



Barclays Bank of Kenya Limited (Now ABSA Kenya PLC) v Commissioner of Domestic Taxes (Large Taxpayer’s Office); Kenya Bankers Association & another (Interested Parties) (Petition (Application) 12 (E014) of 2022) [2024] KESC 6 (KLR) (1 March 2024) (Ruling)

Neutral citation: [2024] KESC 6 (KLR)

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION (APPLICATION) 12 (E014) OF 2022
PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, I LENAOLA & W OUKO, SCJJ
MARCH 1, 2024

BETWEEN

BARCLAYS BANK OF KENYA LIMITED (NOW ABSA KENYA PLC) PETITIONER

AND

COMMISSIONER OF DOMESTIC TAXES (LARGE TAXPAYER’S OFFICE) RESPONDENT

AND

KENYA BANKERS ASSOCIATION INTERESTED PARTY

MASTERCARD ASIA PACIFIC (PTE) LIMITED INTERESTED PARTY

(Being an application for leave to file a Supplementary Affidavit in response to the Respondent’s Replying Affidavit dated 9th November 2022)

RULING

Representation:

Mr. Sakimpa & Ms. Kahumbu..... for the 2nd Interested Party (applicant)
 (Anjarwalla & Khanna LLP)

Ms. Malik..... for the Petitioner (Kaplan & Stratton Advocates)

Mr. Ochieng..... for the Respondent (G.O Ochieng Advocates)

Ms. Ouma and Mr. Muhindi..... for the 1st Interested Party (Anjarwalla & Khanna LLP)



1. Upon perusing the 2nd Interested Party's (the applicant) Motion dated 19th October 2023 and filed on 23rd October 2023, brought pursuant to Section 3A of the Supreme Court Act and Rules 3 (5) and 17 (1) of the Supreme Court Rules, 2020 seeking leave to file a supplementary affidavit in response to the respondent's replying affidavit sworn by Phillip Munyao on 9th November 2022; in the alternative, to expunge paragraphs 26 to 33 and 47 of the respondent's said affidavit; and costs; and
2. Upon considering the applicant's grounds on the face of the application and supporting affidavit sworn by Shafi Shaikh on 19th October 2023, wherein the applicant contends that; upon its joinder as an interested party, it filed a replying affidavit sworn by Shafi Shaikh on 19th October 2022 in response to the petition (the applicant's affidavit); in response to this affidavit, the respondent filed its replying affidavit sworn by Philip Munyao on 9th November 2022 (the respondent's affidavit); the respondent's affidavit, particularly at paragraphs 26 to 33 and 47, pleads new, factually incorrect and prejudicial allegations not deponed in the applicant's affidavit or by any party before this Court or the superior courts below; and
3. Upon further considering the applicant's additional grounds to the effect that, the new and factually incorrect statements include, the alleged use and sub- license of the applicant's proprietary software by the petitioner or other banks in Kenya, and tax evasion on the part of the applicant; grant of leave will uphold the applicant's rights under Article 50(1) of the Constitution; the Court has the discretion and jurisdiction to grant the orders sought; and no prejudice will be suffered by the respondent; the applicant is not guilty of laches because though desirous of moving the Court for leave in 2022, on 28th November 2022, it was directed by the Deputy Registrar of the Court that the Court would first deal with the respondent's application dated 25th November 2022; and subsequently, applications raising the same subject matter were filed by the parties herein; and
4. Further considering the applicant's submissions dated 19th October 2023, and supplementary submissions dated 5th November 2023, to the effect that, this Court has inherent and express jurisdiction to grant leave to file further pleadings including a supplementary affidavit under Section 3A of the Supreme Court Act and Rules 3(5) and 17(1) of the Court's Rules respectively; this jurisdiction was upheld by this Court in Fredrick Otieno Outa v. Jared Odoyo Okello & 3 Others [2017] eKLR; Stephen Maina Githiga & 5 Others v. Kiru Tea Factory Company Limited [2020] eKLR and Katiba Institute v. AG, PSC & Others [2020] eKLR; the applicant having been enjoined in the appeal has an identifiable stake and duty to provide the Court with an understanding of the intricate terms delineated in the agreement between itself and the petitioner;
5. Having read and considered the respondent's replying affidavit sworn by Philip Munyao on 30th October 2023, wherein it avers that the impugned paragraphs of the respondent's affidavit do not raise any new issues or incorrect allegations; the applicant has failed to identify precisely the new issues that have been raised; the alleged 'new' issues were before the superior courts below as evidenced in the Record of Appeal (at pages 145 to 146, 246, 313, 416 to 686, 506, 559, 630-683, 971 to 1023); therefore, these issues ought to have been addressed in the applicant's affidavit in response to the appeal; in any event, the appeal before the Court is a second appeal and therefore the applicant is limited to points of law only; the applicant is an interested party who is peripheral to the appeal, and therefore cannot raise new issues; and that the application is brought in bad faith and is an abuse of court process; and
6. Upon considering the respondent's submissions dated 30th October 2023, wherein the respondent restates its grounds in opposition and further urges that the applicant's application



is not deserving of this Court's exercise of discretion under Rule 17 as the applicant's intention is to convolute the issues before the Court; to support this assertion it relies on this Court's decision in *Nicholas Korir Arap Salat v. The IEBC & 8 Others*, SC Application No. 16 of 2015; [2014] eKLR and urges that discretion is to be used judiciously and not whimsically; it also submits that the Court's jurisdiction in a second appeal such as the instant appeal, is limited to matters of law; and therefore, the applicant cannot introduce new issues, it cites *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 3 Others*, SC Petition No. 2B of 2014; [2014] eKLR, in support of its argument thereof; and

7. Taking into account the consents between the petitioner and the applicant dated 9th November 2023; and the 1st interested party and the applicant dated 8th November 2023, both filed on 9th November 2023, wherein the said parties do not oppose the motion for leave to file a supplementary affidavit;
8. Bearing in mind that the legal question whether this Court can grant leave to file a supplementary affidavit is well settled by Rule 17(1) of the *Supreme Court Rules* 2020, which gives this Court the discretion to grant a party, with the consent of the other party, leave to file further pleadings or affidavit. Further considering that Section 21(2) of the *Supreme Court Act*, 2011, and Rule 3(5) of the *Supreme Court Rules* 2020, grant this Court inherent power to make any ancillary and interlocutory orders as may be necessary for the ends of justice; as further affirmed by the Court in *Stephen Maina Githiga & 5 Others v. Kiru Tea Factory Company Limited*, SC Petition No. 12 of 2019; [2019] eKLR;
9. We now opine as follows:
 - i. Having considered the pleadings and submissions by the parties herein, we find that the applicant has demonstrated to our satisfaction that the supplementary affidavit it seeks to file will help the Court further define the real questions in controversy, and specifically the 2nd interested party's stake in the appeal;
 - ii. No prejudice will be suffered as the respondent will have an opportunity to respond to the averments by the applicant in the course of the hearing of the main appeal;
 - iii. As to whether either of the parties' pleadings introduce new issues, we restate our finding in the earlier Ruling delivered on 16th June 2023, to the effect that this is a substantive question that will be properly determined in the main appeal;
 - iv. Since the main appeal is still pending, it is only prudent that the issue of costs be deferred to the determination of the main appeal; and
10. Consequently and for reasons aforesaid, we make the following Orders:
 - i. The Notice of Motion dated 19th October 2023 and filed on 23rd October 2023 is hereby allowed;
 - ii. The applicant shall file and serve the Supplementary Affidavit within seven (7) days from the date of this Ruling; and
 - iii. Costs shall be in the Cause.

It is so Ordered.

DATED AND DELIVERED AT NAIROBI THIS 1ST DAY OF MARCH, 2024.

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT OF KENYA

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M. K. IBRAHIM S.

JUSTICE OF THE SUPREME COURT

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C. WANJALA

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

