IN THE EAST AFRICAN COURT OF JUSTICE

AT ARUSHA
FIRST INSTANCE DIVISION

(Coram: Monica Mugenyi, PJ; Isaac Lenaola, DPJ; Faustin Ntezilyayo, J; Fakihi A. Jundu, J & Audace Ngiye, J)

APPLICATION NO. 1 OF 2015

(Arising from Reference No. 6 of 2014)

1. **Dr. ALLY POSSI.....1ST APPLICANT**

2. **CENTRE FOR HUMAN RIGHTS, UNIVERSITY OF PRETORIA.....2ND APPLICANT**

VERSUS

1. **HUMAN RIGHTS AWARENESS AND PROMOTION FORUM (HRAPF).....1ST RESPONDENT**

2. **THE ATTORNEY GENERAL OF THE REPUBLIC OF UGANDA.....2ND RESPONDENT**

25TH NOVEMBER 2015

RULING OF THE COURT

A. INTRODUCTION

1. This is a Notice of Motion dated 13th April 2015, filed jointly by Dr Ally Possi, a lawyer, member of the Tanganyika Law Society and a lecturer at Ardhi University in Dar es Salam (hereinafter referred to as the **"1st Applicant")** as well the Centre for Human Rights, University of Pretoria, which is described as being both an academic department and a non-governmental organisation (NGO) (hereinafter referred to as the **"2nd Applicant"**).

2. By their Notice of Motion, the Applicants have sought leave, pursuant to the provisions of Articles 23(1) & (3) and 40 of the Treaty for the Establishment of the East African Community (hereinafter referred to as **"the Treaty")** and Rule 36 of the East African Court of Justice Rules of Procedure, 2013 (hereinafter referred to as **"the Rules")** to be joined as ***Amici curiae*** in **Reference No. 6 of 2014 Human Rights Awareness and Promotion Forum (HRAPF) vs. Attorney General of the Republic of Uganda.**

3. In **Reference No. 6 of 2014,** HRAPF (hereinafter referred to as the "**1st Respondent")** had contested the validity of certain sections of the now repealed Uganda's **Anti-Homosexuality Act, 2014** in so far as they allegedly violated Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

4. The 2nd Respondent is the Attorney General of the Republic of Uganda.

B. CASE FOR THE INTENDED *AMICIS CURIAE*/APPLICANTS

5. In support of the Motion, the 1st Applicant filed an Affidavit sworn on 13th April 2015 by himself and on behalf of the 2nd Respondent. The Application is premised on the following grounds:

i) ***The Reference raises important questions on the distinction between human rights jurisdiction and the interpretative jurisdiction of the Court with regards to the rule of law and good governance, norms provided in the Treaty;***

ii) ***The Applicants wish to contribute to defining what would constitute human rights jurisdiction as against the general interpretative jurisdiction of the Court with regards to the rule of law and good governance;***

iii) ***The Applicants also wish to contribute to clarifying the circumstances under which the Court should exercise its discretion to hear a matter where considerations of public interest so demand, notwithstanding that part of the matter may be considered moot;***

iv) ***The Applicants are able to make unique contributions to the Reference without usurping the role of the parties thereto.***

6. Dr Possi, the 1st Applicant and representing the 2nd Applicant, stated that he had a significant knowledge of the functioning of this Court, having extensively researched on the matter for his doctoral

degree and would therefore assist the Court in its duty to reach a fair conclusion based on sound interpretation of the law.

7. In his affidavit in support of the Motion, he stated *inter alia* that: "***As a concerned citizen of the East African Community (EAC), I wish to intervene in the interest of constitutionalism and the rule of law, more specifically that Member States of the Community should, in their adoption of national policies and legal instruments always act in conformity to the fundamental and operational principles of the EAC Treaty.***"

8. It was his further submission that issues that fall for determination by the Court in **Reference No. 6 of 2014** are significant in the East African Community specifically the question of what constitutes human rights jurisdiction and the extent of this Court's jurisdiction to determine the obligations of Partner States and the institutions of the Community, as well as the extent of the discretion of the Court to hear **"a seemingly moot case, where considerations of public interest so demand."**

9. He further submitted that although the current jurisprudence of the Court has clarified the extent of the Court's jurisdiction to interpret the Treaty generally under the principles of rule of law and good governance, even where human rights are implicated in the process, there was, however, no clarity as to what constitutes human rights jurisdiction.

10. In this regard, he contended that while the Court has indicated that it has broad jurisdictional powers when it comes to interpretation of the Treaty, and that it will exercise jurisdiction where there are alleged breaches of the fundamental and

operational principles of the Treaty, it has so far not defined what exactly would constitute human rights jurisdiction. Moreover, he submitted that while the Treaty prescribes the exercise of human rights jurisdiction by this Court, the Treaty does not define what human rights jurisdiction is as against the general interpretative jurisdiction of the Court.

11. Based on the foregoing, Dr Possi submitted that the Applicants seek to assist the Court to make a definitive pronouncement as to what will constitute a human rights jurisdiction as distinct from the interpretative jurisdiction of the Court. It was also the Applicants' contention that **"the Court may exercise its discretion to hear a seemingly moot case where considerations of public interest so demand."**

12. As regards the 2nd Applicant, i.e. the Centre for Human Rights (University of Pretoria), the 1st Applicant was asked to prove that he had the authority to depone to the affidavit on its behalf as stated in his Affidavit. Dr Possi, in answer, said that he had a power of attorney in that regard and that it had been lodged at the Dar es Salaam Court sub-registry, but it later transpired that the Court did not have it on its record at all.

13. For the above reasons, the 1st Applicant submitted that both he and the 2nd Applicant were proper parties to be granted leave to be enjoined in **Reference No. 06 of 2014** as *amici curiae.*

C. CASE FOR THE HUMAN RIGHTS AWARENESS AND PROMOTION FORUM (HRAPF)

14. Mr. Ladislaus Rwakafuzi, Counsel for HRAPF, stated that he had no objection to the Applicants being admitted as *amicus curiae.* He

submitted in this regard, that since one of the issues settled upon in the Scheduling Conference as arising for determination in the Reference was whether the matter raised in it was not justiciable on account that it was a human rights matter, it was therefore pertinent that the Applicant helps this Court with his own expertise to have that matter resolved.

D. CASE FOR THE ATTORNEY GENERAL OF UGANDA/2ND RESPONDENT

15. The 2nd Respondent was represented by Ms. Patricia Mutesi, Ms. Josephine Kiyingi and Mr. Kosia Kasibayo. No affidavit in reply was filed on his behalf, but Ms. Mutesi stated from the outset that the 2nd Respondent opposed the Motion.

16. In this regard, she submitted that they do not oppose the Application on account of bias or prejudice, but on the grounds that the Applicant did not meet certain standards set for a party that wishes to be joined as an *amicus curiae,* to wit, a certain level of interest, expertise and relevance.

17. Asserting that there is an issue of mootness pertaining to what is stated in paragraph 15 of the Applicant's affidavit, learned Counsel submitted that the proposed *amici* should not be enjoined as such because both, especially the 1st Applicant, had already taken a position in contested matters within the Reference.

18. Ms. Mutesi further challenged the 1st Applicant's submission that he intended to assist the Court owing to his significant knowledge on the functioning of the Court. She contended that such a ground is not relevant and it was her further argument that it is not sufficient to state that one has a significant knowledge on the

functioning of the Court and its jurisdiction to be admitted as an *amicus curiae*, because standards set by this Court require that such a party must bring new and useful information or evidence which will add value to the Court's determination of the issues in contest.

19. Regarding the 2nd Applicant, learned Counsel submitted that the Application in respect of that Applicant was incompetent on the ground that no Affidavit in support of its Application to be *amicus curiae* was filed. She thus urged the Court to dismiss it because it was not properly before the Court as provided by Rule 36 of the Court's Rules.

E. COURT'S DETERMINATION

20. The only issue for determination in this Application is whether Dr Ally Possi and the Centre for Human Rights (University of Pretoria) should be admitted to these proceedings as *amici curiae*. Before addressing this substantive issue, we propose to dispose of the question raised by the 2nd Respondent as to whether the 2nd Applicant is properly before the Court.

21. It is worth recalling that an application for leave to appear as *amicus curiae* before this Court is governed by Rule 36 of the Court's Rules. Sub-rule (1) of this Rule provides that an application for leave to appear as *amicus curiae* shall be by Notice of Motion. In this regard, Counsel for the 2nd Respondent submitted that there was no such application in respect of the 2nd Applicant, since it did not file any affidavit.

22. We heard the 1st Applicant, stating from the Bar, that he had a power of attorney to file an affidavit on behalf of the 2nd Applicant and that the proof of that power was filed with the Dar-es-Salam Court's sub-registry. After verification, it was evident that the said document was neither on the Court record nor at the said sub-registry.

23. Given the foregoing, the Court finds that the 2nd Applicant is not properly before the Court since there is no proof that Dr Possi had the authority to institute the Application on its behalf. The 2nd Applicant is therefore struck off the instant Application.

24. Other requirements for admission as *amicus curiae* are set out in Rule 36(2). It reads: ***"An Application under sub-rule (1) shall contain-***

(a) ***A description of the parties;***

(b) ***The name and address of the intervener;***

(c) ***A description of the claim or reference;***

(d) ***The order in respect of which the ..... amicus curiae is applying for leave to intervene***

(e) ***.....a statement of*** *amicus curiae*'***s interest in the result of the case."***

25. This Court has previously had opportunity to consider applications seeking admission to join the proceedings as *amicus curiae* in terms of Rule 36 as is the case in the instant Application.

26. It is trite law that admission as *amicus curiae* is in the discretion of the Court which has to be satisfied that the *amicus* application is

justified. In **Avocats Sans Frontieres vs. Mbugua Mureithi, EACJ No. 2 of 2013,** this Court stated that **"... Rule 36(4) of this Court's Rules of Procedure 2013, with regard to an application to join existing proceedings as *amicus curiae* provides that: '*If the application is justified, then it shall be allowed which is also an expression of discretion on the part of the Court. Like all discretions, however, it must be exercised judiciously.*"**

27. It should be pointed out that in the exercise of that discretion, the jurisprudence has defined some guidelines that a Court should look at in relation to the role of *amicus curiae.* The South African Constitutional Court, for example, with regard to the requirements for admission as an *amicus* as set out in Rule 9 of the Constitutional Court Rules of 1995 pointed out in **Ntandazele Fose vs. Minister of Safety and Security, 1997(3)SA 786 (CC); 1997(7) BCLR 851 (CC) para 9**: "***It is clear from the provisions of Rule 9 that the underlying principles governing the admission of an*** *amicus* ***in any given case, apart from the fact that it must have an interest in the proceedings, are whether the submissions to be advanced by the*** *amicus* ***are relevant to the proceedings and raise new contentions which may be useful to the Court.*"**

28. In the same vein, the Supreme Court of Kenya in **Mumo Matemu & Others vs. Kenya Section of the International Commission of Jurists Anor, Petition No. 12 of 13, para 33**, has clarified the duty of *amicus* to the Court citing with approval the decision of the South African Constitutional Court in **Re: Certain Amicus Curiae Applications: Ministry of Health and Others vs. Treatment Action Campaign and Others 2002(5) SA 713(CC) at para 5)** as

follows:***"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."***

29. Moreover, in the fore-cited Petition, the Supreme Court of Kenya, drawing on earlier decisions, as well as on comparative jurisprudence, set out a number of guidelines in relation to the role of *amicus curiae*. Those relevant for the instant Application are that:

(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 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 development of the law.***

(v) The Court will regulate the extent of *amicus* ***participation in proceedings, to forestall the degeneration of*** *amicus* ***role to partisan role.***

(vi) The applicant ought to raise any perception of bias or partisanship by documents filed or by his submissions.

(vii) The applicant ought to be neutral in the dispute, where the dispute is adversarial in nature.

(viii) 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.

(ix) ***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.***

30. We find the above guidelines pertinent and useful in addressing the main issue in the instant Application, to wit, whether the 1st Applicant has sufficient interest in the matter and whether he has relevant expertise that can help the Court in determining **Reference No. 06 of 2014.**

31. During the hearing of this Application, the 1st Applicant was asked to justify his interest in appearing as *amicus curiae* in the Reference and more, importantly, how his submissions would assist the Court in reaching a fair and just decision.

32. Dr Possi stated that he intended to provide materials and analysis making the distinction between what would constitute the Court's human rights jurisdiction and what would not. He further submitted that in that regard, his contribution would even be more useful to future cases and reduce the backlog of cases pending before the Court.

33. Pressed to show how, based on his expertise, his proposed *amicus* brief would help in determining the Reference aforesaid, the 1st Applicant reiterated his previous submissions asserting that he wanted to help the Court in drawing a distinction between its human rights jurisdiction and rule of law jurisdiction, without any indication on how his participation will help the Court to resolve the issues in the Reference.

34. It is worth noting, at this juncture, that the 1st Applicant did not provide any materials, such as publications or others documents in

support of his averment that he had expertise in the matter. Moreover, apart from mere statements, the 1st Applicant did not show how he intended to assist the Court in interpreting and applying the Treaty or enriching the Court's jurisprudence with respect to the subject matter at hand, specifically.

35. In light of the foregoing, some doubt arose on the relevance and usefulness of the intended *amicus* contribution to the Reference. There was indeed concern that the 1st Applicant's intervention would be purely academic, very remote from the issues at hand and thus, would not be helpful to the Court. That concern became even more evident when it appeared that the 1st Applicant was not even aware that the issues for determination in the Reference had been changed and narrowed down by the Applicant in the Reference given that the impugned law (i.e. the **Anti-Homosexuality Act, 2014**) had since been struck out by Uganda's Constitutional Court.

36. From all the above findings, it is clear to us that the 1st Applicant has neither shown a sufficient interest in the results of the Reference as required by Rule 36(1) (e) of the Court's Rules nor demonstrated that he has a particular expertise or specialization related to the issues so as to demonstrate to the Court that, if admitted, he would be capable of making a valuable contribution to the proceedings.

37. In the result, while we appreciate Dr. Possi's initiative to institute an application for appearance in the Court's proceedings, we, however, for the reasons stated hereinabove, find that it does not meet the conditions required for its admission.

F. CONCLUSION

38. For the above reasons, the Court finds no merit in **Application No.1 of 2015** seeking leave to intervene as *amicus curiae* in **Reference No. 6 of 2014**. The Application is therefore disallowed with no order as to costs.

39. It is so ordered.

Dated, Delivered and Signed at Arusha this ....day of 25th November, 2015.

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MONICA MUGENYI

PRINCIPAL JUDGE

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ISAAC LENAOLA

DEPUTY PRINCIPAL JUDGE

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FAUSTIN NTEZILYAYO

JUDGE

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FAKIHI A. JUNDU

JUDGE

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AUDACE NGIYE

JUDGE