



**IN THE EAST AFRICAN COURT OF JUSTICE
(FIRST INSTANCE DIVISION AT ARUSHA)**

(Coram: I. Lenaola, DPJ; J. Mkwawa, J (Rtd); F. Ntezilyayo)

**APPLICATION NO. 2 OF 2014
(ARISING FROM REFERENCE NO. 7 OF 2013)**

BETWEEN

**FORSC, FOCODE, PEN KENYA CENTRE, PALU, PEN INTERNATIONAL,
REPORTERS SANS FRONTIERS AND WORLD ASSOCIATION OF
NEWS PAPERS AND NEWS PUBLISHERS APPLICANTS**

AND

BURUNDIAN JOURNALISTS' UNION 1ST RESPONDENT

**THE ATTORNEY-GENERAL OF
THE REPUBLIC OF BURUNDI2ND RESPONDENT**

15th August 2014

RULING

1. The Applicants herein, Forum pour Renforcement de la Société Civile (“**FORSC**”), the International Press Institute, Maison de la Presse du Burundi, Forum pour la conscience et le développement (**FOCODE**), PEN Kenya Centre, Pan African Lawyers Union (**PALU**), PEN International, Reporters sans frontières and the World Association of Newspapers and News Publishers (**WAN - IFRA**) are all civil society groups and Non-Governmental Organisations operating within and without the borders of the Republic of Burundi.

2. By their joint Notice of Motion dated 7th February 2014, they have sought leave pursuant to the provisions of Rule 36 of the East African Court of Justice Rules of Procedure, 2013 to be allowed to participate in **Reference No. 7 of 2013** as *amici curiae*.

3. For avoidance of doubt, the above Reference challenges inter-alia **Law 1/11** of 4th June 2013 amending **Law 1/25** of 27th November 2003 which governs the Press Sector in Burundi and it is their case that numerous provisions of that law are contrary to the freedoms of expression and of the press within

the meaning of Articles 6 (d) and 7 (2) of the Treaty for the Establishment of the East African Community (hereinafter, "**the Treaty**").

4. In the Notice of Motion aforesaid, it is the Applicants' claim that they all have a genuine commitment to promoting respect for and observance of the freedoms of expression and of the press and in that regard they have acquired valuable expertise in that area of law. They therefore seek to be enjoined as *amici curiae* to assist the court on two issues;

- (i) Identifying and explaining the types of regulation of the media that constitute an infringement on press freedom;
- (ii) Offering reasons why the Freedoms of Speech and of the Press are essential components of both the fundamental principles of the EAC contained in Article 6 (d) of the Treaty and the Operational Principles of the Community set out in Article 7 (2) of the Treaty.

5. In addition, it is their case as set out in the Affidavit and submissions of Vital Nshimirimana, President of **FORSC**, that the Applicants as *amici* will

provide a distinct and helpful international and comparative perspective in the Reference and will offer useful, focused and principled legal submissions to assist the Court in interpreting and applying the Treaty.

6. The 1st Respondent, the Burundian Journalists Union by their Reply to the Motion, filed on 12th June 2014 and in submissions by its Counsel, Mr. Deya, expressed that it had no objection to the admission of the Applicants as *amici curiae*. In addition, Mr. Deya stated that the jurisprudence of the Court will be greatly enhanced by the submissions to be tendered by the Applicants as has happened in the past whenever an *amicus curiae* was admitted to participate in proceedings.

7. Mr. Deya also made the point that by admitting the Applicants to the proceedings, the number of stakeholders that have a direct interest and experience in the Court will be increased and the rule of law would also be advanced amongst the citizens of the EAC and the international community at large.

8. The 2nd Respondent, the Attorney-General of the Republic of Burundi, by his Response filed on 9th June 2014 and relevant to the present Application, argued that the Applicants, while claiming that they have expertise in the area of press freedom, have submitted no legal documents to support that claim.

9. Further, that the Court is fully mandated and has such legal expertise to enable it interpret the Treaty without any assistance, from anyone, least of all from the Applicants whose claim to expertise is unfounded. In any event, that, if the Court requires any assistance, the Parties to **Reference No. 7 of 2013** would render such assistance and so the Applicants' offer of assistance is unmerited.

10. Lastly, that the Applicants' submissions would not only duplicate those of the Applicants in the Reference but would also unnecessarily increase the costs to be incurred by the 2nd Respondent in responding to the Reference.

In his submissions, Mr. Kayobera for the 2nd Respondent also made the point that because there is no statement from each of the Applicants to show their specific interests in the Reference, then their claims are rendered worthless and in any event that they have also failed to produce their Constitutions or documents of registration to show the Court what their mandates are and of what relevance their contribution would be to the dispute before the Court..

11. In the end, the 2nd Respondent strongly opposes the Application and prays that it should be dismissed with costs.

12. On our part, we have carefully considered the rival submissions before us and we must begin by addressing our minds to the fact that the admission or non-admission of an *amicus curiae* to any judicial proceeding is a matter of discretion. In that regard, this Court in Avocats Sans Frontier vs Mbugua Mureithi wa Nyambura, Application No. 2/2013 cited with approval the decision of Fuad J. in Dritoo vs Nile District Administration [1968] E.A 428 where he stated thus:

“The Court has a wide discretion to ask for assistance of a curiae if it considers that the interests of justice would be served.”

13. Discretion, as we understand it, must always be exercised in a judicious manner based on the facts placed before the Court and not on extraneous matters which, if looked at objectively, would cause injustice to one party - see **Mbogo vs Shah (1968) E.A 93 at 96** per Newbold, P.

14. This discretion is also codified in Rule 36 (4) which provides that if an application for leave to appear as amicus curiae is found to be **“justified”**, the Court shall allow the application and fix the time which the statement by the ***amicus curiae*** should be filed.

15. In addition, as was stated in **Fose vs Minister of Safety and Security 1977(30) SA 786 (CC)**, an ***amicus*** must have an interest in the proceedings and its submissions must be relevant to the proceedings and raise new contentions which may be useful to the Court.

16. The role of an *amicus* in proceedings was even more clearly defined by the Constitutional Court of South Africa in Re Certain Amicus Curiae Applications: Minister of Health and Others vs Treatment Action Campaign and others 2002 (5) SA 713 (CC) at para.5 where it stated thus;

“The role of an amicus is to draw the attention of the Court to relevant matters of law and fact and 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.”

17. We are in agreement with the Learned Judges and that the question that we must pose at this stage is ,have the Applicants met the above test? Firstly, whereas it is true that no document has been filed to show what the Applicants individually do, there is a statement of Interest made on their behalf by Mr. Vital Nshimirimana, an advocate and who is an officer of this Court. We take his word on the subject and more critically, the 2nd

Respondent has not shown that the Applicants do not exist and Mr. Kayobera in his submissions actually conceded that he knows of some of the Applicants as active in the Burundian Civil Society.

18. Secondly, looking at the Applicants' Statement of Interest again, it is clear to us that they have knowledge of and are involved in matters relating to press freedom generally and this Court can take judicial notice that PEN International, International Press Institute and PEN Kenya Centre for example are well known for their involvement in matters relating to the freedom of the press.

19. Thirdly, we are in agreement with Mr. Deya that a Court such as this one which is in the process of settling its jurisprudence will benefit from any assistance from experts and groups with relevant experience and expertise in relevant areas of law and so to turn away the Applicants merely because they have not filed a more comprehensive statement of interest would not be a progressive move on the part of the Court.

20. Fourthly, an *amicus* is a friend of the Court and the Court can only take what it considers relevant and non-partisan from the *amicus* and the ultimate control over what the *amicus* can do is the Court itself. The *amicus* has on the other hand, the onerous duty of ensuring that it gives only the most cogent and impartial information to the Court or risk losing the respect and friendship of the Court in future proceedings.

21. Fifthly, in the present Application, the 2nd Respondent's fears that all the Applicants will file individual briefs and thereby tax him in responding to all of them are in our considered view, misplaced, to say the least. There shall be only one brief by the Applicants and we see no prejudice to be caused to the 2nd Respondent thereby.

22. Lastly, looking at **Reference No. 7 of 2013** and noting the issues in contest, it would be in the wider interests of justice that we admit the Applicants as *amicus curiae* and their role shall be limited to the filing of only one set of submissions within the timeframe to be determined by this Court.

23. As for costs, bearing in mind the facts and circumstances of the case, we see no reason to make any order in that regard and so each party shall bear its own costs.

Orders accordingly.

Dated, signed and Delivered at Arusha this 15th day of August 2014.

.....
ISAAC LENAOLA
DEPUTY PRINCIPAL JUDGE

.....
***JOHN MKWAWA**
JUDGE(RTD)

.....
FAUSTIN NTEZILYAYO
JUDGE

*NB: Hon. Justice John Mkwawa participated in the hearing and deliberations leading to the above Ruling. He retired from the Court on 26th June 2014.