



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION (APPLICATION) NO. E006 OF 2025

— BETWEEN —

ELIUD KARANJA MATINDI PETITIONER

— AND —

THE NATIONAL ASSEMBLY 1ST RESPONDENT

THE SPEAKER NATIONAL ASSEMBLY 2ND RESPONDENT

**THE CABINET SECRETARY, MINISTRY OF
NATIONAL TREASURY & PLANNING 3RD RESPONDENT**

**COMMISSIONER GENERAL
KENYA REVENUE AUTHORITY 4TH RESPONDENT**

ATTORNEY GENERAL 5TH RESPONDENT

KENYA PORTS AUTHORITYINTENDED INTERESTED PARTY

(Being an application for joinder of an interested party.)

Representation:

Mr Eliud Matindi, the petitioner/respondent
(Acting in person)

Mr Andrew Emacar for the 1st and 2nd respondents
(Andrew Emacar Advocate)

No appearance for the 3rd respondent

Ms Fridah Mwangera for the 4th respondent/applicant
(Fridah Mwangela Advocate)

Mr Emmanuel Mbita h/b for Mr Kaumba for the 5th respondent
(State Law Office)

Mr Denis Nkarichia h/b for Prof Githu Muigai, SC, for the intended interested party

RULING OF THE COURT

[1] UPON PERUSING the Notice of Motion dated 3rd June 2025 and filed on 10th June 2025, pursuant to Sections 3, 3A and 23(2B) of the Supreme Court Act, 2011, and Rule 24 of the Supreme Court Rules, 2020, *seeking leave to join the Kenya Ports Authority as an interested party; leave to file a response and submissions to the appeal; and costs; and*

[2] UPON CONSIDERING the intended interested party's grounds on the face of the application, the supporting affidavit and further affidavit sworn by *Stephen Kyandih* on 4th June 2025 and by *Turasha Kinyanjui* on 4th July 2025, respectively, wherein it is contended that: the intended interested party is a contracting entity to two financing agreements (*Mombasa Port Development Project Phase 1, dated 20th November 2007 and Mombasa Port Development Phase 2, dated 9th March 2015*) set out in the Schedule to the Legal Notice No. 15 of 2021 (*Impugned Legal Notice*), which is the subject matter of the appeal before this Court; the intended interested party is directly affected or otherwise has a direct interest in four more financing agreements identified in the impugned Legal

Notice, to wit, the *Project for Infrastructure Development in Mombasa Special Economic Zone near Dongo Kundu areas, Mombasa Port Area Road Development Project -Phase 1, Mombasa Port Area Road Development Project Phase -2, and Mombasa Special Economic Zone Development Project -Phase 1*; the intended interested party has a direct, identifiable and legally relevant financial stake in the outcome of the appeal; its non-participation before the High Court and the Court of Appeal was neither due to indolence nor by design, but as a result of the drafting of pleadings as a challenge on the ratification and implementation of bilateral agreements between states; and

[3] UPON CONSIDERING further grounds in support of the application that the intended interested party has received various tax demand notices from the Kenya Revenue Authority (KRA) on payments made under the said contracts, after the waiver of tax exemptions under the impugned Legal Notice; has received various correspondences from its contractors, consultants and Japanese nationals involved in the said contracts, regarding continued demand for taxes by KRA; the intended interested party is aware of six suits between KRA and its consultants, contractors, or Japanese nationals regarding tax demands arising from contracts exempted by the impugned Legal Notice; the intended interested party is also apprehensive of the potential reputational risk to itself and the Government of Kenya as the guarantor of the loans under the said contracts; and

[4] FURTHER NOTING the applicant/intended interested party's submissions dated 3rd June 2025, wherein it is urged that: it has met the threshold for joinder as settled by this Court in *Trusted Society of Human Rights Alliance Vs Mumo Matemu & 5 others* [2014] eKLR (*Mumo Matemu Case*) and *Francis Karioko Muruatetu & another Vs Republic & 5 others* [2016] eKLR (*Muruatetu Case*). The applicant's stake and personal interest in the matter are traced to the Legal Notice No. 15 of 2021, which the appellant seeks to have deemed a nullity; by virtue of the Court of Appeal Judgment, there is real and ascertainable prejudice to be suffered by the applicant, including demands for the

tax amounting to four billion, withdrawal of its financiers from the contracts under the said Legal Notice, and stalling in the completion of the highlighted contracts; and

[5] NOTING that the applicant/intended interested party intends to canvass the following issues:

- i. *whether the Court of Appeal erred in holding that legal notice No. 15 of 2021 was executive in character and hence did not fall within the ambit of the Statutory Instruments Act in response to the first issue in the appeal at paragraphs 26 of the petition;*
- ii. *whether the implementation of the Exchange of Notes vide the Legal Notice No. 15 of 2021 was a legitimate and lawful basis for differentiated treatment in taxation, in response to the point of law that the Legal Notice No. 15 of 2021 was unlawful and discriminatory at paragraph 27 of the petition; and*
- iii. *whether the Court of Appeal erred in holding that the impugned Legal Notice complied with the requirement of Article 210 of the Constitution in response to the point of law framed in paragraph 28 of the petition; and*

[6] UPON CONSIDERING the petitioner/respondent's affidavit in opposition, sworn on 17th June 2025, and submissions of even date wherein it is contended that: Prof. Githu Muigai, SC of Mohammed Muigai, LLP ought not to participate in these proceedings as counsel, on grounds of conflict of interest; that Senior Counsel was the Attorney General and the advisor of the Government of Kenya, and was involved in advising and signing off on the contracts, the subject of the impugned Legal Notice; the application is incompetent because the affidavit in support of urgency is uncommissioned, thus upsetting Section 5 of the Oaths and Statutory Declarations Act and Rule 32(1)(b) of the Court Rules; the application for joinder was filed outside the stipulated timelines under Rule 24 of the Court Rules; and

[7] **FURTHER CONSIDERING** the petitioner/respondent’s arguments on the merits of the application, wherein he urges that: the intended interested party has failed to meet the threshold for joinder of an interested party as settled by this Court in *Mumo Matemú and Muruatetu Cases*; the respondents have adequately addressed the arguments advanced by the intended interested party; the intended interested party seeks to be joined long after the proceedings have closed; the intended interested party failed to apply to be joined to the proceedings before the High Court or the Court of Appeal, and has not provided a justifiable explanation for the failure; as a state corporation, the intended interested party’s interests are sufficiently represented by the 3rd and 5th respondents; and

[8] **NOTING** Rule 24 of the *Supreme Court Rules*, which provides for the joinder of an interested party in the following terms:

“(1) A person may, within seven days of filing a response in any proceedings, apply for leave to be joined as an interested party.

(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.”***

[9] **GUIDED** by our decision in *Trusted Society of Human Rights Alliance Vs Matemo & 5 others* (Petition 12 of 2013) [2014] KESC 32 (KLR), wherein we stated:

“Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the

cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. On the other hand, an amicus is only interested in the Court making a decision of professional integrity. An amicus has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a ‘friend’ of the Court, his cause is to ensure that a legal and legitimate decision is achieved.”

[10] FURTHER GUIDED by this Court’s pronouncement in *Muruatetu & another Vs Republic; Kenya National Commission on Human Rights & 2 others (Interested Parties); Death Penalty Project (Intended Amicus Curiae)* (Petition 15 & 16 of 2015, consolidated) [2016] KESC 12 (KLR) on threshold for joinder as an interested party 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.*

[11] HAVING CONSIDERED the totality of the pleadings, affidavits, and rival arguments by the parties, **WE OPINE** as follows:

- i. We find that the issues highlighted by the applicant/intended party have been largely addressed by the parties in the appeal, particularly the 3rd and 5th respondents;
- ii. We also find that the applicant/intended party did not apply to be joined to the proceedings before the High Court or the Court of Appeal, was well aware of the existence of the said proceedings, and has not provided a justifiable reason for this lapse. We therefore find no merit in the application.

[12] ACCORDINGLY, we make the following orders:

- (i) *The Notice of Motion dated 3rd June 2025 and filed on 10th June 2025, is hereby dismissed.***
- (ii) *Each party shall bear its costs.***

It is so ordered.

DATED and DELIVERED at NAIROBI this 30th Day of January, 2026.

.....
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

