



Barclays Bank of Kenya Limited (Now ABSA Bank Kenya PLC) v Commissioner of Domestic Taxes (Large Taxpayers Office); Kenya Bankers Association (Proposed Interested Party) (Petition 12 (E014) of 2022) [2022] KESC 60 (KLR) (7 October 2022) (Ruling)

Neutral citation: [2022] KESC 60 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 12 (E014) OF 2022
PM MWILU, DCJ & VP, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ
OCTOBER 7, 2022**

BETWEEN

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

AND

COMMISSIONER OF DOMESTIC TAXES (LARGE TAXPAYERS OFFICE) RESPONDENT

AND

KENYA BANKERS ASSOCIATION PROPOSED INTERESTED PARTY

(Being an application for joinder as an interested party and to adduce additional evidence)

Additional evidence introduced at the appellate stage should influence or impact the result of the verdict, or remove any vagueness or doubt within a case.

In an application to be enjoined as an interested party and to introduce additional evidence in a second appeal before the Supreme Court, the court held that for the court to grant leave to a party to adduce additional evidence in an appeal, the evidence should influence or impact upon the result of the verdict, or remove any vagueness or doubt within a case.

Reported by John Ribia

Civil Practice and Procedure – joinder of parties – interested party - joinder of parties in a second appeal – joinder of parties in an appeal before the Supreme Court – threshold to be met for one to be enjoined as an interested party - whether the applicant would be directly affected by the decision of the court in the instant matter to warrant it being enjoined as an interested party in an appeal before the Supreme Court – 7.

Law of Evidence – additional evidence – application to adduce additional evidence in a second appeal – threshold to be met in order to introduce additional evidence in an appeal - whether the applicant had met the threshold for the introduction of additional evidence in an appeal before the Supreme Court – .



Brief facts

The Kenya Bankers Association (the applicant) filed the instant application in which it sought to be enjoined as an interested party and to adduce additional evidence.

The respondents opposed the joinder application on grounds that the applicant had failed to comply with the provisions of rule 24(1) of the Supreme Court Rules, 2020; failed to demonstrate the personal interest it had in the matter; had not shown any prejudice it stood to suffer if joinder was not granted and failed to set out its precise case and that whatever the applicant intended to bring to the petition was properly covered by the parties as the contested issues between the appellant and respondent.

Issues

- i. Whether the applicants would be directly affected by the decision of the court in the instant matter and warranted being enjoined as an interested party in an appeal before the Supreme Court.
- ii. Whether the applicant had met the threshold for the introduction of additional evidence in an appeal before the Supreme Court.

Held

1. The applicant's members who were also in the banking sector were likely to be directly affected by the outcome of the instant decision. That was an identifiable stake in the matter.
2. The applicant had not satisfied the threshold in rule 18 of the Supreme Court Rules in that he had failed to show that the additional evidence would, if given, influence or impact upon the result of the verdict or remove any vagueness or doubt within the case. The issues were plain and required no more than the applicant's participation.

Application partly allowed.

Orders

- i. *The application dated July 5, 2022 and lodged on July 8, 2022 by Kenya Bankers Association for joinder as interested party was allowed.*
- ii. *Kenya Bankers Association was to file its affidavit in response to the petition within 14 days of the instant order.*
- iii. *Any party that wished to file a rejoinder to that affidavit could do so within 14 days of service.*
- iv. *Parties were to bear their respective costs.*

Citations

Cases

1. Francis Kariuki Muruatetu & another v Republic & 5 others (SC Petitions No. 15 and 16 of 2015; [2016] eKLR) — Mentioned
2. Mohamed Abdi Mahamud v Ahmed Abdullahi Mohammad & 4 others (SC Petition No. 7 of 2018; [2018] eKLR) — Mentioned
3. Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others (SC Petition No. 12 of 2013; [2014] eKLR) — Mentioned

Statutes

1. Supreme Court Act (No 7 of 2011) — Section 24 — Interpreted
2. Supreme Court (General) Practice Directions (2020) — Interpreted
3. Supreme Court Rules, 2020 (No 7 of 2011 SubLeg) — Rule 3(1)(2)(4)(5); 24 — Interpreted

Advocates

None mentioned



RULING

Order of the Court

1. On October 7, 2022, this court delivered a ruling allowing the applicant's notice of motion for joinder as interested party but dismissing the applicant's prayer to file additional evidence. In the said ruling at paragraph 8, we erroneously indicated that rule 18 of the Supreme Court Rules 2020 is the rule applicable in admission of additional evidence. This was an inadvertent error as the correct rule should read as rule 26 of the [Supreme Court Rules 2020](#).
2. Section 21(4) of the [Supreme Court Act](#) clothes this court with general powers to correct any apparent errors in its judgments, rulings and/or orders as follows:

“General powers.

(4) The court may, on its own motion or application by any party with notice to the other or others, correct any oversight or clerical error of computation or other apparent on such judgment, ruling or order and such correction shall constitute part of the judgment, ruling or order of the court.”
3. As a result, we hereby order as follows:
 - i. The ruling is corrected by deleting ‘rule 18’ and inserting therein the correct rule being “rule 26”.
4. This ruling is accordingly amended, and this order shall constitute part of the ruling of the court.

Ruling of the Court

1. Upon perusing the notice of motion by Kenya Bankers Association, the applicant, dated July 7, 2022 and filed on July 8, 2022 brought pursuant to section 24 of the [Supreme Court Act 2011](#), rule 3(1), (2), (4) and (5) and 24 of the [Supreme Court Rules, 2020](#) and Direction 55(a) of the [Supreme Court \(General\) Practice Directions, 2020](#) for leave for joinder as an interested party and to submit additional evidence and written submissions on the petition herein; and
2. Upon considering the grounds in support of the application and the supporting affidavit of Dr Habil Olaka, the applicant's Chief Executive Officer where the applicant claims to have a direct interest in the petition being the body bringing together banking institutions licensed and regulated by the Central Bank of Kenya; that the question of whether the disputed payments are subject to withholding tax is an important question within the banking industry that would affect all the applicant's members; that should this court decide in the respondent's favour, all the applicant's members will receive assessments from the respondent for payment of withholding tax on interchange and professional fees; that the payment of such taxes will lead to loss of business as the cost will be borne by their customers; and
3. Upon considering the applicant's written submissions dated July 7, 2022 contending that it has met the requirements under rule 24 of the [Supreme Court Rules, 2020](#) and that it has demonstrated that it has a stake/ interest in the matter, stands to suffer prejudice should it not be joined, advanced relevant arguments as a proposed interested party relevant to the petition as was determined in [Francis Kariuki Muruatetu & another v Republic & 5 others](#), SC Petitions No 15 and 16 of 2015; [2016] eKLR



(Muruatetu case) and Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others, SC Petition No 12 of 2013; [2014] eKLR (*Mumo Matemu* case);and

4. Also considering the argument by the applicant that it has met the threshold to be granted leave to adduce additional evidence by way of an affidavit as was set out in Mohamed Abdi Mahamud v Ahmed Abdullahi Mohammad & 4 others; SC Petition No 7 of 2018; [2018] eKLR;
5. Further considering the consent dated July 28, 2022 and lodged on July 28, 2022 where the petitioner does not oppose the applicant's notice of motion for joinder as an interested party;
6. And further considering the respondent's replying affidavit sworn by Philip Munyao, an officer with the respondent's Large Taxpayer's Office (LTO) and written submissions opposing the joinder of the applicant as an interested party contending that the applicant has failed to comply with the provisions of rule 24(1) of the Supreme Court Rules, 2020; failed to demonstrate the personal interest it has in the matter; has not shown any prejudice its stands to suffer if joinder is not granted and failed to set out its precise case as was held in *Mumo Matemu* and *Muruatetu* and; that whatever the applicant intends to bring to the petition is properly covered by the parties as the contested issues between the appellant and respondent are largely factual and uncontested; and
7. Noting the provisions of rule 24 of the Supreme Court Rules, 2020 and the principles set out in this court's decisions in *Mumo Matemu* and *Muruatetu* on the joinder of an applicant as an interested party, we find that the application conforms to the principles laid out in that the applicant's members who are also in the banking sector shall also be directly affected by the outcome of this decision. This is an identifiable stake in the matter and we so find.
8. Also noting that the applicant has also prayed and submitted that they be allowed to adduce additional evidence, Upon consideration of rule 26 of this Court's rules and the principles set out in Mohamed Abdi Mahamad v Ahmed Abdullahi Mohamed & 3 others, it is our finding that the applicant has not satisfied the threshold set out therein by failing to show that the additional evidence would 'if given, influence or impact upon the result of the verdict, or removes any vagueness or doubt within the case'. The issues are plain and do not require no more than the applicant's participation for reasons given above. This prayer therefore fails.
9. Accordingly, we make the following orders:
 - a. The application dated July 5, 2022 and lodged on July 8, 2022 by Kenya Bankers Association for joinder as interested party is allowed. It shall file its affidavit in response to the petition within 14 days of this order. Any party that wishes to file a rejoinder to that affidavit may do so within 14 days of service.
 - b. Parties shall bear their respective costs.
10. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER 2022

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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S. C. WANJALA



JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

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I. LENAOLA

JUSTICE OF THE SUPREME COURT

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W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

