

UGANDA / JUDGMENT

**Secretariat of The Joint United Nations Programme On
HIV/Aids v Human Rights Awareness and Promotion
Forum and Anor (Application 3 of 2015) [2015] EACJ
107 (25 November 2015) (First Instance Division)
[2015] EACJ 107**

COURT

East African Court of Justice

BEFORE

Mugenyi JA

CASE / FILE NUMBER

Application 3 of 2015

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IN THE EAST AFRICAN COURT OF JUSTICE

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AT ARUSHA

FIRST INSTANCE DIVISION

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

APPLICATION NO: 3 OF 2015

(ARISING FROM REFERENCE NO.6 OF 2014)

**SECRETARIAT OF THE JOINT UNITED NATIONS PROGRAMME ON HIV/
AIDS..... APPLICANT**

VERSUS

**HUMAN RIGHTS AWARENESS & PROMOTION FORUM (HRAPF).....
\$1^{ST}\$ RESPONDENT**

AND

ATTORNEY GENERAL OF UGANDA

\$25\$ TH NOVEMBER, 2015

RULING OF THE COURT

A. INTRODUCTION

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- 1. Rule 36 of the East African Court of Justice Rules of Procedure, 2013 ('The Rules') provides for the procedure to be invoked when a party wishes to be granted leave to appear as *amicus curiae* in proceedings pending before the Court.
- 2. Pursuant to the above Rule, the Secretariat of the Joint United Nations Programme on HIV/AIDS ('**The Applicant**') by a Notice of Motion dated 26th May, 2015, has now applied to be granted leave to intervene as amicus curiae in **Reference No.6 of 2014**, Human Rights Awareness and Promotion Forum (HRAPF) 18. and The Attorney General of Uganda.
- 3. The above Reference was filed by HRAPF, a human rights organization registered as a company limited by guarantee in the Republic of Uganda, and principally challenges certain provisions in Uganda's **Anti-Homosexuality Act 2014** and is further seeking a declaratory order that the challenged provisions are allegedly in violation of the principles of human rights and rule of law in Articles \$6(d)\$ and \$7(2)\$ of the Treaty for the Establishment of the East African Community ('The Treaty').

B. CASE FOR THE INTENDED AMICUS CURIAE/APPLICANT

4. The Applicant in the body of its Motion, the Supporting Affidavit of its Executive Director, Dr. Mariangela Batista Galvao Sinao and in Submissions by its Learned Counsel, Mr. Donald Omondi Deya, stated that because of its objectives and mandate since it

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was established in 1994, if granted leave to join **Reference No.6 of 2014** as *amicus curiae*, it would offer this Court the benefit of being fully appraised of the international perspectives relating to the issues under consideration in the said Reference.

- 5. Specifically, the Applicant stated that it has an extensive history of conducting research, collecting data and drafting policy papers and publications on issues relating to HIV, public health, human rights and same-sex sexual relations. Further, that the Reference concerns a subject at the core of its mandate, namely the impact on public health and human rights of criminalisation of the work of organizations and individuals working on the rights of persons who engage in same-sex sexual relations and various other conducts relating to it.

- 6. The Applicant, in addition, submitted that it has participated as **amicus curiae** in judicial proceedings in Malawi, the United States of America and the European Court of Human Rights and in the spirit of the United Nations it has remained impartial in all those proceedings.
- 7. Lastly, it submitted that it will accept the Reference as it is and would only file written Submissions and not even participate at the oral hearing of the Reference.

C. CASE FOR THE HUMAN RIGHTS AWARENESS AND PROMOTION FORUM (HRAPF)/ \$1ST RESPONDENT

- 8. The Human Rights Awareness and Promotion Forum (HRAPF) took the view that the Motion is merited and does not object to

the Applicant being granted leave to join the Reference as **amicus* curiae*.

D. <u>CASE FOR THE ATTORNEY GENERAL OF UGANDA/</u> \$2ND</sup>RESPONDENT\$

- 9. The Attorney General of Uganda representing the Republic of Uganda filed an Affidavit sworn on 20th July, 2015 by one Oburu Odoi Jimmy, Principal State Attorney, in opposition to the Motion.
- 10. First, he stated that, he was aware that in the Reference, it is alleged that Sections 7 and \$13(1)\$ and \$(2)\$ of the **Anti-Homosexuality Act 2014** impede HIV related services' promotion and access to health services by members of the Lesbian Gay Bi-sexual Transgender and Inter-sexual (LGBTI) Community.
- 11. Second, that in the Applicant's website and public statements, it has expressed itself on the issues forming the subject of the Reference and that it cannot be termed as a neutral/ impartial party deserving the title of *amicus curiae*. At paragraph 5 of the Affidavit of Oburu Odoi Jimmy, the Attorney General has therefore set out the statements attributed to the Applicant and which, in his view, indicate open bias.
- 12. That paragraph, for avoidance of doubt, reads as follows:
 - a. The Applicant in a press statement dated 10th May 2011 stated that it was concerned over the renewed consideration by the Ugandan Parliament of an Anti-

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Homosexuality Bill. It stated that the criminalization of people based on their sexual orientation is a denial of human rights and a threat to public health in the context **of the HIV response.* The Applicant further urged countries which criminalise same-sex behaviour to repeal such laws;*

- b. The Applicant's Executive Director on 18th February, 2014 stated that 'I strongly urge the Ugandan authorities to reject the Bill and ensure the human rights **dignity of all people of Uganda.**' The Applicant further stated that the Bill had public health implications, citing studies which show that when gay people feel discrimination including prosecution, they are less likely to seek HIV testing, prevention and treatment services. It *urged all governments to protect the human rights of lesbian, gay, bisexual and trans gender people through* repealing criminal laws against adult consensual to same *sex conduct;*
- c. *The Applicant's Executive Director on 1st August, 2014 hailed the annulment of the Anti-Homosexuality Act as a victory for the rule of law and social justice. The Applicant* also noted that while homosexuality remains illegal in *Uganda, annulling the law could have positive public health implications.*
- 13. Third, that since there is apparent bias on the part of the Applicant, its intervention in the proceedings would prejudice

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the case for the Attorney General and to allow the Motion would not be in the interests of Justice.

- 14. Fourth, that since the Anti-Homosexuality Act has been struck down by the Constitutional Court of Uganda, both the Reference and the Motion have been overtaken by events and no purpose would be served in allowing the said Motion.
- 15. Fifth, Ms. Patricia Mutesi, Principal State Attorney, added that if the Applicant is an expert in the matters to be determined in the Reference, then it should seek to be called as such expert or as an intervener and not as *amicus curiae* because of its obvious bias.

E. COURT'S DETERMINATION

16. From the outset, it cannot be denied that the Applicant has an interest in the subject matter of the Reference and as correctly stated by Oburu Odoi Jimmy in his Affidavit, Sections 7 and \$13(1)\$ and \$(2)\$ of the Anti-Homosexuality Act 2014 have been allegedly "**criminalising*, aiding, challenged as abetting, counselling, procuring and promotion of homosexuality, create offences that are overly broad, hampers professional counsel and impedes legitimate debate, HIV related service provision and access to health services."*
- These complaints, if read with the mandate of the Applicant, in our considered view, create sufficient interest for it to have filed the instant Motion (see -*Avocats Sans Frontieres vs. Mbugua Mureithi*, EACJ, No.2 of \$2013\$). In the circumstances, should it be granted leave to be enjoined as an **amicus curiae**?

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- 17. Before addressing that issue, we must dispose of the question whether the Reference and the Motion have been overtaken by events and whether the Applicant is best suited to be enjoined as an intervener or be called as an expert witness.
- 18. With tremendous respect to Ms. Mutesi, both issues require not more than the following answers:
 - i) We have perused the Reference and we note that on 6th November, 2014, Ms. Mutesi was party to a Scheduling Conference called under Rule 53 of the Rules. On that day, the issue of amendment of the Reference was raised and indeed by leave of Court, the Reference was amended and an Amended Reference was filed on 7th January, 2015. The issues for determination in it are therefore still live and we cannot in this Ruling determine whether it has or has not been overtaken by events; and
 - ii) As to whether the Applicant should have come in as an intervener or expert witness, the matter is irrelevant. It has applied to be granted leave to join as an **amicus curiae** and that is the matter to be determined and no other. The Attorney General's preference is not an issue for us to determine save that it is obvious that the Applicant is indeed an expert in HIV/AIDS related issues, a matter we shall touch on later in this Ruling.
- 19. Having said so and turning back to the single issue to be determined, what considerations should a Court take into

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account when faced with an application such as the one before us?

- 20. In **Avocats Sans Frontieres** (supra), 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.'
- 21. We restate that holding and would also repeat the words of Fuad J. in **Dritoo vs. Nik Distributors Administration** [1968] E. A. 428 where he stated that :-

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

- 22. In exercising discretion as above, what guidelines should the Court look at in relation to the role of **amicus curiae**? In **Mumo Matemu & Others vs. Kenya Section of the International Commission of Jurists & Anor**, Petition No.12 of 2013, the Supreme Court of Kenya set out a number of such guidelines and of relevance to the present matter, they include the following:

- *i) An amicus brief should be limited to legal argument;*
- *ii) The relationship between amicus curiae*, *the principal* parties and the direction of amicus intervention, ought to be

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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) 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 vs. IEBC & Others**; S. C. Petition No.5 of 2013 - Katiba Institute's Application to appear as amicus);
- v) The Court will regulate the extent of amicus participation in proceedings, to forestall the degeneration of amicus role to *partisan role;*
- *vi) In appropriate cases and at its discretion the Court may* assign questions for amicus research and presentation;
- *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

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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;*
- \$x\$) Whereas consent of the Parties, to proposed amicus role, is a *factor to be taken into consideration, it is not the determining factor.*

- 23. We are persuaded that the above guidelines are useful in determining the present Motion and we further deem it necessary to address the issue whether the Applicant by fact of past pronouncements is biased, has taken a position on the matters to be adjudicated in the Reference, and whether its participation as **amicus curiae** would prejudice the Attorney General's case.
- 24. On that issue, the Constitutional Court of South Africa in **Re: Certain Amicus Curiae Applications; Minister of Health and Others vs. Treatment Action Campaign and Others** (CCT \$8/02\$ [2002] had this to say:

'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**

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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 it 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.** (Emphasis added)

25. Further, in **Mumo Matemu** (supra), the Court stated **that**:

it is not for the **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.'

26. In the above context, we have seen a press statement issued by the Applicant on 10th May, 2011 as well as print outs from the internet dated 18th February, 2014 and 10th August, 2014 in which the Applicant's Executive Director is quoted as faulting the Anti-Homosexuality law upon its enactment and later lauding its annulment. It has been submitted that these statements are an expression of bias and lack of partiality but in our considered view, the undenied statements were made as part of the Applicant's mandate, generally, and not necessarily in the context of the Reference before this Court. The statements were also made generally as regards the impugned law and were not targetted at the various sections of the law placed before us for

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scrutiny. More fundamentally, the Amended Reference has narrowed down the issues in contention and we have seen evidence that the Applicant has not addressed itself specifically to those issues which have more to do with specific actions of the Government of Uganda in implementing the impugned law as opposed to the enactment of the law **per se** which was the direction the Applicant's initial statements took.

- 27. In addition to the above findings, it has not been denied by the Attorney General that the Applicant is an expert in HIV related service provision and questions of human rights attendant to the said services and that is why he proposed that the Applicant could indeed join the Reference as an expert. Its knowledge of the subject, which is partly an issue in the Reference, is therefore necessary for the Court to get a wholesome understanding of the same.
- 28. It is also our considered view that an **amicus** brief is limited in the terms set out in **Mumo Matemu** (supra) and it is upto the Court to distill from such a brief what is useful in the determination of the matter before it. While therefore the Court is not seized of the Applicant's brief, by this Ruling, it has been and shall be made aware, of its limited participation in the proceedings and to avoid any sign of partiality or lack of fidelity to its role as **amicus curiae**. The converse is that if it exhibits partiality in the brief, the same risks being ignored by this Court. So far as we are concerned, however, we have seen no sign that it has taken sides specifically in regard to any issue directly in

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contention before us, its general public pronouncements notwithstanding.

29. In concluding, we have seen and have had the benefit of useful submissions by **amicus curiae** in the past and like Sachs J. in Republic of South Africa & Others vs Grootboom (Others <u>20(1)</u> SA 46 (CC) where an **amicus curiae** can help the Court 'in a most considerable way' by participating in novel proceedings, the Court should not shut it out. The consent of the substantive Parties in the making of such a decision, while not necessary as a matter of right, is nonetheless important as a matter of discretion, which we exercised in the present Reference (see \$M\$. Ssekaana and S. Ssekaana, Civil Procedure and Practice in Uganda, (2010).

F. DISPOSITION

- 30. Having decided that there is merit in the Notice of Motion dated 26th May, 2015, it follows that the final orders to be made are that:
- i) The Secretariat of the Joint United Nations Programme on HIV/AIDS the Applicant is hereby granted leave to join **Reference No.6 of 2014**, as *amicus curiae*;

- ii) The said **amicus curiae** is also hereby granted leave to make written Submissions at the hearing of **Reference No.6 of 2014** limited to issues within its mandate and of specific relevance to the Reference aforesaid; and
- iii) There shall be no order as to costs.

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HON. LADY JUSTICE MONICA MUGENYI PRINCIPAL JUDGE

HON. JUSTICE ISAAC LENAOLA DEPUTY PRINCIPAL JUDGE

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HON. JUSTICE DR. FAUSTIN NTEZILYAYO JUDGE

HON. JUSTICE FAKIHI A. JUNDU JUDGE

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HON. JUSTICE AUDACE NGIYE JUDGE

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