**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA AT NAIROBI**

**PRESIDENTIAL 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 SUPPLEMENTARY LIST OF AUTHORITIES**

1. Balancing the Scales of Electoral Justice (Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence- Chapter IX (Dr. Collins Odote): Friend of the Court or Partisan Irritant? The Role of Amicus Curiae in Kenya's Election Dispute Resolution.

**DATED** at **NAIROBI** this 26th day of August **2017**

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# IX

# Friend of the Court or Partisan Irritant? The Role of *Amicus Curiae* in Kenya's Election Disputes Resolution

DR. COLLINS ODOTE

## Abstract

*The involvement of amicus curiae in Kenya's first Presidential election petitions raised important issues on the nature of election petitions and the distinction between private and public litigation. That distinction is the more critical in light of the changed landscape following the adoption of the Constitution of Kenya, 2010 with a focus on larger public interest. In light of these changes, the Chapter discusses the jurisprudence emerging from the Presidential election petition on the issue of amicus curiae. The paper argues for a shift in the treatment of amicus away from representation of private partisan interests to a policy tool for ventilating larger societal and public interest matters. It concludes that such an approach requires a careful balance in the context of election petitions, which although partisan and private in their nature, raise wider constitutional and public interest issues.*

## 1.0 Introduction

The case of *Raila Odinga v IEBC and Others*[1] (hereafter *Raila Odinga* case) saw an application by the Law Society of Kenya (LSK),[2] Katiba Institute[3]

1 Raila Odinga and 2 others Versus Independent Electoral and Boundaries Commission and 3 others, Petition Number 5 of 2013 as consolidated with number 4 and 3. (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/87380/\, at 25 September 2015.

2 The Law Society of Kenya is established by statute, the Law Society of Kenya Act, as a professional body for all Advocates in Kenya with the responsibility of assisting both the Government and the Judiciary in matters relating to legislation, administration of justice and legal practice.

3 Katiba Institute is a non-governmental organization registered in Kenya and engaged in promoting constitutionalism and implementation of the Constitution of Kenya. See, http://www.katibainstitute.org/, at 26 September 2015.

and the Attorney General of the Republic of Kenya apply to join the case as *amicus Curiae*. While the first two applications were rejected by the Supreme Court, that of the Attorney General was accepted. Like several other aspects of the case, this decision raised heated debate amongst a cross-section of Kenyans.

The Supreme Court, in arriving at the decision on whom to admit and not admit as an *amicus* in the petition held that an *amicus* should not be partisan.[4] Instead they are expected to be neutral parties whose admission is to assist the court arrive at an informed decision either way. Their contribution and interest is expected to be restricted to fidelity to the law. This decision raised concerns not just about the meaning of the term *amicus curiae*, but also its application by the Supreme Court in Kenya.

As originally conceived *amicus curiae*, acted as a friend of the court and was seen as a bystander without an interest in the case before the Court. All they sought was to share their experience on either the law or fact to help the Court arrive at an informed decision. However, as several scholars have argued, this concept has gone through developments and innovations across the world. In the United States of America (US), for example, there have been discussions about the extension of the concept away from non-partisan friends of the court to interest groups and activists pursuing a particular agenda. Hellen Anderson categorizes the many facets of *amicus curiae* into five.[5] These include(1) lawyers appointed to argue a particular issue;(2)groups or persons invited by the court to provide their perspective;(3)those who advocate for one side of the dispute;(4)those who support neither party; and (5)those who just missed qualifying as interveners yet have a stake in the outcome.[6] The author argues that courts need to look at the numerous cases of applications for and faces of *amicus* and put restrictions on the friendship. Other commentators accept that the option gives courts the opportunity to listen to diverse voices, including from political groups.

This Chapter assesses the decision of the Supreme Court on the question of *amicus*. Its central thesis is that modern developments on the use of *amicus*

4 Raila Odinga and 2 others Versus Independent Electoral and Boundaries Commission and 3 others, Petition Number 5 of 2013 as consolidated with number 4 and 3. (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/87380/\ at 25 September 2015.

5 H Anderson, "Frenemies of the Court: The Many Faces of *Amicus Curiae*" (2014-2015) 49 University of Richmond Law Review 361.

6 H Anderson, "Frenemies of the Court: The Many Faces of *Amicus Curiae*" (2014-2015) 49 University of Richmond Law Review 361.

have shifted it away from its traditional position of a non-partisan friend of the court to an extent where it is invariably a backhanded manner of canvassing matters as an interested party. The key options to be considered in addressing this challenge is whether courts should depart from admitting *amicus* completely or set rules whose focus is not about if an applicant has an interest in a matter but what the nature of that interest is. Secondly, courts should be more clear and appreciative of the value that admission of *amicus* adds to a case, hence seek to and balance between benefiting from that value with the disadvantages that multiplicity of partisan parties to a suit under the guise of *amicus* poses to the objective and expeditious determination of disputes by courts.

This Chapter is divided into eight sections. Following this introductory section, section two conceptualizes the nature of the term *amicus curiae*, discusses its historical evolution and development. In section three, a case is made for the reliance of the *amicus* in dispute resolution in a democracy. The fourth section of the Chapter summarizes the context in which the term has been applied in Kenya broadly and the legal and constitutional framework that regulates its application. In sections five and six, the facts in Raila Odinga case as relates to *amicus* are stated, the rules relied on by the Court to make its determination are explained and the advantages and shortcomings with the Court's approach are discussed. Section seven details comparative experience and borrowing from these and recent developments in the *amicus* debate, the section canvases the critical issues to consider in modern application of *amicus*. Section eight concludes the paper.

## 2.0 Evolution of *Amicus Curiae* in Litigation

The term *amicus curiae* as originally used meant friend of the court, a definition still maintained to date. Abbott's Dictionary of terms and phrases defines the term as "a friend of the court. A term applied to a bystander, who without having an interest in the cause, of his own knowledge makes suggestion on a point of law or of fact for the information of the presiding judge."

The acceptance of the concept of *amicus curiae* as part of the judicial system of determining cases dates back to several centuries. Its origins are traceable to Roman law.[7] It also found usage in early common law. Since then, the

7 S Krislov, "From Friendship to Advocacy" (1963) 72(4) Yale Law Journal 694, 694.

concept has been used in several jurisdictions and now has almost universal usage worldwide including in civil law jurisdictions[8] and in international adjudicatory proceedings,[9] extending to regional mechanisms and at the African continental level. In the process, some of its early characteristics have been retained, while changes have been made some universally and others to respond to country and regional specificities and legal systems.

While its origins are traceable to Roman law, its usage became common practice in the 17th century in England.[10] It later spread to other parts of the common law jurisdiction, with its most extensive application being in the US. The first *amicus* brief in the US was submitted when the Supreme Court requested Henry Clay to aid in determining the application of the commerce clause to a land agreement between Kentucky and Virginia.[11] While this case was filed in 1823, The US Supreme Court promulgated its first written rule on the subject of *amicus* briefs in 1939.[12] Since that time, the role of the *amicus* in US law has changed drastically, such that almost every case that goes to the US Supreme Court attracts numerous *amicus* submissions. Not just in the US but the rest of the common law jurisdictions, *amicus* emerged as response to the resistance by the common law to expand the scope of participation of third parties in trials.[13] Even when *amicus* was adopted as an avenue for allowing third party intervention, the common law viewed the role of such interveners as being that of "bringing up of cases not known to the judge."[14] In a system based on precedent, this oral role was important at a time when there was no law reporting for it enabled judges to be made aware of relevant decisions made in court, that may not be readily within the Court's knowledge. This would also guard against the failure of opposing counsel not bringing such cases to the attention of the court, when they thought they were not in their client's interest to do so.

8 S Kochevar, "Amici Curiae in Civil Law Jurisdictions', (2013) 122 Yale Law Journal 1653, 1659.

9 E De Brabandere "NGOs and the 'Public Interest': The Legality and Rationale of *Amicus Curiae* Interventions in International Economic and Investments Decisions", (2011) 12(1)(5) Chicago Journal of International Law 85; J Crawley " Friend of the Court: How the WTO Justifies Acceptance of the *Amicus* Brief From Non-Governmental Organizations," (2004-2005) 23(1) Penn State International Law Review 47; D Shelton "The Participation of Non-governmental Organizations in International Judicial Proceedings", (1994) 88 American Journal of International Law 611.

10 A Lucas, "Friends of the Court: The Ethics of *Amicus* Brief Writing in First Amendment Litigation," [1998] 26(5) Fordham Urban Law Journal 1605, 1607; S Krislov, "From Friendship to Advocacy" (1963) 72(4) Yale Law Journal 694, 695.

11 Green v Biddle 21 U.S. (8 Wheat.) 1 (1823), cited in S Krislov, "From Friendship to Advocacy" (1963) 72(4) Yale Law Journal 694, 700.

12 M Solimine, "The Solicitor General Unbound: *Amicus Curiae* Activism and Deference in the Supreme Court," (2013) 45 Arizona State Law Journal 1183, 1189.

13 *S Krislov, "From Friendship to Advocacy" (1963) 72(4) Yale Law Journal 694, 695.*

14 *S Krislov, "From Friendship to Advocacy" (1963) 72(4) Yale Law Journal 694, 695.*

Historically, *amicus* briefs did not appear in modern civil law jurisdictions.[15] This is despite arguments that *amicus* participation has more of a civil law as opposed to common law jurisdiction characteristics. Unlike the common law adversarial system, *amicus curiae* is more about objective gathering of facts without only relying on the parties, similar to fact-gathering of some civil law courts.[16] In more recent times, though, a practice that has civil law elements but was largely a common law innovation has found its way to the civil law. This has happened in two instances. First, formally through inclusion in rules and statutes and as a result of Court decisions. In this first category, include Brazil, Israel, Mexico and France. Second mode is through informal action by non-governmental organizations (NGOs), who despite non-recognition by rules, statues and courts have gone ahead and filed *amicus* submissions. NGOs informally submit briefs to courts in virtually every region in the world, from Southeast Asia to the former Soviet Union to sub-Saharan Africa.[17] The main explanation of the evolution of *amicus* in civil law jurisdictions as well, is the emergence of *amicus curiae* as a "global procedural norm."[18]

The third development has been in the field of international dispute resolution fora. This development has been largely at the instance of non-governmental organizations who have relied on the concept of *amicus* to be able to access international courts and tribunals. The approach has been relied on due to the historical position in international law where only states were considered subjects thus able to participate as parties in litigation at international fora. Despite debate about the role of non-state actors in international law, the involvement of non-state actors as participants, either formally or informally, in international law has increased substantially over the past years.[19] Non-state actors have benefited from being admitted as friends of the courts, from which position, despite not being parties to the suit before international tribunals, they have been able to submit written statements during proceedings. However, only in very limited instances are they allowed to orally address court.

15 S Kochevar, "Amici Curiae in Civil Law Jurisdictions', (2013) 122 Yale Law Journal 1653, 1659.

16 S Kochevar, "Amici Curiae in Civil Law Jurisdictions', (2013) 122 Yale Law Journal 1653, 1656.

17 S Kochevar, "Amici Curiae in Civil Law Jurisdictions', (2013) 122 Yale Law Journal 1653, 1662-1663.

18 S Kochevar, "Amici Curiae in Civil Law Jurisdictions', (2013) 122 Yale Law Journal 1653, 1669.

19 E De Brabandere "NGOs and the 'Public Interest': The Legality and Rationale of *Amicus Curiae* Interventions in International Economic and Investments Decisions", (2011) 12(1)(5) Chicago Journal of International Law 85; J Crawley " Friend of the Court: How the WTO Justifies Acceptance of the *Amicus* Brief From Non-Governmental Organizations," (2004-2005) 23(1) Penn State International Law Review 47; D Shelton "The Participation of Non-governmental Organizations in International Judicial Proceedings", (1994) 88 American Journal of International Law 611.

From this historical sketch, it is clear that *amicus curiae* has undergone transformations in many jurisdictions, some more than others. The most development towards being parties is in the US, where *amicus* are now almost like participants to a suit. In all jurisdictions though, there are still common traditional elements that define *amicus*. These include the fact that *amicus curiae* are not considered and should not be viewed as parties to a suit. Their participation in a suit is thus at the discretion of the court. In addition, they are expected not to raise new causes of action. Instead, their contribution is in highlighting or raising new, novel or different perspectives to the case before the court. This way they will comply with the traditional dicta of being experts whose role is to raise technical aspects of law or fact and not have a personal partisan stake in a case.

## 3.0 The Place of *Amicus* in Litigation

*Amicus curiae* developments needs to be seen within the larger context of litigation and roles it serves in society. In its traditional and ordinary sense, litigation was always private to the parties seeking to determine disputes and vindicate rights. The traditional function of a lawsuit as understood in common law jurisprudence is that it is a vehicle for settling disputes between private parties about private rights.[20] Lawsuits were consequently, initiated and confined to private individuals to whom judgment was confined. The basis of determination of cases was the rule of *locus standi,*[21] determined based on personal or proprietary interest in the subject matter of the dispute. Public matters, in this arrangement, could only be pursued by the defender of the public interest, who was the Attorney General.

Over time, however, the restrictive nature of private interest litigation became evident leading to the development of the field of public interest litigation. This is litigation where issues of personal or sufficient interest or personal injury take a back seat and instead focus is on public-spirited entities seeking to ventilate public rights. The reliefs sought are for the entire or a large section of the population. The entity moving court may not even have a personal interest in the matter and will not receive any special benefit should the court rule in their favor. Public interest litigation has, over the years been used in

20 M Makoloo, B Ochieng and C Odote, Public Interest Environmental Litigation in Kenya: Prospects and Challenges (2006) 13; E Clark, "The Needs of the Many and the Needs of the Few: A New System for Public Interest Intervention in New Zealand," (2005) 36 Victoria University Wellington Law Review 71, 71.

21 This means the right or capacity to bring an action or appear in court.

many field including human rights, environment, labor rights and gender rights.[22] The emergence of public interest litigation as a tool for social change and seeking justice in Kenya is traceable to the establishment and work of the Public Law Institute. The Public Law Institute was the first, pubic spirited, NGO in Kenya to employ the tool of litigation in the public interest in modern Kenya at a time when the legal and policy environment was restrictive.[23] The Public Law Institute instituted cases on consumer protection, human rights and the environment with the most famous being representing Professor Wangari Mathai in a case against the efforts to grab a public recreational space, Uhuru Park, to construct an office complex.[24]

With the adoption of the Constitution of Kenya, 2010, there has been an increase in public interest litigation cases. This increase is attributable to the nature of Constitution itself, hailed as a progressive and transformative document, useful as an "instrument for change."[25] The Constitution provides space for citizens to use courts as an avenue for protecting rights and seeking justice. Unlike the past Constitutional order, there is greater recognition and space for public rights and their protection by individuals. There is also increase in use of Courts to provide policy guidance in certain instances, expanding frontiers for public interest litigation.[26]

Many options exist for public-spirited entities to participate in litigation. One such option has been through the avenue of *amicus curiae*. A rough review of *amicus curiae* cases in Kenya reveals that NGOs and other public interest bodies, like the LSK, have mainly relied upon it.

*Amicus Curiae* participation is important for several reasons. It sensitizes the Court in its decision-making process ensuring that a court is better informed when making its decision.[27] *Amicus* also bring new and different perspectives to matters before a court. They help to not only develop jurisprudence but

22 For discussions on public interest litigation see generally: D Robinson and J Dukley(Ed), Public Interest Environmental Litigation (1995); M Makoloo, B Ochieng and C Odote, Public Interest Environmental Litigation in Kenya: Prospects and Challenges (2006) 13.

23 For a discussion of the history and mandate of the Public Law Institute see, O, Ooko-Ombaka, "Education for Alternative Development: The Role of the Public Law Institute" [1985] 4(11) Third World Studies (1985) 171.

24 Wangari Maathai V Kenya Times Media Trust Limited (1989) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/53011/, at 12 October 2015.

25 YP Ghai and JC Ghai, Kenya's Constitution: An Instrument for Change, (2011).

26 See J Oloka-Onyango, "Human Rights and Public Interest Litigation in East Africa: A Bird's Eye View" (2015) 47 George Washington International Law Review 763; Ghai, n 24, 173-4.

27 C Murray, "Litigating in the Public Interest: Intervention and the *Amicus Curiae*," (1994) 10 South African Journal of Human Rights 240, 250.

also create awareness on the jurisprudence of the courts due to their focus on wider jurisprudential aspects of a case and its public impacts.

It also acts as an avenue of representation and ventilation of wider societal impacts of a case even if only between two private litigants. For example, the *amicus* brief is an institutional part of US court systems, serving to broaden the transparency and democratic legitimacy in the courts.[28] As part of a democracy, it is important that all views be heard before making a decision. This is the essence of deliberative democracy. However, this has to be balanced against the fact that the judiciary in its functioning is not a political institution, less one that is based on open public input. It is for this reason that *amicus curiae* participation is important to the judicial process. Some scholars argue that it provides avenues for democratic input in what is otherwise not a democratic arm of government.

In the US, reliance on *amicus curiae* has evolved away from the traditional position of a friend of the court to a tool for lobbying and advocacy, especially within the Supreme Court. As highlighted above, Professor Hellen Anderson[29] categorizes the different types of amici in the US into five: lawyers appointed to argue a particular issue[30]; groups or persons invited by the court to provide their perspective[31]; those who advocate for one side of the dispute[32]; those who support neither side[33]; and those who just missed qualifying as interveners[34] yet they had a stake in the outcome.[35] Of these categories, the friend of party has grown most tremendously leading to complaints that the avenue as opposed to being one for helping the court to arrive at an informed decision by supplying information or pointing the court to material or legal issues it may have overlooked has turned into an avenue either for parties to get those who support their cause to join in the case or an avenue for lobbyists to seek to influence judgments. This has led to *amicus* being increasingly viewed with less approval than before by courts.

28 R Garcia, " A Democratic Theory of *Amicus* Advocacy" (2008) 35 Florida State University Law Review 315,319.

29 H Anderson, "Frenemies of the Court: The Many Faces of *Amicus Curiae*" (2014-2015) 49 University of Richmond Law Review 361.

30 Also referred to as Court's lawyer.

31 Also known as the invited friend.

32 The friend of a party.

33 The independent friend.

34 The near intervener.

35 H Anderson, "Frenemies of the Court: The Many Faces of *Amicus Curiae*" (2014-2015) 49 University of Richmond Law Review 363.

One of the greatest critics of *amicus curiae* is the US judge, Judge Posner. He has argued that *amicus* briefs filed in his court provide little or no assistance to judges because they largely duplicate the positions and arguments advanced by the parties.[36] In one instance, he explained his decision for denying an application for admission as *amicus* on the following ground:

> After 16 years of reading *amicus curiae* briefs the vast majority of which have not assisted the judges, I have decided that it would be good to scrutinize these motions in a more careful, indeed a fish-eyed, fashion. The vast majority of *amicus curiae* briefs are filed by allies of the litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigants' brief. Such *amicus* briefs should not be allowed.[37]

The above is the context within which the debate as to whether to admit or not admit those who seek to serve in *amicus* is seen across many jurisdictions. Essentially, however, every common law jurisdiction in the world recognizes some form of *amicus* participation.[38] While there are several differences and viewpoints on *amicus curiae*, the reality is that in its modern form *amicus curiae* has moved away from its traditional role as a neutral dis-interested by-stander to a form of "participant". In the US, for example, it has shifted "from a source of neutral information to a flexible tactical instrument available to litigants and third parties." The question that continues to exercise legal minds and courts is what extent, if at all, this is legitimate and serves the interests of justice.

This debate is critical in the light of modern trends where a judge can at the click of a button retrieve huge amount of literature and material on matters before them. Coupled with increase in law-reporting one would be tempted to side with Judge Posner in his critiques of *amicus curiae*. Others would even opine that the roles that *amicus* play could very well be covered by having expert witnesses. However, the author opines that expert witnesses are normally more focused on facts and not the law. Secondly, expert witnesses are governed by the law of evidence and expected to provide perspectives on the evidence before the court. Their testimony is consequently restricted to a

36 J Kearney and T Merrill, "The Influence of the *Amicus* Brief in the US Supreme Court." (2000), Faculty Publications. Paper 568. Available at, http://scholarship.law.marquette.edu/facpub/568, at 30 December 2015.

37 Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J., in chambers). Cited in Kearney, J.D., Ibid.

38 S Kochevar, "Amici Curiae in Civil Law Jurisdictions', (2013) 122 Yale Law Journal 1653, 1656.

particular technical aspect of the evidence before the court. An *amicus* on the other hand, is more broadminded in approach, including brings in new and novel aspects of a discussion. Courts are not compelled to admit *amicus*, but their inclusion is an appreciation that effects of a court decision may be much wider than just the interests of the parties to the dispute.

## 4.0 *Amicus Curiae* in Kenya's Constitutional and Legal Framework

The inclusion of *amicus curiae* in Kenya's constitutional and legal framework has to be seen within the larger context of reforms ushered in by the Constitution adopted in 2010. Kenya, as a common law system, for long viewed cases before courts in the strict sense of an adversarial system. Judges were to make decisions based on the representation by the parties, their analysis of that evidence and application of relevant law. However, over time this traditional adversarial system was tinkered with. Judges have a slightly larger role than this, including some law-making functions.[39] In deciding cases, they are expected to also carry out their own research and analysis. In public interest cases, it also soon became clear that decisions would not just ventilate the rights of private parties before the courts. On the contrary, most public interest cases affected a wide spectrum of the population.[40]

It is for the above reasons that courts, which were originally in favor of the traditional position that litigation was purely the preserve of the private parties with no third party involvement, started changing. From early 2000, Courts started admitting public-spirited citizens especially in matters that had a public angle. This was more extensive in cases of human rights, land, environment and gender. In the case of Kenya Bankers Association and others Versus Minister of Finance and Another,[41] the Court justified relaxation of the traditional rule of locus standi based on personal injury or proprietary interest in favor of public spirit and interest. It held that:

> We state with firm conviction that as part of the reasonable, fair and just procedure to uphold constitutional guarantees, the right of access to justice

39 There is an important distinction though between the role of judges in law making in the US and Common law traditions. Despite this distinction, some scholars give judges much more law-making functions than is reasonable in a common-law country based on a written constitution like ours. See this reasoning in JB, Ojwang, *The Common Law, Judge's Law: Land and Environment before Kenyan Courts* (2014).

40 M Makoloo, B Ochieng and C Odote, *Public Interest Environmental Litigation in Kenya: Prospects and Challenges* (2006) 13.

41 *Kenya Bankers Association and others Versus Minister of Finance and Another* (2002) 1 KLR 61.

> entails a liberal approach to the question of *locus standi*. Accordingly, in constitutional questions, human rights cases, and public interest litigation and class actions, the ordinary rule of Anglo-Saxon jurisprudence, that action can be brought only by a person to legal injury is caused, must be departed from. In these types of cases, any person or social groups, acting in good faith, can approach the Court seeking judicial redress for a legal injury caused or threatened to be caused to a defined class of persons represented.

While this progressive approach was evident in several cases decided by the judiciary even before the promulgation of the Constitution in 2010, it was not based on a supportive constitutional foundation or statutory rules. In several instances, cases were not determined on their merits but on technicalities based on arguments of lack of locus standi, or the failure of the Chief Justice to develop rules on procedures for enforcement of fundamental rules as required by the Constitution.

The Constitution of Kenya, 2010 has sought to depart from this approach and adopt a more liberal approach to access to justice. It provides for access to justice for all persons, requires purposive and wide application and interpretation of the Bill of Rights so as to "promote the spirit, purport and objects of the Bill of Rights"[42] and the values that underlie an open and democratic society based on human dignity, equality, equity and freedom."[43] In addition, courts are required to avoid over-reliance on technicalities as a bar to access to justice.[44] The Constitution, consequently seeks to provide space for fair, objective and inclusive decision-making and opportunity for anybody desirous of ventilating a matter before the courts to do so subject to adherence to the rules set. Such rules though have to be seen within the overall purpose of the Constitution. Article 259 of the Constitution demonstrates this approach of promotion of a culture of protection of rights, providing space for the voices of especially the marginalized to be heard and a focus on substantive justice. The approach to interpreting the Constitution that is required by Article 259 is one that promotes its values, principles; an approach that advances the rule of law and human rights and fundamental freedoms; permits the development of the law; and contributes to good governance.[45]

42 Constitution of Kenya, 2010, Article 20(4) (b).

43 Constitution of Kenya, 2010, Article 20(4) (a).

44 Constitution of Kenya, Article 159(2) (d).

45 Constitution of Kenya, 2010, Article 259.

Kenya's Constitution, thus, seeks to protect both the rights of private individuals while also giving support to public rights. In its letter and spirit, it ensures that strict rules of standing are no longer a bar to seeking justice. Two substantive provisions of the Constitution address themselves to allowing public-spirited individuals to access courts. Article 70(3) of the Constitution provides that a person who goes to court seeking the enforcement of the right to a clean and healthy environment does not have to demonstrate that either they or any other person has suffered any personal loss or injury because of the action complained about. In all the other human rights and fundamental freedoms, the Constitution also provides every person, including one acting in the public interest, the right to go to court and seek relief when human rights and fundamental freedoms are threatened.[46]

The Chief Justice is required by the Constitution to develop rules to govern proceedings on the enforcement of the fundamental freedoms and human rights.[47] However, unlike in the past, the failure to develop such rules cannot bar people from seeking the enforcement of human rights and fundamental freedoms.[48] Importantly, the rules are to meet a certain threshold, one of which provides for the admission and participation of *amicus curiae* in such proceedings. The Rules by the Chief Justice are required to, inter alia; contain provisions that seek to ensure that "an organization or individual with particular expertise may, with the leave of the court, appear as a friend of the court."[49] The participation as an *amicus* is not restricted just to individuals and organizations. Article 156 which provides for the Office of the Attorney General lists as one of his functions, the authority to appear, with leave of court, as a friend of the court in any civil proceedings to which the Government is not a party.[50] Through these provisions, the role of *amicus curiae* is now constitutionally recognized. While discretion is still with the court to admit one as an *amicus*, *amicus* and their importance in court proceedings is accepted as part of Kenya's constitutional culture.

On June 25 , 2013, the Chief Justice of the Republic of Kenya and President of the Supreme Court published The Constitution of Kenya (Protection of Rights and Fundamental Freedoms)[51] (Mutunga Rules) to provide

46 Constitution of Kenya, 2010; Article 22(2).

47 Constitution of Kenya, Article 22(3).

48 Constitution of Kenya, Article 22(4).

49 Constitution of Kenya, 2010, Article 22(3) (e).

50 Constitution of Kenya, 2010, Article156 (5).

51 Legal Notice Number 117 of 2013, Kenya Gazette supplement Number 95 of 28 June 2013.

procedures for enforcement of Bill of Rights and access to justice as required by the Constitution. The Mutunga Rules recognize and make provisions for *amicus curiae* in proceedings. In its definitions section. It refers to an *amicus* as a "friend of the Court" and defines such a person as "an independent and impartial expert on an issue which is the subject matter of proceedings but is not party to the case and serves to benefit the court with their expertise."[52] It is clear from this definition that the criteria for one to be an *amicus* is that they should be impartial and independent, and secondly, that they are an expert. It is not everybody who can be an *amicus*. One should have demonstrable expertise while at the same time be independent and impartial. Either the courts can request such expert to appear and act as a friend or the person can apply on their own and seek the court's leave.[53] The upshot of the foregoing is to underscore the importance of independent expert involvement in relevant cases to aid the court in arriving at sound decisions.

Similar provisions exist in the Supreme Court of Kenya Rules, 2012 made under and pursuant to the Provisions of the Supreme Court Act.[54] It defines *amicus* 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", similar to the definition in the Mutunga Rules. The Rules set the contours of participation of *amicus* before the Supreme Court.[55] It sets three instances where an *amicus* may participate in proceedings at the Supreme Court. The Court may allow an *amicus* in any matter before it; appoint a legal expert to assist it in submissions; or either at the request of any party or on its own initiative appoint an independent expert to assist the court in any technical matter before the court.[56] The Rule shows that *amicus*, is not restricted to lawyers only. It can either be a legal or non-legal entity. The only time when only a lawyer can be a friend of the Court is when the court requires someone to help it with submissions. In the other two instances, both legal and laypersons can be admitted as a friend of the Court. The overriding consideration for the Court in all cases of determination whether or not to admit an *amicus* is the "expertise, independence and impartiality of the person."[57] In addition, the Court "may take into account the public interest"[58] involved in the matter. It is clear from the Kenyan legal

52 Legal Notice Number 117 of 2013, Kenya Gazette supplement Number 95 of 28 June 2013.

53 Legal Notice Number 117 of 2013, Kenya Gazette supplement Number 95 of 28 June 2013, Rule 6.

54 Act Number 7 of 2011.

55 Legal Notice Number 117 of 2013, Kenya Gazette supplement Number 95 of 28 June 2013, Rule 54.

56 Legal Notice Number 117 of 2013, Kenya Gazette supplement Number 95 of 28 June 2013, Rule 54.

57 Legal Notice Number 117 of 2013, Kenya Gazette supplement Number 95 of 28th June, 2013, Rule 45(2).

58 Legal Notice Number 117 of 2013, Kenya Gazette supplement Number 95 of 28 June 2013, Rule 45(2).

framework that the role *amicus* has been expanded beyond their traditional role of bringing to the Court's attention cases or provision of the law unknown to the Court.

With the above supportive legal framework, there has been a rise in the number of applications for admission as *amicus curiae* to the courts. The jurisprudence from the Supreme Court has sought to develop guidelines on when to admit one as *amicus curiae*. The Raila Odinga[59] case saw the court pronounce itself on the issue, a pronouncement that raises several jurisprudential issues on the role of *amicus* in Kenya's landscape especially in the context of election disputes.

## 5.0 The Three *Amicus* in *Raila Odinga Case*

The high stakes and context for the 2013 Presidential election petition case was set by the number of applications that the Court had to deal with before addressing the substance of the petition.[60] The Court disposed of several issues ranging from parties to the suit, access to documents, and scrutiny of votes in contested polling stations to application for leave to file further affidavit.

As part of the preliminary processes, three parties applied to be enjoined to the case as friends of the Court. The Court dismissed the application of the LSK and that of the Katiba Institute but accepted that of the Attorney General to act as an *amicus*. The reasons advanced by the Court in arriving at these decisions have continued to raise concerns on the exact nature of *amicus* in Kenya, the rules for their participation in court and the real difference between interested parties or interveners and *amicus* and whether that difference is necessary to maintain. LSK's application was grounded on its statutory mandate in aiding courts and government in legal matters while the Katiba Institute sought to be enjoined as part of its continued advocacy to support the implementation of the 2010 Kenyan Constitution. The advocates for Uhuru Kenyatta strenuously opposed both applications on the grounds that both LSK and Katiba Institute had demonstrated partiality in their prior conduct, writing and comments as relates to the elections and their client to disqualify them from being objective and hence qualifying as an *amicus*.

59 Raila Odinga and 2 others Versus Independent Electoral and Boundaries Commission and 3 others, Petition Number 5 of 2013 as consolidated with number 4 and 3. (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/87380/\ at 25 September 2015.

60 There were three petitions and numerous interlocutory applications.

The application by the Attorney General for admission was grounded on the role of the Attorney General as being vested with the constitutional authority to protect public interest. The Attorney General also pointed out to the court that the nature of the case, and its importance for Kenya's constitutional democracy, coupled with the fact that the Attorney General as defender of public interest would not be partisan, justified his inclusion in the case. He further relied on the recognition of the Attorney General in Article 156 of the Constitution as the one who promotes, protects and uphold the rule of law and defends public interest. In addition, the Article provides that the Attorney General had authority with leave of the Court to appear as a friend of the Court in any civil proceedings to which the government is not a party.

The Court, in granting the application by the Attorney General, held that doing so would neither prejudice the scope of the Court's authority or the best interests any of parties to the proceedings.[61] The Court held that:

> Firstly, the State Law Office, the chief officer of which is the Attorney-General, is the custodian of the legal instruments of the Executive Branch, and the recognized advisor of the State in matters of public interest. Secondly, and interlinked with the foregoing point, the said office is the main player in the performance of the Executive's role vis-a-vis the operationalization of the Constitution. Thirdly, the Constitution expressly provides that, in certain instances, the Attorney-General may obtain the Court's permission to appear as *amicus*. Fourthly, the Court, which is the custodian of rules of validity, propriety and fair play under the Constitution and the law, remains in charge, in regulating such precise role as the Attorney-General may play if admitted as *amicus curiae*.[62]

The admission of the Attorney General was based on a two-pronged test of whether the inclusion was in the public interest and whether the Attorney General was non-partisan. On both counts, several issues arise as relates to admission of *amicus* that this article will canvass in later sections.

The LSK, on its part, sought to be part of the case based on the argument that this was in pursuit of fulfilling its statutory mandate to assist the government in

61 Raila Odinga and 2 others Versus Independent Electoral and Boundaries Commission and 3 others, Petition Number 5 of 2013 as consolidated with number 4 and 3. (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/87380/\, at 25 September 2015.

62 Raila Odinga and 2 others Versus Independent Electoral and Boundaries Commission and 3 others, Petition Number 5 of 2013 as consolidated with number 4 and 3 (2013). eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/87380/\, at 25 September 2015.

law making matters. However, its application was denied due to its perceived partisanship in the case evidenced by the swearing of an affidavit by the Vice-chairman of the LSK in support of one of the parties to the Raila Odinga case. Partisanship was the same reason for the refusal to allow the Katiba Institute to join the case as an *amicus*, based on an article written by Professor Ghai of the Katiba Institute arguing that due to the cases against Uhuru Kenyatta and William Ruto in The Hague, the two were not qualified to vie as President and Deputy President in the 2013 elections. The Court held that unlike in advisory opinion cases, where admission to *amicus curiae* was much easier in adversarial cases non-partisanship was a key criteria for admission. In the words of the Court:

> ...Where in an adversarial proceedings, parties allege a proposed applicant for *amicus curiae* is biased or hostile to one or more of the parties or where the applicant through previous conduct appears to be partisan on an issue before the court, then (the court) must consider such an objection seriously.[63]

The case marked a departure from the previous open-door approach to the admission of *amicus curiae* in Kenya. In the instance, the court's ruling pointed out to consideration of bias, non-partisanship and public interest as the main considerations in determining whether to admit each of the three applicants. While theoretically these criteria help determine who should or should not be an *amicus*, the critical concerns that the case raised related to the exhaustive nature of the criteria, and the objectivity in their application. While in both the cases of LSK and that of the Katiba Institute, reliance was had on past writings to demonstrate their lack of objectivity and bias against one of the parties, the Court seemed to have taken as a given the admission of the Attorney General as a friend to the court. In the next section, we undertake a critical analysis of the application of these criteria and determine whether they help clarify the nature and role of *amicus curiae* in Kenya's dispute resolution generally and in specific context of election disputers.

## 6.0 Kenyan Supreme Court and *Amicus Curiae* Jurisprudence: Restricting or Clarifying Rules?

From the preceding discussions, it is emerging that there has been an effort to develop jurisprudence on admission and participation of *amicus*. The main point of debate is whether the rules as elaborated in the *Raila Odinga*

63 Raila Odinga and 2 others Versus Independent Electoral and Boundaries Commission and 3 others, Petition Number 5 of 2013 as consolidated with number 4 and 3. (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/87380/\, at 25 September 2015.

*Case* above were clear and objective. Additional debate is whether the rules have served to guide the practice of *amicus curiae* in Kenya. Conversations between the authors, Katiba Institute, and LSK who were both denied *amicus* status by the Supreme Court reveal dissatisfaction with the manner in which their respective applications were dealt with. Katiba Institute, had applied for *amicus* in several cases before the courts and been admitted in others, a fact that even the Supreme Court recognized in the ruling in the Raila Odinga case. However, the Supreme Court sought to distinguish admission in cases of an advisory nature from those that involved litigation of interests between two or more parties, arguing that in the admission in advisory proceedings is more relaxed.[64] This should not be the case. In both instances, the judgment should be on the technical value that an *amicus* would be able to add to the court proceedings and their objectivity.

In determining objectivity and impartiality, the Court relied on public comments by Professor Ghai of Katiba Institute and the affidavit signed by Lilian Renee Omondi the Vice-Chairperson of LSK in favor of one of the petitioners, which demonstrated their partiality hence the refusal to admit them as *amicus*. This raises the question on the test of impartiality. Courts have to balance between avoiding partisan interests being clothed as friends of the court. The rationale behind this is to ensure that a friend of the court is one helping the court to arrive at a just decision and not helping one of the parties to the dispute. However, the contrary argument is whether partisanship on its own would be a bar to an accurate determination of cases before the courts. In any case, even the parties before the court will be canvassing partisan arguments. In the process, though, advocates are under a duty to bring to the attention of the court all relevant matters and case law, both those that are in favor of and those against their case. This is out of the need to ensure that justice is served when courts finally make a determination. Based on this logic, it is essential that the test of partiality be applied within the context of the broad aims it seeks to serve.

The approach that would help the court is one where we use a test which focuses on ensuring *amicus* actually serve the role of providing technical and expert assistance to the court. To do so it would be more desirable to adopt an approach that encourages those with expertise to aid the court in appropriate

64 Raila Odinga and 2 others Versus Independent Electoral and Boundaries Commission and 3 others, Petition Number 5 of 2013 as consolidated with number 4 and 3. (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/87380/, at 25 September 2015.

cases, while ensuring that they focus on technical contributions and not turn themselves into parties to the case, canvassing partisan interests. However, a question may be raised why these should not come in as expert witnesses. The important point to note is that this route, while providing the requisite technical information, would have these organizations appearing only at the instance of the parties either to the suit or at the court's instance. In an adversarial system as Kenya's, a witness must witness for somebody, a fact that would restrict the latitude available to *amicus* to come to court on their own volition. They do not need to wait for a party to seek them out.

To achieve the above aim, the approach that should be adopted is one that looks favorably at most applications for admission as *amicus curiae* but puts conditions on the conduct of those admitted. Some of the conditions are already evident from Rule 54 of the Supreme Court Rules. When a friend knocks at your door, you should be ready to welcome them to the house. In return, the person knocking should be able to be identified as a friend and not an enemy. The friend should know that as a friend, there are things he/she can do and others they cannot do. The balance to be struck is between only allowing friends to get in while blocking enemies. The test of partisanship has been utilized as the basis for determining friendship. The danger is that it ends up locking out even genuine friends. It is imperative that the application of these rules should lean more towards welcoming potential friends. The courts should, however, require those who apply and are admitted, to behave like friends of the court and not friends of the parties. To achieve this requires setting parameters on how friends should act. Rule 54 already suggests this approach. It requires that friends of the court should be those who are technical experts. As opposed to asking, upfront whether one will be partisan or non-partisan, a similar result may be achieved in a more acceptable manner if the court applied the test of assessing the expertise of the applicant, and if admitted restricting their submissions to technical issues in their areas of expertise. The Rule even shows that lawyers can be admitted to help with submissions, should the court require this aid demonstrating the importance of an expertise approach to determination of *amicus*. If we were to take this approach in admission of *amicus*, we may get around the controversies of partisanship. It is important to remember that in the final analysis the court retains the final authority to determine whether to take into account the ideas from the *amicus* or not. At this stage, the court can determine the technical nature and objectivity of the contributions made.

It is also important to adopt this approach to address the second concern around the partisan test as applied by the Supreme Court. Although the Court rejected both the Katiba Institute and LSK on this ground, it admitted the Attorney General without deep reflection on the discussions of partisanship. The only argument the Court made was that since the Attorney General was the custodian of the legal instruments of the executive branch of government and the 2010 Constitution also required that the with leave of Court in appropriate cases he could act as *amicus*, it would proceed to admit him as *amicus curiae*. The Court also used the public interest test, pointing out that as "the recognized advisor of the State in matters of public interest," the Attorney General would be admitted as *amicus*. While the Attorney General is the accepted defender of the public interest, it is important to always keep in mind the context. Historically, there were times when even as the public defender, the Attorney General did not defend public interest. The case of *El-Busaidy v Commissioner of Public Lands and 2 others*[65] illustrates instances when the Attorney General, while expected to act in the public interest failed to do so. The case involved an application seeking to restrain the defendants from alienating a public park in Mombasa and converting it to private ownership. The applicant was a private citizen and resident of Mombasa. The applicant was opposed based on, amongst other objections that the applicant had no locus standi, to institute the suit since it is only the Attorney General who could bring such a suit seeking to protect public interest. This preliminary objection was raised, by amongst others state counsel appearing for the Attorney General. In declining this line of argument, Judge Onyancha stated as follows:

> I find it necessary to point out that this case and this application also raise the issue of whether or not the Attorney General who is the protector of public interest in the now notorious issue of land-grabbing, has played his part in the manner he should, to protect the state and public institutions from losing public land to private individuals. Has the office taken up the position of protecting the public from being deprived of public land the subject matter of this suit?[66]

The essence of the Judge's questions was that while the Attorney General is the defender of public interest, in practice he does not act in such interest all the times. This is the theoretical rationale for allowing other public interest bodies

65 El-Busaidy v Commissioner of Public Lands and 2 others KLR (E&L) 1, 2006 pages 479-502.

66 El-Busaidy v Commissioner of Public Lands and 2 others KLR (E&L) 1, 2006 page 501.

to also speak in the public interest. The issue becomes even more vexing in electoral cases, which by their nature are political-legal. Due to the political nature of electoral disputes and the high stakes involved, partiality becomes a fluid concept whose application may raise more heat than light. Even when it is accepted that the Attorney General is the public defender, there will be debates in electoral matters about whether they are acting in the public interest or if the state is a disinterested and non-partisan actor.

To avoid the above controversy, it is preferable that the test for *amicus* focuses on post-admission limitation. The Court in Raila Odinga case held that admitting the Attorney General as *amicus* would not "present a condition prejudicial to either the scope of the Court's authority, or the best interests of the parties to the several petitions."[67] The Court should in admitting all *amicus* set conditions for ensuring that the participation of the admitted *amicus* does not prejudice either its authority as a dispute resolution body or the interests of the parties. This can be done much better through providing parameters for the *amicus* participation once admitted as opposed to focusing on locking them out from admission. Using the above approach, we would take as granted that the Attorney General as defender of public interest would always speak in the interest of the larger public. This could be further buttressed by restricting the Attorney General to technical expert issues and not factual evidentiary submissions. This way a fair balance will have been struck for all applicants to be friends of the courts, hence avoiding classifying friendships into levels.

The Supreme Court, though, in subsequent cases on *amicus* has restated the approach in the Raila Odinga case. It has since given detailed guidelines on how it views applications on *amicus* and the standards for considering whether or not and in what circumstances to accept request for friendship from applicants. It has done so in the case of *Trusted Society of Human Rights Alliance vs. Mumo Matemu & 6 others.*[68] In the case before the Supreme Court, the Katiba Institute applied to be enjoined as *amicus curiae* in the substantive appeal even though they did not participate in the earlier case. In considering the case, the Court pointed out the rationale for the increase

67 Raila Odinga and 2 others Versus Independent Electoral and Boundaries Commission and 3 others, Petition Number 5 of 2013 as consolidated with number 4 and 3. (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/87380/\, at 25 September 2015.

68 Petition Number 12 of 2013, Supreme Court of Kenya (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/110554/, at 11 October 2015.

in number of applications for *amicus* on the transformative nature of the Kenyan constitution and increased vigilance of citizens. It also praised the roles that such *amicus* play in helping the Court discharge their mandate and develop jurisprudence. The Court however argued that it needed to regulate the admission of *amicus*. It justified this as follows:

> *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 was the risk of the real interest of the *amicus* threatening the position of the original suitors whose rights and obligations stood to be upset by the outcome of the appeal.[69]

In seeking to provide guidelines to achieve this aim, the court resorted to an approach that may end up limiting *amicus* to the Attorney General only, since the bar for other entities is exceedingly high. In the Supreme Court's view, the test to be applied is one that first relates to the traditional role of an *amicus* as one that focuses on points of law. The Court argued "the legitimacy of briefs flows from their engagement with points of law."[70] However, the author is of the opinion that this cannot be the correct position, since the most important consideration is expertise and such expertise cannot be restricted to law only. In appropriate cases, an *amicus* may have technical information that would aid the Court to reach a correct decision and should be admitted even if the technical information does not concern the law.

In the author's view, the Supreme Court was right though in distinguishing *amicus* from interveners or interested parties in the Kenyan context. Balancing the two is a delicate one, with the guide being that interveners will have an interest in the matter, not necessarily have to be technical experts and will have more partisan inclinations. In the words of Justice Odunga in the case of *Judicial Service Commission versus Speaker of the National Assembly and Another.*[71]

> ....(I)t is clear that an interested party as opposed to an *amicus curiae* or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He is a person with an identifiable stake or

69 Petition Number 12 of 2013, Supreme Court of Kenya (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/110554/, at 11 October 2015.

70 Petition Number 12 of 2013, Supreme Court of Kenya (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/110554/, at 11 October 2015.

71 High Court of Kenya at Nairobi, Petition Number 518 of 2013. (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/92015., at 29 September 2015.

> legal interest in the proceedings hence may not be said to be wholly non-partisan as he is likely to urge the Court to make a determination favorable to his stake in the proceedings. *Amicus curiae* on the other hand is defined as a "an expert on an issue which is the subject matter of proceedings but is not party to the case and serves to benefit the court with their expertise." *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.[72]

The Supreme Court developed a catalogue of rules to guide *amicus* applications and admission in Kenya in the following terms:

- An *amicus* brief should be limited to legal arguments.
- 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. When parties to a suit challenge such impartiality, they should get a chance to be heard before the Court makes a decision.
- An *amicus* brief ought to be made timely, and presented within reasonable time.
- An *amicus* brief should address point(s) of law not already addressed by the parties to the suit or by other amici, to introduce only novel aspects of the legal issue in question that aid the development of the law.
- 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.
- 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.
- The Court will regulate the extent of *amicus* participation in proceedings, to forestall the degeneration of *amicus* role to partisan role.
- In appropriate cases and at its discretion, the Court may assign questions for *amicus* research and presentation.

72 High Court of Kenya at Nairobi, Petition Number 518 of 2013. (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/92015., at 29 September 2015.

- An *amicus curiae* shall not participate in interlocutory applications, unless called upon by the Court to address specific issues.
- 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.
- Whereas consent of the parties, to proposed *amicus* role, is a factor to be taken into consideration, it is not the determining factor.
- The Court may exercise its inherent power to call upon a person to appear in any proceedings as *amicus curiae.*
- The Court reserves the right to summarily examine *amicus* motions, accompanied by *amicus* briefs, on paper without any oral hearing.
- The Court may also consider suggestions from parties to any proceedings, to have a particular person, State Organ or Organization admitted in any proceedings as *amicus curiae.*[73]

The principles are detailed and seek to give clarity to *amicus* presentation. They, however, focus too much on control as opposed to regulation. To cure the problem of partisanship, courts should apply the above cited rules developed in this paper. Such an approach seeks to "both welcome and regulate"[74] the participation of *amicus curiae.* Adopting this approach would turn the focus to a friendly approach where applicants will be more easily admitted. However, once admitted they will have less latitude than parties will during cases. As friends, they will be expected to have a restricted audience, to focus their interventions to well-defined parameters and in a manner that is helpful to the court.

## 7.0 Some Comparative Experiences

While the concept of and application of *amicus* originated in either Roman law[75] or common law,[76] it has spread across many jurisdictions and civilizations. Kenyan experience can be compared with, not because they are similar but because they have a fairly well developed experience with

73 Petition Number 12 of 2013, Supreme Court of Kenya (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/110554/, at 11 October 2015.

74 A Loux, "Hearing a Different Voice: Third Party Intervention in Criminal Appeals," (2000) 53(1) Current Legal Problems 449, 460.

75 See SC Mohan, "The *Amicus Curiae:* Friend no More?" (2010) Singapore Journal of Legal Studies 355.

76 See, F. Covey, Jr., "*Amicus Curiae:* Friend of the Court" (1959 - 1960) 9(1) (5) DePaul Law Review. 30, 34-35; A Levy, "The *Amicus Curiae:* An Offer of Assistance to the Court" (1972) Chitty's Law Journal 94.

*amicus* several jurisdictions. As already discussed above, the most extensive experience with use of *amicus* over the past century is in the US. This expansion is captured by an article that surmised that about 85 percent of the cases argued before the US Supreme Court at the end of the 20th century had at least one *amicus* brief filed.[77] Despite this increase, there is divergence of opinion on the importance of *amicus* and the rules of their admission. While judges like Judge Posner already discussed above see *amicus* more as partisan parties disguising themselves as objective experts out to assist the court, others like US Supreme Court justice, Judge O'Connor opined that ""[t]he 'friends' who appear today usually file briefs calling our attention to points of law, policy considerations, or other points of view that the parties themselves have not discussed."[78] In her view, ""[t]hese *amicus* briefs invaluably aid our decision-making process and often influence either the result or the reasoning of our opinions."[79]

What is clear is that the US experience has expanded the notion of *amicus* away from its traditional position as an impartial assistant to the judiciary to an active participant in litigation, including representation of third parties. However, even with the expansion the *amicus* in the US is still not a traditional party, its participation is at the discretion of the court. In addition, he/she will not raise new cause of action of repeat what the parties have already argued. They are still required to assist courts by bringing in fresh perspectives.

The one country that modern judicial decisions have sought to draw parallels and inspiration from is South Africa. This is due to the similarity between Kenya's 2010 Constitution and that of South Africa, a fact based on the fact that Kenya's Constitution borrowed substantively from the South African one. Secondly, as South Africa is an African country, it has more in common with Kenya than Western and other democracies. Since 2010, both the Supreme Court and other Kenyan courts have relied on South African jurisprudence as they determine cases before them. For that reason, the experience of South Africa on *amicus* provides useful comparative information.

77 J Kearney & T Merril "The influence of *Amicus Curiae* Briefs on the Supreme Court" (2000) 148. University of Pennsylvania Law Review 743.

78 Honorable Justice Sandra Day O'Connor in his speech while accepting Henry Clay Medallion from the Henry Clay Memorial Foundation on 4 October 1996, available at, http://henryclay.org/?page_id=372, 31 December 2015.

79 Honorable Justice Sandra Day O'Connor in his speech while accepting Henry Clay Medallion from the Henry Clay Memorial Foundation on 4 October 1996, available at, http://henryclay.org/?page_id=372, 31 December 2015.

Initially *amicus curiae* in South Africa adopted the traditional common law position that saw them as assistants to the Court or helpful bystander. This position had been captured in a 1939 case in *South Africa Connock's (SA) Motor Co. Ltd V Pretorius.*[80] The court held that:

> So far as concerns the position of *amicus curiae*, I have looked into the matter and I find the definition of the term is to be found in several legal dictionaries, such as Sweet and Bouvier and Whorton. They all speak of an *amicus curiae* as a bystander – someone who is present in Court and not concerned with the matter in hand, who may be counsel or may not. He is a person who, if he observes the judge is in doubt about something, or likely to fall into error through failure to recollect a fact of which he ought to take cognizance, such as a legal decision or a statute, asks leave to come to his assistance and to mention it, and thus helps the judge by pointing out what appears to be in danger of being overlooked. But the point is also made that it is not the function of an *amicus curiae* to seek to undertake the management of a cause....I think we should be laying down a dangerous precedent if we were to allow intervention of this kind.[81]

With the adoption of a progressive constitution in 1994, the role of *amicus* expanded significantly in South Africa.[82] The 1994 Constitution expanded standing and voice for marginalized groups and focused on deliberative and participatory democracy. It included the Constitutional Court as an organ for determining matters that dealt with the implementation and protection of the Constitution. Rule 10 of the Constitutional Court adopted in 1995 provided for legislative provisions on *amicus*. Essentially, Rule 10 of the Constitutional Court Rules provides guidelines as to who can act as an *amicus curiae* n a Constitutional Court hearing.[83] According to the rules, admission as *amicus* can be sought either with the consent of the parties or the approval of the Chief Justice. The Constitutional Court has in laid down clear guidance on *amicus* in the South African context stating that admission will be based on discretion of and approval by the court, irrespective of the parties.[84] Further, in exercising its discretion, the court would determine whether the

80 Connock's (SA) Motor Co. Ltd V Pretorius 1939 TPD 355.

81 Connock's (SA) Motor Co. Ltd V Pretorius 1939 TPD 357.

82 C Murray, "Litigating in the Public Interest: Intervention and the *Amicus Curiae*," (1994) 10 South African Journal of Human Rights 240, 250.

83 JC Mubangizi, &C Mbazira, "Constructing The *Amicus Curiae* Procedure in Human Rights Litigation: What Can Uganda Learn From South Africa" (2012) 16 Law, Democracy and Development 199, 203.

84 Institute for Security Studies: In re S v Basson 2006 (6) SA 195 (CC) Para 6.

submissions by the *amicus* were useful to the court and different from those of other parties.[85]

In South Africa, *amicus* have helped expand the jurisprudence from the courts, making South Africa's cases to be cited across the continent. They have also helped the courts in deciding cases in addition to assisting in the implementation of the Constitution. They have provided an avenue for the participation of public interest organizations, especially NGOs, in litigation.[86]

Parallels can be drawn from the experiences of Canada and New Zealand, with their approach to what they call public interest intervention. A public interest intervener is not a full party to the proceeding, having fewer rights and liabilities than a party. Their intervention does not concern itself with the concrete facts of the dispute between the parties, just the legal issues that are of interest to them.[87] This mirrors the role of *amicus curiae* in other jurisdictions. The overriding test to be applied is whether the court can gain assistance from the intervener's submissions that will go beyond the assistance that counsel from the parties can provide. Legitimate interest of the intervener is not an issue for consideration. In New Zealand, "the courts do not see any practical difference between public interest intervention and appearance as *amicus curiae*. Neither form of non-party appearance is seen as more neutral or more partisan than the other."[89]

What the comparative experiences show is the evolution of *amicus* away from the traditional position of friend of the court to a more expansive role that focuses on public interest.

In dealing with rules to govern *amicus* participation, the judicial system has to balance two overriding interests. In the first instance is the right of the parties to litigate their matter unencumbered by non-parties and extraneous matters against the interest of justice and that of the wider public. *Amicus* brief are useful as a litigating strategy for interest groups and as a source of information

85 Ibid, Para 7; See also in Re: Certain *Amicus Curiae* Applications; Minister of Health and Others v Treatment Action Campaign and Others, 2002 (5) SA 713 (CC).

86 JC Mubangizi, &C Mbazira, "Constructing The *Amicus Curiae* Procedure in Human Rights Litigation: What Can Uganda Learn From South Africa" (2012) 16 Law, Democracy and Development 199, 203.

87 E Clark, "The Needs of the Many and the Needs of the Few: A New System for Public Interest Intervention in New Zealand," (2005) 36 Victoria University Wellington Law Review 71, 74.

88 E Clark, "The Needs of the Many and the Needs of the Few: A New System for Public Interest Intervention in New Zealand," (2005) 36 Victoria University Wellington Law Review 71, 74.

89 Connock's (SA) Motor Co. Ltd V Pretorius 1939 TPD 357.

for the court.[90] With the robust constitutional framework that the country now has and the increasing role of the Judiciary in public policy discourse and determinations,[91] the importance of *amicus* is bound to increase.

It is important to bear in mind that "*amicus* filers are not parties and judges have wide discretion to reject *amicus* briefs if they believe that the *amicus* participation does not add anything to the briefs already filed by the parties."[92] The critical question is what *amicus* should be expected to add. Is it only legal issues, as some courts have argued? If adding to legal issues, should the legal issues be novel? On the other hand, should it be adding to matters of both law and fact? This article argues that there has been growth in the application of *amicus* away from the traditional position of a disinterested by-stander. In practice most applicants for *amicus* status have some interest in the outcome of the case. The reasoning by the court in the *Raila Odinga Case* sought to provide contours within which one would be admitted as a friend of the court. It sought to ensure that such a person was a friend of the court and not of the parties. However, in the process it developed rules that have since been expanded by the Supreme Court[93] whose import has been to take back the debate on who a friend of court is to its traditional position.

While it is true that every country has to develop its own jurisprudence based on its legal provisions and social context,[94] the modern day role that entities who are not the traditional disputing parties to the court play in expanding the materials before the court and helping the court to arrive at a just decision is such that a restrictive rule on *amicus* is much more detrimental to the ideals of an open and democratic society that ours is. The main test should be one of public interest and not restriction based on independence/partisanship. A survey of the cases where parties have been admitted as *amicus curiae* in Kenya show that in none of the cases have the parties adhered to the ideal friend that

90 R Bradley, and P Gardner, "Upper dogs and the Use of the *Amicus* Brief: Trends and Explanations" (1985) 10(1) Justice System Journal 78, 79.

91 For a discussion of the Judiciary and its role post-2010 Constitution see generally JB Ojwang, The Ascendant Judiciary in Kenya (2013); JB, Ojwang, The Common Law, Judge's Law: Land and Environment before Kenyan Courts (2014).

92 R Garcia, "A Democratic Theory of *Amicus* Advocacy" (2008) 35Florida State University Law Review 315,315.

93 Petition Number 12 of 2013, Supreme Court of Kenya (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/110554/, at 11 October 2015.

94 For detailed discussions on imperative for an indigenous jurisprudence, See Willy Mutunga, "The 2010 Constitution and its Interpretation: Reflections from the Supreme Court Decisions," Paper Presented at the University of Fort Hare Inaugural Distinguished Lecture Series, October 16, 2014. Available at, https://www.google.com/search?q=Mutunga+Kenyan+Court+and+Indigenous+Jurisprudnece&ie=utf-8&oe=utf-8, at 30 October 2015.

the Supreme Court seems to paint in its judgments on who an *amicus* should be. The reality is that those who seek to join cases have a reason for doing so. They are not your traditional non-interested party. What is important is for the courts to require that the interest they seek to advance is a public and not personal interest. This way the perceptions of bias on the part of the court in its admission of friends of the court will cease to be raised. Secondly, it will enable deepening of Kenyan jurisprudence through allowing public-spirited bodies, including civil society, to contribute to the determination of cases, even if they are not parties.

## 8.0 Conclusion

As we assess the place of *amicus curiae* in Kenya it is important that the courts remember that as a developing country, our interpretation of the rules on admission of *amicus* should be facilitative and not prohibitive. Should courts continue with their current restrictive conditions the result will be a decline or disappearance of the feature of *amicus* from our court processes. If this became the result, Kenyan jurisprudence would be the loser. The rich jurisprudence that has developed in the country following the promulgation of the Constitution, especially in the area of enforcement of fundamental rights and freedoms has been because of work by public interest organizations, with several of them participating in cases more as an *amicus* as opposed to a party or interested party. While rules for admission as necessary to ward off 'busy bodies', they should not end up throwing out the baby with the bathwater. Courts must always remember the dicta by the High Court of Tanzania, which argued as follows:

> The relevance of public litigation in Tanzania cannot be overemphasized. Having regard to our socio-economic conditions, these development promises more hopes to our people than any other strategy currently in place. First, illiteracy is still rampant. Secondly, Tanzanians are massively poor. Our ranking in the World on the basis of per capita income has persistently been the source of embarrassment...
>
> Given all these and other circumstances, if there should spring up a public spirited Individual and seek the Court's intervention against legislation or actions that pervert the constitution, the Court, as a guardian and trustee of the Constitution and what it stands for, is under an obligation to rise-up to the occasion and grant him standing.[95]

95 Christopher Mitikila vs. The Attorney General, Tanzanian High Court Number Civil Suit Number 5 of 1993.

While the above guidance was given in a case relating to public interest litigation, the caution and approach equally should apply to the treatment of *amicus curiae* cases. In dealing with such cases, courts should help friends to remain true to the test of expertise and non-partisanship, by focusing on their engagement in the cases that come before it rather than not locking them out. This approach will still adhere to the requirements in the Constitution, help serve the interest of justice and advance the jurisprudence in the country. Reconsideration of the current approach to *amicus* by the Supreme Court will help to ensure that the court continues to benefit from the input of public-spirited organizations. As Loux has opined, "The experience in Canada has been that specialized human rights, feminist, and other organizations have at their fingertips a wealth of information that for reasons of time ... [or] resources ... are unavailable to the average barrister or advocate."[96] This is not to ignore the potential negative effects that *amicus* has on proceedings, including its effects on the parties and on the court and its time management. It is possible to balance these through strict rules on role of *amicus* once admitted. In any case, benefits of admission of *amicus* usually outweigh the negative implications often cited.[97] It will also be in keeping with both a pluralist and deliberative conception of democracy,[98] options that Kenya has adopted in its new Constitution.

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The jurisprudence in the *Raila Odinga Case* on the question of *amicus* is one that does not help develop the public-spirited nature required to help implement and protect a transformative Constitution, such as that of Kenya. While it recognizes the need to guard against partisanship, a legitimate concern arising from those who seek to be admitted as *amicus*, the manner it goes about solving the problem will not deliver the intended results in the end.

96 A Loux, "Hearing a Different Voice: Third Party Intervention in Criminal Appeals," (2000) 53(1) Current Legal Problems 449, 460.

97 See Generally, O Simmons, "Picking Friends from the Crowd: *Amicus* Participation as Political Symbolism" (2009)42(1) Connecticut Law Review 185; R Garcia, " A Democratic Theory of *Amicus* Advocacy" (2008) 35 Florida State University Law Review 315,319; R.J. "A Democratic Theory of *Amicus* Advocacy,".

98 R Garcia, "A Democratic Theory of *Amicus* Advocacy" (2008) 35 Florida State University Law Review 315,319.