

**THE REPUBLIC OF UGANDA**

**THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA**

**CONSOLIDATED CIVIL APPLICATIONS NOs. 055 and 60 OF 2023**

**[ARISING FROM CONSOLIDATED CONSTITUTIONAL PETITIONS 14, 15, 16  
AND 85 OF 2023]**

*(Coram: Richard Buteera, DCJ; Geoffrey Kiryabwire, Muzamiru M. Kibeedi, Monica K.  
Mugenyi & Christopher Gashirabake, JJCC)*

**IN THE MATTERS OF APPLICATIONS FOR LEAVE TO BE ADMITTED AS  
AMICUS CURIAE**

**BY**

**THE SECRETARIAT OF THE JOINT UNITED NATIONS**

**PROGRAMME ON HIV/AIDS [UNAIDS] .....APPLICANT**

**AND**

**In the Constitutional Petition No.14 of 2023 between**

- 1. FOX ODOI-OYWELOWO**
- 2. FRANK MUGISHA**
- 3. PEPE ONZIEMA**
- 4. JACKLINE KEMIGISHA**
- 5. ANDREW MWENDA**
- 6. LIND AMUTESI**
- 7. KINTU NYAGO**
- 8. JANE NASIIMBWA**

**.....PETITIONERS**

**AND**

**THE ATTORNEY GENERAL OF UGANDA ..... RESPONDENT**

**AND**

**In the matter of an Application for leave to be admitted as Amicus Curiae  
of**

**THE SECRETARIAT OF THE JOINT UNITED NATIONS**

**PROGRAMME ON HIV/AIDS[UNAIDS] ..... APPLICANT**

**In the Constitutional Petition No. 15 of 2023 between**

- 1. PROF. SYLVIA TAMALE**
- 2. DR. BUSINGYE KABUMBA**
- 3. ANDREW M. MWENDA**
- 4. SOLOME NAKAWEESI KIMBUGWE**
- 5. KASHA JACQUELINE NABASEGERA**
- 6. RICHARD SMITH LUSIMBO ERIC NDAWULA**
- 7. WILLIAMS APAKO**
- 8. HUMAN RIGHTS AWARENESS  
AND PROMOTION FORUM [HRAFH]**

**.....PETITIONERS**

**AND**

**THE ATTORNEY GENERAL ..... RESPONDENT**

**AND**

**In the matter of an Application for leave to intervene and/or to be  
admitted as Amicus Curiae of**

**THE SECRETARIAT OF THE JOINT UNITED NATIONS  
PROGRAMME ON HIV/AIDS[UNAIDS] ..... APPLICANT**

**In the Constitutional Petition No.16 of 2023 between**

- 1. ADV. RUTARO ROBERT**
- 2. MUSIIME ALEX MARTIN**
- 3. MUTEBI EDWARD**
- 4. NABUYANDA JOHN SOLOMON**
- 5. LET'S WALK UGANDA LTD ..... PETITIONERS**

**AND**

**THE ATTORNEY GENERAL OF UGANDA ..... RESPONDENT**

**AND**

**In the matter of an Application for leave to intervene and/or to be  
admitted as Amicus Curiae**

**In the Constitutional Petition No.15 of 2023 between**

- 1. VIIV HEALTHCARE UK LIMITED ..... 1<sup>ST</sup> APPLICANT**
- 2. GLAXOSMITHKLINE SERVICES UNLIMITED ..... 2<sup>ND</sup> APPLICANT**
- 3. MSD LIMITED ..... 3<sup>RD</sup> APPLICANT**
- 4. GILEAD SCIENCES INC..... 4<sup>TH</sup> APPLICANT**

**VERSUS**

- 1. PROF. SYLVIA TAMALE..... 1<sup>ST</sup> RESPONDENT**
- 2. DR. BUSINGYE KABUMBA..... 2<sup>ND</sup> RESPONDENT**
- 3. MUTEBI EDWARD ..... 3<sup>RD</sup> RESPONDENT**
- 4. SOLOME NAKAWEESI KIMBUGWE..... 4<sup>TH</sup> RESPONDENT**
- 5. KASHA JACQUELINE NABASEGERA ..... 5<sup>TH</sup> RESPONDENT**
- 6. RICHARD SMITH LUSIMBO..... 6<sup>TH</sup> RESPONDENT**
- 7. ERIC NDAWULA..... 7<sup>TH</sup> RESPONDENT**
- 8. WILLIAM APAKO..... 8<sup>TH</sup> RESPONDENT**
- 9. HUMAN RIGHTS AWARENESS AND  
PROMOTION FORUM (HARPF) ..... 9<sup>TH</sup> RESPONDENT**

**AND**

- 10. ATTORNEY GENERAL ..... 10<sup>TH</sup> RESPONDENT**

## **DETAILED RULING OF THE COURT**

### **A. Introduction**

[1] The Applicants filed Applications numbers 055 of 2023 and 060 of 2023 (hereinafter referred to as “the Applications”) to be joined as Amicus Curiae in the head Consolidated Constitutional Petitions 14, 15, 16 and 85 of 2023.

[2] The main Decisions in these Applications were rendered *extempore* on the 13<sup>th</sup> December, 2023 and the detailed reasons of Rulings of the Court were reserved to be rendered on the 18<sup>th</sup> December, 2023. The Court in the interests of judicial economy has decided to consolidated the said Rulings into this Ruling of the Court as the subject matter in all these Applications is similar.

[3] In Application No 055 of 2023, the Applicant The Secretariat of the Joint United Nation as Programme on HIV/AIDS (UNAIDS) (hereinafter referred to as “UNIDS”) applied for Orders that: -

1. This Honourable Court be pleased to grant leave to the Applicant to intervene in Constitutional Petition No.014 of 2023 pending before this Honourable Court as Amicus Curiae.
2. This Honourable Court be pleased to grant the Applicant leave to file an amicus brief in the matter and further address the Court by way of oral or written submissions at the hearing of the Petition on an Amicus Curiae Brief;
3. An order of the costs of and incidental to this Application abide by the result of the head Petition.

[4] The Application by UNAIDS is supported by the Affidavit of Jacqueline Makokha, who deponed that she is the UNAIDS Country Director for Uganda.

[5] In Application No 060 of 2023, there are four Applicants which are all private pharmaceutical companies namely M/s VIIIV HealthCare UK Limited; M/s GlaxoSmithKline Services Unlimited; M/s MSD Limited and M/s Gilead Sciences, Inc. (hereinafter collectively referred to as “the pharmaceutical companies”).

[6] The pharmaceutical companies applied for Orders that: -

- a) The Applicants be admitted as *Amicus Curiae* in Constitutional Petition No.15 of 2023.
- b) The Applicants be granted leave to present their *Amicus* Brief at the hearing of Constitutional Petition No.15 of 2023.
- c) No order be made as to costs.

[7] The Application by the pharmaceutical companies is supported by the Affidavits of Antonio Suarez-Martinez, Alison Newstead and Joel Silver being officers of the first, second and third Applicants respectively.

[8] In all the Applications, Counsels for the Applicants filed written submissions which with the leave of Court the Counsels adopted as their oral arguments. The Court has considered these arguments in rendering this Ruling.

#### **B. Brief Statement of Arguments.**

[9] It is inter alia the case for UNAIDS that: -

1. The Applicant unites the effort of eleven UN organisations – UNHCR, UNICEF, WFP, UNDP, UNFPA, UNODC, UN Women, ILO, UNESCO, WHO and the World Health Bank – and works closely with Global and National partners towards ending HIV and AIDS as a public health threat by 2030, as part of the Sustainable Development Goals.

2. The Applicant, in exercise of its mandate, severally files Amicus Curiae applications to courts around the world wherein it provides expert assistance to the courts in respect to matters relating to HIV/AIDS with the view of ensuring that judicial bodies render decisions that positively impact the fight against HIV/AIDS.
3. The Applicants, who are not partisan and do not intend in any way to support either party to the Petition, or descend into the arena of the dispute between the Parties, 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.
4. The Applicant's intended participation is to give this Honourable Court guidance on the impact of the Anti-Homosexuality Act, 2023, on efforts to end and/or curtail the prevalence of HIV/AIDS which has not been traversed by any of the parties in their pleadings before this court and which assistance this Honourable Court would not, without the admission of the applicant, have.
5. The points of law and/or fact that the Applicant intends to submit to this Honourable Court are novel and will aid the development of jurisprudence, especially in respect of the right to health, and specifically, the right to access medical services.
6. The interest of the Applicant as stated above constitutes fidelity to law, including to both municipal and international law in Uganda
7. The intended submission of the Applicant draws attention to matters of law that are focused on the right to health, and the Applicant's intended submissions are principled and focused.

[10] It is inter alia the case for the pharmaceutical companies that: -

1. That the Applicants are all pharmaceutical companies with a global footprint that are focused on combating, preventing and treatment of various diseases in humans including HIV and AIDS through research and

delivering innovative medicines for the treatment and care of persons living with HIV/AIDS.

2. That the Applicants have over the years researched, developed and manufacture medicines which will help offer a greater range of health technologies to accelerate progress to achieve the global and Uganda's HIV prevention targets by 2030 notably the long-acting injectable HIV prevention option Cabotegravir LA (CAB LA) for pre-exposure prophylaxis (PrEP).
3. That the Applicants, as key players in HIV/AIDS medicine, treatment, care and research, see to intervene as *amici curiae* to make a presentation on the perspectives of the healthcare services sector drawing on their unrivalled global expertise in the pharmaceutical sector.
4. That the Applicants are independent, neutral and impartial experts, capable and interested in offering their expertise in ensuring that this Honourable Court addresses matters including those under their expertise as the Court addresses the matters raised by the Petition.
5. That the Applicants intend to assist this Honourable Court in addressing the impact of the relevant provisions of the Anti-Homosexuality Act, 2023 on Uganda's obligations and commitment to promote access to health services for all including men who have sex with men ("MSM"), and transgender persons affected by the Anti Homosexuality Act, 2023.

[11] The pharmaceutical companies argued that if admitted as Amici Curiae, they intend to address the following issues: -

- i. Uganda's commitment to promote access to health services by all including men who have sex with men and transgender persons affected by the Anti Homosexuality Act, 2023;
- ii. The challenge posed by criminalization of same sex relations among adults in private on access to health services and the fight to end HIV transmissions and HIV/AIDS related deaths and its impact to society.



[12] Both Applications is opposed by the Attorney General of Uganda, who filed an Affidavits in Reply to the Applications, the details of which we shall illuminate later in this Ruling.

### **Determination.**

#### **a. The Law**

[13] It is trite law that the admission of amici curiae is purely at the discretion of the court (see **In Re: Prof J. Oloka Onyango & 8 ors V Amama Mbabazi & Yoweri Kaguta Museveni** Civil Application No 2 of 2016). The Court is not even bound to rely upon the documents that are presented and admitted by it.

[14] The legal position and procedure for the admission of Amicus Curiae has now been settled with the promulgation of the Judicature (Amicus Curiae) Rules 2022 (SI 54 of 2022 and hereinafter referred to as the “Amicus Curiae Rules”). Rule 4 of the Amicus Curiae Rules Defines Amicus Curiae as follows: -

“...a person or organisation that is not a party to a suit but who participates in the litigation by providing the Court with important information intended to assist the Court in making an informed decision”

[15] Furthermore, Rule 5 of the Amicus Curiae Rules provides the tests and requirements for admission of an Amicus Curiae as follows: -

“... ”

- (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...”

[16] While applying the tests for admission of an Amicus Curiae the Court may still refuse admission under Rule 7 of the Amicus Curiae Rules where: -

“ ...

(a) the application does not state what point of law is overlooked;

(b) the application does not show the expertise in the matter and the assistance which the applicant is to give the court in resolving the dispute before it;

(c) the application introduces new evidence; or

(d) the hearing has already been closed and judgment reserved...”

[17] Rule 8 of the Amicus Curiae Rules Provides that a Party to any matter before the Court can object to the admission of an Amicus Curiae where: -

“ ....

(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...”

**b. The Application by UNAIDS.**

[18] The Application by UNADS is objected to by the Attorney General vide an Affidavit in Reply by Mr. Mark Muwonge a State Attorney. It is the case for the Attorney General that the UNAIDS harbors negative sentiments towards the Anti –Homosexuality Act 2023 and is therefore not neutral or impartial as it contends in its Motion.

[19] In particular, the Attorney General refers to the following publications available on the website of the Applicant and annexed to their Affidavit in Reply namely: -

- a. “UNAIDS urges the Government of Uganda not to enact harmful laws that threaten public Health” dated 22<sup>nd</sup> March 2023
- b. “UNAIDS urges all countries to decriminalize homosexuality as a vital step in ensuring health for all” dated 17<sup>th</sup> May 2023
- c. “Uganda’s new Anti- Homosexuality Bill would harm public health” dated 03<sup>rd</sup> May 2023...”.

[20] It is the case for the Attorney General therefore that UNAIDS lacks neutrality, does not state any novel point of law and is therefore biased and hostile to the subject matter law.

[21] Although we might have perceived UNAIDS to be non-neutral given the material on its website, we are alive to its unique position as a joint United Nations (UN) program that unites the efforts of eleven (11) UN agencies – UNHCR, UNICEF, WFP, UNDP, UNFPA, UNODC UN WOMEN, ILO, UNESCO, WHO and the World Bank, that works closely with global and national partners towards ending the public health threat of HIV/ AIDS. Consequently, given its strategic global mandate in the fight against the HIV/ AIDS pandemic, we take the view that the Applicant would be a most useful friend to the court, drawing

from its breadth of resources to engender a holistic approach to the issues before the Court in the consolidated petitions.

[22] Indeed, having perused the documents presented for our consideration in this application, we find that documents provided in this application to be most useful to the Court in that regard. Although the right to health is in fact raised as an issue for consideration in Constitutional Petition No. 15 of 2023, we are of the considered view that the Applicant would be uniquely placed to address us on that facet of the consolidated petition.

[23] Be that as it may, our misgiving with the application before us is the failure of its brief (Annex “J”), which is availed pursuant to Rule 6 (2) and (3) of the Amicus Curiae Rules, to create a nexus between the documents so supplied of its worldwide work and the matters before the court in the petition. Whereas we agree with the Attorney General that the particular documents found on the Applicant’s website point to a position on the Impugned law, these particular documents are not part of the bundle presented to the court for our consideration.

[24] It is therefore our view that the documents presented in the Application provide important information of the Applicant’s global activity in the area of HIV and AIDS that the court can use to come to an informed decision. The decision in the Petition will purely be that of the Court taking into account all of the arguments in the Petition.

### **c. The Application by the pharmaceutical companies**

[25] The Application by the pharmaceutical companies is equally objected to by The Learned Attorney General vide an Affidavit in Reply by Mr Mark Muwonge a State Attorney.

[26] It is the case for the Attorney General that the Applicants harbor negative sentiments towards the Anti –Homosexuality Act 2023 and are therefore not neutral or impartial as they contend in their Motion

[27] It is therefore the case for the Attorney General that the Applicants lack neutrality, do not state any novel point of law and are therefore biased and hostile to the subject matter law.

[28] In particular, the Attorney General in its Affidavit following a review of the various websites of the Applicant pharmaceutical companies contends that: -

- a. The fourth Applicant Ms Gilead Sciences Inc. is a top funder of the LGBTQ communities in USA for the years 2019 and 2020 (annexture "A")
- b. The third Applicants MSD Ltd have a corporate policy to support LGBTQ communities (annexture "B") at their work places.
- c. The second Applicant GSK has taken part in the supporting strategic litigation in favour of same sex relations and marriage (annexture "C").
- d. The first Applicant HealthCare UK Ltd supports annual Pride celebrations (annexture "D").

[29] In rejoinder to the position taken by the Attorney General, Mr Antonio Surarez –Martinez denies the assertions of the Attorney General and states that these assertions should be put to strict proof. He further states that the intervention of the pharmaceutical companies is not centered on the promotion of health services for same sex relations. He goes on to depone at paragraph 11 of his affidavit that the pharmaceutical companies wish to provide facts and perspectives to the ongoing legal discourse "including whether the Anti-Homosexuality Act is unconstitutional because its effect is to deny Ugandans access to healthcare."

[30] In this matter we have perused the documents presented for our consideration by the pharmaceutical companies. We find that documents provided are largely general corporate policies of the Applicants who are pharmaceutical companies towards the support of LBTQ communities. In the case of M/s GlaxoSmithKline Services Unlimited they provided documentation that shows that their Public Policy Position is not inter alia to discriminate against "sexual orientation and gender identity"

[31] Indeed, the Amicus brief of the pharmaceutical companies at Para 5.3 shows concern that the impugned law has implications on their ability to carry on business operations in Uganda by creating challenges in employment and labour relations for them.

[32] It is our view that unlike the UNAIDS documents (Supra) that the documents so presented by the pharmaceutical companies do not amount to important information and or expertise that the court can use to come to an informed decision in the interpreting the impugned law as against the Constitution of Uganda. Furthermore, we caution ourselves that the Applicants are all commercial enterprises which run for profit and therefore this may affect their impartiality.

[33] It is our findings therefore that the said documents presented by the pharmaceutical companies, fall short in regard to the impartiality test when referring to the constitutional question of legislating against homosexuality.

## **Final Orders**

### **a. UNAIDS**

[34] It is our decision therefore that the Court will benefit from the documents that UNAIDS has provided as a UN Agency in the area of HIV and AIDS and so hereby admit the Applicant as Amicus Curiae on the following conditions: -

1. The Applicant writes a brief within the meaning of the Amicus Curiae Rules that relates its expertise as presented in the documents presented in its Application to the dispute before the Court.
2. No other documents may be added to those already filed.
3. The Applicant do so no later than Friday 15<sup>th</sup> December 2023

### **b. The pharmaceutical companies**

[35] Court hereby declines to admit the pharmaceutical companies as Amicus Curiae.

**c. Costs**

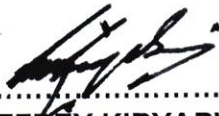
[36] Given the nature of this application each party shall bear their own costs.

**We so Order**

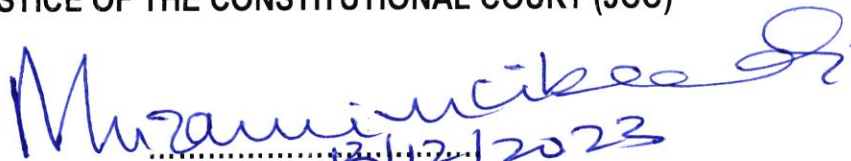
Dated at Kampala this <sup>13<sup>th</sup></sup> day of December, 2023



RICHARD BUTEERA  
DEPUTY CHIEF JUSTICE (DCJ)



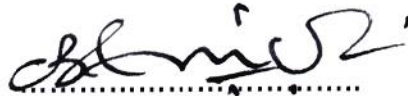
GEOFFREY KIRYABWIRE  
JUSTICE OF THE CONSTITUTIONAL COURT (JCC)



MUZAMIRU MUTANGULA KIBEEDI  
JUSTICE OF THE CONSTITUTIONAL COURT (JCC)



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MONICA K. MUGENYI  
JUSTICE OF THE CONSTITUTIONAL COURT (JCC)



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CHRISTOPHER GASHIRABAKE  
JUSTICE OF THE CONSTITUTIONAL COURT (JCC)