

**THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT
KAMPALA**

5 *[CORAM: KATUREEBE, C.J; TUMWESIGYE; KISAAYE; ARACH-AMOKO,
NSHIMYE, MWANGUSYA, OPIO—AWERI, MWONDHA, TIBATEMWA-
EKIRIKUBINZA, J JSC]*

**CIVIL APPLICATION NO 03 OF 2016
[Arising from Election Petition No. 01 of 2016]**

10 **IN THE MATTER OF AN APPLICATION FOR LEAVE TO
INTERVENE AS AMICUS CURIAE BY THE APPLICANTS
HEREIN ARISING FROM ELECTION PETITION NO. 01 OF
2016.**

15 **BETWEEN**

- 20 1. FOUNDATION FOR HUMAN RIGHTS
INITIATIVE.
2. UGANDA ASSOCIATION OF WOMEN LAWYERS
(FIDA UGANDA)
3. CHAPTER FOUR UGANDA
4. HUMAN RIGHTS NETWORK UGANDA
5. CENTRE FOR CONSTITUTIONAL GOVERNANCE
- 25 6. KITUO CHA KATIBA, EASTERN AFRICAN
CENTRE FOR CONSTITUTIONAL DEVELOPMENT
7. LEGAL AID SERVICE PROVIDERS NETWORK
UGANDA
- 30 8. TRANSPARENCY INTERNATIONAL:..... APPLICANTS

AND

AMAMA MBABAZI :.....] PETITIONER

1. YOWERI KAGUTA MUSEVENI

2. ELECTORAL COMMISSION

3. ATTORNEY GENERAL :::::::::::::::::::::::::::::::] RESPONDENTS

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RULING OF THE COURT

This application was brought by 8 applicants which are Civil Society Organizations. The applicants are non-governmental organizations and Civil Society Organizations. They were accredited by the Electoral Commission as Election Observers. Some of the applicants are members of the Citizen Coalition for Electoral Democracy (CCEDU) and others are members of Citizens Coalition for Election Observers Network (CEON).

The applicants are seeking leave of this Court to be admitted as Amici Curiae in Presidential Election Petition No. 01 of 2016, permission to file amicus curiae brief in the form of written submissions and filing any further materials that the Court may deem fit. The applicants are also seeking such further orders that this Court may deem appropriate.

The Application was brought by Notice of Motion under Articles 1(1), 3(1), 104(3), and 126 (2) of the Constitution, Rule 15 of the Presidential Elections (Election Petitions) Rules, S.I. No. 13 of 2001, Rules 2(2), 42, 43, 47(2) and 51 of the **Judicature (Supreme Court) Rules** S.I. 13-11, , Sections 14, 33 & 39(2) of the Judicature Act and Section 98 of the Civil Procedure Act.

It has the following 9 grounds spelt out in the Notice of Motion.

1. *That the Applicants are non-governmental organizations registered under the laws of the Republic of Uganda; are independent and non-partisan with a strong and genuine commitment to promoting constitutionalism, respect for and observance of human rights and of electoral democracy; and would offer a unique contribution for the resolution of the issues before the Court.*
2. *That the applicants were accredited by the Electoral Commission as observers in the 2016 general election under the framework of Citizens Election Observers Network ("CEON") and Citizens Coalition for Electoral Democracy (CCEDU) and observed the Presidential and Parliamentary elections conducted on February 18, 2016 and later elections.*
3. *That the applicants possess valuable expertise, specific information about the conduct of the 2016 elections that will offer a unique contribution for the resolution of the issues before Court.*
4. *That the applicants have a strong interest in the Petition because it raises important constitutional questions of public interest, in the principles upon which the Presidential Elections Act touching upon the collective exercise of the sovereignty of the citizens of Uganda otherwise not represented in Court. These*

issues are central to the mandate of each of the Applicants.

5 **5. That the applicants' submissions are independent of any of the parties to the Petition; are voluntary, non-partisan manner without prejudice to the parties to Election Petition No. 1 of 2016 and shall be intended for consideration of the Court in its discretion.**

10 **6. The applicants' submissions will not enlarge the matter before the Court beyond what is already canvassed in the Petition and answers thereto.**

15 **7. That the applicants will share their independent findings of fact and law to enrich the Court's consideration of the test of judging a Presidential Election Petition to potentially enhance the Court's assessment of whether the 2016 Presidential Elections were conducted in compliance with the law.**

20 **8. That the application is not time barred and mindful of the timelines in Article 104(3) of the Constitution and does not delay, or prejudice any of the parties to the Petition or the hearing and timely disposal of the Petition; and**

9. That the applicants do not seek costs in the matter.

25 The application is supported by the Affidavit of Mr. Praise Crispy Kaheru, an employee of the 1st applicant and national coordinator of Citizen Coalition for Electoral Democracy (CCEDU).

The applicants were represented by Mr. Karoli Ssemogerere, Mr. Opio Nicholas and Mr. Matovu Winyi.

The respondents were represented by their respective counsel in the main Presidential Election Petition No. 01 of 2016.

5 Parties Submissions

The applicants' case is mainly based on the grounds that, they have valuable expertise on the subject before Court, that they possess specific information regarding the conduct of 2006 elections which will offer a unique contribution to this Court in resolving the matter before it, they have a strong interest in the Petition and raise important questions of public interest, that they are voluntary and non-partisan and without prejudice to the parties in Election Petition No. 01 of 2016, that their submissions will not go beyond the issues before Court, that they intend to share independent findings of fact and law and that they want to enhance this Court's assessment of whether the 2016 Presidential Elections were conducted in compliance with the law.

Counsel for the Petitioner did not object to the applicant's application. However all the three respondents in this application and the main Petition, namely, Yoweri Kaguta Museveni, Electoral Commission and the Attorney General filed affidavits in opposition to the Notice of Motion.

They also submitted orally opposing the application. The 1st respondent opposed the application on grounds that (a) the applicants had no special expertise in law; (b) the applicants are seeking to be allowed to bring in evidence about disputed facts; (c) that they were biased; (d) that there was no need for the applicants to come as amici because they could come as witnesses; (e) that the deponent of the application's affidavit in support was a relative to one of the losing candidates in the 2016 Presidential Election and therefore the likelihood of bias was high.

The 2nd and 3rd respondents associated themselves with the submissions of the 1st respondent but added a few grounds of objection. First, that it was only the 1st applicant who was accredited as an election observer and not all the applicants. Secondly, they submitted that the 1st applicant had published material that was prejudicial to the respondents and that matters which were before Court were not the kind that needed international comparative analysis noting that this was not canvassed by the parties in their pleadings.

The respondents prayed that the application be dismissed with costs.

Consideration of the Application by Court

Black's Law Dictionary 9th Edn at Page 98 defines amicus curiae as follows:

“[Latin “friend of the Court”] A person who is not a party to a law suit 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”

5 We are alive to the fact that there are no specific provisions governing this Court in determining which person or organization qualifies to be amicus curiae in Presidential Election Petitions or in any other proceedings before Court.

We note that prior to this application, there have been a few
10 instances when this Court has been moved by applicants seeking to be amicus curiae. In the case of **Attorney General v. Silver Springs Hotel Ltd & Others, Supreme Court Civil Appeal No. 1 of 1989**, this Court held that an appearance by amicus curiae had to be at the invitation of Court, and not by
15 application of a party seeking that status. The Court also further held that the friend of Court must be a person without interest in the suit. In **Edward Fredrick Sempebwa v. Attorney General, Misc Application No. 90/86**, court rejected
20 an amicus curiae application on ground that the applicant had failed to point out what point of law was overlooked and that the parties were ably represented

We note that this Court’s holding in **Attorney General v. Silver Springs Hotel Ltd & Others, Supreme Court Civil Appeal No. 1 of 1989** is no longer good law in light of the fact that in the
25 case of **NSSF & Another v. ALCON International Ltd, Supreme Court Civil Appeal No. 15 of 2009**, this Court

considered an application for amicus curiae and only rejected it on grounds that the applicant had not shown his expertise in the matter and had not demonstrated that he would be of assistance to the Court in resolving the dispute before it.

5 Furthermore, an application for amicus curiae was made in ***Uganda v. Thomas Kowyelo, Constitutional Appeal No. 01 of 2012*** subsequent to Court's hearing of the appeal. However, Court declined to grant the application on grounds that the hearing had already been closed and Judgment in the appeal
10 reserved.

In line with Article 132(4) of the Constitution which permits this Court to depart from its previous decisions where it deems it right to do so, we find and hold that the decision of ***Attorney General v. Silver Springs Hotel Ltd*** (supra) is no longer good
15 law in stating the law governing for amicus curiae in Uganda.

Further still, we observe that the participation of *amicus curiae* in litigation is a practice which is increasingly being entrenched not only across common law and civil law jurisdictions but also in domestic and international legal tribunals.

20 We must also note that the said practice has found place in the East African Court of Justice, Rules of Procedure which allow participation of amicus curiae in court proceedings. We specifically also note that Kenya provides for amicus procedure in its 2010 Constitution whereas in South Africa, legislative

provision was first made through the Constitutional Court Rules in 1995.

We are also aware that Uganda is a member of the East African Community and that in more recent times, the East African Court of Justice which was established under the East African Community Treaty has rendered several decisions on amicus curiae arising from disputes involving Uganda as a party. These include ***Secretariat of the Joint UNAIDS Programme on HIV/AIDS v. Human Rights Awareness Promotion Forum (HRAPF) & Attorney General of Uganda, Application No. 03 of 2015; Uhai Eashri, Health Development Initiative-Rwanda v. Human Rights Awareness Promotion Forum (HRAPF) & Attorney General of Uganda, Applications No. 20 & 21 of 2015; and Dr. Ally Possi, Centre for Human Rights, University of Pretoria v. Human Rights Awareness Promotion Forum (HRAPF) & Attorney General of Uganda, Application No. 01 of 2015.***

In ***the UNAIDS Application*** (supra), which was cited by counsel for the 3rd respondent, the Court granted the application of the Joint UNAIDS Programme to be joined as amicus curiae. This decision is important and relevant to the present application in two aspects. The first is that Uganda was a party to this dispute. Secondly, UNAIDS was admitted, in spite of objections made by the respondents that they were not impartial due to

prejudicial Statements against some of the respondents that they had issued.

In arriving at this decision, we are also mindful of the fact that under Article 126(1) of the Constitution judicial power is derived from the people and is exercised by the Courts on behalf of the people.

In the absence of legislative provisions on Uganda's statute books, we will be guided by Section 39(2) of the Judicature Act and the principles developed by courts in various jurisdictions in determining the admission of amicus curiae.

The following are some of the accepted principles.

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1. Participation of amici is purely at the discretion of the court.
2. Amicus curiae can be important and relevant in matters where Court is of the opinion that the matter before it requires some kind of expertise which is in the possession of a specific individual
3. The ultimate control over what the amicus can do lies exclusively with the Court.
4. The amicus must be neutral and impartial.

5. The submissions must be intended to give assistance to the court it would not otherwise enjoy.

6. Limited to engagement with matters of the law.

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7. Submissions draw attention to relevant matters of law-useful, focused and principled legal submissions not favouring any of the parties.

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8. The amici must have valuable expertise in the relevant area of law and general expertise in law does not suffice.

9. The points of law to be canvassed should be novel to aid development of jurisprudence

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10. The participation must be in the wider interest of public justice.

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11. The interest of the amicus is its 'fidelity' to the law.

12. An amicus should address court on points of law not raised by the parties but is of concern to the court.

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13. Remind the court of legal matters which have escaped the court that may cause a wrong interpretation of law.

14. An amicus shall not introduce new/ fresh evidence.

5 15. Where in adversarial proceedings, parties allege that a proposed amicus is biased or hostile towards one or more of the parties, or where the applicant through previous conduct, appears to be partisan on an issue before the court the court will consider such an objection by allowing the respective part to be heard on the issue.

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16. The court will regulate the extent of amicus participation in the proceeding to forestall the degeneration of amicus role to partisan role.

15 17. Whereas consent of the parties to the proposed amicus role is a factor to be taken into consideration, it is not the determining factor. Furthermore, objections raised by the parties is a factor to be taken into consideration but is not the determining factor.

20 The single issue for determination is whether the applicants should be admitted to join Election petition No.1 of 2016 as amicus curiae.

25 Having considered the pleadings and submissions of the parties and the law, these are our findings and conclusions:

1. The applicants conceded that the expertise on which they based their application was their having observed the elections. It was on that basis that they had issued their Observer Reports. In our opinion, the expertise of Mr. Crispy Kaheru, even if it were to be accepted by Court, cannot be sufficient to prove the expertise of the applicants which are civil society organizations.

2. Having issued Reports under Citizen Coalition for Electoral Democracy (CCEDU) and Citizens Coalition for Election Observers Network (CEON), they assessed and made findings of fact that are central to the matters in dispute in Presidential Election Petition No.1 of 2016. Therefore, admitting them as friends of Court will be prejudicial to the parties who will not have an opportunity to cross examine the applicants.

3. The Petitioner in his pleadings has alluded to the fact that he intends to rely on among others, Observers' Reports. Since the Petitioner does not object to the application, the petitioner is therefore, in our view, free to rely on the Reports they intend to rely on including the ones issued by the applicants'. This will give the respondents an opportunity to challenge the Reports if they wish to do so, by way of reply or cross examination.

4. Court also takes note of the respondents' objection based on statements made by some of the applicants in the aftermath of the election and declarations of results which are prejudicial to the respondents.

make it be applied by Prof. Oluwole Oyejide & Ors 8/08

5. We note that the applicants neither attached an intended brief nor were they able to show Court the novel points of law they intended to address Court on, so the court is not able to judge the extent of the applicants' intervention as amicus curiae.

5 It is settled that the Court's discretion must be exercised judicially on the basis of material that must be placed before the court by the person requesting the court to exercise its discretion in his or her favour.

We are convinced for all these reasons that the applicants have not met the criteria to be allowed to join the proceedings as amici.

Accordingly, we disallow the application. We make no orders as to costs.

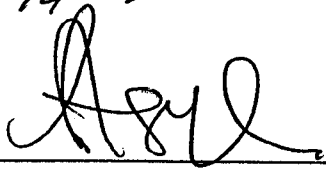
Dated at Kampala this 14th day of March 2016

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B. M. Katureebe.

Chief Justice

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Jotham Tumwesigye
Justice of the Supreme Court

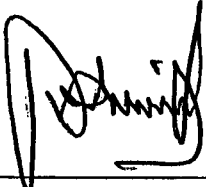
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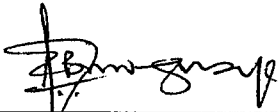
Hon. Justice Arach-Amoko
Justice of the Supreme Court

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Hon. Justice Augustine Nshimye
Justice of the Supreme Court

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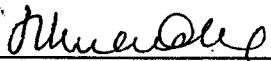
Hon. Justice E. Mwangusya
Justice of the Supreme Court

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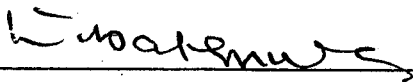
Hon. Justice Opio-Aweri
Justice of the Supreme Court

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Hon. Justice Faith Mwendha
Justice of the Supreme Court

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Tibatemwa

Hon. Justice Prof. Dr. Tibatemwa-Ekirikubinza
Justice of the Supreme Court