not take place"***

[49] The only course open to an *amicus* is to aid the Court in arriving at a determination based on the law, and/or upon uncontroverted, scientific and verifiable facts. Whether the superior Courts erred in arriving at their determination is to be left to the value judgement of the Court, as the ultimate decision - maker, following a conscientious evaluation of the parties' respective cases. It is not for *amicus* to suggest to the Court whether a decision was wrong or right, nor to advise on which resolution to arrive at. The pursuit of a particular outcome is reserved to the parties to the controversy, including the interested parties or interveners. Consequently, we agree with the 1st respondent that the

applicant has demonstrated partiality, and does not satisfy the threshold of admission as *amicus* in these proceedings.

(b) ***Delay in Seeking Admission as*** *amicus?*

[50] The intended *amicus curiae* had, besides, delayed in seeking admission into this case. The petition of appeal was filed on 2nd September, 2013. The matter had been scheduled for hearing on 22nd October, 2014 and 5th March, 2015 but could not proceed. We note that the applicant neither sought to be enjoined as *amicus* in this matter at the High Court nor the Court of Appeal. For purposes of proper administration in this Court, applications seeking the exercise of discretionary powers are to be made within reasonable time; this ensures expedition in the proceedings, and gives fulfillment to parties' constitutional right of access to justice. This is a statement of principle, and by no means attributes blame to the applicant, in this instance. The application fails not on this limb, but on that of alignment and partiality.

E. ORDER

(i) The application for admission to the status of *amicus curiae* ***is disallowed, with no orders as to costs.***

DATED and **DELIVERED** at **NAIROBI** this 17th day of **June**, 2015

.....	.....
M.K IBRAHIM	N.S. NDUNGU
JUSTICE OF THE SUPREME COURT	JUSTICE OF THE SUPREME COURT

I certify that this is a true
Copy of the original

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SUPREME COURT OF KENYA