

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
[CORAM: KATUREEBE, C.J; TUMWESIGYE; KISAAYE; ARACH-
AMOKO, NSHIMYE, MWANGUSYA, OPIO-AWERI, MWONDHA,
TIBATEMWA-EKIRIKUBINZA, J JSC]

CIVIL APPLICATION NO 02 OF 2016
[Arising from Election Petition No. 01 of 2016]

BETWEEN

- 10 1. **PROF. J. OLOKA-ONYANGO**
2. **PROF. SYLVIA TAMALE**
3. **ASSOC. PROF. CHRISTOPHER MBAZIRA**
4. **DR. RONALD NALUWAIRO**
5. **DR. ROSE NAKAYI**
15 6. **DR. BUSINGYE KABUMBA**
7. **MR. DANIEL RUWHEZA**
8. **DR. KAKUNGULU MAYAMBALA**
9. **MR. DANIEL NGABIRANO**
- :::APPLICANTS

20 **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.

AND

25 **AMAMA MBABAZI :::::::::::::::::::::::::::::::::::::::] PETITIONER**

1. YOWERI KAGUTA MUSEVENI

2. ELECTORAL COMMISSION

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

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RULING OF THE COURT

The above named 9 applicants who are lecturers of law at Makerere University School of Law, jointly applied to this Court seeking leave of this Court to intervene in Election Petition No. 01 of 2016 as
10 Amicus Curiae as well as leave to address the Court by way of oral and written submissions at the hearing of the Petition on a joint Amicus Curiae Brief.

The Application was brought by Notice of Motion under Articles 1, 3(4), 17, 54, 104(5), 126 (1), 127 and 128 (3) of the Constitution,
15 Objective XXIX of the Constitution, Section 59(3) of the Presidential Election Act, Rules 2(2) of the **Judicature (Supreme Court) Rules** S.I. 13-11, Regulation 15 of the Presidential Elections (Election Petitions) Rules, S.I. No. 13 of 2001, Sections 14, 33 & 39(2) of the Judicature Act, Section 98 of the Civil Procedure Act, and Order 52
20 of the Civil Procedure Rules.

It was supported by the following 11 grounds spelt out in the Notice of Motion.

- 1. That the Applicants are Ugandan citizens and all are prominent scholars and distinguished lecturers of Law***

at the Makerere University School of Law, with a keen serving interest in and commitment to promoting respect for and observance of Constitutionalism, the rule of law, democratic governance and the effective regulation and conduct of the electoral process in Uganda.

2. That the applicants have a vested interest and sufficient interest in the determination of the head petition as is set out in the statement of the Amicus curiae's interest in the result of the Petition.

3. That the applicants, who are all independent of the dispute between the Parties in the head Petition, have carefully studied and paid keen interest to all Uganda's elections and are ardent believers in the need for the continuous improvement in the manner of regulation and conduct of the electoral process in Uganda.

4. That the applicants have studied the previous decisions of this Honourable Court in past Presidential Petitions in Uganda of 2001 and 2006, and are intent on making a cogent submission that will not only assist the Court in arriving at a just decision in the present Presidential Petition, but will ultimately constitute an improvement to Constitutionalism, the rule of law, democratic governance and electoral reform in Uganda.

5. That the applicants have perused the Amended Presidential Petition filed by the Petitioner in the head Petition and all the responses thereto, and find that

there are matters that are central to its determination and the general regulation and conduct of the electoral process in Uganda that have not been canvassed by either party, but which are pertinent for the Court's consideration in determining this petition and in helping the process of streamlining the electoral process in Uganda.

6. That the applicants, who are not partisan and do not intend in any way to support either party to the Presidential Petition, or descend into the arena of the dispute between the parties.

7. That the applicants will be able to make a unique and astounding submission/contribution to the Petition without taking away the litigation from the parties to the Petition.

8. That the applicants' brief is intended to be restricted to expression of view that represent the concerns of a wide cross-section of the Ugandan citizenry that have an interest in a harmonious electoral process and a commitment to upholding the Constitution of the Republic of Uganda, the rule of law, democratic governance and electoral reform in this country, which is pertinent in benefitting this honourable Court in performing its Constitutional duty for the benefit of other stakeholders in the electoral process, who are not

party to the head Petition but have a keen interest in its result.

5 **9. That the adequate representation of the citizenry in Uganda, the Civil Society and advocates and proponents of electoral reform and democratic governance will be missing in the petition if the applicants are not granted leave to intervene and make a contribution/submission as Amicus curiae.**

10 **10. That the intervention by the Applicants as Amicus curiae outweighs and potential opposition from the parties to the Petition.**

11. That in the interests of justice and promotion of electoral democracy and reform in Uganda that the Orders sought herein be granted.

15 The application was supported by affidavits sworn by Professor J.Oloka Onyango and Dr. Christopher Mbazira, Associate Professor of Law. The rest of the applicants swore affidavits authorizing Professor Oloka Onyango to depone on their behalf in support of the joint application.

20 **Representation**

At the hearing of the application, the applicants were represented by Mr. Mulema Mukasa, Mr. David Sempala and Mr. Robert Kirunda.

The 1st respondent was represented by Mr. Didas Nkurunziza, Mr. Peter Kabatsi, Mr. Herbert Byenkya and Mr. Bruce Musinguzi.

The 2nd respondent was represented by Mr. Mac Dusman Kabega, Mr. Enos Tumusiime, Mr. Erison Karuhanga and Mr. Oryem
5 Okello.

The 3rd respondent was represented by the Deputy Attorney General- Mr. Mwesigwa Rukutana, Mr. Francis Atoke-Solicitor General and Ms. Patricia Muteesi- Principal State Attorney.

The petitioner was represented by Mr. Mohammed Mbabazi, Mr.
10 Asuman Basalirwa, Mr. Michael Akampurira, Mr. Elvis Twenda and Mr. Twinobusingye Severino.

Submission of Applicants

The grounds justifying the intervention of the applicants as amicus were canvassed in their Notice of Motion, which we have
15 reproduced above, supporting affidavits and oral submissions.

The essence of the application was that the applicants intend to help this court by making cogent submissions which would not only enable the court in arriving at a just decision in the present petition but also improve constitutionalism, the rule of law,
20 democratic governance and electoral democracy in Uganda.

It was the submission of the applicants that they were professional experts in matters of constitutionalism, good governance and

human rights which expertise would benefit the court in reaching a just decision in the Election Petition if admitted as amicus curiae.

Counsel for the petitioner in the main petition raised no objection to the application.

5 In reply to the applicants' Notice of Motion, Justine Kasule Lumumba, Secretary General of the National Resistance Movement (NRM), the party that sponsored the 1st Respondent swore an affidavit in reply opposing the application.

10 Jude Mwassa and Fredrick Ruhindi, the Attorney General, also swore affidavits in reply opposing the application on behalf of the 2nd and 3rd respondents, respectively.

Grounds of Objection

15 (i) That the applicants' brief is broad and general based on precedents of past Presidential Election Petitions and thus nothing novel was being brought to the court.

(ii) That the applicants do not demonstrate special or unique expertise in the areas of Constitutional Law, Human Rights, Democratic Governance and electoral reforms in presidential election disputes.

20 (iii) That the applicants are neither independent of the dispute between the parties nor are they neutral, having solely and or collectively expressed biased statements against the 1st respondent

as evidenced by various articles authored by the 1st, 2nd, 3rd and 6th applicants attached to the affidavits in reply to the motion.

(iv) That the applicants' intention is to expand the scope of the dispute beyond the issues agreed upon by the parties. That this expansion also seeks to import alleged concerns of a wide cross section of the Ugandan citizenry, civil society, and advocates which defeats the status of the applicants as amicus curiae.

(v) That because of the limited time within which to determine the presidential election petition, the admission of the applicants would prejudice the parties.

Submissions in rejoinder

In rejoinder, the applicants' counsel essentially contended that the admission of the applicants as amicus was important for two reasons;

- 15 (i) to determine if the non-action by state agencies on the observations of the court in the last two elections in any way had a bearing on whether or not the Presidential election in dispute was free and fair. And
- 20 (ii) to aid court in making rightful steps and recommendations to avoid the re-occurrence of the same election disputes thereby improving democratic governance and the electoral practices of this beautiful nation.

The applicants further submitted that the above had not been canvassed by the parties in the petition and thus justified their contribution to the proceedings in the court as amicus.

In regard to the objection of the neutrality and bias of the applicants, it was contended that there was no bias whatsoever in the intended amicus brief and that none of the parties in their affidavits in reply to the motion had pointed to bias in the brief. In this regard, Counsel for the applicant submitted that bias must be determined on the basis of the intended submission before the court and not on extraneous facts.

Consideration of the Application

Black's Law Dictionary 9th Edition 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”

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 instances when this Court has been moved by applicants seeking

to be amicus curiae. In **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 application of a party seeking that status. The Court also further held that the friend of Court must
5 be a person without interest in the suit. In **Edward Fredrick Sempebwa v. Attorney General, Misc Application No. 90/86**, court rejected an amicus curiae application on ground that the applicant had failed to point out what point of law was overlooked
10 and that the parties were ably represented

We note that this Court's holding in **Attorney General v. Silver Springs Hotel Ltd & Others, (Supra)** is no longer good law. This is evidenced by the Court's subsequent acceptance of amicus applications brought before it. In **NSSF & Another v. ALCON
15 International Ltd, Supreme Court Civil Appeal No. 15 of 2009**, the 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.

20 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 hear the application on grounds that the hearing had already been closed and Judgment in the appeal 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) on the law governing *amicus curiae* is no longer good law.

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.

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
5 **2015.**

In the **UNAIDS Application** (supra), which was cited by counsel for the 3rd respondent, the East African Court of Justice granted the application of the Joint UNAIDS Programme to be joined as amicus curiae. This decision is important and relevant to the present
10 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 due to prejudicial statements it had issued in its ordinary course of business against some of the respondents, UNAIDS could not be impartial

15 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,
20 we will be guided by Section 39 (2) of the Judicature Act as well as by principles developed by courts in various jurisdictions in determining the admission of amicus curiae.

The following are some of the accepted principles.

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
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3. The ultimate control over what the amicus can do lies exclusively with the Court.
- 10 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.
- 15 6. Limited to engagement with matters of the law.
7. Submissions draw attention to relevant matters of law- useful, focused and principled legal submissions not favouring any of the parties.
- 20 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
25 development of jurisprudence

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

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

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----- address court on points of law not raised by the parties but is of concern to the court.

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

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

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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.

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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.

Issues

5 The issues for determination in this application are:

1. Whether the applicants have expertise in the relevant area of the law
2. Whether the amicus are neutral
3. Whether the intervention would expand issues already agreed
10 upon by the parties
4. Whether the points of law which the applicants intend to canvass are novel and would aid development of jurisprudence.

15 **1. Expertise**

We are satisfied that the applicants have proven record in the area of Human Rights, Constitutionalism and Good Governance. They are highly experienced and widely researched legal scholars in these and related matters as evidenced by the attached curricula
20 vitae.

2. Impartiality and Neutrality.

It is a settled rule of practice of courts in various jurisdictions that for a person to be admitted as amicus, they ought to possess a status of neutrality and impartiality.

Dispute resolution in common law jurisdictions is essentially adversarial in nature and we do not accept the blanket submission of counsel for the applicant that the principle of impartiality and neutrality has long been outdated. In this, we are guided by the principle that justice must not only be done but also seen to be done.

The 1st respondent in refuting the impartiality and neutrality of the applicants referred this Court to written articles by the 1st, 2nd, 3rd and 6th applicants which revealed bias against the 1st respondent.

The respondents submitted that court should not entertain such partisan people to come under the guise of being friends of the court. However, although objections to the admission of an application as amicus curiae are a factor to be taken into consideration, it is not the only determining factor. See ***Secretariat of the Joint UNAIDS Programme on HIV/AIDS v. Human Rights Awareness Promotion Forum (HRAPF) & Attorney General of Uganda, (Supra)***. What Court is called upon to do is balancing the wider interest of justice and the benefit of the participation of the intended amicus to court against the risk of the amicus descending into the litigation between the parties. An amicus is the friend of the court and the court can only take what it considers relevant and non-partisan from the amicus and the ultimate control over what the amicus can do is the court itself.

Aware of the concern of the respondents, Court will be vigilant in ensuring that the applicants will not overstep their amicus brief

and the directives given herein so as not to prejudice any of the parties to the proceedings.

Court will ensure that the intervention will not serve to widen the case between the parties or introduce a new cause of action.

- 5 In arriving at our decision to allow this application, we have also taken into account the role envisaged of this Court under the Constitution, when it is seized with a Petition arising out of a Presidential Election.

10 We have considered two possible approaches the Court can adopt in this matter in the course of its inquiry. The first being to limit our role only to the Petition as presented by the Petitioner as an aggrieved candidate under Article 104(1) of the Constitution and also under Article 104(3) of the Constitution to inquire into the Petition and make our findings.

15 The other approach is to view the Court's role within the wider context of the Orders it is empowered to make under Article 104(1) and Article 104(5) which include

- (a) That a candidate declared by the Electoral Commission elected as President was not validly elected;
- 20 (b) To declare that another candidate was validly elected; and
- (c) To annul the entire Presidential election.

We are aware that by virtue of the powers vested in this Court under **Article 104 (3) and 104 (5)**, our decision in an Election Petition is likely to affect many Ugandans who participated in the election, as well as those who did not participate.

5 It therefore follows, in our view, that the Court should at all times be mindful of its role in this broader context, because it is seized with a matter of great public importance. If Court were to prefer the narrow interpretation, or restrict itself to considering only those Presidential candidates who feel aggrieved, the Court would be
10 excluding or making an interpretation that is inconsistent with the spirit of the Constitution which vested in it wider powers to hear, determine and make pronouncements on Presidential Elections as a whole.

Given this responsibility vested in the Court by the Constitution,
15 the Court has concluded that this great public interest and importance outweighs the concerns or objections raised by the respondents to the applicants as amici curiae in the Presidential Election Petition No. 1 of 2016.

We are further convinced that the potential prejudice to the
20 respondents (if any) will be curtailed by the principle of regulation of the extent of amicus participation in the proceeding to forestall the degeneration of amicus role into partisan role.

The Court retains the power to determine what use it will make of the brief (if any).

Novelty

We have examined the intended brief of the applicants and also examined the scope of the assistance the amicus intends to give court.

- 5 (i) To appraise the persistent flaws with the electoral process in Uganda and offer practical/effective recommendations in electoral law reforms which will go great lengths in determining the electoral disputes before the court .
- (ii) Aiding court to exercise its residual power in emphasizing
10 structural interdicts.

We do accept the submissions of the applicant that structural interdicts/ supervisory injunctions is a remedy which is yet to take root in our jurisdiction and more specifically in electoral disputes. The matter has not been canvassed by any of the parties in the
15 petition.

The other point on which the applicants seek to address the Court rotates around the legal implications of non-action by state actors in regard to recommendations made by this Court in previous electoral disputes. The recommendations intend to improve
20 electoral democracy.

We find that a submission on the crafting of effective remedies and recommendations is a novel point that would essentially benefit the Court.

We are thus satisfied that the applicants' brief in essence raises

ORDER

5 Having considered the pleadings and submissions of the parties,
and carefully analyzed the law, Court finds that the applicants
satisfy the criteria for admission as amicus curiae.

We therefore order as follows:

- 10 1. The applicants be allowed to file a written brief to the court as
amicus.
2. The brief shall be strictly limited to points of law and specifically:
 - (i) Proposing reforms relating to Presidential Elections.
 - (ii) Proposing judicial remedies related thereto.
- 15 3. The brief shall not go into matters of evidence or raise new
issues not before the Court.

In exercising our discretion to allow the application, we charge the
amicus to abide by its limited role described herein.

The brief shall be filed in this Court and served on the other parties
by the 17th of March 2016.

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We so order.

Dated, delivered and Signed at Kampala this ^{14th}..... day of
..March..... , 2016.

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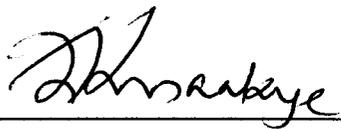
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Chief Justice

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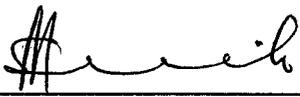
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Justice of the Supreme Court

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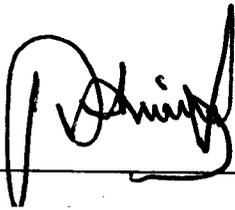


Hon. Dr. Esther. Kisaakye
Justice of the supreme Court

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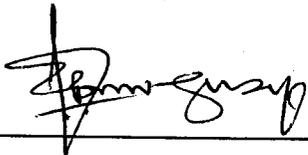


Hon. Justice Arach-Amoko
Justice of the Supreme Court



Justice of the Supreme Court

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Hon. Justice Eldad Mwangusya
Justice of the Supreme Court

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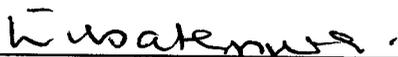


Hon. Justice Opio-Aweri
Justice of the Supreme Court

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Hon. Justice Faith Mwondha
Justice of the Supreme Court



20 **Hon. Justice Prof. Lillian Tibatemwa-Ekirikubinza**
Justice of the Supreme Court