



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION (APPLICATION) NO. 12 (E014) OF 2022

BARCLAYS BANK OF KENYA LIMITED

(NOW ABSA KENYA PLC) PETITIONER/RESPONDENT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES

(Large Taxpayer's Office)RESPONDENT

-AND-

KENYA BANKERS

ASSOCIATION.....1ST INTERESTED PARTY/RESPONDENT

MASTERCARD ASIA PACIFIC PTE

LIMITED.....2ND INTERESTED PARTY/APPLICANT

*(Being an application seeking leave to file supplementary submissions in
rejoinder)*

Representation:

Ms. Nazima Malik for the petitioner/respondent
(*Kaplan and Stratton Advocates*)

Mr. Ochieng Gaya for the respondent
(*G.O. Ochieng Advocate*)

Ms. Edel Ouma for the 1st interested party/respondent
(*Anjarwalla & Khanna LLP*)

Mr. Abbass Esmail for the 2nd interested party/applicant
(*Anjarwalla & Khanna LLP*)

RULING OF THE COURT

[1] **UPON PERUSING** the Notice of Motion by the 2nd interested party/applicant dated 9th January 2025 and filed on 10th January 2025, brought pursuant to Section 3A of the Supreme Court Act, 2011 and Rules 3(5), 17(1) of the Supreme Court Rules, 2020 seeking leave to file supplementary submissions in response to the respondent's submissions; and

[2] **UPON CONSIDERING** the 2nd interested party/applicant's supporting affidavit sworn by *Yunsok Chang* on 9th January 2025, supplementary affidavit sworn by *Abbas Esmail* on 30th January 2025, and written submissions dated 9th January 2025, contending that; by this Court's Ruling delivered on 13th December 2024, the respondent in the petition was granted leave to file submissions out of time; that correspondingly, the petitioner/respondent and the 1st interested party/respondent were granted leave to file submissions in rejoinder; that the Court inadvertently omitted the 2nd interested party/applicant from such leave, effectively denying it the right to reply contrary to Article 50(1) of the Constitution; that Rule 17 of the Court Rules gives the Court discretionary powers to grant leave

to file further pleadings; and further that Section 3A of the Supreme Court Act as read with Rule 3(5), grants this Court inherent powers to make such orders as may be necessary for the administration of justice as held in ***Fredrick Outa Vs Okello & 3 Others*** [2017] KESC 25 (KLR); and

[3] TAKING INTO ACCOUNT the replying affidavit sworn on behalf of the respondent to the main petition by *Carol Mburugu*, its Deputy Commissioner, Legal Services & Board Coordination on 15th January 2025 and the written submissions of even date, contending; that the motion is premised on a misconception and misapplication of the law as the only party who ought to have been granted corresponding leave was the petitioner/respondent; that leave granted to any other party has only served to prejudice the respondent and given undue advantage to the parties supporting the petition, who have collectively filed a total of 45 pages of submissions against the respondent's limit of 15 pages; and that in any event, corresponding leave was not sought and ought not have been granted to any party in the first place; and

[4] FURTHER CONSIDERING the respondent's further submission that the 2nd interested party/applicant has failed to meet the threshold for review of the Court's Ruling delivered on 13th December 2024. To that end, the respondent contends that the failure to grant the 2nd interested party/applicant corresponding leave was not an error on the face of the record, more so, because the 2nd interested party/applicant failed to seek corresponding leave in the first place. Furthermore, it is the respondent's submission that pursuant to Rule 17 of the Court Rules upon which the application is anchored, submissions are not pleadings. It relies on the decisions of the superior courts in ***Daniel Toroitich Arap Moi Vs Mwangi Stephen Muriithi & Another*** [2014] KECA 642 (KLR) and ***Mwavula Vs Waweru t/a Antique Auctioneers Agencies & Another*** [2024] KEHC 5988 (KLR). Be that as it may, the respondent argues that the grant of leave to file submissions is discretionary and not a right as espoused in ***Salat***

Vs Independent Electoral and Boundaries Commission & 7 Others
[2014] KESC 12 (KLR); and

[5] BEARING IN MIND that Rule 17(1) of this Court's Rules confers discretionary power upon the Court to grant a party, with the consent of the other party, leave to file further pleadings or affidavits; that Sections 3A and 21 of the Supreme Court Act, empower this Court to grant such orders as are necessary for the administration of justice, including leave to file supplementary pleadings; and

[6] HAVING CONSIDERED the totality of the application, responses and submissions made by the parties, WE NOW OPINE as follows:

- i) Upon perusal of the record, the 2nd interested party/applicant has admitted that it neither filed a response to the respondent's application seeking leave to file submissions out of time, nor sought corresponding leave to file submissions in rejoinder. It was only upon delivery of the Ruling dated 13th December 2024 that the 2nd interested party/applicant, vide a letter dated 24th December 2024, raised the issue of its right to file submissions in rejoinder.
- ii) The grant of leave to file supplementary pleadings is ultimately a question of judicial discretion. In view of the foregoing, we see no persuasive basis for exercising such discretion in favour of the applicant. In any event, such prejudice, if any, that may visit the applicant, can be remedied by oral submissions.

[7] CONSEQUENTLY, and for the reasons aforesaid, we make the following orders:

- (i) The Notice of Motion dated 9th January 2025 and filed on 10th January 2025 is hereby dismissed.***
- (ii) Costs shall abide the outcome of the appeal.***

It is so ordered.

DATED and DELIVERED at NAIROBI this 23rd Day of May 2025.

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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