IN THE EAST AFRICAN COURT OF JUSTICE

AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Jean Bosco Butasi, PJ; Isaac Lenaola, DPJ; Faustin Ntezilyayo, J; Monica K. Mugenyi, J, & Fakihi A. Jundu, J)

APPLICATIONS NO: 20 & 21 OF 2014

(ARISING FROM REFERENCE NO. 6 OF 2014)

1. UHAI EASHRI.....

2. HEALTH DEVELOPMENT INITIATIVE – RWANDA .....

APPLICANTS

VERSUS

1. HUMAN RIGHTS AWARENESS & PROMOTION FORUM (HRAPF).....

2. THE ATTORNEY GENERAL OF THE REPUBLIC OF UGANDA.....

RESPONDENTS

17TH FEBRUARY 2015

RULING OF THE COURT

A. INTRODUCTION

1. **Applications No. 20 and 21 of 2014** were separately brought under Article 40 of the Treaty for the Establishment of the East African Community (hereinafter referred to as 'the Treaty), as well as Rule 36(1) and (2) of the East African Court of Justice Rules of Procedure, 2013 (hereinafter referred to as 'the Rules).

2. In **Application No. 20 of 2014**, UHAI EASHRI (hereinafter referred to as the First Applicant) sought to be joined as *amicus curiae* in **Reference No. 6 of 2014 Human Rights Awareness and Promotion Forum (HRAPF) vs. Attorney General of Uganda**. Similarly in **Application No. 21 of 2014**, Health Development Initiative – Rwanda (hereinafter referred to as the Second Applicant) sought to be joined as *amicus curiae* in the same Reference.

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HRAPF (hereinafter referred to as 'the First Respondent) had contested the validity of certain sections of Uganda's now repealed Anti-Homosexuality Act, 2014 in so far as they allegedly violated Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

4. At the hearing of the Applications, learned Counsel for the Applicants successfully applied to have them consolidated, hence the present Consolidated Application. The Applicants were both represented by Mr. Colbert Ojiambo; the First Respondent was represented by Mr. Ladislaus Rwakafuuzi, while Ms. Patricia Mutesi and Ms. Josephine Kiyingi appeared for the Second Respondent.

B. APPLICANTS' CASE

5. **Application No. 20 of 2014** was premised on the following grounds:

   i. As an organisation that seeks to positively influence policies and practices on human and sexual rights, the First Applicant had an interest in the conduct and outcome of **Reference No. 6 of 2014** (hereinafter referred to as 'the Reference') in so far as it pertains to a statute on sexual rights ;

   ii. As an organisation that is actively involved in the promotion and development of human and sexual rights in the East African region, and mandated to conduct research on, as well as collate and disseminate information about the said rights for purposes of institutional development, the First Applicant had acquired sufficient expertise in the area of human and sexual rights that it wished to draw to the Court's attention to assist it resolve the complex questions posed by the Reference;

   iii. This Court's decision would be a benchmark for policy makers and legislators in the East African region, therefore it was fair and just to permit an entity with knowledge of the legal landscape of other countries in the region to avail the Court with information that would assist it arrive at a wholesome decision ; and

   iv. Granting the Application would cause no prejudice to the Respondents.

6. On the other hand, the grounds outlined in **Application No. 21 of 2014** were materially similar to those highlighted in clauses (ii), (iii)

and (iv) above, with the additional ground that as an organisation that seeks to *inter alia* contribute to and educate young people on HIV/ AIDS, malaria, tuberculosis, reproductive health, sexually transmitted diseases and other preventable diseases, the Second Applicant had an interest in the outcome of the Reference in so far as it pertains to human rights violations.

7. Responding to questions from the Bench, Mr. Ojiambo contended that although the Second Applicant was operative in Rwanda while the applicability of the Anti-Homosexuality Act that was in issue under the Reference was restricted to Uganda, nonetheless, the Treaty mandated any member of the East African Community (EAC) to challenge a law of any EAC Partner State if it was deduced to contravene Treaty provisions.

C. RESPONDENTS' CASE

8. Whereas the First Respondent did not contest the Consolidated Application, the Second Respondent did oppose it and specifically filed an Affidavit in Reply in respect of **Application No. 20 of 2014**.

9. In opposing **Application No. 20 of 2014**, the Second Respondent relied on the Affidavit of one Oburu Odoi Jimmy, in which he averred that literature that he had accessed from the First Applicant's website (www.eahi-uashri.org) depicted it as an organisation that promoted lesbian, gay, bisexual, trans-sexual and intersex (LGBTI) rights within the East African region, and therefore was not a neutral or impartial party as is legally required of an *amicus curiae*. The literature in question was duly appended to the deponent's Affidavit.

10. It was argued for the Second Respondent that the First Applicant had no legal expertise to bring to the Reference as this Court was capable of interpreting the relevant legal provisions without assistance. Ms. Mutesi argued that the First Applicant was partial in so far as it advocated for LGBTI rights; was incapable of providing the Court with a neutral and unbiased opinion as was required of an *amicus curiae*; would serve better as an expert witness for the Applicant in the Reference given that they were advancing the same position, and allowing the Application would occasion injustice to the Second Respondent. It was Ms. Mutesi's contention that although the decisions of this Court were binding on EAC Partner States, that was not a legal basis for the grant of an application to appear as *amicus curiae*.

11. On the other hand, the Second Respondent opposed **Application No. 21 of 2014** on grounds that the information sought to be presented by the Second Applicant included facts and data, contrary to the legally recognised restriction of *amicus curiae*'s role to legal arguments; the said Applicant sought to go beyond the pleadings in the Reference and make reference to laws of other countries, and had not demonstrated its interest in **Reference No. 6 of 2014** as required by Rule 36(2)(e) of the Rules, neither had it demonstrated any justification for the prayer sought in the Consolidated Application as prescribed in Rule 36(4).

D. APPLICANTS' REJOINDER

12. In a brief rejoinder, Mr. Ojiambo contended that the scales of justice tilted towards the grant of the Consolidated Application,

whereupon the Court would be at liberty to only rely upon such submissions from the *amicus curiae* as were deemed to be neutral.

E. COURT'S DETERMINATION

13. Rule 36 of this Court's Rules provides for an application for leave to appear before this Court as *amicus curiae*. Literally translated to mean 'a friend of court', an *amicus curiae* has been defined as '**a person who is not a party to a law suit but who petitions the Court to file a brief in the action because that person has a strong interest in the subject matter**.' *See* ***Black's Law Dictionary****, 7th Edition.*

14. Rule 36(2)(e) and (4) highlights the parameters against which an application for leave to appear as *amicus curiae* may be allowed. Whereas Rule 36(2)(e) necessitates the demonstration of an interest in the outcome of the case in which an applicant seeks to appear, Rule 36(4) prescribes the additional test of justification as a basis for the grant of leave to appear as *amicus curiae*.

15. For ease of reference, we reproduce the cited Rules below:

"**Rule 36(2)(e)**

(2) An application under sub-rule (1) shall contain –
(a) ....
(b) .....
(c) ....
(e) a statement of the intervener's or *amicus curiae*'s interest in the result of the case.

Rule 36(4)

"If the Court is satisfied that the application is justified, it shall allow the intervention and fix a time

within which the intervener or amicus curiae may submit a statement of intervention."

16. In the instant case, both Applicants did include a Statement of Interest in their respective pleadings. Their Statements of Interest were substantially identical, save for being grounded in each Applicant's respective Memorandum and Articles of Association (MemArts). We propose to address **Application No. 21 of 2014** prior to a determination of **Application No. 20 of 2014**.

17. The Second Applicant's interest in the Reference is captured in the following statement in **Application No. 21 of 2014**:

> ***"Therefore, the Applicant has an interest in the conduct and outcome of this matter in so far as the Reference seeks this Honourable Court's determination as to whether Uganda is in violation of the fundamental principles of the Treaty .... The Applicant recognises that the potential impact of the decision of the Honourable Court in the proceedings in the Reference will extend beyond the borders of Uganda into other Member States, which are not represented before the Court."***

18. The Second Applicant's Certificate of Compliance reveals that it is registered in Rwanda, while Article 2 of its MemArts limits its scope of operation to Rwandans. The Article reads:

> **The Association shall have the following objectives:**
>
> ***"To build capacities of Rwanda and institutions in the health sector to benefit all Rwandans."***

19. The import of Rule 36(2)(e) and (4) is to place a two-faceted duty upon an applicant for leave to be joined as *amicus curiae*: first, such applicant must demonstrate that it has an interest in the outcome of the substantive Reference and, secondly, the applicant must establish to the satisfaction of the Court circumstances that *prima facie* justify its appearance as *amicus curiae*. We find appropriate guidance on justification for the designation of a party as *amicus curiae* in the following preposition by **Mohan, S. Chandra, 'The Amicus Curiae: Friends No More?', 2010, Singapore Journal of Legal Studies, 352 – 371, p.14**:

> ***"An amicus is normally appointed if the court is of the view that a case involves important questions of law of public interest; if a party that is unrepresented would not be able to assist the court; or if the points of law do not concern the parties involved but is nevertheless a matter of concern to the court."***

20. We are unable to deduce any purported interest in the outcome of the Reference with regard to the Second Applicant for the following reasons. First, the applicability of the Anti-Homosexuality Act that is in issue in the Reference is restricted to the Republic of Uganda. It is inapplicable to the Rwandan people and institutions *per se*, and is certainly not operative law in the Republic of Rwanda. Secondly, even if one sought to impute interest in the Reference from the Second Applicant's focus on health rights (as this Court understood Mr. Ojiambo to argue), a purposive interpretation of Article 2 of the Second Applicant's MemArts reveals that the health rights it advocates for pertain to its territorial scope of operation only, namely, the Republic of Rwanda. Therefore, we are not satisfied that

the Second Applicant has demonstrated an interest in the outcome of the Reference that would warrant its appearance as *amicus curiae*.

21. Further, whereas we do recognise that the Reference involves important questions of law on a matter of immense public interest, we do not deduce the Second Applicant's territorial scope of operation to present legal issues that are pertinent to the determination of the Reference in so far as they do not relate to the territorial jurisdiction within which the Statute in issue therein applies. Indeed, we do not find sufficient demonstration by the Second Applicant that this Court's decision in the Reference would impact on its activities given its territorial scope of operation.

22. Finally, we must clarify that the *locus standi* that is granted to residents of EAC Partner States under Article 30(1) of the Treaty mandates such persons to file a Reference before this Court as a party thereto, but would not form a basis for them to appear as *amicii curiae* in a matter before the Court. An applicant that seeks to appear as *amicus curiae* must satisfy the parameters highlighted in Rule 36 of the Rules. For the above reasons, we would disallow **Application No. 21 of 2014**.

23. On the other hand, the First Applicant's interest in the Reference is captured in the following statement in **Application No. 20 of 2014**:

> ***"Therefore, the Applicant has an interest in the conduct and outcome of this matter in so far as the Reference seeks this Honourable Court's determination as to whether Uganda is in violation of the fundamental principles of the Treaty ...."***

24. The foregoing statement is grounded in the First Applicant's corporate objectives as reflected in its MemArts and restated in paragraph 5 above. Clause 2(a) of the said MemArts specifically designates it as a company that is registered in Kenya, the objective of which is to seek to advance education within the East African region in sexual health rights and best practice in this area. Given that the territorial scope of its operation includes Uganda, we are satisfied that the First Applicant has demonstrated an interest in the outcome of the Reference as required by Rule 36(2)(e).

25. Having so found, we revert to a consideration of whether the First Applicant has satisfactorily demonstrated circumstances that would justify its appearance in the Reference as *amicus curiae*. Clearly, Rule 36(4) grants the Court wide discretionary powers. It is now a well recognised principle of judicial practice that courts must exercise their discretionary powers judiciously and not in a manner that would cause injustice to one party. *See* ***Mbogo vs. Shah (1968) EA 93 at 96***. It is also well appreciated that rules of procedure are 'intended to be hand maidens of justice, not to defeat it (justice).' *See* ***Iron & Steelwares Ltd vs. C. W. Martyr & Co. (1956) 23 EACA 175 (CA-U)***.

26. We have carefully scrutinised all the material on record in **Application No. 20 of 2014**. We find that the literature appended to the Affidavit of one Oburu Odoi Jimmy does depict the First Applicant as an organisation that advocates for and promotes LGBTI rights. The Applicants did not controvert this literature by way of counter-affidavit, therefore it is deemed to have been admitted under Rule 43(1) and (3) of the Rules.

27. Mr. Oburu's averments are in alignment with Clause 2(d)(v) of the First Applicant's MemArts which states one of the objectives of the First Applicant as follows:

> "***To seek to positively influence policies and practices … towards supporting the development of human and sexual rights of all, social justice and further improve access to such human and sexual rights together with economic and socio-cultural rights particularly among previously excluded members of society.***" (Our Emphasis)

28. Further, in his submissions in support of the Application, learned Counsel for the Applicants did establish a nexus between the sexual rights advocated by the First Applicant and such rights as are addressed by the Anti-Homosexuality Act that is in issue in the Reference in the following terms:

> "**The main issue that is before this Court in the *Reference is around an Act of Parliament from the State of Uganda and it touches on issues of sexual rights. The Applicant has been actively involved in advocating for the sexual rights … Having actively been involved in the promotion of these rights, it will be in the interest of justice that the Applicant be allowed to participate in the proceedings … It will in effect affect all its activities as an organisation***."(Our Emphasis)

29. A '*friend of court*' assists the court by providing information so that the court will not fall into error, but does not seek to influence the final outcome or attempt to persuade the court to adopt a particular point of view, whether or not he has a direct interest in the

outcome. *See* ***Mohan, S. Chandra, 'The Amicus Curiae: Friends No More?', Ibid., p. 3***. Thus, in the Australian case of **United States Tobacco Co. v. Minister for Consumer Affairs [1988] 83 A.L.R. 79 (F.C.A.)**, it was held:

> "**An *amicus curiae* (as opposed to an intervenor) has no personal interest in the case as a party and does not advocate a point of view in support of one party or another**."

30. Indeed, in the case of **Advocats Sans Frontiers vs. Mbugua Mureithi wa Nyambura & 2 Others Application No. 2 of 2013**, this Court did cite with approval the decision of the Supreme Court of Uganda in **Attorney General of Uganda vs. Silver Springs Hotel Ltd & Others Civil Appeal No. 1 of 1989** that 'one of the fundamental considerations for any *amicus curiae* to be admitted is that such a party must be independent of the dispute between the parties.' Further, in the case of **Forum pour Renforcement de la Societe Civile (FORSC) & 8 Others vs. Burundian Journalists' Union & Another Application No. 2 of 2014**, this Court pronounced itself on the duty of an *amicus curiae* in the following terms:

> ***"The amicus curiae has on the other hand, the most 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."***

31. In the instant case, the Anti-Homosexuality Act, 2014 clearly sought to *inter alia* prohibit any form of sexual relations between persons of the same sex or the promotion or recognition of such relations in Uganda. Against that background, it is manifestly

apparent that the spirit and letter of that Act run contrary to the objectives of the First Applicant. It follows, then, that it would be illogical to attribute neutrality to the First Applicant, or expect cogent, objective and impartial assistance from it on the matter before this Court in the Reference. In our considered view, a party that seeks to be enjoined as *amicus curiae* has a duty to demonstrate its neutrality and objectivity on the subject matter it seeks to address the court on. In **Application No. 20 of 2014**, the material before this Court runs contrary to that test of neutrality. Perhaps more importantly, the participation of such a demonstrably non-neutral party as *amicus curiae* in the Reference would be a dereliction of this Court's duty to exercise its discretionary powers judiciously and not in a manner that would cause injustice to one party.

32. In the EAC jurisdiction, distinction has been drawn between an *amicus curiae* and an intervener: the latter may advocate a point of view in support of one party over another, whereas the former may not. *See Rule 36 of the Court's Rules of Procedure and* ***Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 Others Petition No. 12 of 2013*** *(SCK).* We think that this is a useful distinction to distinguish between a party to a suit that has *locus standi* in a matter; an intervener that, while not having *locus standi* in a matter, does have a partisan interest therein, and an *amicus curiae* that has an interest in providing objective, cogent assistance to courts to engender the advancement of legal jurisprudence on a given subject. Consequently, we are satisfied that it would be neither justified nor just, or in the interests of justice to grant leave to appear as *amicus curiae* to a party that does

not pass the test of neutrality that is so pertinent to the role of an *amicus curiae* in this jurisdiction.

33. In the result, **Application No. 20 of 2014** is disallowed. We hereby dismiss the Consolidated Application with costs to the Second Respondent. It is so ordered.

Dated and delivered at Arusha this 17th day of February, 2015.

JEAN BOSCO BUTASI
PRINCIPAL JUDGE

ISAAC LENAOLA
DEPUTY PRINCIPAL JUDGE

FAUSTIN NTEZILYAYO
JUDGE

MONICA K. MUGENYI
JUDGE

FAKIHI A. JUNDU
JUDGE