



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION(APPLICATION) NO. 5 OF 2017

– BETWEEN –

BRITISH AMERICAN TOBACCO KENYA PLC (formerly BRITISH AMERICAN TOBACCO KENYA LIMITED)APPELLANT

-AND-

MINISTRY OF HEALTH1ST RESPONDENT

THE TOBACCO CONTROL BOARD2ND RESPONDENT

HON. ATTORNEY GENERAL 3RD RESPONDENT

KENYA TOBACCO ALLIANCE1ST INTERESTED PARTY

CONSUMER INFORMATION NETWORK.....2ND INTERESTED PARTY

-AND-

MASTERMIND TOBACCO KENYA LIMITED.....THE AFFECTED PARTY

– AND –

JAMES GICHERU KARIUKI, PETER MWAI NDEGWA & JOYCE NJOKI KUBUTHU (Applying as Secretary, Chairperson & Treasurer of KIAMBU COUNTY WELFARE ASSOCIATION.....1ST INTERVENER/APPLICANT

FRANCIS GICHEHA MUTURI (Applying as a member of CHANIA GROUP.....2ND INTERVENER/APPLICANT

MOSES MWEGA GITHINJI (Applying as member of MALEWASIBIS ASSOCIATION 3RD INTERVENER/APPLICANT
JOHN NGUGI MUIGAI (Applying as member of ALKEBLUN GROUP 4TH INTERVENER/APPLICANT
RACHEAL NJERI KARIUKI (Applying as member of NONGAIMWARA ASSOCIATION5TH INTERVENER/APPLICANT
PETER NJUGUNA MWANGI (Applying as member of MATGAC ASSOCIATION6TH INTERVENER/APPLICANT
ROSALINE NJERI CHANGE (Applying as member of PERSEGUIR GROUP7TH INTEVENER/APPLICANT

(Being an application to be enjoined as an Intervener in S.C. Petition No. 5 of 2017)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion dated 17th July 2024 and lodged before this Court on 21st August 2024, by the Applicants seeking orders *inter alia* -

- a. **THAT** applicants herein be enjoined as parties in this matter and be designated the title “Intervener/Applicant” in the already decided ***Supreme Court Petition No. 5 of 2017*** herein for the purpose of applying for a review of the judgement made on 26th November 2019 in accordance with the provisions of Section 21A of the Supreme Court Act Cap 9B Laws of Kenya.
- b. **THAT** the costs of the application be provided for; and

[2] TAKING INTO ACCOUNT the affidavit in support of the motion sworn by **James Gicheru Kariuki** and written submissions both dated 17th July 2024 and to the effect that; the applicants are applying to be enjoined in the matter for purposes of reviewing the judgement of this Court dated 26th November 2019 which action emanates from a petition the applicants presented to the Chief Justice requesting the Court on its own motion to review its aforesaid judgement; the Chief

Justice referred the matter to the Office of the Ombudsman, and which office, after analyzing the issues in their petition to the Chief Justice opined that they ought to move this Court appropriately; that it is only a party to the proceedings who may apply for review of the judgement of the Court and it is therefore necessary for the applicants to be enjoined as parties for purpose of applying for review of the Judgement of this Court and to reveal some concealed statutory provisions; and

[3] BEARING IN MIND that this Court in *British American Tobacco Kenya, PLC formerly British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party)* (Petition 5 of 2017) [2019] KESC 15 (KLR) (26 November 2019) (Judgment) set out the guidelines for public participation and upheld the decision of the Court of Appeal to the extent that; a solatium compensatory contribution was not a payment that goes towards the national and county revenue, and could not be considered a levy by the national government or county government for the purposes of national or county revenue; it does not violate Article 210 of the Constitution and its imposition cannot amount to deprivation of the appellants' right to property under Article 40 of the Constitution, and that the Regulations and the Tobacco Act provisions are neither unconstitutional or unlawful nor do they unlawfully violate any rights of the appellants, the affected party or the Tobacco industry players; that in cases where the Regulations or the Act limits the rights of specific industry players, the same is reasonable and justified in accordance with Article 24 of the Constitution.

[4] NOTING that none of the respondents have filed any answer to the application, **WE NOW OPINE AND DETERMINE** as follows:

- i. The Supreme Court Act 2011 and the Supreme Court Rules 2020 provide for only two instances when a party can be enjoined in proceedings before

the Supreme Court. The first instance is under Rule 19 of the Supreme Court Rules 2020 which provides for the participation of friends of the Court (*amici curiae*). Before admitting a person as a friend of the court, this Court has to consider the proven expertise of the person; independence and impartiality of the person; or the public interest involved. The second is under Rule 24 of the Supreme Court Rules 2020 which provides for the joinder of interested parties. Rule 24 (1) is particular that *a person may, within seven days of filing a response in any proceedings, apply for leave to be enjoined as an interested party*. Rule 24 (2) further provides that;

(2) An application under sub-rule (1) shall include—

(a) a description of the interested party;

(b) a depiction of such prejudice as the interested party would suffer if the intervention was denied; and

(c) the grounds or submissions to be advanced by the interested party, their relevance to the proceedings, and their departures from the standpoint of the parties.

- ii. We note that the Supreme Court (General) Practice Direction 2020 on general filings provides in Rule 8 (c) that *the cover of all documents by the amicus, interested parties and interveners shall be in red*. This is the only instance where the Practice Direction has used the word *intervener*.
- iii. The Supreme Court Act and the Supreme Court Rules do not contemplate an instance where a party can be joined as an intervener. In the joinder of an *amicus curiae* or interested party, the application is made during the conduct of the proceedings and not after the final decision of the Court has been rendered.

- iv. The Act and the Rules equally do not provide an instance where a person affected by a decision issued in *rem* can be joined to the proceedings in an attempt to review the aforesaid decision.
- v. The above facts and rendition of the law notwithstanding, the applicants herein have neither laid out any ground that they seek to advance were we to review our judgment, save for mentioning that there was alleged concealment of statutory provisions by parties to the appeal then before us nor shown the prejudice they will suffer if their intervention is denied.
- vi. The application is misguided, frivolous, filed almost five years after our judgment was rendered and is a clear abuse of court process and must therefore be dismissed with no order as to costs since it was not responded to.

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

- i. The Applicant’s Notice of Motion dated 17th July 2024 and filed on 21st August 2024 is hereby dismissed.***
- ii. As the Motion was not opposed, we make no orders as to costs.***

It is so ordered.

DATED and DELIVERED at NAIROBI this 22nd day of November, 2024.

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

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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

