

**THE REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

(Coram: Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. 12 (E014) OF 2022

BARCLAYS BANK OF KENYA LIMITED

(NOW ABSA BANK KENYA PLC)APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES

(Large Taxpayers Office).....RESPONDENT

AND

MASTERCARD ASIA PACIFIC

PTE LIMITED.....PROPOSED INTERESTED PARTY/APPLICANT

(Being an application for joinder as an interested party)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion filed by the Applicant, Mastercard Asia Pacific PTE Limited, dated 5th July, 2022 and filed on 8th July, 2022 brought under the provisions of Rule 3(1), (2), (4) and (5) and 24 of the Supreme Court Rules, 2020 and the supporting affidavit sworn by Shafi Shaikh, the Executive Vice President in charge of customer delivery in the Asia Pacific region seeking leave of the Court to be admitted as an interested party and to submit evidence by way of affidavit and file written submissions; and

[2] UPON considering the applicant's grounds in support of its application and the applicant's written submissions dated and filed on 8th July, 2022 where the applicant argues that it is a leading global payment solution provider through the Mastercard network that facilitates the processing of card payments throughout the world, including virtual cards stored in a digital wallet; that the key issue in dispute involves the interpretation of the terms of the agreement between the applicant and the petitioner governing their relationship and the use of the applicant's logo, tradenames, service marks and logotypes with one of the terms of the agreement being that the petitioner should not pay royalties to the applicant; that the interchange fees earned by the petitioner and other banks within the applicant's network acts as an incentive to utilize the global payment system of the applicant for transactions on debit and credit cards issued by the petitioner to card holders and for customers to join the applicant's network; and

[3] UPON considering the applicant's further arguments that the imposition of withholding taxes on the interchange and transaction fees as a management and professional fee will impact the use of the applicant's payment solutions in Kenya; that the applicant has a direct interest in this petition as the orders issued by this Court will affect its engagement with the petitioner and all the other banks in the applicant's network; that the applicant seeks to provide the court with an understanding of the nature of the Mastercard service fees and interchange fees and; that the petition is a matter of public interest as it will impact the uptake and popularity of the use of debit and credit cards as modes of payment in Kenya; and

[4] UPON noting further submissions by the applicant that it has met the requirements under Rule 24 of the Supreme Court Rules, 2020 and that it has demonstrated that it has a stake/ interest in the matter, stands to suffer prejudice should it not be joined and will advance relevant arguments as a proposed interested party relevant to the petition as was determined in *Francis Kariuki Muruatetu & another v Republic & 5 others*, SC Petitions No. 15 and 16 of

2015; [2016] eKLR (*Muruatetu Case*) and *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others*, SC Petition No. 12 of 2013; [2014] eKLR (*Mumo Matemu Case*);

[5] FURTHER considering the consent dated 28th July, 2022 and lodged on 28th July, 2022 where the petitioner does not oppose the applicant's Notice of Motion for joinder as an interested party;

[6] AND further considering the respondent's replying affidavit sworn by Philip Munyao, an officer with the Respondent's Large Taxpayer's Office (LTO) and written submissions opposing the joinder of the applicant as an interested party contending that the applicant has failed to comply with the provisions of Rule 24(1) of the Supreme Court Rules, 2020, failed to demonstrate the personal interest in the matter nor any prejudice its stands to suffer and has also failed to set out its precise case as was held in *Mumo Matemu* and *Muruatetu* and; that whatever the applicant intends to bring to the petition is properly covered by the parties as the contested issues between the appellant and respondent are largely factual and uncontested; and

[7] NOTING the provisions of Rule 24 of the Supreme Court Rules, 2020 and the principles set out in this Court's decisions in *Mumo Matemu* and *Muruatetu* on the joinder of an applicant as an interested party, we find that the application conforms to the said principles in that the applicant is the party that facilitates the global payment system by which the petitioner issues debit or credit cards that display the Mastercard logo. Furthermore, the applicant is the other main party in the agreement between the petitioner and the applicant on whether any fees paid by the petitioner to facilitate use of debit or credit cards should be subjected to withholding tax, which issue is central to this dispute. This is an identifiable stake in the matter, and the applicant will be directly affected by the outcome of the case. The applicant therefore stands to be prejudiced and its joinder is thus necessary.

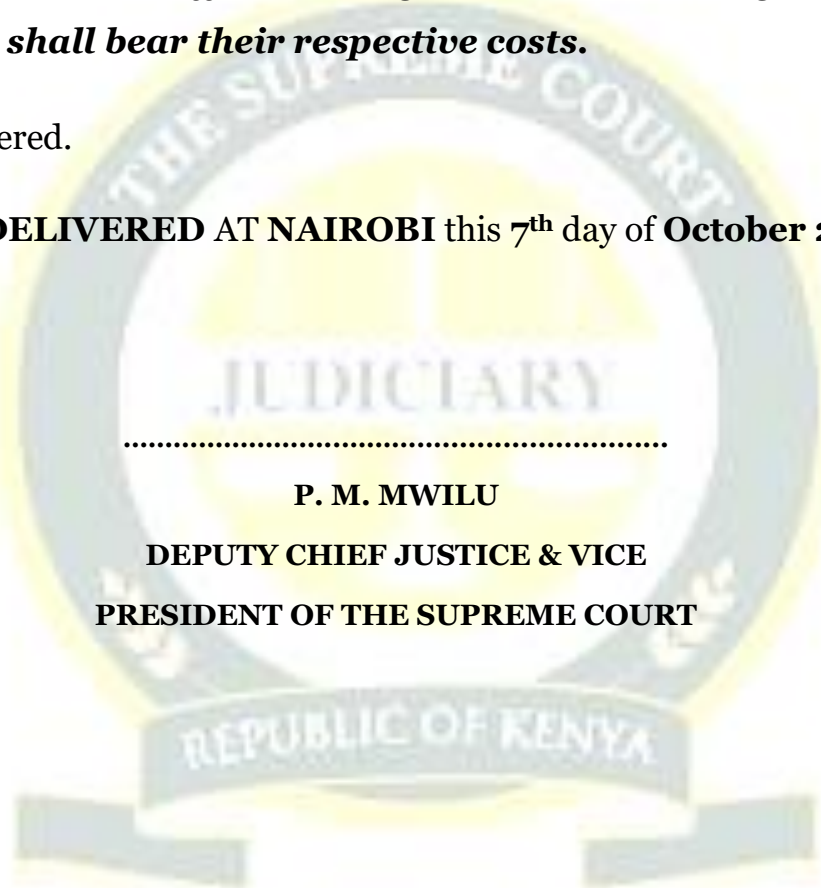
[8] HAVING therefore considered the application, we find that the applicant qualifies to be joined as an interested party and make the following Orders:

a) The application dated 5th July, 2022 and lodged on 8th July, 2022 by Mastercard Asia Pacific PTE Limited as an interested party is allowed. It shall file its affidavit in response to the petition within 14 days of this Order. Any party that wishes to file a rejoinder to that affidavit may do so within 14 days of service.

b) Parties shall bear their respective costs.

[9] It is so ordered.

DATED and DELIVERED AT NAIROBI this 7th day of October 2022



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P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE
PRESIDENT OF THE SUPREME COURT

.....
S.C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA

