



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA AT NAIROBI**

*(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Wanjala & Njoki, SCJJ)*

**PETITION (APPLICATION) NO. E005 OF 2023**

– BETWEEN –

**STANBIC BANK KENYA LIMITED ..... APPELLANT**

– AND –

**SANTOWELS LIMITED ..... RESPONDENT**

– AND –

**KENYA BANKERS**

**ASSOCIATION ..... INTENDED INTERESTED PARTY /APPLICANT**

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*(Being an application by Kenya Bankers Association to be joined in the appeal as an interested party)*

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Representation:

Mr. Allen Gichuhi, SC for the appellant  
*(Wamae & Allen Advocates)*

Mr. Kevin Mogeni for the respondent  
*(Mogeni & Co. Advocates)*

Mr. Kenneth Fraser, SC for the intended interested party/applicant  
*(Hamilton, Harrison & Mathews Advocates)*

## **RULING OF THE COURT**

**[1] WHEREAS** the Court of Appeal by a ruling dated 17<sup>th</sup> February, 2023 in Civil Applic. (Sup) No. E196 of 2022 granted leave to Stanbic Bank Kenya Ltd. (the appellant) to file the appeal, Petition No. E005 of 2023, under Article 163(4)(b) of the Constitution in the following terms:

*“We have also considered the applicant’s grounds in support of certification and in our view, the intended appeal primarily revolves around the proper interpretation and application of sections 44 and 52 of the Banking Act. As we understand it, the applicant is saying that the courts have given different interpretation on instances when the consent of the minister in charge of finance is required and instances when the parties have freedom of contract to agree on the rate of interest, including the right to vary that rate.*

*Having considered the issue, we find there is uncertainty in the law arising from the contrary views in the High Court and this Court on the question of the rate of interest and banking charges which requires certainty. The battle on whether banks have a free hand to change any rate of interest and banking charges and whether customers can wake up many years after signing contractual documents to challenge the rate of interest has been ranging in our courts for a long time and requires clarification.”; and*

**[2] UPON** considering the Notice of Motion dated 23<sup>rd</sup> March, 2023 and lodged on 24<sup>th</sup> March, 2023 by Kenya Bankers Association (the applicant) under Rules 3, 24 and 31 of the Supreme Court Rules, 2020 seeking the following orders:

*a) Leave be granted for the applicant to be joined as an interested party to this appeal.*

*b) The costs of this application be provided for.*

**[3] TAKING INTO ACCOUNT** the affidavit in support of the motion sworn by the applicant's Chief Executive Officer, Habil Olaka, on 23<sup>rd</sup> March, 2023 and the applicant's submissions of even date to the effect that; firstly, the applicant and its members have an identifiable stake/interest in the appeal before this Court. In that, the applicant as well as a number of its members are parties in several suits pending before the superior courts below, all of which revolve around the interpretation, application and effect of Sections 44 and 52 of the Banking Act; the issues in dispute in the superior courts below are directly in issue in the appeal before this Court; and this Court's decision will be final and binding on the superior courts below. Secondly, that the applicant's members will be prejudiced if the applicant is not allowed to participate in the appeal and be able to put forth submissions on behalf of the banking industry; the submissions not only set out a different perspective from the appellant but are also relevant to the determination of the appeal.

**[4]** Thirdly, the applicant intends to, submit on the historical development of legislation relating to the control of interest, on one hand and bank charges other than interest, on the other hand; demonstrate that it was never the intention of the Legislature that Section 44 of the Banking Act should control interest; and establish that Section 52 of the Banking Act was intended to preserve contractual obligations and assets of banks from claims by customers seeking to avoid liability for their contractual obligations as well as restrain banks from seeking to recover interest or other bank charges in excess of what is permitted by legislation. In any event, no prejudice will be occasioned to the parties by the applicant's participation as an interested party; and

**[5] APPRECIATING** the fact that when the matter was mentioned before the Hon. Deputy Registrar of this Court on 27<sup>th</sup> March, 2023 and 11<sup>th</sup> April 2023, the

appellant's counsel indicated that the appellant had no objection to the motion; and

**[6] NOTING** that Santowels Ltd. (the respondent) by a replying affidavit sworn by its Managing Director, Rajiv Raja, on 4<sup>th</sup> April, 2023 opposed the motion on the grounds that; the crux of the appeal relates to the appellant overcharging interest on its loan account, which issue the applicant cannot respond to or submit on; the question of interpretation of Sections 44 and 52 of the Banking Act neither arose in the superior courts below nor is it subject of the appeal before this Court; the issues in the suits pending before the superior courts below cannot be raised in this appeal; and the joinder of the applicant to the appeal would only convolute the matter; and

**[7] BEARING IN MIND** the guiding principles in considering an application for joinder of an interested party as delineated under Rule 24 of the Supreme Court Rules, 2020 and discussed by this Court ***Francis Karioki Muruatetu & Another v. Republic & 5 Others***, SC Petition No. 15 & 16 of 2015; [2016] eKLR wherein it was held that -

*“One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:*

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.*
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the*

*satisfaction of the Court. It must also be clearly outlined and not something remote.*

*iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”*

**[8] WE OPINE** as follows:

- i. It is clear that the Court of Appeal certified the appeal on the basis of uncertainty that had arisen due to conflicting decisions from the superior courts below on the interpretation of Sections 44 and 52 of the Banking Act.
- ii. Having perused the submissions that the applicant intends to put forth as well as the appellant’s written arguments in support of the appeal, we cannot help but note that there is no divergence between the two. In other words, the applicant’s submissions do not offer a different perspective from the appellant.
- iii. Further, the applicant has not demonstrated the prejudice it will suffer if it is not admitted as an interested party. This is because the applicant and its members can advance their interests in the suits pending before the superior courts below, which have the competence to interrogate the evidence and deal with the issues therein. It is our humble view that allowing the applicant to engage in multiple litigation in all the courts will not only be prejudicial to the parties but undermine the core purpose of the hierarchy of courts. Moreover, it is this Court’s duty to safeguard the autonomous exercise of the respective jurisdiction of those superior courts as aptly observed in ***Peter Oduor Ngoge v. Francis Ole Kaparo and 5 Others***, SC Petition No. 2 of 2012; [2012] eKLR.

[9] CONSEQUENTLY and for the reasons afore-stated we make the following Orders:

- i. The Notice of Motion dated 23<sup>rd</sup> March, 2023 and filed on 24<sup>th</sup> March, 2023 is hereby dismissed.*
- ii. The applicant shall bear the costs of the respondent in this Motion.*

It is so ordered

**DATED and DELIVERED at NAIROBI this 16<sup>th</sup> day of June, 2023.**

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**M. K. KOOME**  
**CHIEF JUSTICE & PRESIDENT**  
**OF THE SUPREME COURT**

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

.....  
**M. K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

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

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

**I certify this as a true Copy of the Original**

**REGISTRAR**  
**SUPREME COURT OF KENYA**

