

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS APPLICATION NO. 650 OF 2022
(ARISING OUT OF MISC. CAUSE NO. 86 OF 2022)
IN THE MATTER OF AN APPLICATION FOR LEAVE TO INTERVENE AS
AMICUS CURIAE BY THE APPLICANTS

1. COLLABORATION ON INTERNATIONAL ICT POLICY FOR EAST AND SOUTHERN AFRICA (CIPESA)

2. ACCESS NOW

3. ARTICLE 19: GLOBAL CAMPAIGN

FOR FREE EXPRESSION ::: APPLICANTS

VERSUS

1. INITIATIVE FOR SOCIAL AND ECONOMIC RIGHTS (ISER) LTD

2. THE UWANTED WITNESS (U) LIMITED

3. HEALTH EQUITY AND POLICY INITIATIVE LIMITED

4. THE ATTORNEY GENERAL

5. NATIONAL IDENTIFICATION

REGISTRATION AUTHORITY (NIRA) ::: RESPONDENTS

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] This Application was brought by Notice of Motion under Article 50(2) of the Constitution and rules 5, 6 & 9 of the Judicature (Amicus Curiae) Rules, S.I No. 54 of 2022 seeking orders that;

- a) The Applicants be granted leave to intervene as Amicus Curiae in Miscellaneous Cause No. 86 Of 2022.

b) Each party bears its own costs.

[2] The grounds of the application are summarized in the Notice of Motion and also set out in the affidavits in support of the application deposed by **Edrine Wanyama** on behalf of the 1st Applicant, **Joseph Steele** on behalf of the 2nd Applicant and **Mugambi Kiai** on behalf of the 3rd Applicant. Briefly, the grounds are that the Applicants are recognized experts regionally and internationally in the promotion and advancement of human rights, especially the right to inclusion in the arena of data protection, right to privacy, freedom of expression, surveillance, and how these intersect with the socio-economic rights. The Applicants possess expertise and knowledge on matters concerning Digital Identity systems, digital security, right to privacy, internet freedom, biometric systems, data management, and governance and their impact on the civil and political rights, as well as social, economic, and cultural rights. The Applicants have interest in the determination of the Main Cause as human rights organizations promoting equity and inclusion and this constitutes fidelity to the law. The Applicants are neutral and impartial of the dispute between the parties in the Main Cause.

[3] The Applicants further state that the submissions made by them on various points of law regarding the subject matter are novel and shall aid the development of jurisprudence in Uganda. The submissions draw attention to relevant matters of law that are useful, focused, and principled. The Applicants have previously submitted amicus briefs, expert opinions, legal analyses, intervener and inter-party submissions to various international, regional and national courts, tribunals and Human Rights Commissions on points of law of key importance to human rights protection especially on the use and management of personal data and inclusion. The Applicants are aware of the current system in Uganda that makes it mandatory for one to present a national identification number, or being part of the national identification

register acquired through enrollment in the national digital identification system by Ugandans to access SAGE benefits as a form of social security, as well as public health services. There are questions that have not been dealt with by the pleadings of the parties before the Court and yet are important in the Court's determination of the Main Cause and the need to balance access to SAGE with the right to privacy and freedom of expression, equity and inclusion. The positive benefits of the intervention of the Applicants as Amici Curiae outweigh any possible opposition from the parties to the main cause. It is in public interest, interests of justice, the promotion and protection of human rights that the application is granted.

[4] The Application was opposed by the 4th and 5th Respondents through an affidavit in reply deposed by **Rosemary Kitembo**, the Executive Director of the 5th Respondent. Briefly, the grounds of opposition are that the Applicants are biased, hostile to the 4th and 5th Respondents and only seek to support the applicants' case in the main cause; that the Applicants have not adduced sufficient evidence of expertise on which their application is based; the Applicants are introducing a fresh cause of action and new evidence which is averse to the 4th and 5th Respondents; and that there is nothing novel that the Applicants are bringing to this case as to warrant their admission as amici curiae.

[5] The 1st, 2nd and 3rd Respondents did not oppose the application. The Applicants filed an affidavit in rejoinder whose contents I have also taken into consideration.

Representation and Hearing

[6] At the hearing, the Applicants were represented by **Mr. Raymond Owak** and **Mr. Michael Aboneka**; the 1st, 2nd and 3rd Respondents were represented by **Mr. Laston Gulume**; while the 4th and 5th Respondents were represented by

Mr. Brian Musota. Counsel agreed that the hearing would proceed by way of written submissions which were duly filed and have been adopted and considered in the determination of the matter before court. I will refer to the submissions in the course of resolution of the issue.

Issue for Determination by the Court

[7] Only one issue is up for determination by the court namely;

Whether the application discloses sufficient grounds for the Applicants to be granted leave to intervene as Amici Curiae?

Determination by the Court.

[8] The position of the law on Amicus Curiae in Uganda is provided for under the Judicature (Amicus Curiae) Rules S.I No. 54 of 2022. Under the Rules, “amicus curiae” is defined as a person or organization that is not a party to a suit but who participates in the litigation by providing the court with important information intended to assist the court in making an informed decision. Under rule 5 thereof, the court may admit a person or organization as amicus curiae who meets the following requirements —

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

[9] Rule 8(1) of the Judicature (Amicus Curiae) Rules makes provision for objection by a party to the admission of a person or organization as amicus curiae. It provides that a party to a suit may object to the admission of a person or organization as amicus curiae where the party considers that —

- (a) the applicant does not have sufficient expertise;
- (b) the applicant is introducing new evidence;
- (c) the applicant is not impartial or is biased or hostile towards one or more of the parties; or
- (d) the applicant, through previous conduct, appears to be partisan on the issue before court.

[10] The above legal provisions are in consonance with the decision of the Supreme Court over the matter in ***Prof. Joe Oloka-Onyango & Others vs Amama Mbabazi & Others, SC Civil Application No. 2 of 2016*** wherein the Court set out a range of accepted principles when determining admission of an intervention in the form of amicus curiae.

[11] On the case before me, the 4th and 5th Respondents opposed the admission of the Applicants as amicus curiae on three grounds, namely; bias/impartiality, based on the argument that the overall effect of the application is to support the applicants' case in the main cause to the prejudice of the Respondents; addition of a fresh cause of action and evidence; and lack of any novel expertise. I intend to deal with each ground of objection separately.

Impartiality/ Lack of Neutrality of the Applicants

[12] Rule 5 (a) of the Judicature (Amicus Curiae) Rules requires a party seeking admission as amicus curiae to establish that they are neutral and impartial. It is argued for the 4th and 5th Respondents that the allegation by the Applicants

that SAGE is not balanced and violates the right to privacy and freedom of expression is an expression of bias and partiality in the matter subject of the main cause. The Respondents also pointed out that the fact that the 1st Applicant previously filed an affidavit in support of a petition brought against the 4th Respondent in Constitutional Petition No. 26 of 2018 demonstrates that the Applicants are biased, hostile towards the 4th and 5th Respondents and only seek to use the application to support the applicants' case in the main cause. On the other hand, the Applicants have averred that they are neutral and impartial over the subject matter in the main cause and their interest is fidelity to the law.

[13] The **Black's Law Dictionary, 5th Edition, page 939**, defines the term "neutral" as being indifferent; unbiased; impartial; not engaged on either side; not taking an active part with either of the contending sides. At page 677, it defines "impartial" as favoring neither; disinterested; treating all alike; unbiased; equitable, fair, and just. At page 147, the Black's Law Dictionary defines "bias" as inclination; bent; prepossession; a pre-conceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction; to incline to one side. From the above definitions, it is clear that bias is the absence of neutrality or impartiality. It connotes that the subject person has a vested interest or inclination in a matter and is incapable of having his/her mind perfectly open to conviction. Being an interested party in a subject matter is one example of bias. An interested party is one who, clearly, will be affected by the decision when it is made one way or the other. See: ***Trusted Society of Human Rights Alliance vs Mumo Matemo & 5 Others, SC Civil Application No. 12 of 2013 (Kenya)***.

[14] On the case before me, no vested interest in the matter has been established against the Applicants. The Applicants have established that their

interest is the promotion of human rights, good governance and fidelity to the law. The fact that their opinion, when considered by the Court, may lead to a decision favorable to one of the parties is not the determining factor. This is because even the court, whose imperative is impartiality, makes opinions favorable to one of the parties after considering evidence and the law. Rather, the issue is absence of predisposition and having a mind open to conviction. The argument by Counsel for the 4th and 5th Respondents is that by making averments that are apparently in support of the Applicants' case, the Applicant is thus not impartial and is biased. This is not a correct view in my opinion. It is expected that if the Applicants' submissions are grounded in law and on the facts, they may support the case of either side where such a party is right. It is also important to note that according to the rules, the opinion of the amicus curiae is not binding on the Court. The purpose of the amicus curiae brief is to assist the court reach an informed decision; in which decision, one of the parties will be right and the other wrong. As such, the point raised by the Respondents' Counsel as pointing to bias does not in fact constitute bias.

[15] The same reasoning applies to the argument by the 4th and 5th Respondents that the fact that the 1st Respondent has ever deposed to an affidavit in support of an application against the 4th Respondent is further evidence of bias or partiality on the part of the Applicants. As explained by the 1st Respondent, the subject matter of the case in **Cyber Law Initiative and Others Vs Attorney General, Constitutional Petition No. 26 of 2018** was different as the challenge therein was against social media tax and its impact on the socio-economic life of the people of Uganda. It was submitted by Counsel for the Applicants that the 1st Applicant was not a party to that case but rather a witness who deposed to a supplementary affidavit after the applicants had secured leave of the court to adduce expert evidence. I agree that giving evidence in a matter, more so expert evidence, does not make one partisan. Unless there is evidence that the person giving evidence is an

interested party in the matter, it does not necessarily impair such a person's impartiality. In this case, the 1st Applicant and indeed all the Applicants are not potential beneficiaries of the rights being litigated over. They are thus not an interested party within the meaning of the law.

[16] In that regard, therefore, in order to prove bias or impartiality, the Respondents had to show previous inclination, predisposition, or pre-conceived opinion on the part of the Applicant on the matters before the Court in the main cause in order to prove existence of bias; which they have not done. In the circumstances, the 4th and 5th Respondents have not satisfied the Court that the Applicants are not neutral or impartial persons as to disqualify them from admission as amici curiae in the main cause. This ground of objection therefore fails.

Addition of a fresh cause of action and evidence

[17] Rule 8(1)(b) of the Judicature (Amicus Curiae) Rules provides that introduction of new evidence is one of the grounds for objection to admission of a person or organization as amicus curiae. This ground of objection serves to guard against the risk of diversion of proceedings and delving into the arena of litigation of the matters before the court in the main cause. The court has the power and discretion to limit the submission of the amicus curiae to only points of law relevant to the subject matter, facts brought before the court by the parties and must not introduce new evidence in the matter.

[18] It is alleged by the 4th and 5th Respondents that the Applicants seek to influence the Court by adding a fresh cause of action and new evidence in support of the applicants' case in the main cause. It is also argued by the said Respondents that their right to a fair hearing will be violated since they will not have an opportunity to cross examine the Applicants if admitted as amici curiae. Unfortunately, the 4th and 5th Respondents did not highlight the cause

of action distinct from that of the applicants in the main cause that is sought to be introduced by the present Applicants. The Respondents also did not indicate to the Court the fresh evidence introduced by the Applicants. The matters alluded to in paragraphs 15, 13 and 13 respectively of the 1st, 2nd and 3rd Applicants' affidavit in support of the application are not matters of evidence but rather legal concepts that are being advanced by the Applicants in line with their expertise.

[19] According to rule 5(e) of the Judicature (Amicus Curiae) Rules, one of the factors to be established by an applicant before admission as amicus curiae is that the submissions of the person or organization draw attention to relevant matters of law that are useful, focused and principled. In ***Prof. Joe Oloka-Onyango & Others vs Amama Mbabazi & Others (supra)***, one of the principles laid down by the Supreme Court is that the amicus curiae should address the court on points of law not raised by the parties but is of concern to the court. This principle is also reckoned under rule 6(3) of the Judicature (Amicus Curiae) Rules.

[20] The claim for the need to cross examine the Applicants when admitted as amici is in my view misplaced. This is because an amicus curia does not come to court as a witness and the amicus brief must not introduce evidence. Where the brief does introduce evidence, the same would be rejected by the court. Where such evidence is identified after the brief has been admitted, such a part can be expunged. As such, there is sufficient safety valve that is capable of ensuring that the respondent in such a matter is not prejudiced. It follows, therefore, that a need to cross examine an amicus should never arise. This claim by the Respondents was therefore made out of context.

[21] In the circumstances, the ground of objection to the application based on introduction of a fresh cause of action or new evidence is not made out and it accordingly fails.

Absence of Novelty in the points of law raised

[22] Under rule 5(c) of the Judicature (Amicus Curiae) Rules, the person seeking admission as amicus curiae must establish that the points of law or facts submitted by the person or organization are novel and will aid the development of jurisprudence. According to rule 4 of the Judicature (Amicus Curiae) Rules, “novel” means the quality of being new, original, unfamiliar, unusual or unique. In this case, the Applicants have indicated to court the areas that the parties in the main cause have not traversed but will aid the development of jurisprudence. The Applicants pointed out matters such as questions revolving around data protection, digital inclusion, surveillance and the sufficiency of protection measures and their impact on protection of the right to privacy even at the instance of a roll out of a good government program like SAGE. Indeed, the above are the very matters that the 4th and 5th Respondents categorized as constituting new evidence. To my finding, those matters do not constitute evidence; but rather do constitute legal concepts that are new, unfamiliar, unusual or unique. Such aspects constitute the quality of novelty. This ground of objection to the application also fails.

[23] In the premises, therefore, none of the grounds of objection to the application has been made out. The Applicants have satisfied the Court that they meet the legal requirements under the law as to warrant their admission as Amici Curiae in the main cause. The application is accordingly allowed with orders that;

- a) The Applicants are granted leave to intervene as Amici Curiae in Miscellaneous Cause No. 86 of 2022.

- b) The joint amicus brief filed by the Applicants onto this application is adopted by the Court subject to the Applicants' right to make any necessary changes. In case of any changes, the same shall be drawn to the attention of the Court and the parties' Counsel before the hearing of the main cause.
- c) Each party shall bear their own costs of this application.

It is so ordered.

Dated, signed and delivered by email this 24th day of March, 2023.

A handwritten signature in blue ink, appearing to read 'Boniface Wamala', with a long horizontal flourish extending to the right.

Boniface Wamala

JUDGE