



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 APPLICANT

– AND –

SANTOWELS LIMITED RESPONDENT

*(Being an application for joinder of the Hon. Attorney General as an amicus curiae
in the appeal from the Judgment of the Court of Appeal at Nairobi (Okwengu,
Makhandia & J. Mohamed, J.J.A.) dated 28th April, 2022 in Civil Appeal No. 160 of
2018)*

Representation:

Mr. Caxstone Kigata h/b for Mr. Allen Gichuhi, SC for the applicant
(Wamae & Allen Advocates)

Mr. Kelvin Mogeni for the respondent
(Mogeni & Co. Advocates)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion dated 18th July, 2023 and lodged on 25th July, 2023 by Stanbic Bank Kenya Limited (the applicant) under Rules 3, 19(1)(2) & (4) and 31 of the Supreme Court Rules, 2020 seeking the following orders:

a) Leave be granted by this Court for the Cabinet Secretary for Finance & National Treasury (*sic*) to be joined as an *amicus curiae* to this appeal.

b) The costs of this application be provided for.

[2] NOTING that while the applicant seeks the admission of the Cabinet Secretary for Finance and National Treasury (*sic*), it probably meant the Cabinet Secretary, National Treasury and Economic Planning (the Cabinet Secretary); and that throughout its application and supporting affidavit thereto, the applicant refers to the Cabinet Secretary and the Attorney General interchangeably;

[3] TAKING INTO ACCOUNT the affidavit in support of the Motion sworn by the applicant's Head of Legal, Litigation and Corporate Functions, June Opiyo, on 18th July, 2023 and the applicant's submissions of even date to the effect that; firstly, the appeal herein raises substantial matters of general public importance; the issues revolve around the interpretation of Sections 44 and 52 of the Banking Act; that is, whether the rate of interest applied by a financial institution and the variation/increase thereof is subject to the approval of the Minister (now known as the Cabinet Secretary) in charge of finance or within the parties freedom to contract; and the issues are cross cutting and affect the entire banking industry;

[4] Secondly, upon filing the appeal herein, the applicant by a letter dated 6th March, 2023 informed the Attorney General of the same and served him with copies thereof; the Attorney General has significant experience in law, legislative amendments as well as the roles and workings of the Cabinet Secretary; the participation of the Attorney General/Cabinet Secretary will be of valuable assistance to this Court; thirdly, the intended *amicus curiae* meets the criteria under Rule 19 of the Supreme Court Rules, 2020; the Attorney General meets the neutrality test set out in ***Trusted Society of Human Rights Alliance v. Mumo Matemo & 5 Others***, SC Petition No. 12 of 2013; [2015] eKLR (***Mumo***

Matemo); the Motion has been brought without delay; and lastly, no prejudice will be occasioned to the parties by the admission of the intended *amicus curiae*;

[5] COGNIZANT that Santowels Ltd. (the respondent) by a replying affidavit sworn by its advocate on record, Kelvin Mogeni, on 2nd August, 2023 and written submissions of even date opposed the Motion on the grounds that; the crux of the appeal relates to the applicant overcharging interest on the respondent's loan account; no issue arose as to the application of Sections 44 and 52 of the Banking Act in the superior courts below; in any event, while interpreting Sections 44 and 52 of the Banking Act that duty falls on the Court and not the Cabinet Secretary; the appeal does not raise any matter of public importance or public interest to warrant the intended *amicus curiae*'s participation; moreover, the Motion was brought late contrary to Rule 19(4) of the Supreme Court Rules, which requires such a Motion to be lodged within seven (7) days of filing any response in the appeal; the appeal was filed on 1st March, 2023 while the respondent filed its response vide a cross appeal dated 23rd March, 2023 and a replying affidavit dated 24th March, 2023; it follows that the Motion should have been filed within seven (7) days of filing of the cross appeal; the intended *amicus curiae* has not filed any application for admission as required by Rules 6 and 7 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the Mutunga Rules); and the admission of the intended *amicus curiae* would only convolute the matter;

[6] APPRECIATING that when the Motion was mentioned before the Deputy Registrar of this Court on 7th August 2023, counsel for the applicant indicated that the intended *amicus curiae* had been served although the intended *amicus curiae* had not filed any brief or response to the Motion; and

[7] BEARING IN MIND the role of an *amicus curiae* in any proceedings is to aid the court to arrive at a determination based on the law. See ***Attorney General v. Ndi & 73 others; Akech (Intended Amicus Curiae)***, SC

Petition (Applic.) No. E016 of 2021; [2021] KESC 20 (KLR). Further, that the operative provision that guides the Court in considering the admission of an *amicus curiae* is Rule 19 of the Supreme Court Rules, 2020 which reads –

“19. Participation of friends of the Court

- 1) The Court may on its own motion, or at the request of any party, permit a person with particular expertise to appear in any matter as a friend of the Court.*
- 2) The Court shall before admitting a person as a friend of the court, consider*
 - a) proven expertise of the person;*
 - b) independence and impartiality of the person; or*
 - c) the public interest.*
- 3) Any fees or expenses incurred by a person appointed by the Court as a friend of the court on its own motion, shall be paid out of the Judiciary Fund, in accordance with a scale determined by the President.*
- 4) An application to be admitted as an amicus or a friend of the Court shall be done within 7 days upon filing of a response in any proceedings before the Court.”*

[8] UPON DELIBERATIONS ON THE MOTION AND THE RIVAL SUBMISSIONS WE OPINE as follows:

- i. It is not disputed that the appeal herein was lodged under Article 163(4)(b) of the Constitution. In point of fact, the Court of Appeal in certifying that the appeal raised issues of general public importance by its ruling dated 17th February, 2023 in Civil Applic. (Sup) No E196 of 2022 expressed as follows:

“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.”

- ii. It is also common ground that the respondent did not seek a review of the above order of certification. Accordingly, the respondent cannot now be heard to claim that the appeal does not raise any issue of general public importance.
- iii. As to the competence of the Motion which was filed by the applicant as opposed to the intended *amicus curiae*, Rule 19(1) of the Supreme Court Rules is clear. It provides that **any party** can request the Court to admit a person as *amicus curiae*. Furthermore, this Court in **Mumo Matemo** confirmed that it can consider suggestions from parties to any proceedings, to have a particular person, State Organ or organization admitted in any proceedings as *amicus curiae*.
- iv. It is not clear to us who between the Cabinet Secretary and the Attorney General, the applicant seeks to be admitted as *amicus curiae*. As we pointed

out earlier in this ruling, the applicant refers to both of them interchangeably. Be that as it may, while we have no doubt as to the Attorney General's expertise, the applicant has not demonstrated that the intended *amicus curiae* would be addressing point(s) of law which have not been addressed by the parties to the suit. In other words, that he would introduce novel aspects of the legal issues in question that will aid in the development of the law. See ***Mumo Matemo***.

- v. Besides, it would appear that neither the Attorney General nor the Cabinet Secretary is keen in participating in this matter. The applicant deposed that it served the Attorney General with its appeal on 6th March, 2023. What is more, despite being served with Motion, the intended *amicus curiae* have not filed any response or brief setting out their position. Equally, we find that no prejudice would be occasioned to the Cabinet Secretary or the Attorney General if they are not admitted as *amicus curiae*. See ***JOO v MBO; Federation of Women Lawyers (Intended Interested Party); Law Society of Kenya & 3 others (Amici Curiae)***, SC Petition (Applic) No. 11 of 2020; [2021] eKLR.
- vi. Last but not least, the applicant lodged its appeal on 1st March, 2023 while the respondent lodged its cross appeal and replying affidavit on 22nd and 24th March, 2023 respectively. It is not clear why the applicant chose to file the Motion at hand on 25th July, 2023. Moreover, the explanation that the applicant could not file the Motion because of another pending application for joinder of Kenya Bankers Association as an interested party, which was only determined on 16th June, 2023 holds no weight. Nothing stopped the applicant from filing its Motion as an application for joinder of an interested party has no bearing on admission of an *amicus curiae*. In fact, in many instances this Court has determined such applications simultaneously. Consequently, we find that the Motion at hand was lodged after unreasonable delay.

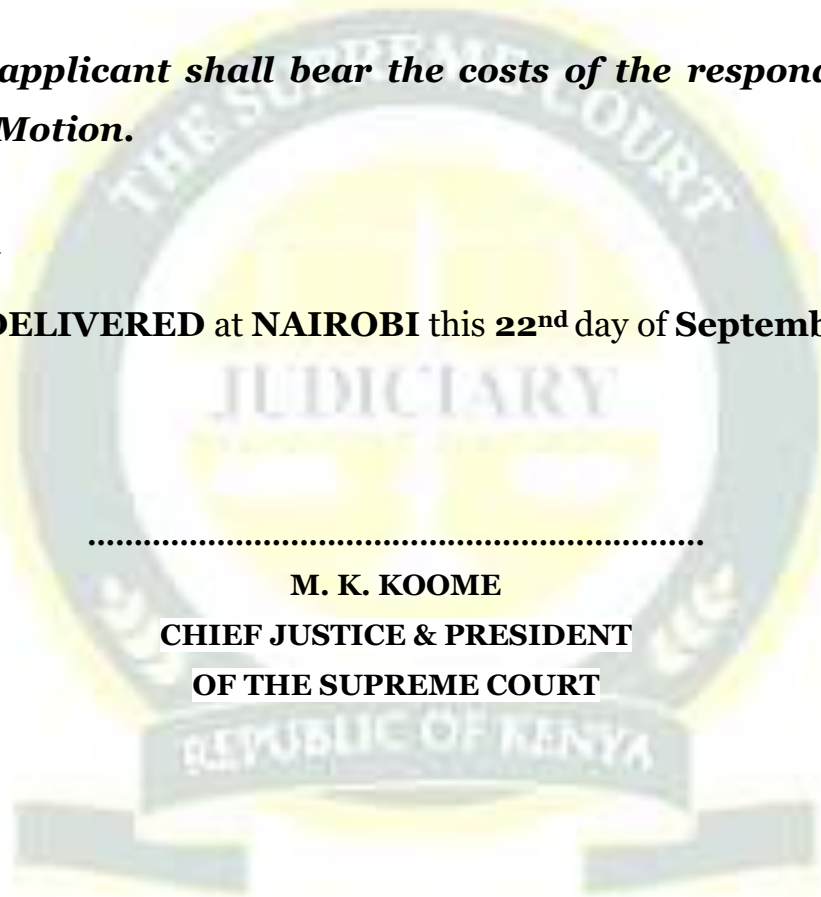
vii. Based on the foregoing, the Motion does not meet the criteria set out under Rule 19 of the Supreme Court Rules and lacks merit.

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

- i. The Notice of Motion dated 18th July, 2023 and filed on 25th July, 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 **22nd** day of **September**, 2023.



.....
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 that this is a true copy
of the original**

REGISTRAR
SUPREME COURT OF KENYA

