REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Koome; CJ & P, Mwilu; DCJ & VP, Wanjala, Lenaola & Ouko SCJJ)

APPLICATION NO. E028 OF 2024

-BETWEEN-

ECOBANK KENYA LIMITED ..... APPLICANT

-AND-

MACHARIA MWANGI & NJERU ADVOCATES..... RESPONDENT

Being application for review of the Ruling of the Court of Appeal at Nairobi (Tuiyott, Ali Aroni & Gachoka JJ. A) delivered on 11th October 2024 in Civil Application Nai. Sup No. E003 of 2024

Representation:

Mr. Steve Luseno for the Applicant
(*Majanja Luseno & Company Advocates*)

Mr. Elijah Kimani for the Respondent
(*Macharia Mwangi & Njeru Advocates*)

RULING OF THE COURT

[1] UPON READING the Originating Summons dated 25th October 2024 and filed on 4th February 2025 pursuant to Article 163(5) of the Constitution, Rule 33 (2) of the Supreme Court Rules 2020, Sections 15, 16, 21 and 24 of the Supreme Court Act and all enabling provisions of the law, seeking the following orders:

1. ***THAT*** *this Honourable Court be pleased to review, reverse and/or set aside the decision of the Court of Appeal (Tuiyott, Ali-Aroni & Gachoka*

JJ.A) delivered on 11th October 2024 declining to issue a Certificate that the applicant's intended appeal against the judgment of the Court of Appeal (M'inoti (dissenting), Omondi & Ngenye-Macharia JJ.A) on 8th December 2023 in ***Nairobi Civil Appeal No. E474 of 2021*** *to the Supreme Court of Kenya raises matters of general public importance.*

2. ***THAT*** *this Honourable Court be pleased to certify that the applicant's, Ecobank Kenya Limited, intended appeal against the Judgment and Orders of the Court of Appeal (M'inoti (dissenting), Omondi & Ngenye-Macharia JJ.A) on 8th December 2023 in Nairobi* ***Civil Appeal No. E474 of 2021*** *raises matters of general public importance.*

3. ***THAT*** *the applicant, Ecobank Kenya Limited, be granted leave to appeal to the Supreme Court of Kenya against the Judgment and Orders of the Court of Appeal (M'inoti (dissenting), Omondi & Ngenye-Macharia JJ.A) on 8th December 2023 in* ***Nairobi Civil Appeal No. E474 of 2021****.*

4. ***THAT*** *time be limited within which the intended appeal should be filed and served.*

5. ***THAT*** *the costs of this Motion be provided for*; and

[2] APPRECIATING that the applicant engaged the respondent to provide legal services for the realization of security in respect of a debt of USD.228,232,287.00 (approximately Kshs.2,907,925,561/=) owed by Hashi Energy Limited to the Bank; the respondent's Bill of Costs for non-contentious debt collection was taxed at Kshs.43,688,833.40 under Paragraph 7, Part II of Schedule 5 of the Advocates Remuneration Order (ARO); the High Court (*Majanja J.*) found that the Bill of Costs had been wrongly taxed and should have been assessed under Paragraph 1, Part II of Schedule 5 of the ARO; on appeal, the Court of Appeal through the lead judgment of *Ngenye – Macharia, JA* (with *Omondi JA* concurring and *M'inoti JA* dissenting) overturned the High Court's decision and upheld the assessment by the Taxing Master; and

[3] UPON CONSIDERING the grounds on the face of the application and supporting affidavit of Caroline Mbenge, the applicant's Head of Legal and Company Secretary, sworn on 25th October 2024, wherein the applicant contends that, contrary to the Court of Appeal's Ruling, the intended appeal to this Court raises substantial issues of law that transcend the circumstances of the dispute between the parties hereto; it bears significant public interest implications concerning the remuneration of advocates on one hand, and the reasonable costs to be borne by clients for the provision of legal services on the other, bearing in mind that costs that are exorbitant and unjust, ultimately cascade down to the defaulting chargor, especially where a chargee seeks to realize securities; and that intervention and guidance is needed from this Court on the following issues as reproduced verbatim from the application:

(i) *The proper interpretation of Paragraph 7, Part II of Schedule 5 of the Advocates Remuneration Order and Paragraph 1 of Part II of the Schedule 5, an issue of which the learned Judges of Appeal were divided;*

(ii) *Even if under Paragraph 1 of Part II of Schedule 5, the proper exercise of the taxing master's discretion in light of the decision of this Honourable Court in* ***Kenya Airports Authority Vs Otieno Ragot and Company Advocates*** *(Petition E011 of 2023) [2024] KESC (KLR) holding, inter alia, that assessment of advocate-client costs is not a mechanical exercise but a granular one context-dependant, fact-specific one to place "what he considers a fair value upon the work and responsibility involved" ensure that while advocates are fairly remunerated, clients are not subjected to excessive fees;*

(iii) *Whether the approach endorsed by majority of the Court of Appeal is consistent with what the UK Supreme Court has just observed, fully consistent with the above-mentioned decision of this Honourable Court, that "The court has long had powers to ensure that solicitors do not claim excessive remuneration for work done by them. These powers are exercised through the court's taxation or, in modern parlance, assessment*

of solicitor's bill of costs. An assessment involves the court determining whether the costs are reasonably incurred and are reasonable in amount." – ***Oakwood Solicitors Ltd v Menzies*** *[2024] UKSC 34 (23 October 2024)*

(iv) Whether a fair reading of the text of Paragraph 7 in line with the principles of statutory interpretation permits an advocate to charge a client a percentage of the amount of debt owed for ancillary services rendered in the process of debt collection, where the actual debt is not recovered;

(v) What is the significance of the general agreement contemplated under Paragraph 7 of the Advocates (Remuneration) (Amendment) Order, 2014; and

(vi) Whether realization of a security offered to a bank commences and terminates with the issuance of a Statutory Notice by an advocate; and

[4] UPON CONSIDERING the applicant's written submissions dated and filed on 4th February 2025, the applicant, while acknowledging this Court's decision in ***Steyn vs Ruscone*** (Application 4 of 2012) [2013] KESC 11 (KLR) (hereinafter referred to as ***the Steyn Case***), further submits that the legal issues at hand transcend the immediate interests of the parties as evidenced by the divergence in reasoning among the learned Judges in the interpretation of Paragraph 7 of Part II of Schedule 5 of the ARO; that the core contention is whether, for an advocate to be entitled to fees under Paragraph 7 aforesaid, there must be a general agreement between the advocate and the client, or whether such agreement is merely optional at the client's election; the applicant urges this Court to conclusively interpret Paragraph 7 to resolve the conflicting jurisprudence and offer authoritative guidance to courts on the proper approach to the taxation of advocate-client Bills of Costs; and

[5] UPON CONSIDERING the applicant's further argument that taxation, as accentuated in ***Oakwood Solicitors*** and ***Kenya Airports Authority Cases*** *(supra),* is not a mere mathematical exercise, given that advocate fees must be

commensurate with the actual work done. In this regard, the applicant contests the award of instruction fees to the respondent in the sum of Kshs.43,688,883.40, now accrued to Kshs.103,444,908.56, based solely on the issuance of a Statutory Notice, with no subsequent steps taken towards the realization of the securities. Accordingly, that such an action cannot be construed as debt recovery as contemplated under Schedule 5 of the ARO; and

[6] TAKING INTO ACCOUNT the respondent's replying affidavit sworn on 3rd March 2025 by Elijah Mwangi Njeru, Senior Partner at the respondent's firm, wherein he deposes that the respondent was instructed to render a legal opinion on a debt recovery matter and to issue Statutory Notices under the Land Act against the borrower, chargor and guarantors; that it duly executed the instructions culminating in a settlement agreement between the applicant and its customer; that, in light of this fact, the applicant's pursuit to recover Kshs.109,444,908.56 paid to the respondent constitutes a personal grievance confined to the parties and does not raise any issue transcending their immediate interests; and that the decretal sum has already been satisfied, rendering the present dispute moot and purely an academic exercise, having been overtaken by events; and

[7] TAKING INTO ACCOUNT the respondent's further deposition that the decisions of the Taxing Master, the High Court and the Court of Appeal merely entailed the interpretation of Paragraph 7, Part II of Schedule 5 of the ARO, without alteration of the settled principles governing the taxation of Bill of Costs; that the intended issues raised do not disclose anything jurisprudentially significant to warrant the Supreme Court's intervention; that the interpretation rendered by the superior courts was a conventional exercise of judicial discretion and decision making process; and that the issues in contention bear no substantial impact on practice of members of the legal profession in any large scale. Subsequently, the jurisdiction to interpret the ARO and tax Bills of Costs continues to vest in the taxing master, whose role remains untainted by the decisions rendered in this case; and

[8] CONSIDERING the respondent's submissions dated 3rd March 2025 and filed on 5th March 2025 wherein it propounds that the application for certification before the Court of Appeal was premised on a subjective belief that the respondent was excessively remunerated; that all the superior courts below were unanimous in their finding that the services rendered by the respondent constituted debt collection; to this end, the applicant's issues such as "whether realization of a security offered to a bank commences and terminates with the issuance of a Statutory Notice by an advocate" were neither raised nor considered by the courts below; the applicant's attempts to rely on a decision of the UK Supreme Court, which was never cited in the proceedings before the courts below or grants basis for this court to certify a matter under Article 163(4) of the Constitution as a result of divergence from the UK Supreme Court, or obligate this court to align its jurisprudence with that of the UK; and

[9] CONSCIOUS of the respondent's submission that the applicant has failed to demonstrate any apparent error by the Court of Appeal in declining to certify the matter or any uncertainty or confusion or inconsistency in the interpretation of the relevant provisions of the ARO; that the question of when realization of security begins, as posited by the applicant is a factual rather than a legal issue; this matter is distinguishable from ***Otieno, Ragot & Company Advocates Vs Kenya Airports Authority*** (Application E015 of 2023) [2023] KESC 55 (KLR), and falls short of the threshold required for certification as a matter of general public importance as defined in ***the Steyn Case***; and that the applicant merely seeks another opportunity to be heard before the Supreme Court. That therefore the application should be dismissed with costs; and

[10] COGNIZANT of the guiding principles governing the certification of a matter as one involving general public importance, as authoritatively laid down by this Court in ***the Steyn Case*** and reaffirmed in ***Bell Vs Moi & another*** (Application 1 of 2013) [2013] KESC (KLR); and having considered the totality of the application, response, submissions and issues proposed to be certified as involving general public importance **WE NOW OPINE** as follows:

(i) The gravamen of the present matter, as articulated by the applicant, the intended appeal circles around the interpretation of Paragraph 7, Part II of Schedule 5 of the ARO which provides as follows:

> *"In respect of non-contentious debt collection matters an advocate <u>may</u> enter into a general agreement with a client to charge therefor upon the following inclusive scale in lieu of charging per item for work done, but—*
>
> *(a) where not more than one letter of demand has been written the scale shall be reduced by one-half, subject to a minimum fee of Kshs. 1,000; or*
>
> *(b) where the letter of demand is followed by the institution of proceedings at the instance of the same advocate the scale does not apply and fee shall be as prescribed in paragraph 5 of this Schedule or under Schedule 6 or Schedule 7 as the case may be."*

(ii) In its judgment dated 8th December 2023, the Court of Appeal, by a majority, recognizing that the word *'may'*, connotes a discretionary mandate, found that a general agreement between advocate and client was not a mandatory requirement under Paragraph 7, and the respondent was therefore entitled to instruction fees pursuant thereto. On that basis, the court reversed the High Court's decision that, in the absence of such an agreement, the Bill of Costs ought to have been taxed under Paragraph 1, Part II of Schedule 5 of the ARO. As a result, the Court of Appeal reinstated the Taxing Master's original assessment.

(iii) Dissatisfied with this outcome, the applicant sought leave to appeal to this Court through ***Civil Application No. E003 of 2024***, urging that the matter raised issues of general public importance. The applicant contended, both then and now, that the proper interpretation of Paragraph 7, Part II of Schedule 5 of the ARO, carries profound ramifications not only for members of the legal profession but also for the

general public. Of particular concern to the applicant is the lack of uniformity in judicial interpretation, citing the conflicting views among the four learned Judges who have addressed the provision.

(iv) In its Ruling dated 11th October 2024 (*Tuiyott, Ali Aroni & Gachoka JJ.A*) declined to grant certification, holding as follows:

> *"It is important to note that every interpretation of a section or a rule affects the parties that are before the Court and any other party that relies on it in one way or the other. Therefore, when a party seeks certification, they must demonstrate how the impugned decision transcends beyond a dissatisfaction with the decision and has a bearing on the public interest. Therefore, the fact that a court has interpreted a section or a rule in a certain way is not enough to create an issue of general public importance. The argument that the decision of the Court renders paragraph 7 open to abuse against unsuspecting persons seeking debt collection services is speculative, to say the least."*

(v) We are in agreement with the Court of Appeal's reasoning in this regard. The mere fact that the decision of the Court of Appeal was by a majority of the Bench that determined the matter does not of itself amount to uncertainty or confusion in the emerging jurisprudence. It is well settled that the decision of the majority constitutes the court's *ratio decidendi* that remains binding to lower courts under the principle of *stare decisis*. The existence of a solitary dissent in the impugned ruling does not of itself create a jurisprudential conflict.

(vi) Accordingly, the applicant has failed to demonstrate the presence of any substantive or recurring conflict or confusion in the interpretation of Paragraph 7, Part II of Schedule 5 of the ARO that would necessitate the intervention of this Honourable Court. No comparative decisions of the Court of Appeal or even the High Court were presented to buttress the

applicant's assertion. As emphatically held in ***Koinange Investments & Development Ltd Vs Ngethe*** (Application 4 of 2013) [2014] KESC 19 (KLR), the burden of demonstrating that a legal provision suffers from uncertainty, ambiguity, or a *lacuna* that adversely affects the public interest lies squarely with the party seeking certification. In the present case, that threshold has not been met to our satisfaction including that the issues raised transcend the private interests of the parties before us.

(vii) In the same breadth, the existence of a divergent decision by the UK Supreme Court is not of itself a criteria for certification of an intended appeal as raising issues of general public importance.

(viii) The upshot of our finding is that we find no fault in the determination of the Court of Appeal and accordingly, uphold its decision declining to certify the questions posed by the applicant as raising substantial issues of law or of general public importance. Axiomatically, the threshold to warrant the invocation of this Court's appellate jurisdiction under Article 163 (4) (b) of the Constitution has not been met.

(ix) By fact of the respondent prevailing in these proceedings, it is entitled to costs. Anchored in the well-established principle that costs follow the event, as reaffirmed in ***Rai & 3 others Vs Rai & 4 others*** (Petition 4 of 2012) [2014] KESC 31 (KLR), and there being no compelling justification to depart from this norm, we are satisfied that an award of costs to the respondent is both fair and appropriate in the circumstances.

[11] CONSEQUENTLY, for the reasons aforesaid, we make the following Orders:

(i) The Originating Motion dated 25th October 2024 and filed on 4th February 2025 be and is hereby dismissed.

(ii) The applicant shall bear the costs of the respondent.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **16th** day of **May, 2025.**

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M. K. KOOME
CHIEF JUSTICE & PRESIDENT OF
THE SUPREME COURT

.....	**.....**
P. M. MWILU	**S. C. WANJALA**
DEPUTY CHIEF JUSTICE & VICE PRESIDENT 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