

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 MUSYOKA.....2ND PETITIONER

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE CHAIRPERSON OF INDEPENDENT

ELECTORAL AND BOUNDARIES COMMISSION.....2ND RESPONDENT

H. E. UHURU MUIGAI KENYATTA.....3RD RESPONDENT

AND

CHARLES KANJAMA.....PROPOSED AMICUS CURIAE

PROPOSED AMICUS CURIAE'S WRITTEN SUBMISSIONS

May it please Your Lordships:

A. BACKGROUND

B. ISSUE FOR DETERMINATION

C. CONCLUSION

A. BACKGROUND

1. The Application before this Honourable Court is dated 25th August, 2017. The Proposed Amicus Curiae (hereinafter “the Amicus”) seeks leave to be admitted as amicus curiae in this matter and once the leave is granted to be allowed to present both oral and written arguments that will assist the Court during the hearing and determination of the Presidential Election Petition. The Amicus also seeks that the Court be pleased to admit the evidence annexed to his supporting affidavit as the same will also assist the Court during the aforesaid hearing and determination.

B. ISSUE FOR DETERMINATION

2. Your Lordships, the Amicus has narrowed down to one critical issue for determination and would like the same to be considered for purposes of disposing of this matter:

Whether the Proposed Amicus Curiae qualifies for joinder, in light of the governing principles set out in *Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others*, Supreme Court Petition No. 12 of 2013, [2015] eKLR.

3. Black's Law Dictionary, 9th Edition defines an amicus as:

“A person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter”

4. **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms)**

Practice and Procedure Rules, 2012 define amicus curiae as an expert on an issue which is the subject matter of proceedings but is not a party to the case and serves to benefit the court with their expertise. The High Court, Odunga J. in **Judicial Service Commission v Speaker of the National Assembly & another [2013] eKLR** interpreted this definition to mean that *Amicus curiae* is therefore a person who shows that he is possessed of some expertise relevant to the matters for determination before the Court. Such a person as is expected of experts is required to be non-partisan and his role is meant to enable the Court get a clear picture of the issues in dispute in order for the Court to arrive at an informed and just decision.

5. In **Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others, Supreme Court Petition No. 12 of 2013,[2015] eKLR** (an application by Katiba Institute), this Court considered the role of amicus curiae, and set out the guiding principles applicable in determining an application to be enjoined in that capacity. (See paras 41 & 42 of the case). The principles include that:

- a) An amicus brief should be limited to legal arguments.
- b) The conduct of the amicus ought to be governed by the principle of neutrality, and fidelity to the law.
- c) An amicus brief ought to be made timeously, and presented within reasonable time
- d) An amicus brief should introduce only novel aspects of the legal issue in question that aid the development of the law.
- e) 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.
- f) 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.

6. In **Raila Odinga & Others v. IEBC & Others; S.C. Petition No. 5 of 2013-Katiba Institute's application to appear as amicus** the Supreme Court clarified the role of amicus to the effect that an amicus ought to be non-partisan. Suffice it to say an amicus must be a neutral party admitted into the proceedings with the sole aim of aiding the Court in reaching an informed decision either way. The interest of an amicus is reduced to only assisting the Court to make a decision of professional integrity. This means that the amicus must not have any interest in the decision being made either way, but instead he must seek that the final determination of the Court be legal, well informed and in the interest of justice and the public legitimate expectation.
7. In light of the foregoing authorities, it is the Amicus' submission that he is an objective and non-partisan individual equipped with vast legal, professional and personal competencies. The Applicant is not only an expert in the law, but he also possesses the requisite expertise that is relevant to the matters arising from the dispute herein. (see paras 5-9 of the Supporting Affidavit).

8. Additionally, the amicus is not a party to the present suit and his sole aim; once this Honourable Court is pleased to admit him as amicus curiae; is to apply his aforementioned expertise to assist the Court with the interpretation and application of various Constitutional principles, issues of Information Technology (IT), accounting and forensic aspects and any other questions of law that may arise from the proceedings.
9. Moreover, the Amicus intends to further new issues; which issues shall be based entirely on the data already laid before the Court and the substantive submissions shall be constrained to the issues raised in the Petition before this Honourable Court.
10. Further, by virtue of the Amicus' numerous interactions with people from all political divides, his representation of clients from various political backgrounds and his pronouncements on various fora it is our submission that he Amicus has demonstrated his ability to be neutral in the face of adverse disputes and to uphold the rule of law.

C. CONCLUSION

11. Your Lordships, the Amicus is aware that enjoinder to Court proceedings is not a matter of right; rather it is at the discretion of the Court buttressed by sufficient grounds. We believe that we have adduced sufficient grounds to warrant the enjoinder and therefore the Amicus humbly prays that the Application be granted so that this Honourable Court may benefit immensely from the unique competencies and broad perspectives on issues of Constitutional and Electoral Law and on account of the public legitimate expectation on the outcome of this Petition.

DATED this day of 2017

MUMA & KANJAMA
ADVOCATES FOR THE PROPOSED AMICUS CURIAE

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