

THE REPUBLIC OF UGANDA

THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA

(Coram: Buteera, DCJ; & Kiryabwire, Kibeedi, Mugenyi & Gashirabake, JJCC)

CONSOLIDATED CONSTITUTIONAL APPLICATIONS NO. 46, 47, 48 & 53 OF 2023

(ARISING FROM CONSTITUTIONAL PETITIONS NO. 14, 15 & 16 OF 2023)

1. SOUTHERN AFRICAN LITIGATION CENTRE (SALC)
2. CENTRE FOR APPLIED LEGAL STUDIES (CALS)

APPLICANTS

VERSUS

1. HON. FOX ODOI-OYWELOWO
2. FRANK MUGISHA
3. PEPE ONZIEMA
4. JACKLINE KEMIGISA
5. ANDREW MWENDA
6. LINDA MUTESI
7. KINTU NYAGO
8. JANE NASIIMBWA
9. RUTALO ROBERT
10. MUSIIME ALEX MARTIN
11. MUTEBI EWARD
12. NABUYANDA JOHN SOLOMON
13. LETS WALK UGANDA LTD
14. PROF SYLVIA TAMALE
15. DR. BUSINGYE KABUMBA
16. SOLOME NAKAWEESI KIMBUGWE
17. KASHA JACQUELINE NABAGESERA
18. RICHARD SMITH LUSIMBO
19. ERIC NDAULA
20. WILLIAMS APAKO
21. HUMAN RIGHTS AWARENESS
& PROMOTION FORUM (HRAP)
22. ATTORNEY GENERAL

RESPONDENTS

BR
13/12
1/10/23
M.H.

RULING OF THE COURT

A. Introduction

1. Following the promulgation of the Anti-Homosexuality Act, 2023, Constitutional Petitions No. 14, 15, 16 and 85 of 2023 were lodged in this Court challenging the constitutionality of that statute. Those constitutional petitions have since been consolidated. Southern African Litigation Centre ('the First Applicant') subsequently filed Constitutional Applications No. 46, 47 and 48 of 2023 seeking admission as amicus curiae in Constitutional Petitions No. 14, 15 and 16 of 2023 respectively. Following the consolidation of the parent petitions, the parties to those applications mutually agreed to their consolidation.
2. Constitutional Applications No. 46, 47 and 48 of 2023 are each supported by the affidavit of Ms. Anneke Meerkotter of M/S Women's Probono Initiative that attests to the First Applicant's research in the area of human rights (including analysis on proposed legislation), as well as strategic litigation. Though conceded by the First – Twenty First Respondents, who are the petitioners in Constitutional Petitions No. 14, 15 and 16 of 2023 in respect of which the First Applicant seeks admission as amicus curiae; they are opposed by the office of the Attorney General ('the Twenty Second Respondent'). In an affidavit in reply deposed on that party's behalf by Mr. Mark Muwonge, it is proposed that the First Applicant is not a proper entity for admission as amicus curiae given its partiality to the rights of LGBTIQ+ persons, as well as its limited expertise with Ugandan constitutional and legal issues.
3. Meanwhile, Centre for Applied Legal Studies ('the Second Applicant') did also file Constitutional Application No. 53 of 2023 seeking admission as amicus curiae in Constitutional Petition No. 15 of 2023. That application is supported by the affidavit of Dr. Sheena Justine Swemmer, the Head of the Gender Justice Programme at the Applicant Organisation. She attests to the Second Applicant's work in upholding gender rights through the domestic implementation of international human rights law, highlighting civil and political rights as its focal areas. The application is conceded by the Fifth and Fourteenth – Twenty First Respondents, who are the petitioners in Constitutional Petition No. 15 of 2023 in respect of which the Applicant seeks to be admitted as amicus curiae.

BR
H.C.
2
C.M.
M.M.

W.C. 2023
13/12

4. Constitutional Application No. 53 of 2023 is however opposed by the Twenty Second Respondent which, in an affidavit in reply deposed on its behalf by Mr. Mark Muwonge, avers that the Second Applicant is not a proper entity for admission as amicus curiae given its documented antipathy to the impugned statute, as well as its proposed intervention in the area of public participation, an issue that has been pleaded in the constitutional petition in respect of which the application arises.
5. At the hearing of Constitutional Applications No. 46, 47 and 48 of 2023, Ms. Prima Kwagala represented the Applicant; Ms. Freda Mutesi and Messrs. Nicholas Opiyo, Henry Byansi and Derrick Tukwasibwe represented the First – Eighth Respondents, while the Twenty Second Respondent was represented by Mr. Martin Mwanbusya, Ms. Elizabeth Namakula, Mr. Azak Tibakuno, Mr. Samuel Kanana and Ms. Jacqueline Amsugut. On the other hand, the representations in respect of Constitutional Application No. 53 of 2023 were as follows. Ms. Rose Wakikona represented the Applicant; Mr. Onyango Owor and Ms. Susan Baluka represented the Fifth and Fourteenth – Twenty First Respondents, while the representation of the Twenty Second Respondent remained the same.
6. We propose to consider Constitutional Applications No. 46, 47 and 48 of 2023 and Constitutional Application No. 53 of 2023 together as the Consolidated Application.

B. Determination

7. Applications for leave to appear as *amicus curiae* are governed by the Judicature (Amicus Curiae) Rules, 2022 ('the Amicus Curiae Rules'). Rule 5 of those Rules highlights the requirements for the admission of a person as amicus curiae, sub-rule (a) of those Rules explicitly underscoring the qualities of neutrality and impartiality. Meanwhile, Rule 6(2) of the Rules requires that an application for admission as amicus curiae is supported by a formal brief indicating the applicant's '**expertise or justification for consideration**', which brief should in accordance with Rule 6(3) address the court on '**points of law not raised by the parties**' but which are of concern to the court and, if left unaddressed, could lead to a misinterpretation of the law.

BR
↓
3
CWA
muy.

8. For ease of reference, Rules 5 and 6(3) of the Amicus Curiae Rules are reproduced below:

Rule 5 – Requirements for admission

The court may admit a person or organisation as amicus curiae who meets the following requirements—

- (a) the person or organisation is neutral and impartial;
- (b) the court is satisfied that the submission of the person or organisation will give assistance to the court that it would not otherwise have;
- (c) the points of law or facts submitted by the person or organisation are novel and will aid the development of jurisprudence;
- (d) the interest of the person or organisation constitutes fidelity to the law;
- (e) the submissions of the person or organisation draw attention to relevant matters of law that are useful, focused and principled;
- (f) the participation of the person or organisation is in the public interest; and
- (g) the person or organisation has demonstrable expertise or knowledge in the area under dispute. *(our emphasis)*

Rule 6(2) & (3)

- (1)
- (2) An application under subrule (1)(a) shall be supported with a formal brief indicating the expertise or justification for consideration of the person or organisation to be admitted as amicus curiae.
- (3) The brief under subrule (2) shall address the court on points of law not raised by the parties but which are of concern to the court and which may cause a wrong interpretation of the law to be made by the court. *(our emphasis)*

9. Indeed, Rule 8(1) of the same Rules entitles a party to object to the admission of an applicant as amicus curiae where either his/ her application depicts partiality, bias or hostility to the opposing party, or there is otherwise demonstration of such applicant being partisan through past conduct. Rule 8(1) reads as follows:

Handwritten notes and signatures in blue ink at the bottom right of the page, including the date "13/12" and the number "4".

(1) A party to a suit may object to the admission of a person or organisation as *amicus curiae* where the party considers that—

(a) the applicant does not have sufficient expertise;

(b) the applicant is introducing new evidence;

(c) the applicant is not impartial or is biased or hostile towards one or more of the parties; or

(d) the applicant, through previous conduct, appears to be partisan on the issue before court. (*our emphasis*)

10. On the question of neutrality in this case, in paragraphs 6 and 9 of the affidavit in reply to Constitutional Applications No. 46, 47 & 48 of 2023, it is averred on behalf of the Twenty Second Respondent that the First Applicant's website at <https://www.southernafricalitigationcentre.org/our-programmes/sogie-rights> and social media (facebook) page demonstrate its partiality to the rights of LGBTIQ+ persons insofar as it actively supports the LGBTIQ+ community and advocates for the decriminalization of its sexual orientation. In the same vein, paragraphs 7, 8 and 9 of the affidavit in reply to Constitutional Application No. 53 of 2023 state that the Second Applicant's website at <https://www.wits.ac.za/news/sources/cals-news/2023/cals-condemns-ugandas-anti-homosexuality-legislation.html> demonstrates its partiality in this matter by its condemnation of the statute that is in issue presently.

11. Conversely, without quite denying its partiality towards LGBTIQ+ interests, the First Applicant does in paragraph 5.1 of its affidavit in rejoinder contend that '*bias in amicus applications is determined on the basis of the intended submissions and not on extraneous facts,*' arguing that there is nothing amiss with an *amicus curiae* reiterating a party's submissions. On its part, in paragraph 6 of the affidavit in rejoinder, the Second Applicant simply denies the insinuation that it lacks neutrality.

12. The notion of *amicus curiae* evolved to address third party interests in an adversarial court system such as obtains under the Common Law. The limitations of that system were espoused in Mohan, S. Chandra, 'The Amicus Curiae: Friends No More?', 2010, Singapore Journal of Legal Studies, 352 – 371, p.9 as follows:

WCL 2023
13/12

BR
5
Craw
muy.

The essence of the quest for justice in an adversarial system is that it is restricted to the resolution of the dispute between the parties to the dispute and confined to the issues that have been raised in the course of this dispute. There is no wider third party or public interest involvement beyond the outcome. The interests of parties not "formally represented" are generally irrelevant in a traditional judicial setting. The very nature of legal proceedings in a common law adversarial system, the argument goes, compelled the accommodation of an independent adviser who could give the court assistance on behalf of a third party.

13. In **UHAI EASHRI & Another v Human Rights Awareness & Promotion Forum (HRAPF) & Another, Consolidated Applications No. 20 & 21 of 2014**, the East African Court of Justice (EACJ) was alive to the broad categories of non-party intervention, specifically distinguishing the role of an *amicus curiae* vis-à-vis that of an intervener in the following terms:

In the EAC jurisdiction, distinction has been drawn between an *amicus curiae* and an intervener: the latter may advocate a point of view in support of one party over another, whereas the former may not. See **Trusted Society of Human Rights Alliance v Mumo Matemo & Others, Petition No 12 of 2013** (Supreme Court, Kenya). We think that is a useful distinction to distinguish between a party to a suit that has locus standi in a matter; an intervener that, while not having locus standi in a matter, does have a partisan interest therein, and an *amicus curiae* that has an interest in providing objective, cogent assistance to the courts to engender the advancement of jurisprudence on a given subject.

14. Thus in the Australian case of **United States Tobacco Co. v Minister for Consumer Affairs [1988] 83 A.L.R. 79 (F.C.A.)**, underscoring the importance of neutrality to an *amicus curiae*'s function, it was observed that 'an *amicus curiae* (as opposed to an intervenor) has no personal interest in the case as a party and does not advocate a point of view in support of one party or another.' In the same vein, in **Kenya Human Rights Commission & Others v Forum Pour le Renforcement de la Societe Civile (FORSC) & Others, EACJ Application No. 21 of 2017**, the EACJ reiterated the vitality of demonstrable impartiality to an application of this nature in the following terms:

The benefits of the concept of *amicus curiae* hinge significantly on the neutrality, impartiality and independence of a prospective *amicus curiae*, as well as the expertise it avails to a court, underscored by its demonstrable fidelity to the law. If sufficiently established by an applicant, these parameters would significantly obviate or mitigate

6
Crown
muk
13/12

the incidence of subjectivity or mal-advice in a successful applicant's *amicus* brief. They would be, to that extent, fundamental determining factors in an application for leave to appear as *amicus curiae*. Consequently, an application that does not reasonably demonstrate proof of the foregoing factors would not justify an applicant's admission as *amicus curiae*.

15. The foregoing jurisprudence clearly posits that the relevance of an *amicus* brief hinges as much on the neutrality and impartiality of its author as on the expertise s/ he seeks to bring to the court. Advice from a *friend of court* can only be as good as the credibility of that friend. On that premise, we respectfully take a contrary view to the First Applicant's stance on the implications of views publicly expressed by a prospective *amicus curiae*. It seems to us that a website that explicitly pronounces an applicant's support for an issue in contention before the court cannot be ignored in determining its neutrality for purposes of admission as an *amicus curiae*. Such an applicant would run afoul of Rule 8(1)(c) and (d) of the Amicus Curiae Rules to the extent that its support for a position adopted by one of the parties renders it hostile to the opposite party and indeed partisan on the issues before the court.

16. In our considered view, an *amicus curiae* may submit its expert opinion on issues under consideration before a court without expressing deference to any of the adversarial parties' legal positions or arguments. In that way, even if it arrived at the same conclusions as one of the parties it would be perceived as a neutral and impartial expert. However, where (as in this case) an applicant for admission as *amicus curiae* is demonstrably pre-inclined towards one of the conflicting positions before the court, such applicant would not meet the test of neutrality expected of '*friends of court*.' Accordingly, we find that the Second Applicant's outright condemnation of the legislation that is in issue before the Court and its support for the challenge to the impugned law, as documented on its website and reproduced in Mr. Muwonge's affidavit, do similarly raise connotations of partiality in the matters for consideration under the petition.

17. Perhaps more importantly, we do not consider the applications before us to identify a novel area of law that the applicants seek to address that has been overlooked by the parties to Constitutional Petitions No. 14, 15 and 16 of 2023, in respect of

BB
K
7
CRAW
muy

W. O. O. 23
13/12

which admission as *amicus curiae* is sought. This alludes to the intrinsic function of *amici curiae*.

18. We find broad consensus on this in *Osborne, PG, A Concise Law Dictionary* (London: Sweet & Maxwell, 1927) where the term *amicus curiae* or friend of court is defined as '**a person who calls the attention of the court to some point of law or fact which would appear to have been overlooked.**' In the Ugandan context, however, Rule 6(3) of the Amicus Curiae Rules restricts the intervention of an *amicus curiae* to '**points of law not raised by the parties but which are of concern to the court and which may cause a wrong interpretation of the law.**' It thus negates the canvassing of questions of fact by *amici curiae*. Indeed, Rule 7(a) of the same Rules unequivocally disqualifies from admission as *amicus curiae* an applicant the application of which '**does not state what point of law is overlooked.**' This would suggest that Rules 6(3) and 7(a) of the Amicus Curiae Rules restrict admission as *amicus curiae* to such applicants as seek to address points of law that are not raised by the parties or otherwise overlooked by them. Such points of law would be limited to the confines of the petition.

19. In the applications before us, the applicants describe themselves as non-governmental organisations (NGOs), the First Applicant *inter alia* providing support to lawyers and judges on constitutionalism and human rights, while the Second Applicant focuses on upholding gender rights through the domestication of international human rights law.

20. With tremendous respect, we do not consider the Second Applicant's expertise in gender issues to be very relevant to the broad constitutional questions that are before the Court in the petitions. Even if perchance it was to be considered a pertinent area, the Fourteenth Respondent is described in *Constitutional Petition No. 15 of 2023* as a scholar with commensurate expertise, having conducted extensive research and widely published in the area of human rights, gender and sexuality. On the other hand, whereas the First Applicant possesses expertise in the relevant fields of constitutionalism and human rights, the Fifteenth Respondent demonstrates related expertise as a scholar of constitutional law, human rights and international law.

RD
K
8
Cowan
my

C. Conclusion

24. With the greatest respect, therefore, we find that both applicants' partiality to the interests of LGBTIQ+ persons does not meet the test of neutrality expected of *amici curiae*. Their quest to address questions that have been canvassed by the parties in their pleadings, moreover with some of the parties to the petitions being adorned with commensurate expertise to adequately address the said questions, would further render their admission as *amici curiae* superfluous.

25. Be that as it may, considering that the matters raised in the consolidated parent petitions are undoubtedly of immense public interest, we would depart from the general rule that costs should follow the event.

26. Consequently, Constitutional Applications No. 46, 47, 48 and 53 of 2023 are hereby disallowed with no order as to costs.

It is so ordered.

15/12/23
10
Crown
nuty.

Dated and delivered at Kampala this 13th day of December, 2023.




Richard Buteera

Deputy Chief Justice



Geoffrey Kiryabwire

Justice of the Constitutional Court



Muzamiru M. Kibeedi

Justice of the Constitutional Court



Monica K. Mugenyi

Justice of the Constitutional Court



Christopher Gashirabake

Justice of the Constitutional Court