REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E008 OF 2023

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20(1) & (4), 21, 22, 23, 24,25,26(1), 27, 28, 29, 35, 43(1)(a), 47, 53 (1)(c), 165, 232(1), 258 & 259 OF THE CONSTITUTION OF KENYA, 2010

-AND-

IN THE MATTER OF SECTIONS 4(b), (c), (d), (e), (f), (h), (I) (m) & (n), 14(f), 20, 24, 32 & 33(2) & (5) OF THE EAST AFRICAN COMMUNITY HIV & AIDS PREVENTION & MANAGEMENT ACT, 2012

-AND-

IN THE MATTER OF SECTIONS 4(c), (d), 5, 8 (c) (d), 15 OF THE HEALTH ACT, 2017

-AND-

IN T HE MATTER OF SECTION 19 OF THE HIV PREVENTION & CONTROL ACT

-AND-

IN THE MATTER OF SECTIONS 8, 9, 10 & 16 OF THE CHILDREN ACT, 2022

-BETWEEN-

FA (Suing on her own behalf and as mother and next friend of DM – A Minor)..... 1ST PETITIONER

BK ..... 2ND PETITIONER

CN..... 3RD PETITIONER

PATRICIA ASERO OCHIENG ..... 4TH PETITIONER

AMBASSADOR FOR YOUTH & ADOLOSCENTS REPRODUCTIVE HEALTH PROGRAM (AYARHEP) .....5TH PETITIONER

KENYA LEGAL & ETHICAL ISSUES NETWORK ON HIV/AIDS (KELIN)..... 6TH PETITIONER

KATIBA INSTITUTE .....7TH PETITIONER

-VS-

THE HON. ATTORNEY GENERAL ..... 1ST RESPONDENT

THE CABINET SECRETARY FOR HEALTH ..... 2ND RESPONDENT

KENYA MEDICAL SUPPLIES AUTHORITY .....3RD RESPONDENT

THE 3RD RESPONDENT'S SUBMISSIONS

INTRODUCTION

The Petitioners herein vide a Petition dated 21st September, 2023 moved this Honourable Court seeking reliefs for their perceived Constitutional grievances against the Respondents.

The gist of the Petitioners' grievances are alleged violations of Article 43(1)(a), Article 53(1)(c) of the Constitution, the Children's Act, East African Community HIV and AIDs prevention and Management Act, HIV Prevention and Control Act, Article 26, 28, 35 among others. The violations in summary are as follows:

i. Violating the Petitioners' right to health;
ii. Violating the Petitioners' right to life;
iii. Violating the Petitioners' right to access information;
iv. Violating the Petitioners' right to equal protection, equal benefit of the law and the freedom from non – discrimination; and
v. Violating the Petitioners' right to human dignity.

To be more precise the 1st, 2nd 3rd and 4th Petitioners are claiming lack of essential HIV/AIDs related drugs and commodities in health facilities in Kisumu, Nakuru, Makueni, Machakos and Nairobi counties since January, 2021. However, there is no evidence or reports from the said counties confirming the allegations in the Affidavits in support of the Petition.

By way of response to the Petition, the 3rd Respondent filed a Replying Affidavit sworn on 26th October, 2023 together with annexures of even date.
On the 24th January, 2024 the Interested Party and *Amicus Curiae* were enjoined to the Petition by consent and they both filed responses and advisory accordingly.

From the pleadings and Supporting Affidavits of the Petition, it is very clear that this Petition as against the 3rd Respondent raises only two issues for determination: -

1. Whether the 3rd Respondent breached/violated any of the Petitioners' constitutional rights as outlined above.
2. Whether the Petitioners are entitled to the reliefs sought.

To answer the two issues listed hereinabove, it is pertinent to examine the functions of the 3rd Respondent. Section 4 of the Kenya Medical Supplies Authorities Act, 2013 outlines the functions as follows: -

4. Functions of the Authority

(1) The functions of the Authority shall be to—

(a) procure, warehouse and distribute drugs and medical supplies for prescribed public health programmes, the national strategic stock reserve, prescribed essential health packages and national referral hospitals;

(b) establish a network of storage, packaging and distribution facilities for the provision of drugs and medical supplies to health institutions;

(c) enter into partnership with or establish frameworks with county Governments for purposes of providing services in procurement, warehousing, distribution of drugs and medical supplies;

(d) collect information and provide regular reports to the national and county governments on the status and cost-effectiveness of procurement, the distribution and value of prescribed essential medical supplies delivered to health facilities, stock status and on any other aspects of supply system status and performance which may be required by stakeholders;

(e) support county governments to establish and maintain appropriate supply chain systems for drugs and medical supplies.

(2) The Cabinet Secretary shall, in consultation with the Authority and the appropriate county government organs, determine the requirement of drugs and medical supplies in public health facilities.

(3) A national or county public health facility shall, in the procurement and distribution of drugs and medical supplies, obtain all such drugs and medical supplies from the Authority subject to—

(a) the drug being duly registered by the Board; and

(b) drugs and medical supplies meet the standards of quality and are efficacious as authorized by the Board.

(4) A person responsible for the procurement and distribution of drugs and medical supplies in a national or county public health facility and who contravenes provisions of this section, commits an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding five years, or to both.

1. **WHETHER THE 3RD RESPONDENT BREACHED/VIOLATED ANY OF THE PETITIONERS' CONSTITUTIONAL RIGHTS AS OUTLINED ABOVE.**

MY LADY,

Arising from the above functions, it is trite to say that the violations being complained about ought not to be directed at the 3rd Respondent whose functions are clear. In fact, the Petitioners acknowledge this in their Petition at page 86 and 87 where they attribute the violations and failures if at all, to the 2nd Respondent.

The 3rd Respondents by its Affidavit sworn by DR. ANDREW MULWA, his examination in chief, cross – examination and re-examination clearly spelt out its role in the distribution chain and confirmed that the 3rd Respondent has never at any one moment completely run out of stock on ARVs and other related commodities. The delay and stockout on ARVs being alluded to on page 86 and 87 of the Petitioners' Petition was not caused by the 3rd Respondent but rather the donors who shipped in medicine in the name of private entrepreneurs that attracted duty. That notwithstanding, the 3rd Respondent had sufficient stock of ARVs and related commodities and it was the duty of the Counties to place their request depending on their needs.

My Lady, we submit that the Petition in its entirety does not indicate the exact legal obligation violated and/or breached by the 3rd Respondent and therefore, the Petitioners have no cause of action against 3rd Respondent. Indeed, the Petitioners' claims are extreme and are meant to discredit and hurt the reputation of the 3rd Respondent.

A. Alleged violation of the Petitioners' right to health

Article 43 (1) (a) of the Constitution of Kenya, 2010 provides that every person has the right to the highest attainable standards of health and it is the responsibility of the state to actualize this right and not the 3rd Respondent. And even then, the Petitioners' rights must be weighed within the limitations of Article 24 of the Constitution. Needless to say, the 3rd Respondent is not responsible for the dispensation of drugs directly to patients but counties and the designated health facilities. The Petitioners acknowledge these facts in paragraph D of their Petition on page 92 and 93 thereof which states at paragraph 50 *"...The 2nd Respondent has no implementation plan to procure and distribute ARVs..."*

B. Alleged violation of the Petitioners' right to life.

Article 26 of the Constitution of Kenya, 2010 guarantees the right to life. The Petitioners allege that by failing to provide essential drugs and commodities to treat and manage HIV, the Respondents have threatened the right to life of the Petitioner.

My Lady,

Noting can be further from the truth. The 3rd Respondent through the Affidavit of Dr. ANDREW MULWA and in the annexures thereto has provided evidence that if it had sufficient stocks of the essential ARVs during the period in issue. It was the duty of the counties from which the 1st to 4th Petitioners lived to ensure continuous and uninterrupted supply. The Counties were not made parties and we say no more.

C. Alleged violation of the Petitioners' right to access information

The Petitioners allege that they wrote to the 2nd and 3rd Respondents seeking a resolution of the situation and a means to chart a way forward.

It is in the evidence of the 3rd Respondent that it did not receive any such letter request from any of the Petitioners. Indeed, there is no such letter annexed as evidence in all the Supporting Affidavits. Information regarding where PLHIV can access drugs is within the purview of the respective County Governments and not the 3rd Respondent.

D. Alleged violation of the right to equal protection, equal benefit of the law and the freedom from non – discrimination

The Constitution advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated and/or dealt with equally. At page 84 C of the

Petition, the Petitioners confirm that Kenya has the fifth largest number of persons living with HIV (PLHIV) in the world at over one (1) Million people as at the end of the year 2021. It is not likely that the Respondents would discriminate the Petitioners based on economic status as alleged in paragraph 74 of the Petition. As submitted herein above, the 3rd Respondent does not dispense drugs to individual patients and the allegation of discrimination hence does not hold water.

E. Alleged violation of the Petitioners right to human dignity.

The Petitioners allege that failure by the Government to provide essential medicines has led to the violation of the Petitioners' right to human dignity and the right of PLHIV to access treatment in a manner that is free from cruel, inhuman and degrading.

Visram J (as he then was) in **Samuel Rukenya Mburu vs Castle Breweries, Nairobi HCCC 1119 OF 2003** described inhuman and degrading treatment by stating:

> ***"prohibition against torture, cruel or inhuman and degrading treatment implies that an 'action is barbarous, brutal or cruel' while degrading punishment is 'that which brings a person to dishonour or contempt."***

We submit that there is no iota of evidence in the Petition and the Supporting Affidavits that the 3rd Respondent subjected the Petitioners to such treatment. This allegation is wild. And extreme as against the 3rd Respondent.

SUBMISSIONS ON THE *AMICUS CURIAE*

My Lady, the legal principles applicable to the participation of *Amicus Curiae* in proceedings were set out by the Supreme Court in **Trusted Society of Human Rights Alliance vs Mumo Matemu and 5 Others (2015) eKLR** as follows:

i. ***An amicus brief should be limited to legal arguments.***
ii. ***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.***
iii. ***An amicus brief should address point(s) of law not already addressed by the parties to the suit or by other amici, so as to introduce only novel aspects of the legal issue in question that aid the development of the law.***

iv. ***The applicant ought to raise any perception of bias or partisanship, by documents filed, or by his submissions.***

v. ***The applicant ought to be neutral in the dispute, where the dispute is adversarial in nature.***

My Lady, with tremendous respect to the Petitioners, the Amicus brief as filed has taken a partisan position being that of the Petitioners. It has failed to identify any issues not addressed by the parties so as to give guidance to this Honourable Court and has remained biased to the purpose and intention of the law.

Notably, the amicus has advanced the position that failing to adhere ART or failing to have consistent access to ARVs would have negative consequences being that –

a) Firstly, it increases the risk of the person developing viral resistance
b) Secondly, high viral load will result in increased infectivity of the infected person.
c) Thirdly, high viral load is associated with progression of the disease in the infected person already leading to more morbidity and mortality.
d) Fourthly, early HIV testing for infants born to mothers living with HIV is crucial as it allows prompt initiation of ART if the child is infected with HIV.
e) Fifthly, administration of ART tablets to children through crushing or otherwise presents the challenge unpalatability to the child resulting in vomiting.

This is what the Petition is about. The Amicus has disguised himself as a Petitioner.
My Lady, it is our humble submission that the Amicus brief dated 31st January, 2024 totally offends the principles set out by the Supreme Court. Our prayer is that the brief should be disregarded by this Honourable Court as if the same was not filed in the first place.

2. WHETHER THE PETITIONERS ARE ENTITLED TO THE RELIEFS SOUGHT

My Lady, the reliefs being sought by the Petitioners are enumerated on pages 98, 99 and 100 of the Petition. As pleaded, there is no specific relief that that the Petitioners are seeking against the 3rd Respondent meaning that the Petitioners have no cause of action against the 3rd Respondent. It is trite law My Lady, that a party is bound by its pleadings and further that it is not the business of this Honourable Court to issue orders in vain or in a vacuum.

The Petition as against the 3rd Respondent is mute and has no merit.

CONCLUSION

Having demonstrated that the Petitioners have no cause of action against the 3rd Respondent, we pray that the Petition be dismissed with costs.

DATED at **NAIROBI** this ..... 22nd ..... day of ..... April **2024**

MOMANYI & ASSOCIATES

ADVOCATES FOR THE 3RD RESPONDENT

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THE CABINET SECRETARY FOR HEALTH ..... 2ND RESPONDENT
KENYA MEDICAL SUPPLIES AUTHORITY .....3RD RESPONDENT

THE 3RD RESPONDENT'S LIST & BUNDLE OF AUTHORITIES

1. **CIVIL CASE 1119 OF 2003**
   Samuel Rukenya Mburu vs Castle Breweries, Nairobi HCCC 1119 OF 2003

2. **PETITION 12 OF 2013**
   Trusted Society of Human Rights Alliance vs Mumo Matemu and 5 Others (2015) eKLR

DATED at **NAIROBI** this ..... 22nd ..... day of ..... April **2024**

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KENYA LAW
Where Legal Information is Public Knowledge

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1119 of 2003

1. SAMUEL RUKENYA MBURA
2. DAVID WANYAMA
3. PATRICK MUSYIMI
4. STEPHEN MBONDO WAMBUA
5. TIMOTHY KIMATHI
6. GERALD GITHINJI
7. ERASTUS KAMULU KARIUKI
8. SAMUEL GITAU
9. ALICE GAITHUMA GICHINI
10. CHRISPER MUREI
11. ROBERT KAROKI
12. ORESTE GUCHU
13. JOHNSTONE WAWERU
14. CHARLES KIRUTHI
15. HEZEKIEL MUTURI
16. GEOFFREY KARANJA
17. CHRISTOPHER
18. ROBERT RUTO
19. DAVID WAWERU
20. THOMAS OPIYO OWIDI

SUING FOR THEMSELVES AND ON BEHALF OF OTHER FORMER EMPLOYEES OF CASTLE BREWING KENYA LIMITED.....PLAINTIFFS

-VERSUS-

CASTLE BREWING KENYA LIMITED ..... 1ST DEFENDANT

EAST AFRICAN BREWERIES LIMITED ..... 2ND DEFENDANT

JUDGMENT

In a plaint dated 24th October, 2003 and filed in the High court of Kenya on 3rd November, 2003, the plaintiffs by way of a representative suit averred that on or about 13th May, 2002, the 1st defendant, through its Managing Director, one Mr. Chris Freer, wrote to them terminating their employment following closure of the 1st defendant's brewing plant at Thika. The plaintiffs contended that as a result of the

closure of the said plant, they were debarred from entering the 1st defendant's premises and from picking their personal belongings. It was their case that the closure of the brewing plant was done without consulting them. and or their representatives, and that it was arbitrarily and suddenly executed in a manner that amounted to cruel, inhuman and degrading treatment. The plaintiffs further contended that their loss of employment was caused by the 1st defendant through unlawful conspiracy with the 2nd defendant and that such termination is a breach of their right to life which incorporates their right to livelihood and which is contrary to section 71 of the Constitution of Kenya. It was also their contention that the unilateral decision to close down the brewing plant and to transfer its business to the 2nd defendant without hearing them and or according their union the benefit of making representation, was a denial of their right to belong to a union, and a breach of section 80 of the Constitution of Kenya.

By reason of the aforesaid, the plaintiffs prayed for a judgment against the defendants for damages and or compensation.

The 1st defendant thus filed a defence on 11th December, 2003 and admitted having entered into employment contracts with each of the plaintiffs.

The 1st defendant averred that the suit is incompetent, as the plaintiffs had not been authorized by the court to bring an action on behalf of all its former employees.

The 1st defendant confirmed termination of the plaintiffs' contracts of employment but denied doing so unlawfully. The 1st defendant then enumerated the payments made to the Plaintiffs in satisfaction of all the claims they had against it as follows:

1. Salary and allowances upto 31st May, 2002

2. Payment in lieu of leave accrued upto 31st May, 2002

3. Three months salary and benefits in lieu of notice

4. A gratuity equivalent to 2 months pay for every completed year of service

5. A refund of both the individual and 1st defendant's contribution to the 1st defendant's pension scheme with interest thereon, and stated that each of the plaintiffs had indeed received the payments as set out above.

The 1st defendant further pleaded the background facts that led to its closure. It denied barring the plaintiffs from accessing the premises and stated that the plaintiffs were allowed to collect their personal effects and denied allegations of cruel, degrading and inhuman treatment against the plaintiffs.

The 1st defendant also contended that the employment contracts with the plaintiffs were terminated in accordance with the law, and in particular the Employment Act, and denied contravention of any provisions of the Constitution as alleged by the plaintiffs. The 1st defendant thus prayed for the dismissal of the suit.

The 2nd defendant filed a separate defence on 11th December, 2003 stating that all the plaintiffs were employees of the 1st defendant, not the 2nd defendant. It contested the competence of the suit on the grounds that leave of court to institute the same had not been obtained. It denied any knowledge of the circumstances surrounding termination of the contracts of employment between the 1st defendant and the plaintiffs, as well as any allegations of cruel, inhuman and degrading treatment met on the plaintiffs.

It further denied that it was under any duty to consult the plaintiffs and or their representatives and denied breaching any provisions of the Constitution. Accordingly, it prayed that the claim against it be dismissed with costs to the plaintiff.

The Plaintiffs then filed a Notice of Motion dated on 5th March, 2004 under section 84 of the Constitution of Kenya and in accordance with rule 10(a) and (b) of the Constitution of Kenya (Protection and Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001. Therein the plaintiff sought:

1) A declaration that a contract of employment taking away right to form and belong to a trade union and association for the purposes of affording them protection of their interest is a breach of section 80 of the constitution of Kenya.

2) A declaration that the provisions of the employment act in relation to the termination of the plaintiff contract did not take away the plaintiff right under section 74 of the Constitution of Kenya.

3) A declaration that the defendants conduct amounted to breach of section 70 and 75 of the Constitution of Kenya.

4) A declaration that termination of plaintiff contract was a breach of section 71 of the Constitution of Kenya.

5) A declaration that commercial decisions are not immune to application of the law relating to applicants rights guaranteed under section 80 of the Constitution of Kenya.

6) An order that the plaintiffs are entitled to damages for breach of their constitutional rights and such further orders and or directions deemed appropriate for the purposes of enforcing or securing the protection of the Constitution of Kenya.

As expected the defendants filed grounds of opposition stating *interalia,* that the plaintiffs' application is premised on the incorrect construction of the Constitution and consequently denied any breach of the Constitution.

Prior to the filling of the above mentioned Notice of Motion, the defendants had on 19th December, 2003 filed a chamber summons application seeking to strike out the plaint on the grounds that:

§ The plaint was fatally defective for failing to comply with Order 7 rule 1 (2)

§ It was not sufficient for 1st plaintiff alone to swear the verifying affidavit,

§ It was doubtful whether plaintiffs had authority from other plaintiffs to institute proceedings and

§ The action is an abuse of the court process in so far as the plaintiffs have not been authorized under Order 1 Rule 8 of the Civil Procedure Rules.

The Chamber Summons application was supported by the affidavit of Madren Nderu, the company secretary of the 2nd Defendant.

The plaintiff consequently filed grounds of opposition on 17th February, 2004 stating *interalia* that the application was misconceived.

Of course, the Chamber Summons could not be heard because the proceedings were stayed in accordance with Rule 10 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001, and the file was referred to the Chief Justice, for directions.

By his order dated the 17th May, 2004, the Honourable the Chief Justice appointed me to preside over the hearing of this matter.

The parties appeared before me severally, and at the instance of this court, agreed to abandon all preliminary applications, and to proceed to a full hearing of the suit based on agreed issues, including those raised in the Chamber Summons application dated 19th December, 2003, and Notice of Motion application dated 5th March, 2004.

Accordingly, I began hearing this suit on 26th July, 2005.

APPLICANTS/PLAINTIFFS CASE

The applicants were represented by Ms. Kabage and Ms. Karugu of the firm of Gitobu Imanyara and Co. Advocates. The 1st applicant, Samuel Rukenya Mbura, took the stand on 26th July, 2005. He stated that he knew all the other plaintiffs and that they had worked together for the 1st respondent at Thika. He started working on 17th August, 1998 and his letter of appointment was dated 12th August, 1998. His terms of employment were later revised vide revised terms and conditions of employment under the Collective Bargaining Agreement (Page 8 of the Plaintiffs bundle of documents).

It was his testimony that on 13th May, 2002 he went to work as usual and left at 2.00 p.m for the day. He, however, heard on the 7.00 p.m news that Castle Breweries had been closed down which news he says shocked him. He reported to work on 14th May 2002 only to find different *askaris* on guard and who told him that as he was not present in the previous day's meeting, he should pick up his letter of termination from the designated place. He stated that nobody had told him of the closure before leaving work the previous day. He was never called for an interview nor helped to find a job as promised in the letter of termination. He stated that the termination affected him adversely because he and his school going children entirely depended on the job. He also testified that he and his co-workers were allowed to enter the premises but in the company of *Askaris* and only to collect their personal belongings. He found that his safety boots worth Ksh. 4000 were missing.

He urged the court to make a determination that his rights were infringed upon.

The 2nd plaintiff to take the stand was Charles Maina Chege who stated that the documents relating to him were on pages 145-149 of the Plaintiffs bundle of documents. His employment was terminated on 13th May, 2002. His testified that as he was leaving work at 5.00 p.m he met the Human Resource Director who informed him of a meeting of all the staff at the canteen and asked that he attend. He proceeded to the canteen where he found other workers already waiting and soon thereafter the Managing Director, Mr. Freer, and other directors walked in and Mr. Freer shouted "**shut up, listen to me**....." and proceeded to announce the closure of the premises and termination of their services. (I will later on revert to the underlined words as they form one of the basis upon which the Plaintiffs allege breach of the Constitutional provisions).

He could not understand how the services of an employee of three years standing could be terminated in that manner. He said he had to stop his asthma treatment and could no longer pay for his mother's medical bill. He could no longer take care of his sister and his children who were under his

care. He found the presence of *Askaris* armed with *rungus* on that occasion intimidating and unfair.

He talked of a fellow employee and neighbour who committed suicide in the circumstances. He had expected to work with the 1st defendant until retirement. He urged the court to enforce his constitutional rights.

On cross-examination, he admitted not being one of the named plaintiffs.

Evans Mugambi was the 3rd witness to take the stand. He stated that he was one of the plaintiffs and worked for the 1st defendant as a cooling attendant. On 13th May, 2002 he was on a night shift and went to work by taxi as he had missed the staff bus. He arrived at the premises at 10.00p.m and found *askaris* with dogs. They refused him entry and told him that Castle Breweries was no more.

He says that he was shocked and because it was dangerous to go home at that time, he sat around with the askaris until 5.00 a.m the next day. He admitted that he had been paid all his dues. He urged the court to find that he had been treated badly by his employer. He had expected a good future at Castle Breweries and to work until his retirement.

Upon cross-examination, he admitted that his name was not among those in the plaint. He also admitted that the *askaris* did not beat him nor insult him.

The 4th witness to take the stand was Johnstone Waweru. He is the 13th plaintiff in the plaint. He was at work on 13th May, 2002 and was leaving at around 5.00 p.m when the Human Resource Director told him to go to the canteen for a meeting. There he found other employees waiting. Soon after, the MD, Mr. Freer, in company of other directors arrived. According to his testimony, Mr. Freer shouted **"shut up"** before informing them of the closure of the company. He stated that they were required to pick their termination letters and leave the premises without taking anything. Further that the *askaris* while armed with *rungus* and dogs escorted them to the gate, which action he claims was inhuman and cruel. His duties were to guard company assets and property. He says that he can no longer support his family and himself and urged the court to find that his Constitutional rights had been infringed.

He also urged the court to find that he is entitled to a sum of money totaling Ksh.14, 840, 410/= which amount of money he would have earned had he worked until his retirement.

On cross examination, he admitted that he had been paid all his dues as earlier enumerated, and that he had not been physically abused. He also testified that the people in the canteen were chatting immediately before Mr. Freer addressed them.

The plaintiffs closed their case at this juncture.

RESPONDENTS/DEFENDANTS CASE

The defence called one witness, Constance Ruhiu, who was at the material time the Human Resource Director of the 1st defendant company. She stated that she is a graduate of the University of Nairobi, an advocate of the High Court of Kenya, a consultant in performance management and a member of the Chartered Institute of Arbitrators. It was her testimony that South Africa Brewery International (hereinafter referred to as "SABI") through its subsidiary Castle Brewing Kenya Limited, the 1st defendant herein, operated a brewery at Thika in Kenya. East Africa Breweries Limited (hereinafter referred to as "EABL") the 2nd defendant herein, on the other hand, through its subsidiary Kibo Breweries Limited, owned and operated a brewery at Moshi in Tanzania.

By an agreement dated 14th May, 2002 SABI sold to EABL 100% of the entire share capital of Castle Breweries Kenya while EABL on the other hand transferred to SABI ordinary shares in the capital of Kibo Breweries Limited representing 20% of the entire issued capital and accordingly SABI closed its brewery at Thika on 13th May, 2002 and EABL closed its brewery at Moshi, Tanzania.

She admitted that the 20 plaintiffs are the 1st defendant's ex-employees, whose contracts were terminated on 13th May, 2002. She added that EABL was not involved in the termination of the contracts. She testified that she gave advice to the 1st defendant on the terminal benefits payable to the plaintiffs and all other ex-employees upon the closure of the 1st defendant. This advice was based on the letter of employment of each employee and the law of Kenya. She stated that the employees were informed of the 13th May, 2002 meeting through notice boards and their departmental heads. She also testified that the employees were chatting while waiting for the Managing Director, Mr. Freer. Upon the latter's arrival with other directors, he raised his voice in an attempt to speak to the waiting workers. Thereafter the employees were asked to pick their letters of termination of their services. The guards then closed the offices and she left at 6.00p.m. It was her evidence that the *askaris* did not attack anyone and that no one was stopped from collecting their personal belongings.

On cross-examination, she stated that she was not consulted on how the employees were to be informed of the closure of the 1st defendant's business premises and the termination of their employment and further admitted that those on night shift found new security guards upon their arrival at the premises. Such employees were to be informed of the closure by their departmental heads, and that every effort was indeed made to inform all the employees.

The respondents closed their case at that point.

Having summarized the Plaintiffs' and Defendants' case as presented before me, it would now be of importance to include in this judgment, statement of the agreed facts which I shall be referring to from time to time. The agreed facts, filed on 21st October, 2005, are as follows:

1 a. The defendants are limited liability companies duly registered and incorporated under the companies Act, Cap 486 of the laws of Kenya.

b. The 1st defendant was formerly carrying out brewing business in Kenya and currently its properties and operations/business have been transferred to East African Breweries Limited.

2 The first defendant entered into employment contracts with each of its employees which contracts were independent of any other contract.

3 The plaintiffs with the exception of Patrick Musyimi, Alice Gaithuma and Christopher Murei were on diverse dates employed by the 1st defendant.

4 David Chombo Magambo listed as number thirty seven in the list attached to the plaintiffs list of documents filed in court on 14th February 2005 is the plaintiff in Thika Resident Magistrates court Civil Case number 692 of 2002. The first defendant is the defendant in that suit. David Chombo Magambo claims *inter alia* damages for unlawful termination in Thika Resident Magistrate's Court Civil Case Number 692 of 2002.

5. The third plaintiff, Patrick Musyimi is the plaintiff in the Thika Residents Magistrates Court Civil Case Number 693 of 2002 where the first defendant is the defendant. The third plaintiff claims *inter alia* damages for unlawful termination of his contract of employment in Thika Resident Magistrates court

Civil Case Number 693 of 2002.

6. No order has been made by the court under Order 1 Rule 8 of the Civil Procedure Rules authorizing the plaintiffs to bring the action on behalf of the former employees of the first defendant.

7. Before May 2002, Tanzania Breweries Limited, a subsidiary of South Africa Breweries International (Africa) BV, a limited liability company registered in Netherlands was the market leader in the United Republic of Tanzania in the production, marketing and sale of beer.

8. In the corresponding period Kenya Breweries Limited, a subsidiary of East Africa Breweries Limited, the second defendant herein, was the market leader in the Republic of Kenya.

9. At all material times South Africa Breweries International (Africa) BV through its subsidiary Castle Brewing Kenya Limited the first defendant herein operated a brewery at Thika in Kenya with minority share of the beer market in Kenya.

10. East African Breweries Limited through its subsidiary Kibo Breweries Limited owned and operated a brewery at Moshi, Tanzania with minority share beer market in Tanzania.

11. Owing to the economic and financial challenges in the brewing industry in Kenya and Tanzania, South Africa Breweries International (Africa) BV and East Africa Breweries Limited agreed independently to concentrate their production, Marketing and sales resource in the market where each was a market leader.

12. By an agreement dated 14th May 2002 South Africa Breweries International (Africa) BV sold to the second defendant 100% of the entire issued share capital of Castle Brewing Kenya Limited and East African Breweries Limited the second defendant herein transferred to South Africa Breweries International (Africa) BV 8000 002 ordinary shares in the capital of Kenya Breweries Limited representing 20% of the entire issued capital of Kenya Breweries Limited as consideration for the arrangements referred above.

13. Accordingly South Africa Breweries International (Africa) BV closed its brewery at Thika on 13th May 2002 and East African Breweries Limited the second defendant decided to close its brewery at Moshi, Tanzania.

14. The first defendant's contracts of employment were terminated on terms that each employee was to receive the following payments in satisfaction of all claims against the first defendant.

a. salary and allowances upto 31st May 2002

b. payment in lieu of leave accrued upto 31st May 2002

c. Three months salary and benefits in lieu of notice

d. A gratuity equivalent to two months pay for every completed year of service

e. A refund of both individual and first defendant's contributions to the first defendant pension scheme with interest thereon.

15. Each of the employees of the first defendant including such of the plaintiffs as were employed

by it received payment as set out above.

16. The first defendant deployed security personnel at its premises on the material day for security reasons

17. The severance package of each employee were set out in the letters of termination.

18. Each employee was paid by cheque (sic) the package set out in the letters of termination on the material day being 13th May 2002.

19. On subsequent dates, pension and other terminal benefits were paid after tax computations had been made.

20. The first defendant did not promise the employees any payments over and above what was stipulated in the letters of termination.

21. Those former employees who qualified in subsequent interviews conducted by Kenya Breweries Limited the subsidiary of the second defendant were offered employment by Kenya Breweries Limited.

I will now consider the summary of the submissions by both counsels.

SUBMISSIONS BY COUNSEL FOR THE APPLICANTS

Ms. Kabage opened her submissions by stating firstly, that although the plaintiffs' suit herein arose from contracts of employment, this cannot bar the said plaintiffs from seeking remedies and damages under the Constitution. She placed reliance on the case of ***Rashid Odhiambo and 245 Others –v- Haco Industries Limited (civil Appeal No. 110 of 2001)*** where the learned judges in the Court of Appeal overruled the High Court Ruling that availability of other lawful causes of action bars a party from seeking any remedy under section 84 of the Constitution for contravention of fundamental rights and freedoms under the Constitution.

Her second limb of submission was that the suit as presented before the court is properly a representative suit in that there is:

§ Sufficient numerosity of parties

§ Commonality of issues, claims or defences of interest

§ Nexus between the representatives and the class

§ Ascertainability of the group and

§ Good faith of the representative parties

as was stated to be the prerequisite requirements of a representative suit in the case of ***Kenya Bankers Association and Others –v- Minister for Finance and others (2002) 1 KLR 61.*** She distinguished the ***Njoya and Others –v- Attorney General and Others (2004) 1 E.A 194*** case by submitting that it should not be taken out of context.

Thirdly, she submitted that this was a representative suit and that there was no need for all the plaintiffs to give evidence. To support this, she referred to paragraph 3 of the statement of agreed facts where the defendants had conceded that all plaintiffs, except three, were former employees of the 1st defendant.

On damages, she submitted that the only requirement is violation of the Constitutional rights whereupon the court ought to give such remedies as appropriate. She relied on the case of ***Marete –v- Attorney General (1987) KLR*** where it was stated that the Constitution is not a toothless bulldog nor a collection of pious platitudes but one that has teeth and particularly those found in section 84 of the Constitution. She also relied on the case of ***Dominic Amollo Arony –v- Attorney General (HCCC Misc. Appl. 494 of 2003)*** to urge the court that the damages awardable ought to be that which will deter repetition, punish breach, and secure effective policing of the Constitution.

Ms. Kabage finally submitted on instances of violation of the plaintiffs rights as follows:

§ That plaintiff No.1 having had to sleep out in the bush was inhuman and degrading.

§ That the Managing Director's act of shouting "**shut up**" was inhuman, cruel and degrading.

§ That the plaintiffs had to collect their belongings in the presence of supervisors.

§ That the information relating to termination of employment was given through the media and not to the Plaintiffs' personally.

§ That the collection of termination letters from the carton boxes was humiliating.

SUBMISSIONS BY COUNSEL FOR THE DEFENDANTS

The defendants were represented by Mr. Kimani of the firm of Hamilton, Harrison and Mathews who opened his submissions by arguing that for the plaintiffs to successfully invoke the provisions of the Constitution, the following issues must also be addressed:

1) Whether the plaintiffs have followed all the rules of procedure and are properly parties to the suit.

2) Whether the plaintiffs have followed the rules of evidence.

3) Whether each plaintiff as per the rules of evidence has established a claim for compensation.

He cited the ***Haco industries*** **case** (supra) in which the Court of Appeal stated that the burden of proof in a civil case, whether Constitutional or not, is on the plaintiff.

It was his submission that even if a violation was established, damages are not automatically established and that the object of inquiry is to put the plaintiff in the position he would have been but for the injury. The plaintiff must establish the damages.

He proceeded to distinguish the ***Dominic case*** (supra) in that the facts therein were totally different from the present case because it involved loss of employment with a long prison sentence and the damages awarded therein were for solitary confinement. The brief facts of that case were that, Dominic Akony Amolo, a former service man in the Kenya Air Force, together with others, was arrested and confined at Kamiti Maximum Security Prison on charges relating to failed coup attempt against the

Government of the Republic of Kenya. He was thereafter convicted but successfully appealed against the conviction and sentence on the 27th September, 1984. He continued to be held in custody until 5th October, 1984 before release.

He sued the Government for breach of his constitutional rights such as unlawful and solitary confinement for nine days. The court held that his continued imprisonment between 27th September, 1984 and 5th October 1984 was in breach of his right to liberty contrary to section 70 of the Constitution and was awarded Ksh. 2,500,000 in damages. The court further directed that proof of his entitlements to certain benefits and services rendered be tendered before a single Judge of the High Court for determination.

Regarding the ***Marete case (supra)*** Mr Kimani argued that it involved Government employees whose employment had been terminated without pay for two and a half years, whereas in the present case, all dues had been paid to the plaintiffs as per the contract of employment and that this fact had been conceded.

He urged the court that an award of damages was not necessary because the issue here involved redundancy based on a commercial decision to close down the business.

He submitted that the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001, did not outline the procedure relating to representative suits and therefore the civil procedure rules should apply. That being so, he stated that the court ought to come to a finding that the plaintiffs have not complied with Order 1 Rule 8. He conceded that the plaintiffs did not need leave of court but that they needed to take directions pursuant to Order 1 Rule 8 (3) which is mandatory.

He referred to the case of ***Alfred Njau and 5 Others -v- City Council of Nairobi KAR (1982-1988)Vol.1,229*** which made reference to the procedure set out in Order 1 Rule 8 (2) of giving due notice to the institution of a suit either individually or through public advertisement. He contended that the only people who are before the court are the twenty plaintiffs as were the six appellants in the ***Alfred Njau case (supra).***

He cited the case of ***Suniv Vinayak -v- Diners club international (HCCC 1885 of 2003)*** where the court held that a claim for damages is a personal relief and a representative suit is absolutely inapplicable and urged the court to rely on the same to find that this suit was incorrectly instituted as a representative suit. The case of ***Paul Ng'ang'a Ndetei and 3 Others –v- Housing Finance Company of Kenya (Civil Case No. 151 of 20030*** was cited to demonstrate to the court that the plaintiffs therein sought directions to sue the defendant on their own and as representatives of the borrowers of the defendant interested in the suit and submitted that only the named twenty Plaintiffs herein had the right to make claims.

He closed his submissions by stating that any involuntary termination of employment is bound to be painful but the same should not be graduated to such a level as to amount to breach of fundamental rights in the Constitution.

ISSUES

Having set out the facts of this case and submissions of the parties, it now follows that I should consider and make determination on the issues of law and facts arising therein.

The parties filed a list of Agreed issues on 25th January, 2005, and I shall be guided by the same to reach the end of this matter.

I will now consider each issue as hereunder:

1. Were all the Plaintiffs employees of the 1st defendant"

Statement No.3 of the agreed facts confirms that all the plaintiffs with the exception of Patrick Musyimi, Alice Gaithuma, and Christopher Murei were on diverse dates employed by the 1st defendant and as no evidence was tendered to controvert the three exceptions, the court believes that the said three plaintiffs do not exist and their claims must accordingly fail. This is because the Evidence Act provides that whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

That leaves 17 plaintiffs suing on behalf of themselves and on behalf of other former employees of the 1st defendant.

Clearly then the suit is presented in a representative manner and the question that follows is whether or not the suit as presented stands the test of law on representative suits.

The Plaintiffs responded to the question by relying on the case of ***Kenya Bankers association and Others –v- Minister for Finance and Another (supra)*** as hereinbefore stated and which they associated with their claim herein in that the plaintiffs are an identifiable group, their cause of action arose from the same incident and that they are seeking similar orders and reliefs.

I agree with the plaintiffs' assertion but only to the extent of their claim as pleaded in the plaint but disagree that their Constitutional claim as stated in the Notice of Motion stands the test. To this extent, I associate myself with my brothers finding in the ***Njoya Case*** (supra) wherein it was clearly stated:

"..every other complaint of an alleged contravention of the Fundamental Rights must relate the contravention to himself as a person .....there is no room for representative actions or public interest litigation in matters subsumed by sections 70-78 of the constitution."

The reasoning behind such an assertion is that fundamental rights relate to people in their individual capacities and the same are best articulated at an individual level.

The oral testimony of PW1, PW2, PW3 and PW4 all contain different modes of alleged constitutional breaches e.g.

§ PW1 stated having heard of the closure of the 1st defendant's premises over the radio

§ PW2 testified that he was told of the closure at a meeting in the canteen.

§ PW3 stated having been told of the same by the *askaris* upon his arrival at the premises for the night shift and

§ PW4 was told of the news at the canteen meeting.

It is equally probable that the other former employees of the 1st defendant represented in this suit also had had different encounters in the manner in which their Constitutional rights were allegedly

breached, and the details of which encounters are unknown to this Court.

I thus come to the conclusion that the plaintiffs claim for damages for breach of their Constitutional rights ought not to have been presented in a representative manner.

I shall however make a finding on whether or not the alleged violations constitute a breach of fundamental rights and freedoms as against the twenty named plaintiffs herein.

Having agreed that the plaintiffs rightly presented their claim as pleaded in the plaint by way of a representative suit, it would have followed naturally that I should consider the defendants' earlier contention that the plaintiffs ought to have sought leave of the court as per Order 1 rule 8 of the Civil Procedure Rules before presenting their case in a representative capacity. The defendants, however, in the course of proceedings before me, conceded that the plaintiffs needed not to get leave of court.

I shall nevertheless address this issue because it has been raised before me severally by other litigants while relying on the case of ***Johnson –v- Moss (1969) E.A 654*** which is notably a Ugandan case. The case firmly stated that leave must be sought to sue or be sued in a representative capacity.

The provisions of Order 1 Rule 8 (1) of the Civil Procedure Act and Rules, Cap 21 of the Laws of Kenya, are couched in the following terms:

"Where there are numerous persons having the same interest in one suit, one or more of such persons may sue or be sued, or may be authorized by the court to defend in such suit on behalf or for the benefit of all persons so interested."(Emphasis mine)

Order 1 Rule 8 of the Ugandan Civil Procedure rules read as follows:

"Where there are numerous persons having the same interest in one suit, one or more of such persons may with the permission of the court sue or be sued or may defend in such suit, on behalf or for the benefit of all persons so interested. But the court shall in such case give such persons either by personal service or where from the number of persons or any other cause, such service is not reasonably practicable, by public advertisement as the court may in each case direct." (Emphasis mine)

Thus, it is evidently clear that the Ugandan Rules require persons intending to sue or be sued to seek the court's permission. This is not so in the Kenyan Rules which require that only where a party is defending on behalf of other defendants that leave is required.

2. Did the 1st defendant enter into contracts of employment with the plaintiffs which were independent of any other contracts"

The 2nd statement of the agreed facts answers this question in the affirmative.

The evidence tendered before me fosters this position as each and every plaintiff had a letter of appointment specifically addressed to them. One such letter is Mr. Samuel Rukenya's (the 1st plaintiff) letter on page 4 of the Plaintiffs bundle of documents.

3. (a) What payments did the plaintiffs receive upon termination of their contracts"

Statement number 14 of the Agreed Facts answers this question by stating that the Plaintiffs

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contracts of employment were terminated by the 1st defendant on terms that each plaintiff was to receive the following payments:

a. salary and allowances upto 31st May, 2002

b. payment in lieu of leave accrued upto 31st May, 2002

c. Three months salary and benefits in lieu of notice.

d. A gratuity equivalent to two months pay for every completed year of service.

e. A refund of both individual and first defendant's contributions to the first defendant pension scheme with interest thereon.

And which the plaintiffs who testified in court confirmed having received.

(b) Were these payments in satisfaction of all claims against the 1st defendant for termination of their contracts"

The evidence tendered before this court running from the provisions of the letters of appointment to oral testimony of the plaintiffs no doubt indicates that the payments made to the plaintiffs were in full satisfaction of the claims against the 1st defendant and even more.

It is now settled law that the measure of damages for unlawful dismissal is the amount which the employee would have earned during the period of notice if the employment is terminable by notice or from the period of dismissal upto the time the contract would have ended if the employment was on a fixed term basis and that general damages for unlawful dismissal are not available in a claim for unlawful dismissal.

The above sentiments constituted the running theme in the following cases amongst many others, ***Ombanya –v- Gailey Roberts Limited (1974) E.A Kenya Ports Authority –v- Edward Otieno Okello (C.A No. 120 of 1992) and Rift Valley Textiles Limited –v- Edward Onyango Oganda (C.A No. 27 of 1992).***

In the latter case the court of appeal stated the following:

"We have no doubt whatsoever that the law did not entitle the judge to do any of these things. The contract of employment between the appellant and the respondent specifically provided for a notice period and it also provides for what was to be done if either party was unable to comply with the said notice period namely to pay the other party for the notice period. In our view, even though the respondent's dismissal was unlawful, he had been paid all that he was entitled to be paid under and in accordance with the terms of his contract with the appellant."

In that case, the contract of service provided that it could be terminated by a three months notice by either party but the high court awarded the respondent twelve months gross salary as general damages in addition to the three months salary in lieu of notice already paid.

4. (a) Do the Plaintiffs establish a reasonable cause of action known in law"

Ordinarily this issue would have had to be considered as a preliminary issue and if the court's finding

was not in the affirmative, this court would have had to strike out the pleadings. But having had the benefit of hearing this matter, I find that the plaintiffs established a case with a reasonable cause of action.

b) Is the claim frivolous or vexatious"

The plaintiffs claim arises out of contractual obligation between them and the 1st defendant as well as alleged violation and breach of constitutional provisions as stated in the pleadings.

Frivolous is defined in the Black's Law Dictionary as ***lacking a legal basis or legal merit, not serious; not reasonably purposeful.***

Vexatious has been defined in the same dictionary as ***without reasonable or probable cause or excuse; harassing, annoying.***

The matter before me is by no means trivial, frivolous or vexatious. It raises very pertinent issues relating to employer /employee relationship. I find that issue in the negative.

5. Did the 1st defendant bar the plaintiffs from entering its premises or collect their personal effects"

I shall consider the testimony before me in part to ably address this issue.

PW1 testified that the employees were allowed to re-enter the premises to clear their lockers while in the company of *askaris.*

PW2 did not make any mention of the issue.

PW3 testified that on arriving at the premises at about 10.00 p.m, the askaris did not allow him to enter the compound but testified he was later allowed to do so.

PW4 testified that he had nothing left at the 1st defendant premises except personal effects which he did not collect.

DW1 testified that all the plaintiffs were escorted to collect their personal belongings and their letters.

On a balance of probability, I find that the plaintiffs were accorded an opportunity to collect their personal effects.

6. Was the 1st defendant's brewery closed in a manner that was cruel, inhuman and degrading"

I note that the plaintiffs were never notified of impending closure of the 1st defendant's premises but only informed of the same upon its execution.

It is however my humble opinion that the closure of the brewery may have been shocking news to the employees but I find nothing close to cruelty, inhuman or degrading treatment in the way that this unfortunate news was communicated.

7. Was the 1st defendant obliged under contract or other legal duty to consult the plaintiff or

their representatives regarding the closure of the brewery"

Section 16 A (1) of the employment Act provides that:

A contract of service shall not be terminated on account of redundancy unless the following have been complied with

a). the union of which the employee is a member and the labour officer in charge of the area where the employee is employed shall be notified of the reasons for and the extent of the intended redundancy.

The law thus places a duty of notification on the employer. But is notification equivalent to consultation" I think not. To me notification is just that – to notify or to inform, not to "consult".

It however remains for consideration whether the 1st defendant lived upto its duty of notification. This court finds itself handicapped to make a determination on this issue in view of the fact that despite the plaintiff's contention that the 1st defendant failed to notify them and/or their union, they did not call in any evidence to prove the same.

The only evidence before this court is that of DW1 that the 1st defendant notified the plaintiff's union.

The Evidence Act, Section 3 (4) provides that a fact is not proved when it's neither proved nor disproved.

I therefore find that indeed the 1st defendant had a duty of notification but nothing much turns on this point as the plaintiffs have not discharged the burden placed on them.

8. (a) Did the 1st defendant fail to give notice, bundle out or treat the plaintiffs in a cruel, inhuman and degrading manner"

(b) If so, is such treatment contrary to Section 74 of the Constitution.

Section 74 of the Constitution provides that:

"No person shall be subject to torture or to inhuman or degrading treatment punishment or other treatment."

The starting point is to define what inhuman or degrading treatment constitutes. The new Shorter Oxford English Dictionary on Historical Principles defines Inhuman treatment as "an action that is barbarous, brutal and cruel" while degrading punishment is "that which brings a person in dishonour or contempt".

The evidence before this court is that upon abrupt closure of the 1st defendant's premises, the plaintiffs were escorted out of the compound by security men.

PW1 stated on cross-examination that no one hit him and neither was he confined in any manner. All the other plaintiffs' witnesses also testified that they were not assaulted in any way.

In my considered opinion, based on the weight of the evidence before me, I see nothing brutal in the manner in which the plaintiffs were treated and therefore find no contravention of section 74 of the

Constitution.

9. Was battery, terror or intimidation meted upon the plaintiffs and in violation of their right to protection from inhuman treatment.

I find this issue well addressed in issue number 8 and partly in other issues but will add the following regarding the question of intimidation.

Indeed it is human to feel intimidated when suddenly accosted with unusual security without notice. Dogs are ordinarily intimidating especially if their presence is not notified.

I am however hesitant to hold that the same constitute breach of the Constitution or a violation of the plaintiffs right to protection from inhuman treatment.

Of relevance here is the complaint that the MD, Mr. Freer, treated the plaintiffs in a cruel and inhuman manner by shouting "**shut up**" at the meeting. Indeed all the witnesses including the defendant's witness are in tenor in their testimony that Mr. Freer shouted in the manner stated hereinabove.

However further testimony in relation to the context in which the same was said makes the statement not so out of the ordinary. Witness after witness testified that the plaintiffs were chatting while waiting for Mr. Freer and other directors and therefore one would expect the canteen to have been noisy and that Mr. Freer's statement was meant to get the attention of everyone in the meeting hall.

I therefore find no breach of the Constitutional provision to this end.

I want to however categorically state here that I believe that we should continuously subject our Constitution to a progressive mode of interpretation to enable our Constitution guide the destiny of the people of this country. But the same must be done while having regard to other laws of the country, public interest, economic realities of the world we live in today and socio-political realities that face us as a people.

10. Were the employment contracts between the 1st defendant and the plaintiffs terminated in accordance with the Employment Act"

The plaintiffs admitted receiving certain payments that I had alluded to earlier on.

In view of the above, I find that that 1st defendant terminated the Plaintiffs contracts in accordance with the relevant provisions of the Employment Act.

11. Did the 1st defendant promise the plaintiffs generous severance packages or offer assistance in finding new jobs"

12. If such promise or offer was made is it capable of enforcement without consideration"

I will consider issues number 11 and 12 jointly.

The letters of termination of the Plaintiffs' contracts read in relevant part as follows:

".....but those affected will receive generous severance packages. The company will also assist

employees as far as possible with finding new positions."

Indeed the 1st defendant represented that they would offer generous severance packages and assist employees as far as possible in finding new positions. But is the same capable of enforcement in law" I think not. I agree with the defendant's counsel that the same lacks consideration and is incapable of being enforced in law.

But assuming for a moment that the same is enforceable, this court notes that the plaintiffs did not even attempt to plead what they considered generous packages and which they would have wanted the court to enforce.

If anything it may well be argued that whatever payments that were made to the plaintiffs were indeed generous. Regarding finding new employment, no evidence was tendered to show what was expected and how the 1st defendant failed in its duty.

13. Did the 1st defendant breach the memorandum of agreement entered into by the Plaintiffs' union"

No evidence was tendered by the plaintiffs to state what provisions of the alleged memorandum of agreement were breached let alone evidence to show its existence.

I am therefore not able to make a finding on this issue.

14. Was the loss of employment occasioned by the unlawful conspiracy between the defendants and in breach of the Plaintiffs right to life"

Conspiracy is defined in the Black's Law Dictionary ***as an agreement by two or more people to commit an unlawful act coupled with an intent to achieve the agreement's objective.***

Statement numbers seven to thirteen of the Agreed Facts elaborate the circumstances and the ultimate agreement between the 1st and 2nd defendants which led to the closure of the 1st Defendant's premises and ultimate loss of employment to the plaintiffs.

I find nothing conspiratory or unlawful in the negotiations and the agreement in the circumstances and consequently return a negative finding on this issue.

15. Can termination of employment be equated to punishment"

Termination of employment is a matter provided for in our laws in that there are clear stipulations on how it ought to be done and remedies in the event of the breach. Legally speaking therefore I find this issue as framed is neither here nor there.

16. Were the plaintiffs denied their right to belong to a union or their freedom of assembly and association"

I agree with the defendants' Counsel that no evidence was led by the plaintiffs regarding this issue. The closest the plaintiffs got to evidentiary requirement was to allege non-consultation of their trade union to which the defendants replied by stating that they had informed the union officials of the extent and nature of their action.

I note too that I had partly dealt with this issue earlier on.

I find that the plaintiffs were not denied their right to belong to a union or denied their right to freedom of assembly and association.

17. Have the plaintiffs suffered any loss or damages"

18. Do the plaintiffs have a right to any declaration or entitled to any compensation or form of damages from the defendants"

These two issues are inter-related, and I shall address them together.

Yes the plaintiffs suffered damages upon termination of their contracts but the same was recovered when they received payments in satisfaction of their claims against the 1st defendant.

I find that they are not entitled to any further damages in law as I had indicated before. A claimant is not entitled to any equitable or general damages in a claim for breach of employment contract and that the only damages recoverable are limited to the pay for the notice period.

As regards damages arising out of breach of the Constitution, I agree with the decisions in the very many cases that the plaintiffs have cited and in particular the ***Marete –v- Republic case*** (supra) where Shields J said,

"The constitution of this republic is not a toothless bulldog nor is it a collection of pious platitudes. It has teeth and in particular those to be found in section 84....."

The teeth include an order for damages where necessary and that it would be within the original jurisdiction of the High Court to issue such orders, writs or directions as it may deem necessary to secure the enforcement of sections 70-83 of the Constitution.

But having found as I did that there is no breach of the Constitutional rights of the Plaintiffs, I shall not award damages under this head too.

19. Is the suit fatally defective for failure to comply with Order 7 Rule 1 (2) of the Civil Procedure Rules"

Order 7 Rule 1 (2) reads,

"The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint."

The plaint herein was accompanied by a verifying affidavit which sought to verify the correctness of the averments contained therein and which were both filed on 3rd November, 2003.

I find no fault in the verifying affidavit and therefore return a negative finding on this issue.

I however note that the defendants' contention on contravention of Order 7 Rule 1 (2) is founded on the fact that David Chombo Magambo (listed as number 37 in the list attached to the plaintiffs bundle of documents) and Patrick Musyimi (the 3rd plaintiff) have instituted separate suits in Thika Residents Magistrate Court claiming *interalia* damages for unlawful termination of employment against the 1st

defendant.

Indeed the same is confirmed by statement numbers 4 and 5 of the Agreed Facts.

That being so, I hold that the suit stands fatally defective as against the said David Chomba Magambo and Patrick Musyimi only.

Accordingly, and for all the reasons outlined above, I dismiss the Plaintiffs suit.

Before I close, let me express my gratitude to all the Counsels for their hard work and well researched presentations. And I simply want to say that I feel a deep sense of sorrow for all the Plaintiffs before me, and other former employees of the 1st defendant, for the loss of their jobs. I know how painful and traumatic this is to everyone, especially in a market where there are limited employment opportunities. Some of these people had left fairly good and stable jobs to venture into what they believed were greener pastures. It was unfortunate that their new employer's business had to close down, leaving them stranded and without any source of income. It is for these reasons that I would not wish to inflict any further pain and burden, **and accordingly I will order that each party bears its own costs**. And with that I will end by saying to the Plaintiffs *pole sana*, and God bless.

Dated and delivered at Nairobi this 8th day of June, 2006.

ALNASHIR VISRAM

JUDGE

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KENYA LAW
Where Legal Information is Public Knowledge

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mohammed Ibrahim & Njoki Ndungu, SCJJ)

PETITION NO. 12 OF 2013

–BETWEEN–

TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE.....PETITIONER

–AND –

1. MUMO MATEMO .....

2. THE ATTORNEY GENERAL ..... RESPONDENTS

3. MINISTER FOR JUSTICE & CONSTITUTIONAL

AFFAIRS .....

4. DIRECTOR OF PUBLIC PROSECUTION.....

–AND–

1. THE KENYA SECTION OF INTERNATIONAL

COMMISSION OF JURISTS..... AMICI CURIAE

2. KENYA HUMAN RIGHTS COMMISSION.....

–AND–

KATIBA INSTITUTE .....INTENDED *AMICUS CURIAE*/APPLICANT

(Being an application by Katiba Institute to be enjoined in these proceedings as amicus curiae)

RULING

A.INTRODUCTION

[1] This is a Notice of Motion dated 3rd March, 2015, filed by Katiba Institute seeking leave to be enjoined in the substantive appeal as *amicus curiae*. The application is supported by affidavit sworn by

Christine Nkonge, the applicant's litigation counsel.

B. SUBMISSIONS OF THE PARTIES

i. *The Intended Amicus curiae/Applicant*

[2] Learned counsel for the applicant, Mr. Lempaa submitted that the applicant is an institution with expertise in constitution-making and design, and would therefore contribute to the resolution of the issue at hand. He urged that the applicant was non-partisan in the matter, and was only keen to aid the Court in interpreting and applying constitutional principles on the issues arising, by proposing a comparative approach. Mr. Lempaa submitted that the applicant had no special interest in the matter, personal or commercial, and its sole motivation was fidelity to the law and the Constitution of Kenya, 2010.

[3] In its grounds in support of the application, the applicant stated that it would assist the Court by providing the relevant historical context, constitutional design and principles relating to institutional comity, judicial and quasi-judicial processes, integrity, transparency and accountability, and comparative foreign law on the issues entailed.

[4] We were urged to admit the applicant as *amicus curiae* because of the public interest nature of the appeal before the Court. According to counsel, it was the first time Chapter 6 of the Constitution was coming up for consideration before the Court. Drawing from the supporting affidavit of Christine Nkonge, counsel submitted that the learning of the applicant's founder and director, Prof. Yash Pal Ghai, an expert in constitutional law, would benefit the Court in the resolution of this matter.

[5] It was submitted that Katiba Institute's admission as *amicus* in this case would outweigh any possible prejudice to any of the parties. It was thus deponed in paragraph 10 of the applicant's affidavit:

"THAT even if any prejudice was to be occasioned to any party and /or the Court, we believe that given the importance of issues implicated by this litigation, their complexity, their public - interest nature, the importance of the case in engendering good governance, rule of law and constitutionalism vis - a- vis the information and arguments contained in our submissions, the value of admitting KI (Katiba Institute) as amicus curiae outweighs any prejudice that may be occasioned to any party."

[6] On the issue of delay, counsel submitted that no prejudice would be occasioned to any party as a result of the time taken in filing application.

ii. *The 1st Respondent*

[7] The 1st respondent contested the application by way of a replying affidavit sworn on 16th March, 2015 and learned counsel Mr. Kilonzo, urged that the principles for admission of *amicus curiae* had already been set by this Court in ***Trusted Society of Human Rights Alliance v. Mumo Matemo & 5 Others***, *Sup. Ct. Pet. No. 12 of 2013*, and that the applicant's case in this instance, fell short of the prescribed standard.

[8] Learned counsel questioned the value of the applicant's *amicus* intervention, given that the 5th and 6th respondents had already been admitted as *amici* right from the trial Court. He urged that the intended *amicus* brief had no issues not already covered by the two *amici* on record.

[9] Mr. Kilonzo submitted that a Court ought to consider its limited resources, including time, in determining the number of *amici* it should admit or engage. Counsel urged that an extension of the

issues for determination by *amici* ought to be avoided, since matters before the Court must be expedited and finalized. Counsel urged the Court, in determining this matter, to consider the fact that this was a second and final appeal.

iii. *The Petitioner*

[10] Learned counsel for the petitioner, Mr. Mwongela submitted that his client had not taken a partisan position in this matter even though he had made reference to the High Court decision; and thus his case for *amicus* status was not compromised.

iv. *The 2nd and 3rd Respondents*

[11] Learned counsel for the 2nd and 3rd respondents, Mr. Muiruri submitted that the draft submissions appended to the amicus brief portrayed a partial inclination by the applicant. He urged further, that it was apparent from the said brief, that the applicant would bring no new element to the issues of law. Counsel urged the Court to focus its attention on the live dispute between the real parties, in this adversarial system, in such a manner that the same is not overshadowed by a multiplicity of *amici*.

v. *The 4th Respondent*

[12] Learned counsel for the 4th respondent, Mr. Okello submitted that the intended *amicus* was merely seeking to introduce a historical perspective to the cause, and had indeed taken a position in support of the High Court's stand.

vi. *1st and 2nd Amici curiae [5th and 6th Respondents]*

[13] It is noted that the 1st and 2nd *amici curiae* were erroneously listed as the 5th and 6th respondents. The effect of describing an *amicus curiae* as a respondent is that, by default, such *amicus* gains the status of a respondent. Courts should always be mindful of party description, so as to protect the interests of the parties to the dispute, from a multiplicity of stakes crowding the litigation- forum. So in the instance matter, we amend the status of current *amicus*, to refer to 1st and 2nd *amici curiae*. At the hearing of the appeal, this Court will also regulate amicus interventions, to ensure that the *amici* do not assign to themselves the substance of the claims in the cause.

[14] Learned counsel for the 1st and 2nd *amici curiae*, Mr. Nderitu urged the Court to reject the submissions that an *amicus curiae* ought not to take a particular position in a matter. He submitted that an *amicus* expresses an opinion, whether or not it would favour one side or the other. Counsel urged that as a matter of fact, a determination made by a Court assisted by *amicus*, would still favour one side. Counsel submitted that the disqualification of an *amicus* should only be for lack of adherence to relevant legal principles.

[15] Counsel urged that the admission of the applicant as *amicus curiae* would serve the objects of the Court, as outlined in the Constitution and the Supreme Court Act.

vii. **The *Applicant in Response***

[16] Learned counsel, Mr. Waikwa for the applicant, submitted that there was no evidence to show that the instant application had occasioned any delay in the proceedings; for the main cause was yet to be cleared for hearing.

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[17] On the issue of partisanship, Mr. Waikwa submitted that this has two aspects: partisanship based on factual evidence; and partisanship based on legal interpretation. He urged that the category of partisanship raised by the 1st respondent was one of legal interpretation; and that all the authorities cited by parties beckoned legal, as opposed to factual evaluation. He submitted that the exclusion of the applicant in ***Moses Kiarie Kuria & 2 others v. Ahmed Isaack Hassan & Another***, *Petition No. 3 of 2013, [2013] eKLR* from *amicus* status, was based on the applicant's proposed factual appraisal, which is distinguishable from the current instance. Counsel urged the Court to allow the application.

C. **ISSUE FOR DETERMINATION**

[18] The single issue for determination in this application is whether Katiba Institute should be admitted to these proceedings as *amicus curiae*.

D. **ANALYSIS**

a. *Establishing Principles*

[19] This Court has previously made pronouncements regarding the participation of parties in proceedings as *amici curiae*. This matter, however, presents an opportunity to consolidate the principles previously developed on the subject, drawing on earlier decisions, as well as on comparative jurisprudence.

[20] In this regard, certain specific questions emerge, calling for this Court's attention, as follows:

i. *at what stage can the Court admit a party as* ***amicus curiae"***
ii. *can a party apply to be enjoined as* ***amicus*** *at the final appellate stage, especially where other parties have opposed the application"*
iii. *what are the attributes of* ***amicus*** *status, in the special context of Kenya's legal system.*

[21] The Constitution of Kenya, 2010, by express terms, requires Courts to "develop the law to the extent that it does not give effect to a right or fundamental freedom" (Art. 20(3)(a)). This is the very foundation for well -informed inputs before the Court, which inherently, justifies the admission of *amici curiae*. We have a duty to ensure that our decisions enhance the right of access to justice, as well as open up positive lines of development in jurisprudence, to serve the judicial system within the terms of the Constitution.

[22] The Constitution further bestows upon all State Organs and all public officers the duty to respond to the needs of vulnerable groups within the society (Art. 21(3)). This obligation, in the context of an enlarged *locus* in the enforcement of fundamental rights and freedoms (Article 22(2), and of the enforcement of the Constitution itself (Article 258), enjoins that a person seeking to canvass the values and principles under the Constitution, by applying legal expertise, materials, or information available, is a potential friend of the Court. As observed by the Constitutional Court of South Africa in the case of ***Children's Institute v. Presiding Officer of the Children's Court, District of Krugersdorp and Others*** *(CCT 69/12) [2012]:*

"...the role of a friend of the court can, therefore, be characterised as one that assists the courts in effectively promoting and protecting the rights enshrined in our Constitution."

[23] Rule 3 of the Supreme Court Rules, 2012 defines *"amicus curiae"* 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."* Rule 54(1) vests the Court

with the power to appoint *amicus curiae* in any proceedings, while sub-rule 2 sets out the criteria:

"The Court shall before allowing an amicus curiae take into consideration ***the expertise, independence and impartiality*** *of the person in question and it may take into account* ***the public interest,*** *or any other* ***relevant factor"*** [emphasis supplied].

Rule 25 on the other hand outlines the admission of interested parties into the Court's proceedings.

"25. (1) **A person may** at any time in any proceedings before the Court **apply for leave** to be joined as an **interested party**.

(2) An application under this rule shall include?

(a) a description of the interested party;

(b) any **prejudice** that the interested party would suffer if the intervention was denied; and

(c) the grounds or submissions to be advanced by the person interested in the proceeding, their relevance to the proceedings and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties." [emphasis supplied].

[24] We have in several cases, considered the role of *amicus* and outlined the difference between *amici curiae* and *interveners*. This guideline has been followed by other Courts in our jurisdiction, in cases such as ***Judicial Service Commission v. Speaker of the National Assembly and Another,*** *High Court Petition No. 518 of 2013 [2013]eKLR;* and ***Justice Philip K. Tunoi &***

Another v. Judicial Service Commission & 2 Others*, High Court Petition No. 244 of 2014 [2014]eKLR.* We elaborated the difference between interveners and *amici curiae* in the application to be enjoined as *amicus* by the Law Society of Kenya, in this matter, - ***Trusted Society of Human Rights Alliance v. Mumo Matemo & 5 Others****, Sup. Ct. Pet. No. 12 of 2013* - at paragraphs 17 and 18 of the ruling:

"……. ***while an interested party has a 'stake/interest' directly in the case, an*** *amicus's* ***interest is its 'fidelity' to the law: that an informed decision is reached by the Court, having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.***

'Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause *ab initio.* ***He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in theproceedings, and champions his or her cause. On the other hand, an*** *amicus* ***is only interested in the Court making a decision of professional integrity. An*** *amicus* ***has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a 'friend' of the Court, his [or her] cause is to ensure that a legal and legitimate decision is achieved."***

[25] We have observed the trend of applications by persons seeking *amicus* status, to aid this Court in the execution of its duty. We approbate this inclination, as the transformative cast of the Constitution invites due diligence on the part of all persons. Judicial authority flows from the people as the final

arbiter, with the capacity to affect any settled precedent. It justifies any person with special legal expertise, in matters coming up before this Court, coming as a friend of the Court. Rule 54 beckons the invitation of persons as *amici curiae* and also recognizes the need to allow, from time to time, and on a case-by-case basis, the appearance of legal or technical experts and advocates in proceedings before us. The dichotomy of interest and expertise shreds any doubt as to the role of a party in any proceedings before us. ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate***, Sup. Ct. Appl. No. 2 of 2012, we admitted certain organizations to appear as interested parties (representing the interest of the public) and went further to admit those with certain expertise to appear, including Charles Kanjama who was admitted as *Advocate* under this rule to enrich the legal submissions in the proceedings before the Court. The expanded forum by our Constitution is a testament that we continue to witness various forms of legal mobilization in pursuit of a constitutionally engineered rights-based jurisprudence.

[26] However, this opening ought to be regulated, In order to protect the rights of the parties to the causes before us. *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 is the risk of the real interest of the *amicus* threatening the position of the original suitors, whose rights and obligations stand to be upset by the outcome of the appeal.

[27] This question has also been considered by the United States Supreme Court in the case of ***Florida v. Georgia, 58 U.S. (17 How.) 478 (1854).*** In that case, the Attorney - General of the United States sought to be heard in a case, on appeal, where the interests of the Federation were likely to be compromised. The Court considered the familiar practice of hearing the Attorney - General on behalf of the State, in suits between individuals involving matters of public interest; and if recognized that the Federation would be adversely affected by the decision, if it was accorded no opportunity to be heard. The Court acceded to the Attorney - General's request, granting the motion. There were, however, dissenting opinions (by *Justices Curtis* and *McLean)* which proceeded on the basis that the Supreme Court's jurisdiction had been compromised by the majority decision.

[28] What should be this Court's position on *amicus* briefs inviting factual appraisal" The legitimacy of *amicus* briefs flows from their engagement with points of law.

[29] Cases involving matters of general public interest may occasion the Court inviting certain parties, such as the Attorney - General, to participate in proceedings as *amicus curiae*. The special role of the Attorney - General as *amicus,* on behalf of the State, was considered in the case of ***Moses Kiarie Kuria & 2 others v. Ahmed Isaack Hassan & Another***, *Petition No. 3 of 2013, [2013] eKLR* . In that case we contemplated various governing scenarios in admitting the Attorney - General's *amicus* brief. Indeed the position of the Attorney - General as the custodian of the legal instruments of the Executive Branch, and as advisor in matters of public interest cannot be challenged. We also considered the position of the Attorney - General in the performance of the Executive's role vis-à-vis the operationalization of the Constitution; and the nature of this Court's discretion to regulate the extent of the Attorney - General's participation in the proceedings. The Attorney - General, in a proper case, therefore may be admitted to take part in proceedings as *amicus curiae,* where great public interest is involved. The Office of the Attorney General Act (No. 49 of 2012) reinforces the centrality of this office in relation to the facilitation, promotion and monitoring the rule of law, the protection of human rights and democracy in Kenya (S. 5(2)). Section 7 of this Act gives a statutory right of audience in proceedings of any suit or inquiry in matters involving public interest and those concerning the legislature, Judiciary and any other independent department or agency in government. It is to be observed, however, that despite the Attorney General's extraordinary role, certain exceptions, may be made by a Court in considering an application by the Attorney General seeking audience before it.

[30] A comparative examination of *amicus* jurisprudence from other apex Courts is relevant in illuminating the practice of *amicus* briefs, in other jurisdictions.

[31] The Supreme Court of Minnesota in the case of ***State v. Finley, 242 Minn. 288 (1954)*** rejected an *amicus* brief that suggested by implication, that an accused person was guilty. The Court delimited the remit of *amicus* in the following terms:

"The ordinary purpose of an** amicus curiae **brief in a civil action is to inform the court as to facts or situations which may have escaped consideration or to remind the court of legal matters which have escaped its notice and regarding which it appears to be in danger of making a wrong interpretation."

[32] The Supreme Court of Ireland had occasion to examine the role and place of *amicus curiae* in appellate proceedings in the case of ***I v. Minister for Justice Equality and Law Reform,*** [2004] 1 ILRM 27; [2003] IESC 38. The Court allowed the United Nations High Commissioner for Refugees to appear as *amicus* in a case involving an issue referred to the Supreme Court by the High Court, as involving great public interest. The Court adopted the definition of *amicus curiae* approved in the case of ***United States Tobacco Company v. Minister for Consumer Affairs and Others*** (83 ALR 79), which comes from *Jowitt's Dictionary of English Law:*

"A friend of the court, that is to say a person, whether a member of the bar not engaged in the case or any other bystander, who calls the attention of the court to some decision, whether reported or unreported, or some point of law which would appear to have been overlooked."

[33] The *amicus* practice in South Africa has been to allow persons and organisations or entities that may not have a direct legal interest in a matter, to participate, where sufficient interest has been established. This follows the terms of the Rules of the Constitutional Court (R. 10). The duty of *amicus* to the Court, in that country, was succinctly stated by the Constitutional Court in ***Re: Certain Amicus Curiae Applications; Minister of Health and Others v. Treatment Action Campaign and Others,*** *(CCT 8/02) [2002]*(at paragraph 5 of the Judgement), in the following terms:

"The role of an** amicus **is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an** amicus **has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The** amicus **must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court. Ordinarily it is inappropriate for an** amicus **to try to introduce new contentions based on fresh evidence."

[34] *Justice Sachs* in the case of Government of the ***Republic of South Africa and Others v. Grootboom and Others*** *2001 (1) SA 46 (CC)*, noted the special merits brought by advocates who participated in the case as *amici*.

"I might mention that we were helped at the hearing in a most considerable way by the participation of the Human Rights Commission and the Community Law Centre of the University of the Western Cape. Counsel for the Legal Resources Centre appeared on their behalf and succeeded in broadening the debate so as to require the Court to consider the right of all South Africans to shelter, whether they had children or not. The case showed the extent to which lawyers can help the poor to secure their basic rights".

[35] Although there are no formal rules governing the role of *amicus curiae* in Uganda, the issue has been the subject of legal scholarship. M. Ssekaana and S. Ssekaana in their book, *Civil Procedure and Practice in Uganda (2010)* (at page 50) have considered the role of *amicus curiae* as follows:

"In its ordinary use the term implies a friendly intervention of counsel to remind the court of some matter of law which has escaped its notice in regard of which it is in danger of going wrong. It seems that such a person is not a party to an action but one who calls the attention of the court to some decision or point of law which appears to have been overlooked... ***Where the intervention would only serve to widen the case between the parties or introduce a new cause of action, the intervention should not be allowed. An*** *amicus curiae* ***is not a party to an action, has no control over it and generally should not be allowed costs. The right of an*** *amicus curiae* ***to address the court is purely discretionary and is not dependent upon the consent of the parties to the proceedings"*** [emphasis supplied]

[36] The evolution of the *amicus* role in Kenya is distinguishable from the position in jurisdictions such as the United States, Australia, South Africa and Ireland. This distinction surfaces in the light of the decision of the Supreme Court of Ireland, in ***I v. Minister for Justice, Equality and Law Reform*** *(op.cit.):*

*".....****the court is satisfied that it does have an inherent jurisdiction to appoint an*** *amicus curiae* ***where it appears that this might be of assistance in determining an issue before the court. It is an unavoidable disadvantage of the adversarial system of litigation in common law jurisdictions that the courts are, almost invariably, confined in their consideration of the case to the submissions and other materials, such as relevant authorities, which the parties elect to place before the court. Since the resources of the court itself in this context are necessarily limited, there may be cases in which it would be advantageous to have the written and oral submissions of a party with a*** *bona fide interest* ***in the issue before the court which cannot be characterised as a meddlesome busy body. As the experience in other common law jurisdictions demonstrates, such an intervention is particularly appropriate at the national appellate level in cases with a public law dimension.***

It is, at the same time, a jurisdiction which should be sparingly exercised..."

[37] While such jurisdictions require *amicus* to have *bona fide* interest in the matter, our practice is that *amicus* ought to come into the proceedings on a foundation of neutrality; and by virtue of the express terms of the Constitution, parties with an interest in the proceedings are accommodated in the capacity of *interveners* .

[38] *Amicus* participation is a matter of privilege, rather than of right. And "intervention" in a case, as provided under Rule 25 of the Supreme Court Rules, 2012 allows parties *with sufficient interest in the matter* to apply to be enjoined as *interveners* or *interested parties*. This avenue is set apart from that of *amicus*. As opposed to *amicus*, interveners have an interest in the *res* of the suit, as to be affected by the resulting Judgement of the Court. *Amicus curiae* on the other hand, are "advisors to the Court", and not to the parties, and are in no way bound by the resulting Judgement, except by way of precedent. *Amici curiae* cannot be perceived as an extension of the Court; and they are not to advance any party's case, and ought not to extend their participation to the realm of interveners in any legal proceedings. The interposition of *amici* in judicial proceedings is terminated when they have put forward the points of law outlined in their *amici* brief.

[39] There is, however, an exception in *amicus* interventions, in the case of advisory-opinion proceedings before this Court, as signalled in ***Re the Matter of the Interim Independent Electoral***

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Commission, Sup. Ct. Const. Appl. No.2 of 2011. The absence of a live controversy in such proceedings opens a window for the *amicus* to steer the Court, by specific proposals, towards a definite legal position. The ultimate decision, however, lies with the Court.

[40] In the High Court case, ***Justice Phillip K. Tunoi & Another v. Judicial Service Commission & 2 Others*** *(op. cit)* (at para.30), *Mr. Justice Odunga* had aptly observed, in relation to *amicus* status in Kenya today, thus:

"It is unfortunate that in this country, unlike in other jurisdictions with an advanced Constitution such as ours, we do not have in place comprehensive rules which govern the admission of persons as amici in legal proceedings."

[41] From our perceptions in the instant matter, we would set out certain guidelines in relation to the role of *amicus curiae:*

i. *An **amicus** brief should be limited to legal arguments.*
ii. *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.*
iii. *An **amicus** brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tends to compromise their essence as well as the terms of the Constitution's call for resolution of disputes without undue delay. The Court may therefore, and on a case- by-case basis, reject **amicus** briefs that do not comply with this principle.*
iv. *An **amicus** brief should address point(s) of law not already addressed by the parties to the suit or by other **amici**, so as to introduce only novel aspects of the legal issue in question that aid the development of the law.*
v. *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.*
vi. *Where, in adversarial proceedings, parties allege that a proposed **amicus curiae** 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 parties to be heard on the issue (see: **Raila Odinga & Others v. IEBC & Others;** S.C. Petition No. 5 of 2013-Katiba Institute's application to appear as **amicus**).*
vii. *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.*
viii. *The Court will regulate the extent of **amicus** participation in proceedings, to forestall the degeneration of **amicus** role to partisan role.*
ix. *In appropriate cases and at its discretion, the Court may assign questions for **amicus** research and presentation.*
x. *An **amicus curiae** shall not participate in interlocutory applications, unless called upon by the Court to address specific issues.*

[42] In addition, we would adopt, with respect, certain guidelines which emerge from *Mr. Justice Odunga's* decision in the ***Justice Tunoi case*** *(op.cit.)* :

xi. *The applicant ought to raise any perception of bias or partisanship, by documents filed, or by his submissions.*
xii. *The applicant ought to be neutral in the dispute, where the dispute is adversarial in nature.*

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xiii. *The applicant ought to show that the submissions intended to be advanced will give such assistance to the Court as would otherwise not have been available. The applicant ought to draw the attention of the Court to relevant matters of law or fact which would otherwise not have been taken into account. Therefore, the applicant ought to show that there is no intention of repeating arguments already made by the parties. And such new matter as the applicant seeks to advance, must be based on the data already laid before the Court, and not fresh evidence.*

xiv. *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.*

xv. *Whereas consent of the parties, to proposed* ***amicus*** *role, is a factor to be taken into consideration, it is not the determining factor.*

[43] In addition to these guiding principles, the following *directions* may be applied by a Court considering an ***amicus*** application:

i. *A party seeking to appear in any proceedings as* ***amicus curiae*** *should prepare an* ***amicus*** *brief, detailing the points of law set to be canvassed during oral presentation. This brief should accompany the motion seeking leave to be enjoined in the proceedings as* ***amicus.***

ii. *The Court may exercise its inherent power to call upon a person to appear in any proceedings as* ***amicus curiae.***

iii. *In proceedings before the Supreme Court, the Bench as constituted by the President of the Court, may exercise its discretion to admit or decline an application from a party seeking to appear in any proceedings as* ***amicus curiae,*** *and denial or acceptance such of an application should have finality.*

iv. *The Court reserves the right to summarily examine* ***amicus*** *motions, accompanied by* ***amicus*** *briefs, on paper without any oral hearing.*

v. *The Court may also consider suggestions from parties to any proceedings, to have a particular person, State Organ or Organisation admitted in any proceedings as* ***amicus curiae.***

[44] We are guided by the foregoing principles as we resolve the question before us in the instant application.

a. *Partiality to Petitioner's Cause"*

[45] It is now clear that impartiality to a party's cause is one of the conditions for admission to the status of *amicus curiae*. Now, does the applicant in this case seek to advance a position favouring any of the parties in the petition" Our evaluation of the submissions annexed to the *amicus* brief signals (at paragraphs 60-68), that the intended *amicus curiae* inclines towards sustaining the decision of the High Court, to the detriment of the 1st respondent.

[46] The 1st respondent urged that the intended *amicus curiae* has taken a position of bias, by supporting the appeal. The applicant, on the other hand, has denied the 1st respondent's assertions of partiality. Learned counsel for the 2nd and 3rd respondents, Mr. Muiruri submits that the persuasive authorities cited by the applicant had already been placed before the Court and, in the circumstances, the applicant was introducing no new material to aid the Court in the resolution of the case before it. He is also of the view that the applicant is partisan, and should not be admitted to *amicus* status, except upon conditions. Learned counsel, Mr. Okello for the 4th respondent, agrees with Mr. Muiruri, and submits that the applicant's *amicus* brief brings no additional value to the proceedings. But Mr. Nderitu, learned counsel for the 1st and 2nd *amici curiae*, submits that the intended *amicus curiae* only presents its legal interpretation of the decision of the High Court, rather than delve into matters of fact. Mr. Waikwa, learned counsel for the applicant, disputes the submissions on partisanship, and urges that a

dichotomy be drawn between factual and legal partisanship. He urges that the applicant's submissions are purely legal, and therefore sustainable.

[47] Impartiality is a central tenet in the conduct of judicial proceedings. As counsellor before the Court, an *amicus curiae* should not exhibit partiality towards any party's cause; otherwise some party would be prejudiced. Given the role of *amicus* as friend of the Court, impartiality is required of an *amicus curiae*. The role of an *amicus* is to aid the Court so it may reach a legal, pragmatic and legitimate decision, anchored on the tenets of judicial duty. In an adversarial legal system such as ours, impartiality on the part of the Court, and all its agencies such as *amici curiae,* must withstand all compromise. The Court, in an adversarial system, is but an umpire, not to be seen to descend into the arena of conflict in the cause before it **(see *Muriu & Others v. R. (1955) 22 EACA 417*).** An *amicus curiae* has to stay aloof, assisting the Court, without being seen to take sides.

[48] In the *amicus* brief attached to this application, the applicant gives (at paragraphs 59-65) an analysis of the decisions of the two earlier superior Courts. It is this analysis that Mr. Waikwa urges to be an impartial legal interpretation. Do these paragraphs disclose any impartiality" Justice from the Court has to be assessed from the eyes of the ordinary litigant. When determining whether *amicus* is partisan, the test should be that of the ordinary litigant, rather than of a legal expert examining the dichotomy between factual matter and legal matter. How will an ordinary litigant perceive the submissions of Katiba Institute, as presented in paragraphs 59 to 65 of the proposed draft submissions" The Court is of the opinion that the applicant has scrutinized the decisions of the superior Courts, and taken the stand that the Court of Appeal erred in upsetting the finding of the High Court. A perception of bias beckons, when the ordinary litigant reads these submissions. At paragraph 65 of the *amicus* brief, the applicant states:

"The Court of Appeal in fact proceeded to its own fact- based inquiry and held that the allegations against Mr. Matemu did not hold water. With respect, this does not deal with the finding of the High Court, which was saying that the Panel did not carry out inquiries that would have unearthed the allegations, which allegations would have been sufficiently serious to demand further investigations. Maybe those further investigations would have reached the same conclusion as the Court of Appeal. But the point is that they did not take place"

[49] The only course open to an *amicus* is to aid the Court in arriving at a determination based on the law, and/or upon uncontroverted, scientific and verifiable facts. Whether the superior Courts erred in arriving at their determination is to be left to the value judgement of the Court, as the ultimate decision - maker, following a conscientious evaluation of the parties' respective cases. It is not for *amicus* to suggest to the Court whether a decision was wrong or right, nor to advise on which resolution to arrive at. The pursuit of a particular outcome is reserved to the parties to the controversy, including the interested parties or interveners. Consequently, we agree with the 1st respondent that the applicant has demonstrated partiality, and does not satisfy the threshold of admission as *amicus* in these proceedings.

b. *Delay in Seeking Admission as amicus"*

[50] The intended *amicus curiae* had, besides, delayed in seeking admission into this case. The petition of appeal was filed on 2nd September, 2013. The matter had been scheduled for hearing on 22nd October, 2014 and 5th March, 2015 but could not proceed. We note that the applicant neither sought to be enjoined as *amicus* in this matter at the High Court nor the Court of Appeal. For purposes of proper administration in this Court, applications seeking the exercise of discretionary powers are to be made within reasonable time; this ensures expedition in the proceedings, and gives fulfillment to parties' constitutional right of access to justice. This is a statement of principle, and by no means attributes blame to the applicant, in this instance. The application fails not on this limb, but on that of alignment and

partiality.

E. **ORDER**

I. ***The application for admission to the status of*** *amicus curiae* ***is disallowed, with no orders as to costs.***

DATED and **DELIVERED** at **NAIROBI** this **17th** day of **June**, 2015

....

M.K IBRAHIM SUPREME COURT JUSTICE OF THE SUPREME COURT

N.S. NDUNGU JUSTICE OF THE SUPREME COURT

I certify that this is a true

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SUPREME COURT OF KENYA