# THE REPUBLIC OF KENYA

## IN THE SUPREME COURT OF KENYA

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

**MOTION NO. 15 OF 2021**

**–BETWEEN–**

**BARCLAYS BANK OF KENYA LIMITED**
**(ABSA BANK KENYA PLC) .....APPLICANT**

**–AND–**

**THE COMMISIONER OF**
**DOMESTIC TAXES (Large Taxpayers Office).....RESPONDENT**

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*(Being an application for review and certification that a matter of general public importance is involved in terms of Article 163(4)(b) of the Constitution in the intended appeal from the Judgment and Order of the Court of Appeal* ***(Nambuye, Kiage & Mohammed, JJA)*** *dated* ***5th November, 2021*** *in Nairobi Civil Application (SUP) No. E005 of 2020)*

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## RULING OF THE COURT

**[1]** **UPON** perusing the Originating Motion dated and filed on 19th November, 2021 brought under the provisions of Rule 33 of the Supreme Court Rule, 2020 seeking a review of the Court of Appeal ruling *(Nambuye, Kiage, Mohammed, JJA)* declining to certify the Applicant's intended appeal to this Court as one involving a matter of general public importance; and

**[2]** **UPON** reading the applicant's supporting affidavit sworn by Peter Mungai on 19th November, 2021 and the applicant's supplementary affidavit undated but filed on 17th December, 2021 wherein it is averred that the finding in Nairobi Civil

Appeal No. 195 of 2017 (*Karanja, M'Inoti & Sichale, JJ. A*) that interchange fees were management and professional fees and liable to be charged withholding tax and that transaction fees paid by the applicant to card companies constitute royalties and subject to withholding tax is of great public importance as is affects the entire banking industry since banks will have no incentive to issue debit and credit cards if the interchange fees are liable to withholding tax; and that card companies will also be discouraged to issue cards since the cost of card transactions shall increase and framed the issues of public importance as follows:

(a) The consequence of the decision is that it affects the entire banking industry. All banks in Kenya and internationally issue credit and debit cards and in the event that interchange is subjected to withholding tax, the said banks will have no incentive to issue cards. Following the Court of Appeal's refusal to certify the matter as one of general public importance, the respondent has sent demands to banks specifically quoting the Court of Appeal's decision and demanding payment of tax.

(b) The decision also negatively impacts the card companies who operate the networks that enable payments through the use of credit and debit cards as it increases the cost of card transactions thus discouraging the issuance of use of cards.

(c) Debit and credit cards are cashless, safe, reliable, convenient and a secure way of making payments.

(d) In the event that banks in Kenya stop issuing cards, this will negatively impact the more than 11 million individual and institutional members of the Kenyan public who use credit and debit cards. It will also have a catastrophic impact on the Kenyan businesses that accept payment by cards.

(e) Credit and debit cards provide a secure, efficient and accountable means of effecting payments not only in Kenya but also for members of the Kenyan public who travel abroad. Cards are also utilized by members of

the Kenyan public who make online purchases. If cards are no longer accessible as a result of the imposition of tax that has no basis in law or fact, Kenyans will have to carry cash when travelling abroad and will not be able to undertake online purchases.

(f) The tourism sector in Kenya relies on payments by tourists who use debit and credit cards. The sector is a cornerstone of the Kenyan economy employing millions of Kenyans whose livelihood will be impacted in the event that tourists are unable to utilize their debit or credit cards in Kenya.

(g) The Court of Appeal judgment thus impacts the card payment system both locally and internationally thereby negating the Government of Kenya's agenda on ease of doing business as well as promoting tourism.

(h) Discouraging card transactions for payments in effect imposes a purely cash economy which has been shown to be inimical to public health in light of the domestic and international combat against Covid-19.

(i) The effect of the Court of Appeal judgment is to give the Court the blanket right to re-write the agreements of contracting parties so as to impose tax. It is a cardinal principal of law that the Courts have no jurisdiction to re-write and impose new contractual news. This is a fundamental principal of law which if breached would have an adverse effect on all commercial transactions.

(j) The effect of the Court of Appeal judgement is to give the respondent the right to raise tax demands that lack clarity by merely claiming that a payment is 'management or professional fees' without specifying the category indicating that a particular transaction falls as required by law.

(k) The effect of the Court of Appeal judgment is to create uncertainty and unpredictability in business transactions vis a vis taxation. For a business to operate within tax system, it requires certainty and predictability which enables the business to arrange its tax affairs.

(l) The uncertainty created by the judgment will erode the confidence of Kenyan businesses and foreign investors which will have a devastating effect on the Kenyan economy; and

**[3] UPON** considering the applicant's written submissions dated 24th February, 2022 wherein it is further contended that the decision in Nairobi Civil Appeal No. 195 of 2017 (*Karanja, M'Inoti & Sichale, JJ. A*) has a direct impact on all banks and consequently the members of the public who are members of the banks; that the decision transcends the circumstances of the intended appeal between the applicant and the respondent and that the dispute between the parties does not simply arise from disputed facts but that there are questions of law to be decided that will impact the public; and

**[4] UPON READING** the respondent's replying affidavit sworn on 9th December, 2021 by Philip Munyao and the written submissions dated 5th January, 2022 and filed on 6th January, 2022 in which it was deponed that the matter is not one of general public importance, raises no novel issues and that the facts involved everyday issues of computation and assessment of tax peculiar only to the applicant and respondent;

**[5] AND** which facts it was argued, had no significant bearing on public interest and failed to transcend the circumstances of the case requiring the same to merit this Court's appellate jurisdiction and citing the principles set out in ***Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone***, SC Application No.4 of 2012; [2013] eKLR and in ***Malcolm Bell v. Daniel Toroitich Arap Moi & another***, SC Application No.1 of 2013; [2013] eKLR ***(Malcolm Bell Case)***; and

**[6] NOTING** from the record that the applicant further filed an amended originating motion dated 19th November, 2021 and filed on 3rd December, 2021 premised on the provisions of Articles 163(4) (b), 163(5) and 210(1) of the Constitution, Sections 16(1) and (2) of this Court's Act and Rule 33(3) of this Court's Rules seeking determination of the questions:

a) Whether the Court of Appeal erred in declining certification of the applicant's intended appeal to this Court.
b) Whether the applicant's intended appeal transcends the issues between the applicant and the respondent and raises matters of substantial general public importance
c) Whether the applicant's intended appeal raises serious issues of law that are of general public importance and
d) Whether the imposition of withholding tax on a payment that is not a royalty and a payment that is not for management or professional services as defined in the Income Tax is a violation of Article 210(1) of the Constitution of Kenya; and

**[7] FURTHER NOTING** the submissions by the respondent opposing the amended originating motion being properly on record for failing to seek leave of this Court, introducing new issues of fact and for failing to follow the relevant rules on amendment without seeking leave as was pronounced by this Court in ***Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 others***, SC Petition No.12 of 2013; [2014] eKLR ***(Mumo Matemu Case).***

**[8]** In the above context, **WE NOW OPINE** as follows:

i. Before we review the issue of certification, it is prudent that we address the contention raised by the respondent on whether the amended originating motion filed without leave of the Court is properly before us. We take note of the respondent's submissions that the amended originating motion filed by the applicant was done so without leave of this Court. Under Rule 33(1) of this Court's Rules, a party aggrieved with the finding of the Court of Appeal certifying or declining to certify a matter as one of general public importance may apply to this Court for review within fourteen days. The originating motion dated 19th November, 2021 was filed within 14 days of the date of delivery of the ruling by the appellate

Court on 5th November, 2021. We are cognizant of the provisions of Rule 17(1) of this Court's Rules that provides that:

> ***"A party may only file further pleadings or affidavits with the leave of the Court, and with the consent of the other party."***

ii. This means that any subsequent filing of any motion after 19th November, 2021 required leave of the Court. No such leave was ever sought and/or granted. It is not in contention that the amended originating motion was filed 14 days after the date of delivery of the ruling by the appellate Court. Accordingly, the application had to be filed with leave of this Court. We are cognizant that there is no application and/or prayer before us by the applicant seeking leave to file its amended originating motion. Hence, we find and hold that the amended originating motion having been filed on 3rd December, 2021, without leave of the Court, is fatally defective. The upshot is that we hereby strike out the amended originating motion dated 1st December, 2021 and filed on 3rd December, 2021.

iii. Having so said and turning to the merit of the substantive application that is properly before us, at the core of the finding of the appellate Court was that withholding tax is payable by a bank for payments it has made to credit card companies and to other banks that issue credit cards. This finding is the backbone of the questions the applicant submits transcends the parties-cases and constitutes a matter of general public importance. As such, it is argued that whether such taxes are liable to be paid by banks transcends beyond the parties as it entitles the respondent to demand for such payments from all banks, creating a rippling effect that foresees an increase in charges to be borne by consumers of debit/credit cards should banks be required to pay such taxes.

iv. We have specifically weighed this application against the principles set out in ***Hermanus*** and we note that the applicant has to demonstrate satisfactorily that there is a legal question, the subject matter of which transcends the present litigation. The principles to be considered are well set where it was stated:

> ***"Before this Court, 'a matter of general public importance' warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern."***

v. As regards the substantive issues before the Court of Appeal, while the appellate Court rightfully considered the matter within the principles set out in ***Malcolm Bell***, there is a further principle that is applicable in the matter as was set down by this Court in ***Town Council of Awendo v. Nelson Oduor Onyango & 13 others***, SC Misc. Application No. 49 of 2014; [2015] eKLR where it was held:

> ***"[35] From the content of paragraphs 32 and 34, it emerges that while this Court did, in the Hermanus Phillipus Steyn and Malcolm Bell cases, set out an elaborate set of criteria for ascertaining "matters of general public***

***importance" for the purpose of engaging the Court's jurisdiction, a further criterion has arisen. It may be thus stated. <u>Issues of controversy that emerge from transitional political-economic-social-cum-legal factors, with impacts on current rights and entitlements of suitors, or on public access to common utilities and services, will merit a place in the category of "matters of general public importance."</u>*** [Emphasis supplied]

vi. Having so pointed out, on our part, we note that the issues raised are not frivolous and indeed transcend the specific circumstances of the parties before us. The question of whether such payments made by banks to card companies constitute royalties and whether interchange fees paid by banks are classified as management or professional fees liable to taxation and subject to withholding tax is an important one within the banking industry.

**[9] HAVING** therefore considered the application, we make the following Orders:

***a) The Originating Motion dated and filed on 19th November, 2021 is hereby allowed.***

***b) Parties shall bear their respective costs.***

**[10]** It is so ordered.

**DATED** and **DELIVERED** AT **NAIROBI** this **19th day** of **May, 2022.**

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**P. M. MWILU**
**DEPUTY CHIEF JUSTICE & VICE**
**PRESIDENT OF THE SUPREME COURT**

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| **S. C. WANJALA** | **NJOKI NDUNGU** |
| **JUSTICE OF THE SUPREME COURT** | **JUSTICE OF THE SUPREME COURT** |
| ..... | ..... |
| **I. LENAOLA** | **W. OUKO** |
| **JUSTICE OF THE SUPREME COURT** | **JUSTICE OF THE SUPREME COURT** |

**I certify that this is a true copy of the original**

**REGISTRAR,**
**SUPREME COURT OF KENYA**