



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/APPLICANT

-AND-

KENYA BANKERS

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

MASTERCARD ASIA PACIFIC PTE

LIMITED.....2ND INTERESTED PARTY/RESPONDENT

(Being an application for leave to file submission in rejoinder to each of the parties' submissions or in the alternative, to file expanded submissions)

Representation:

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

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

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

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

RULING OF THE COURT

[1] UPON PERUSING the Notice of Motion by the respondent/applicant dated 15th January 2025 and filed on 16th January 2025, brought pursuant to Sections 21 and 24 of the Supreme Court Act, 2011 and Rules 3(2), 3(5), 15(1) & (2), 23(3), 31 and 32 of the Supreme Court Rules, 2020 seeking leave to file submissions in rejoinder to each of the parties' submissions; or in the alternative, leave to file expanded submissions totalling to 45 pages; or to strike out the petitioner/respondent's submissions for non-compliance with the Supreme Court (General) Practice Directions no. 12; and

[2] UPON CONSIDERING the respondent/applicant's supporting affidavit sworn by *Carol Mburugu* on 15th January 2025, further affidavit sworn on 7th February 2025, written submissions dated 15th January 2025, and further submissions dated 7th February 2025, contending that; by the Court's Ruling delivered on 13th December 2024, the respondent/applicant was granted leave to file submissions out of time and the petitioner/respondent as well as the interested parties/respondents granted corresponding leave to file submissions in rejoinder; upon service of the respondent/applicant's submissions, the

petitioner/respondent and interested parties/respondents filed three sets of submissions totaling to 45 pages; by the impugned directions issued on 10th January 2025, the Deputy Registrar directed the respondent/applicant to file one set of submission in reply, limiting the respondent/applicant's 45 pages submissions to 15 pages; that the respondent/applicant should be granted leave to file additional 45 pages in rejoinder; that given the novelty and complexity of the issues in dispute, the respondent/applicant is unable to respond conclusively; and the 15 pages limit imposed is unduly restrictive and prejudicial to the respondent/applicant's right to a fair hearing enshrined under Article 50(1) of the Constitution.

[3] TAKING INTO ACCOUNT that the respondent/applicant urges us to be guided by the directive principles of Article 159 of the Constitution, as affirmed in *Muruatetu & another Vs Republic; Katiba Institute & 5 Others (Amicus Curiae)* [2017] KESC 2 (KLR). In particular, considering the respondent/applicant's submission to the effect that the directions issued by the Deputy Registrar should apply uniformly to all parties, and failure to do so, amounts to unequal treatment, in contravention of the principles of fairness and non-discrimination; and

[4] FURTHER CONSIDERING the petitioner/respondent's replying affidavit sworn by *Dr. Fred N'cruba Ojiambo, SC* on 31st January 2025 and written submissions of even date opposing the motion, wherein it contends that the respondent/applicant has failed to provide any justification for filing three separate sets of submissions; that the prayer lacks merit pursuant to Practice Direction no. 17; in any event, the issues canvassed in the petitioner/respondent's submissions are identical to those canvassed by the interested parties/respondents; that the Deputy Registrar was right in restricting the respondent/applicant to one set of submissions; and contrary to the respondent/applicant's assertions, the petitioner/respondent has only filed one set of submissions. In response to the assertion that the petitioner/respondent's

submissions failed to comply with Practice Direction no. 12, the petitioner/respondent argues that the same is a mere afterthought, and the respondent/applicant cannot claim that the said submissions did not comply with the Court's Practice Directions seven months after filing. Be that as it may, the petitioner/respondent submits that it fully complied with the Court's Practice Directions and that there is no justification to strike out its submissions; and

[5] UPON CONSIDERING the 1st interested party/respondent's replying affidavit sworn by *Raimond Molenje* on 31st January 2025 and written submissions of even date, wherein in it is contended that pursuant to Practice Direction no. 17, which limits the number of pages of written submission to fifteen, the Deputy Registrar was justified in issuing the impugned directions. Furthermore, the 1st interested party/respondent argues, the directions on filing submissions to the appeal were issued on 16th October 2023, and the instant application was filed over a year later. It contends that equity favours the vigilant, and the Court cannot intervene to aid an indolent party; and

[6] FURTHER NOTING the 2nd interested party/respondent's replying affidavit sworn by *Abbas Esmail* on 31st January 2025 and written submissions of even date opposing the motion wherein they reiterated the assertions by the 1st interested party/respondent save to add that while the application challenges the decision of the Deputy Registrar, the respondent/applicant has not sought to review the said decision as provided for under Section 11 of the Act; and the application demonstrates the respondent/applicant's intention to delay the conclusion of this matter. In its view, the respondent/applicant has not provided this Court with any cogent reason to grant the orders sought; and

[7] BEARING IN MIND that while Practice Direction No.17 of the Court's General Practice Directions requires written submissions in appeals arising from the Court of Appeal, submissions be limited to fifteen pages, nonetheless, Sections

3A and 21 of the Supreme Court Act, 2011 confer discretionary powers upon the Court to grant such orders as are necessary for the administration of justice; and

[8] HAVING CONSIDERED the totality of the application, responses and submissions made by the parties, we now opine as follows:

- i) The grant of leave to file expanded submissions, (above the fifteen pages limit as per Direction No.17), is ultimately a question of judicial discretion; and
- ii) Considering the public interest, novelty and complexity of the issues certified for determination under Article 163(4)(b) of the Constitution, and in the interest of ensuring justice to all the parties, the Court is persuaded to exercise discretion in favour of the respondent/applicant and grant it leave to file expanded submissions.

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

- i) The Notice of Motion dated 15th January 2025 and filed on 16th January 2025 is hereby allowed;***
- ii) The respondent/applicant shall file and serve submissions in rejoinder, limited to thirty (30) pages within seven days from the date of this Ruling; and***
- iii) Costs shall abide the outcome of the appeal.***

It is so Ordered.

