

THE REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
ELECTION PETITION NO. 1 OF 2017

BETWEEN

H.E. RAILA AMOLO ODINGA 1ST PETITIONER

H.E. STEPHEN KALONZO MUSYOKA2ND PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ... 1ST RESPONDENT

THE CHAIRPERSON OF INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION2ND RESPONDENT

H. E. UHURU MUIGAI KENYATTA3RD RESPONDENT

NOTICE OF MOTION

TAKE NOTICE that this Honorable Court will be moved on the _____ day of August 2017 at 9:00 O'clock in the forenoon or so soon thereafter as the counsel for the intended *Amicus Curiae* may be heard on an Application for **ORDERS** :-

1. THAT leave be granted to the Law Society of Kenya to be admitted as *Amicus Curiae* in the above Petition filed in Court on 18th August, 2017.
2. THAT the *Amicus* be granted an opportunity to submit written and oral arguments in the above Petition.
3. THAT the *Amicus* be allowed to submit with leave of Court any other information it may deem important and relevant to allow for the just disposition of this matter.
4. THAT the *Amicus* to be granted leave for the Application to be deemed to be filed within time.
5. THAT there be no costs in relation to this Application or the *Amicus* participation in the main cause.

WHICH APPLICATION is supported by the grounds set out hereunder and more particularized in the annexed Affidavit of **MR. ISAAC OKERO**, President of the Law Society of Kenya and such other grounds and reasons to be adduced at the hearing hereof:-

1. THAT the intended *Amicus* is a public body established under the Law Society of Kenya Act No. 21 of 2014 with the following objects and functions, among others:
 - assist the Government and the courts in matters relating to legislation, the administration of justice and the practice of law in Kenya;

- uphold the Constitution of Kenya and advance the rule of law and administration of justice
2. Because of its mandate and membership, the *Amicus* has significant expertise and knowledge on constitutional and electoral law matters which are relevant to the resolution of the underlying Petition.
 3. The *Amicus* seeks leave to assist the Court in the above-referenced case with the interpretation and application of relevant constitutional principles, Kenyan jurisprudence and comparative foreign law, on the basis of the issues or some of the issues framed by the Parties or the Court. Specifically the Amicus wishes to share its views on the following:
 4. The *Amicus* believes its application should be granted because of the exceptional importance and impact that the determination that this case will have on resolution of disputes relating to a free and fair elections.

DATED in Nairobi this 25th day of August 2017

ADVOCATES FOR
THE INTENDED AMICUS CURIAE

DRAWN & FILED BY:

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H.E. UHURU MUIGAI KENYATTA

NAIROBI

LOGGED in the Registry at Nairobi on 25th day of August 2017

If any party served does not appear at the time and place above mentioned such orders will be made and proceedings taken as the court may think just and expedient.

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H. E. UHURU MUIGAI KENYATTA3RD RESPONDENT

SUPPORTING AFFIDAVIT

I, **ISAAC OKERO** of care of P.O Box 26586-00100, Nairobi within the Republic of Kenya do solemnly make oath and state as follows:

1. **THAT** I am the President of the Law Society of Kenya (LSK) and have the authority to swear this affidavit on its behalf.
2. **THAT** LSK is established by the Law Society Act No. 21 of 2014 as a society and a body corporate. Its relevant objects and functions under Section 4 of the Act are:
 - assist the Government and the courts in matters relating to legislation, the administration of justice and the practice of law in Kenya;
 - uphold the Constitution of Kenya and advance the rule of law and the administration of justice;
 - protect and assist the members of the public in Kenya in matters relating to or ancillary or incidental to the law;
3. **THAT** because of its mandate and membership LSK has a wealth of expertise on constitutional and electoral matters that would meet the requirement of the Rule requiring that an amicus curiae establish expertise in any matter it seeks to join.

4. THAT LSK has in fact been admitted in numerous matters before the various levels of Courts as an *amicus curiae*, including in this Court – see **Jasbir C. Rai & 3 Ors vs. .Tarlochan Singh Rai Estate of and 4 Ors [2013] eKLR**, where the court opined as follows.

[10] Meanwhile, the Law Society of Kenya applied to the Court to be admitted as *amicus curiae*, in the proceedings. LSK’s position was that, whether the declaration of Section 14 as being unconstitutional was proper or not, was a matter of constitutional significance, and, in line with its objectives under Section 4 of the Law Society Act (Cap. 18 Laws of Kenya), it had an obligation to assist the Court in determining the matter. The Court, on 13th June, 2013 allowed LSK’s application and admitted it as *amicus curiae*, on terms that it confines its submissions to the validity of Section 14, and whether the Supreme Court could review its earlier decision.

5. THAT moreover, LSK observes the principle of impartiality whenever it participates as *amicus* in any matter and generally in executing its statutory mandate. The LSK therefore meets the criteria of impartiality required for participation as an *amicus curiae* in this matter.
6. THAT the LSK is aware of the Guidelines set out by this Court in **Francis Karioko Muruatetu & Anr. V. The Republic & Ors [2016] eKLR** relating to participation of *amicus curiae*, especially in contested matters. LSK intends to remain within those guidelines set out in that Ruling including taking advise from the Court on particular issues it should address.
7. THAT the LSK intends to assist the Court in submitting its expert views on the following issues framed by the Petitioners:
- a. Whether the Presidential election was conducted in accordance with the Constitution and electoral laws and existing electoral jurisprudence. On this, the *amicus* hopes to specifically submit on:
 - What are the constitutional obligations that IEBC is required to meet under Articles 81 and 86 to ensure a free and fair election;
 - What interpretation or clarification ought to be made by this Court in regard to the meaning of s. 83 of the Elections Act;
 - b. Whether the total number of verified rejected votes should be considered in ascertaining whether any candidate met the constitutional threshold;
8. **THAT** no prejudice shall be occasioned whatsoever to any party to these proceedings if LSK is enjoined herein as *amicus curiae*.

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COMMISSION 1ST RESPONDENT
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AND BOUNDARIES COMMISSION 2ND RESPONDENT
H. E. UHURU MUIGAI KENYATTA 3RD RESPONDENT

SUBMISSIONS IN SUPPORT OF APPLICATION TO JOIN SUIT AS *AMICUS CURIAE*

10. These are the Submissions of the Law Society of Kenya made in support of the Application to be joined as *amicus curiae* in Election Petition No. 1 of 2017. The Application is premised on Rule 54 of the Supreme Court Rules, 2012.

11. The intended *amicus curiae's* application is founded on the grounds *inter alia* that:

- i. The intended *amicus curiae* is a public body established under the Law Society of Kenya Act No. 21 of 2014 with the following objects and functions, among others:
 - assist the Government and the courts in matters relating to legislation, the administration of justice and the practice of law in Kenya;
 - uphold the Constitution of Kenya and advance the rule of law and administration of justice
- ii. Because of its mandate and membership, the intended *amicus curiae* has significant expertise and knowledge on constitutional and electoral law matters which are relevant to the resolution of the underlying Petition.

- iii. The intended *amicus curiae* seeks leave to assist the Court in the above-referenced case with the interpretation and application of relevant constitutional principles, Kenyan jurisprudence and comparative foreign law, on the basis of the issues or some of the issues framed by the Parties or the Court. Specifically the Amicus wishes to share its views on the following:
 - a. Whether the Presidential election was conducted in accordance with the Constitution and electoral laws and existing electoral jurisprudence. On this, the amicus hopes to specifically submit on:
 - What are the constitutional obligations that IEBC is required to meet under Articles 81 and 86 to ensure a free and fair election;
 - What interpretation or clarification ought to be made by this Court in regard to the meaning of s. 83 of the Elections Act;
 - b. Whether the total number of verified rejected votes should be considered in ascertaining whether any candidate met the constitutional threshold;
- iv. The intended *amicus curiae* believes its application should be granted because of the exceptional importance and impact that the determination that this case will have on resolution of disputes relating to a free and fair elections.

12. The Submissions on the above stated matters will be informed by the knowledge of the membership of the Law Society of Kenya on the constitution and electoral laws, local and comparative jurisprudence.

13. Additionally, the present case is of immense public interest as it will address amongst other issues, fundamental doctrines of representative governance encapsulated in articles 38, 81 and 86 of the Constitution. We humbly believe that joinder of the Law Society of Kenya as *amicus curiae* will assist the Court in dispensing justice by providing detailed analyses of comparative jurisprudence in both public law and international law that is of relevance to the issues before Court.

14. The Society's application is brought under Rule 54 of the Supreme Court Rules, 2012 which provides:

“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”.

15. Further Rule 3 defines a friend of the Court (*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”.

16. Therefore, apart from expertise, the true test of *amicus curiae* is independence and impartiality. The Law Society of Kenya meets both tests of independence and impartiality as described in the Rules above in that it's not under the control, influence or financially reliant on any of the parties to this Petition. Further in the matter before Court, the Society is not biased in favor of any of the parties to the Petition. The Society's interest in the Petition is purely in the law and electoral practices implicated by the case. The Society therefore also meets the standards for *amicus curiae* set by the Supreme Court in the cases of ***Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others, Sup. Ct. Pet. No 12 of 201*** and ***Francis Karioko Muruatetu & another v Republic & 5 others [2016] eKLR***.

17. Additionally, we humbly submit that any fears any party may have as to the participation of the Society can be cured by the Court providing succinct directions of participation to the *amicus curiae*. In any event the Court is not obliged to give any weight to *amicus curiae* submissions if it finds them subjective and not true to the law.

18. The Law Society of Kenya would be willing to abide by any conditions as to its participation that the Court may impose.

19. These submissions are made in support of our application to be joined in this Petition as *amicus Curiae*.

DATED in Nairobi this 25th day of August 2017

**ADVOCATES FOR
THE INTENDED AMICUS CURIAE; THE LAW SOCIETY OF KENYA**

DRAWN & FILED BY:

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