IN THE EAST AFRICAN COURT OF JUSTICE 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. 4 OF 2015

(Arising from Reference No. 16 of 2014)

MEDIA LEGAL DEFENCE INITIATIVE (MDLI)

& 19 OTHERS ..... APPLICANTS

VERSUS

1. RONALD SSEMBUUSI (DECEASED) ..... 1ST RESPONDENT

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

20TH SEPTEMBER, 2017

RULING OF THE COURT

A. INTRODUCTION

1. On 28th June, 2016, we delivered a Ruling in this Application in favour of the Applicants. However, the 2nd Respondent, thereafter successfully appealed to the Appellate Division in **Appeal No.3 of 2016** whereby it quashed and set aside the said Ruling as it found it to be a nullity. It reasoned that in the said Ruling we had inadvertently failed to make a determination within the said Ruling on the preliminary objection raised by the 2nd Respondent on the competency of the Application.

2. Having quashed and set aside the said Ruling in its Judgment delivered on 26th May, 2017, it directed as follows:

> ***"As a way forward, since the Parties were heard in full on the undetermined point of preliminary object, we direct the Trial Court to re-constitute itself in order to compose a fresh ruling which should contain a clear determination of the pleaded point of preliminary objection before considering the merits or otherwise of the Application, if that need will arise"***

3. Therefore, this Ruling is a fresh ruling in compliance with the said direction of the Appellate Division, having reconstituted ourselves as may be depicted in the Coram above shown.

4. This Application was brought under Articles 23, 27, 40 and 127 of the Treaty for the Establishment of the East African Community (hereinafter referred to as "**the Treaty**"), as well as Rules 21, 36 and 53 of the East African Court of Justice Rules of Procedure, 2013 (hereinafter referred to as **"the Rules"**).

5. Media Legal Defence Initiative (MLDI) and 19 other organizations (hereinafter referred to as **"the Applicants"**) sought to be granted leave to appear as *amici curiae* in **Reference No.16 of 2014, Ronald Ssembuusi vs. The Attorney General of the Republic of Uganda.**

6. The above Reference challenges sections 179 and 180 of the Uganda's **Penal Code Act (cap 120),** which provide for the offence of criminal defamation, on the premise that the challenged provisions place unjustifiable restrictions on the right to freedom of expression, freedom of the press and the right to access to information contrary to Articles 6(d) and 7(2) of the Treaty. It also challenges the 1st Respondent's conviction and sentencing under the said provisions, asserting that it constituted a violation of Article 8(1)(a) and (c) of the Treaty.

7. At the hearing, the Applicants were represented by Mr. Francis Gimara, the First Respondent (suing through his legal representative) was represented by Mr. Nicholas Opiyo, while the Second Respondent was represented by, Ms. Patricia Mutesi, Mr. Geoffrey Atwine and Mr. Ojiambo Bichachi.

B. APPLICANTS' CASE

8. It was the Applicants' case that they possess a strong commitment to the promotion of the right to freedom of expression, including freedom of the press and the right to access to information; have significant experience in the promotion of the right to freedom of expression, and had valuable expertise in this area that they sought to share with the Court. It did transpire that some of the Applicants' entities had previously provided the Court with relevant information on the right to freedom of expression in the case of **Burundian Journalists Union**

vs. the Attorney General of the Republic of Burundi, EACJ, No.7 of 2013.

9. It was Mr. Gimara's contention that the Applicants sought to bring clarity to questions of permissible limits on the right of freedom of expression and how these freedoms relate to the Treaty on protected principles of democracy, rule of law, accountability, transparency, justice and protection of human rights. Learned counsel argued that this right had been duly acknowledged by this Court in the case of **Burundian Journalists Union** (supra). He maintained that the Applicants were non-partisan neither did they have a special interest in the matter, and their sole motivation was fidelity to the law and the Treaty. To this end, according to him, the Applicants were only keen to aid the Court in the interpretation and application of Treaty principles articulated in **Reference No. 16 of 2014** by proposing a comparative and international law approach.

C. FIRST RESPONDENT'S CASE

10. The 1st Respondent did not object to the Application, contending that it satisfied the requirements therefor given the Applicants' expertise and extensive experience in handling issues of freedom of expression.

D. SECOND RESPONDENT'S CASE

11. The 2nd Respondent in his Affidavit in Reply filed on 24th July, 2015 in Para.3 resisted, objected and opposed the Application as follows:

> ***"That the Affidavit accompanying the Application is incompetent based on hearsay and does not disclose the source of information contained therein."***

12. At the hearing of the Application, the 2nd Respondent vide Mr. Atwine, Learned Senior State Attorney, stressed that the Affidavit deponed by one Yakare Oule Jansen in support of the Application is incurably defective and ought to be struck out for being hearsay and offending Rule 21(5) of the Rules. He further stressed that the said Affidavit did not disclose the source of information contained therein or how the deponent got to know the said information.

13. The 2nd Respondent further asserted that the Applicants' public statements and associations, as depicted in the Affidavit of Mr. Jimmy Oburu Odoi, exhibited a bias for the decriminalization of defamation, rendering them incapable of being neutral to the Parties in the proceedings to the extent that they share the same goal with the First Respondent herein.

14. Mr. Atwine referred this Court to the case of **Attorney General vs. Silver Springs Hotel Civil Appeal No.1 of 1989,** where the Supreme Court of Uganda held that one of the fundamental considerations for *amicus curiae* to be admitted was that such party was independent of the dispute between the parties. According to him, therefore, a party that sought to be joined as *amicus curiae* was required to demonstrate its neutrality and objectivity on the matter before a court, as well as show that it was not an interested party therein.

E. APPLICANTS' REJOINDER

15. The Applicants in their Affidavit in Rejoinder and at the hearing resisted the preliminary objection raised by the 2nd Respondent maintaining that the Affidavit in support of the Application is competent. In Para.3 of the said Affidavit deponed by one Annet Namugosa, in reply to the 2nd Respondent's Affidavit in Reply she states as follows:

"That in reply to Para.3 of the Affidavit, I am hereby informed by Yakare Oule Jansen that the facts deponed by her are well within her knowledge and from information availed by each of the organizations. Therefore, the Affidavit accompanying the Application is competent".

16. At the hearing, the Applicants vide Mr. Gimara, Learned Counsel, contended that the Affidavit in support of the Application conforms to the relevant Rule and the Form provided for in the Third Schedule therein and that the alleged issue of disclosing source of information in the Affidavit is not provided for in the Rules nor has the 2nd Respondent cited any authorities to support his asserted position.

17. In an Affidavit in Rejoinder, the Applicants' respective mandates in the area of freedom of expression was reiterated as the basis for their expertise in the issues before this Court; their intricate participation in the promotion of the right to designated press freedoms was an expression of this mandate rather than alleged bias and, if granted leave to appear as *amicus curiae*, they would restrict their *amicus* brief to matters of law that were instrumental to the Court's analysis of Uganda's criminal defamation laws.

18. In the same vein, Mr. Gimara maintained that the Applicants' only interest was to share their vast knowledge and expertise in this matter with the Court. He cited **Forum pour Reinforcement de la Societe Civile (FORSC) & 8 Others vs Burundi Journalists Union & Another EACJ Application No. 2 of 2014** in support of this preposition.

F. COURT'S DETERMINATION

19. We shall first consider and determine the preliminary objection raised by the 2nd Respondent in Para.3 of his Affidavit in Reply that the Affidavit in support of the Application deponed by Yakare Oule Jansen is hearsay and does not disclose sources of information stated therein, hence, is incurably defective and incompetent. We have stated the arguments and submissions of the Second Respondent in support of the said preliminary objection in Para 11 – 13 above and those of the Applicants opposing the preliminary objection in Para 15 – 16 above.

20. In our considered view, the matter under scrutiny raises the issue of the veracity of facts deponed in an affidavit. It is settled law that an affidavit must confine itself to matters within its deponent's knowledge; and where a deponent attest to facts not within his or her knowledge, he or she is required to disclose the source of his or her information and the grounds of his or she belief. (see: **Law of Affidavits, Second Edition, by P.M. Bakshi at pages 20 -24**; (See also **Mulla on Code of Civil Procedure, Sixteenth Edition, at Page 2348** discussing **Order 19** of the **Code of Civil Procedure Act V of 1908 of India**; see also **Order 19 of Civil Procedure Codes of Kenya, Uganda** and **Tanzania**).

21. It is also settled law that an affidavit deponed on information and belief which does not disclose sources of information and grounds of belief becomes incurably defective, incompetent and may be struck out by a court of law. However, we hasten to point out that "it is not always the case that an application will be struck out because it is supported by a defective affidavit. In a fit case, there is always room for an amendment of the affidavit" (See: **Samuel Kimaro vs Hidaya Didas, Civil**

Applicatiion No.20 of 2012, Court of Appeal of Tanzania) and for expunging defective parts or paragraphs "where defects in an affidavit are inconsequential" (See: **Phantom Modern Transport (1985) Ltd. versus D. T. Dobie (Tanznia) Ltd, Civil Reference No.15 of 2001 and 3 of 2005, Court of Appeal of Tanzania**).

22. In the present matter, although the 2nd Respondent in the preliminary objection contends that the Affidavit in support of the Application is hearsay and does not disclose sources of information stated therein, he has not shown or demonstrated which paragraphs or parts in the said Affidavit suffer the said defect(s). Apart from mentioning Rule 21(5) of the Rules, he has not cited any authorities to support his case. Our own reading of the impugned Affidavit reveals two issues. First, the deponent used the following words in paras 4 to 22:

".....I have been informed and do believe that..."

Then in the "Verification" Clause immediately after Para.28 she states:

"That what is stated in paragraph 1-28 is true to the best of my knowledge."

23. The 2nd Respondent did not address us at all on the said "Verification." However, quite clearly it is in direct conflict with deponent's own averment in paras 4 to 22. Does the said defect(s) offend Rule 21(5) of the Rules of this Court as alleged by the 2nd Respondent? Rule 21(5) provides as follows:

"Every formal application to the First Instance Division shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts, in accordance with Form 3 of the Second Schedule."

24. Form 3 in the Second Schedule prescribes a "VERIFICATION" paragraph or clause in the following manner or wording:

> ***"I ..... do hereby verify that what is stated above is true to the best of my knowledge, information and belief."***

25. It is clear to us that Rule 21(5) and Form 3 in the Second Schedule require a deponent of an affidavit in support of a formal application to confine himself or herself to the facts within his or her knowledge, information and belief. Though Rule 21(5) and Form 3 in the Second Schedule do not categorically require that in case of deponing an affidavit on information and belief, sources of information and grounds of belief should be disclosed, as we have endeavoured to illustrate herein above, such disclosure is now well-established procedure. Does it then necessarily follow, as argued by Mr. Atwine, that since the impugned Affidavit did not disclose sources of information stated therein it is incurably defective and should therefore be struck out?

26. We do not think so. The entire impugned Affidavit has 28 paragraphs but the alleged defects appear in some of the paragraphs only (Para 4 to 22). The offending words as we have seen above are ***"---- I have been informed and do believe that ...."*** Our reading of Para.4 to 22 shows that the statements deponed therein only state the "*Description of the Proposed Amici Curae"* in this Application.

27. In **Phantom Modern Transport (1985) Ltd versus D.T. Dobbie (Tanzania) Ltd.**(supra) (unreported), the Court of Appeal of Tanzania held:

> "***Where defects in an affidavit are inconsequential, those defective paragraphs can be expunged or overlooked leaving***

the substantive part of it intact so that the Court can proceed to act on it."

This authority was applied in **Samuel Kimaro** (supra) where the same Court held:

"The above authorities are of assistance in highlighting one major point. That it is not always the case that an application will be struck out because it is supported by a defective affidavit. In a fit case, there is always room for an amendment of the affidavit as the above authorities clearly show."

28. We are most persuaded by the Judicial approach adopted in the foregoing cases, and would similarly expunge the offending paragraphs (4 – 22) from the impugned Affidavit as we hereby do.

29. Nonetheless, the striking out of the offending paragraphs notwithstanding, we do find the present Application properly before us. It seems quite clear to us that the expunged paragraphs pertain merely to a description of the proposed *amici curie.* Their deletion does not negate the Applicants' interest in **Reference. No.16 of 2014**. As we endeavour to demonstrate below such interest is a prerequisite for an application for leave to appear as *amicus curiea* in this Court.

30. In conclusion, having expunged the defective paragraphs in the impugned Affidavit, we hereby overrule the preliminary objection raised by the 2nd Respondent. We proceed to determine the Application on merits as hereunder.

31. Rule 36(2)(e) and (4) highlights the parameters against which an application for leave to appear as *amicus curiae* may be considered. Whereas Rule 36(2)(e) requires 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*. 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) ....

(d) .....

(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."

32. As this Court held in **UHAI EASHRI & Another vs. Human Rights Awareness Promotion Forum (HRAPF) & Another, EACJ Applications No. 20 & 21 of 2014**, Rule 36(2)(e) places a duty upon an applicant for joinder as *amicus curiae* to demonstrate the nature of its interests in the outcome of the substantive proceedings. Indeed, faced with a similar Application in **FORSC & 8 Others** (supra), this Court did hold that an *amicus curia* must have an interest in the proceedings it seeks to join. In **UHAI EASHRI & Another** (supra), this

Court also held that Rule 36(4) imposed a duty upon such applicant to establish to the satisfaction of the Court circumstances that *prima facie* justifies its appearance as *amicus curiae*.

33. As quite correctly averred in the present Application, the legality of sections 179 and 180 of the Uganda Penal Code Act, which provide for the offence of criminal defamation, were challenged in **Reference No. 16 of 2014** for violating the right to freedom of expression, including freedom of the press and the right to access to information. The Applicants' interest therein is captured in paragraphs 23 - 27 of the Affidavit of one Yakare-Oule Jansen. Paragraph 23 describes the Applicants as organizations whose area of focus includes 'promoting respect for and observance of the right to freedom of expression, including freedom of the Press and the right to access to information.' It thus establishes their expertise in the matters raised in **Reference No. 16 of 2014**, from which the present Application arises.

34. Against that background, it seems to us that paragraph 25 of the same Affidavit clearly demarcates the Applicants interest in the outcome of the Reference in the following terms:

> **"These issues are central to the mandate of each of the (NGO) organizations, thus they seek to utilize their expertise towards assisting the Court in its interpretation and application of the Treaty."**

35. We are, therefore, satisfied that the Applicants have aptly demonstrated their interest in the outcome of **Reference No. 16 of 2014** as required by Rule 36(2)(e).

36. Having so found, we revert to a consideration of whether the Applicants have satisfactorily demonstrated circumstances that would

justify their joinder in the Reference as *amici curiae* as provided by Rule 36(4). Stated differently, what considerations should a court take into account when faced with an application such as the one before us? This Court has had occasion to pronounce itself on the parameters to be considered in determining this question.

37. In **Advocats San Frontiers vs. Mbugua Mureithi Wanyambura & 2 Others EACJ Application No. 2 of 2013**, it was held that a court may consider joinder of an applicant as *amicus curiae* if it considered it to be in the interests of justice to do so, provided that such prospective *amicus curiae* was independent of the dispute between the Parties. Indeed, in **FORSC & 8 Others** (supra) this Court held that an *amicus curia* was under a duty to restrict its brief to 'the most cogent and impartial information.

38. In the latter case of **UHAI EASHRI & Another** (supra), citing with approval **Mohan, S. Chandra, 'The Amicus Curiae: Friends No More?' 2010, Singapore Journal of Legal Studies, 352 – 371,p.14**, it was held:

> "**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.**"

39. In the more recent cases of **Dr. Ally Possi & Another vs. Human Rights Awareness Promotion Forum (HRAPF) & Another EACJ Application No. 1 of 2015** and **Secretariat of the joint United Nations Programme on HIV/AIDS vs. HRAPF & Another EACJ Application No. 3 of 2015**, this Court did uphold the principle of

neutrality, whereby the relationship between a prospective *amicus curiae* and the parties to a dispute should be neutral, independent of the dispute and governed by fidelity to the law.

40. Therefore, in our considered view, the parameters for consideration in determining the joinder of an applicant as *amicus curiae,* and within which courts' judicial discretion may be exercised are as follows:

    a. ***Principle of neutrality – a prospective amicus curiae should be neutral, impartial, and independent of the parties to an adversarial dispute.***

    b. ***A prospective amicus curia should demonstrate reasonable expertise in the subject matter for adjudication and fidelity to the law.***

    c. ***An amicus curia shall normally be appointed if the court is of the view that a case involves important questions of law in an area of public interest.***

    d. ***If the questions of law posed do not concern the parties involved but are nevertheless a matter of concern to the court.***

    e. ***If it is, otherwise, in the interests of justice to admit a prospective amicus curia to a dispute.***

41. We have carefully scrutinized all the material on record in the present Application, and dutifully considered the rival arguments of all Parties. We have seen press statements, as well as print outs from the different Applicants' websites dated 20th July 2015 in which the Applicants display a series of activities conducted particularly in their campaign to

end criminalization of defamation, including legal representation of journalists and organization of seminars.

42. It was submitted that the foregoing statements are an expression of bias and lack of partiality. With respect, we take a contrary view. It seems to us that the impugned statements provide insight into the Applicants' mandate and, as we have held earlier herein, explain their interest in the outcome of the substantive Reference. Such scholarly interest in the subject of criminal defamation would inform the substance of an *amicus* brief provided by the Applicants, and is to be distinguished from the unprincipled, often unresearched, 'rights-based' agitation that is typified by pressure groups and lobbyist organizations.

43. In the instant case, we have Applicants that have undeniably engaged in the extensive study of selected laws and their impact on freedom of the press and related rights. They seek to share the knowledge garnered with a view to contributing to legal jurisprudence in that area. We take the view that the inference that their mandate is skewed to the abolition of criminal defamation should be weighed against the legal questions posed by criminal defamation as intimated in the material on record, as well as the Applicants' scholarly and specialized contribution to possible legal reform in the area of press freedoms generally.

44. We are fortified in this position by the role of an *amicus curiae* viz a viz the Court's discretion as to the usefulness of an *amicus* brief. On the one hand, 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 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. On the other hand, it is the duty of a court that has been successfully courted by an *amicus curia* to judiciously determine the neutrality of the positions advanced in an *amicus* brief and distill therefrom such data as is demonstrably useful in the determination of the matter before it.

45. It seems to us, therefore, that whereas an *amicus curiae* must of necessity have some semblance of interest in a matter that would motivate it to apply to be joined therein in the first place, courts are at liberty to disregard *amicus* briefs that seek to influence the final outcome or attempt to persuade the court one way or another.For present purposes therefore, should this Court deduce a biased, irrational, unresearched premise for the positions advanced by the Applicants it would be at liberty to sever its friendship with them and disregard their *amicus* brief.

46. In the result, we take the view that the justice of this matter dictates that the Court do benefit from the Applicants apparent expertise in the issues under scrutiny in the substantive Reference. We do, therefore, allow this Application and hereby grant the Applicants leave to be joined as *amici curiae* in **Reference No.16 of 2014**.

G. DISPOSITION

47. Having so held, we make the following final orders:

*i) Medical Legal Defence Initiative (MLDI) & Others are hereby granted leave to join **Reference No.16 of 2014**, as amici curiae;*

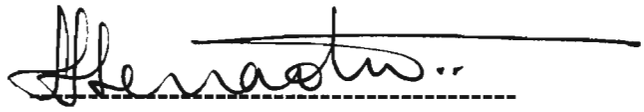
*ii) The said amici curiae are hereby granted leave to submit a joint Amicus Brief in writing in **Reference No.16 of 2014** within such time frame as shall be directed by the Court.*

iii) The Amicus Brief shall be restricted to issues within the amici curiae's mandate and of specific relevance to the Reference aforesaid; and

iv) We make no order to costs.

Dated and delivered at Arusha this 20th day of September, 2017.

Hon. Lady Justice Monica K. Mugenyi
PRINCIPAL JUDGE



Hon. Justice Isaac Lenaola
DEPUTY PRINCIPAL JUDGE

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