

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

KENYA BANKERS

ASSOCIATION.....PROPOSED INTERESTED PARTY/APPLICANT

*(Being an application for joinder as an interested party and to
adduce additional evidence)*

RULING OF THE COURT

[1] UPON perusing the Notice of Motion by Kenya Bankers Association, the Applicant, dated 7th July, 2022 and filed on 8th July, 2022 brought pursuant to Section 24 of the Supreme Court Act 2011, Rule 3(1), (2), (4) and (5) and 24 of the Supreme Court Rules, 2020 and Direction 55(a) of the Supreme Court (General) Practice Directions, 2020 for leave for joinder as an interested party and to submit additional evidence and written submissions on the petition herein; and

[2] UPON considering the grounds in support of the application and the supporting affidavit of Dr. Habil Olaka, the applicant's Chief Executive Officer

where the applicant claims to have a direct interest in the petition being the body bringing together banking institutions licensed and regulated by the Central Bank of Kenya; that the question of whether the disputed payments are subject to withholding tax is an important question within the banking industry that would affect all the applicant's members; that should this Court decide in the respondent's favour, all the applicant's members will receive assessments from the respondent for payment of withholding tax on interchange and professional fees; that the payment of such taxes will lead to loss of business as the cost will be borne by their customers; and

[3] UPON considering the applicant's written submissions dated 7th July, 2022 contending 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, advanced 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***);and

[4] ALSO considering the argument by the applicant that it has met the threshold to be granted leave to adduce additional evidence by way of an affidavit as was set out in ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohammad & 4 others***; SC Petition No. 7 of 2018; [2018] eKLR;

[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 it has in the matter; has not shown any prejudice its stands to suffer if joinder is not granted and 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 principles laid out in that the applicant's members who are also in the banking sector shall also be directly affected by the outcome of this decision. This is an identifiable stake in the matter and we so find.

[8] **ALSO** noting that the applicant has also prayed and submitted that they be allowed to adduce additional evidence, upon consideration of Rule 18 of this Court's rules and the principles set out in ***Mohamed Abdi Mahamad v. Ahmed Abdullahi Mohamed & 3 others***, it is our finding that the applicant has not satisfied the threshold set out therein by failing to show that the additional evidence would ***'if given, influence or impact upon the result of the verdict, or removes any vagueness or doubt within the case'***. The issues are plain and do not require no more than the applicant's participation for reasons given above. This prayer therefore fails.

[9] **ACCORDINGLY**, we make the following Orders:

- a) ***The application dated 5th July, 2022 and lodged on 8th July, 2022 by Kenya Bankers Association for joinder as 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.

[10] 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