Barclays Bank of Kenya v Commissioner of Domestic Taxes (Large Taxpayers Office) (Civil Application E005 of 2020) [2021] KECA 193 (KLR) (5 November 2021) (Ruling)

Neutral citation: [2021] KECA 193 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E005 OF 2020

RN NAMBUYE, PO KIAGE & J MOHAMMED, JJA

NOVEMBER 5, 2021

BETWEEN

BARCLAYS BANK OF KENYA ..... APPLICANT

AND

COMMISSIONER OF DOMESTIC TAXES (LARGE TAXPAYERS OFFICE) ..... RESPONDENT

(An Application for certification that the Applicant's intended appeal raises matters of general public importance and for leave to appeal against the judgment of (W. Karanja, K. M'inoti, & F. Sichale, JJ.A,) Court of Appeal at Nairobi in Civil Appeal No. 195 of 2017)

RULING

Background

1. By a notice of motion dated 10th November, 2020, Barclays Bank of Kenya Limited (Now Absa Bank Kenya PLC) (the applicant) seeks:

    a. That this Court be pleased to certify that the applicant's intended appeal against the judgment of this Court sitting in Nairobi in Nairobi Civil Appeal No. 195 of 2017 between Commissioner of Domestic Taxes (Large Taxpayers Office) V Barclays Bank of Kenya Limited raises matters of general public importance and that there has been a grave miscarriage of justice and grant the applicant leave to appeal to the Supreme Court of Kenya, against the whole of the said judgment.

    b. That the costs of and incidental to this application be costs in the intended appeal.

2. The application is expressed to be brought under the provisions of Article 163 (4) (b) of the Constitution of Kenya, 2010, Section 3A & 3B of the *Appellate Jurisdiction Act* Cap 9 of the Laws of Kenya, Section 15,16 of the *Supreme Court Act*, 2012, Rule 33(1) of the *Supreme Court Rules, 2020* and any other enabling provisions of law. The Commissioner of Domestic Taxes (Large Taxpayers Office) is the respondent herein.

3. The application is premised inter alia on the grounds that the intended appeal raises the following issues of public importance namely that:

    a. There has been a substantial miscarriage of justice as the appellant has been denied a right to a fair hearing as granted by Article 50(1) of the Constitution as this Court decided the appeal on the basis that the royalty was disguised as transaction fees when no such claim was pleaded for by the respondent before the High Court;

    b. This Court's findings and judgment will have a prejudicial and catastrophic effect on the entire banking industry as the issue of payment of withholding tax on payment to card companies and interchange fees deducted by banks is an issue that crosscuts the entire banking industry which will have an adverse effect on the economy;

    c. This Court's findings and judgment will impact on the card payment system both locally and internationally thereby negating the Government's agenda on ease of doing business;

    d. This Court's findings and judgment will discourage banks from issuing debit and credit cards and will also deter card companies who operate the networks from operating in Kenya;

    e. This Court's findings and judgment will adversely affect businesses which prefer payment by credit and debit cards and also affect the Kenyan public who wish to make payments using cards especially during the Covid -19 pandemic;

    f. The effect of this Court's judgment is to give the Court the blanket right to rewrite the agreements of contracting parties which negates the parties' right to freely entered into contract;

    g. The effect of this Court's judgment is to create uncertainty and unpredictability in business transactions vis a vis taxation;

    h. A proper determination of the issues will be beneficial to all taxpayers, the banks and card payment industry; and

    i. There is need for certainty in the adjudication of tax disputes and as such the dispute is of public importance and interest.

4. In support of its application, the applicant contends that it is aggrieved by the judgment and decree of this Court inter alia on the grounds that this Court:

    i. Erred by fundamentally amending, re-writing and imposing new contractual terms between the applicant and card companies by holding that the transaction fees were royalty payments contrary to the express terms of the agreements between the parties which stated that no royalty was payable.

ii. Erred in failing to realize` that the applicant had gone as far as providing invoices from the card companies to demonstrate that no payment was received for the use of the Companies' trademarks;

iii. Violated the applicant's right to a fair hearing granted under Article 50(1) of the Constitution by finding that the payments of royalty were disguised where no such claim was pleaded by the respondent nor was there any evidence adduced by the respondent to this effect both in the High Court and in this Court;

iv. Had jurisdiction to deal with issues that had not been pleaded by the respondent in its memorandum of appeal;

v. Erred in finding that the transaction fee constituted payment for the right of the applicant to use the card companies' trademarks and logos contrary to the express terms of the agreements between the parties which clearly indicated that there would be no payment of royalties;

vi. Erred in failing to appreciate that Section 35 of the *Income Tax Act* requires that withholding tax be deducted from payment made. In this case, there were no royalty payments demanded from the card companies and thus there was no withholding tax to be remitted;

vii. Failed to appreciate that the transaction/scheme fees are settlement and clearing fees similar to fees charged for cheque clearing and cannot therefore be deemed as royalties;

viii. Erred in finding that the respondent had proved that the interchange fees fell under "management and professional fees" without realizing that the definition in Section 2 of the Act is "management or professional fees" so the fees cannot be both management and professional which is why the definition refers to specific categories; and

ix. Judgment is against public policy as it creates two conflicting court decisions in respect of the same facts as produced in the decision of Majanja, J. in R Vs Commissioner of Domestic Taxes ex parte Barclays Miscellaneous Application No. 1223 of 2007.

5. The application was opposed by way of a replying affidavit sworn by Mr. Philip Munyao, (Mr. Munyao), an officer serving within the respondent's Large Taxpayers Office (LTO) Division engaged in the International Tax Office.

6. Mr. Munyao deposed that: the applicant is seeking to relitigate issues which were the subject of the dispute of this Court and in some instances, convulating the issues by raising new facts which were not placed for consideration before the High Court and this Court; this Court went into an in-depth analysis of the facts and the law and made specific and cognitive findings on the issues sought to be appealed against in the Supreme Court; the matter herein is not a matter of general public importance as it simply relates to assessments directed to a specific taxpayer who is the applicant herein; there were no novel issues before the High Court and this Court and the facts and evidence were peculiar to the applicant and the respondent and none can be deemed to touch on general public interest; the issue for determination does not transcend the circumstance of this case and have absolutely no significant

bearing on general public interest but rather is a creative attempt by the applicant to convolute issues and have a second bite at the cherry by seeking to relitigate their dispute at the Supreme Court.

Submissions by Counsel

7. The application was heard by way of written submissions. Learned Senior Counsel for the applicant, Dr. Fred N. Ojiambo, submitted that the applicant had established that the issue to be canvassed on appeal is one, the determination of which transcends the circumstances of the particular case and constitutes a significant bearing on the public; that the effect of the decision of this Court is that banks will be hesitant to issue cards if withholding tax is imposed thus depriving the public a secure, reliable and accountable way of making and receiving payments and that it will further result in either the card companies pulling out of Kenya or increasing the amount payable by banks thus making card transactions extremely expensive and unaffordable to Kenyans.

8. Counsel relied on the decision in *R Vs Commissioner of Domestic Taxes ex parte Barclays Bank of Kenya Ltd* [2012] eKLR where the High Court held that it is incumbent on the respondent to identify the specific transaction or specific category of services in respect of which a payment is being made. This Court in the impugned decision held that interchange fees paid was "management and professional fees" without identifying the specific category of services as required in Section 2 of the *Income Tax Act*. Counsel also relied on the case of *R Vs Commissioner of Income Tax and Another* [2005] eKLR in which the High Court held that the categories set out in the definition of "professional or management fees" cannot be used interchangeably as the meaning of each category is different.

9. On the question whether the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, counsel submitted in the affirmative and referred to the case of R Vs Commissioner of Domestic Taxes ex parte Barclays (2012) eKLR, where the High Court in the applicationinvolving the same parties, facts and points of law to be determined, held that the respondent was required to specifically identify the transaction or category of payment and that the payments to card companies were not royalties. Counsel submitted that these contradictory decisions create uncertainty and thereby prejudicing the applicant and various banks. Counsel submitted that the impugned judgment is against public policy as it created two conflicting decisions in respect of the same facts.

10. On the question whether there has been a miscarriage of justice, counsel submitted that this Court found that royalties were disguised as transactional and other fees paid by the applicant to the card companies yet no such claim was made by the respondent before the High Court nor was such a claim raised as a ground of appeal.

11. Learned counsel for the respondent, Mr. Gaya Ochieng, opposed the application and submitted that no question of general public importance can be made from the appeal as the Supreme Court will only have to re-examine the explanations and the documents to determine whether the evidence was sufficient for this Court to arrive at its finding; and that the assessment was specific to the applicant and the respondent since there is no evidence that the contracts used in the particular case can affect the contracts of third parties and the general public. Counsel relied on the decision of *Hermanus Phillipus Steyn –Vs-Giovanni Gnechi Rusconne* Supreme Court Civil Application No. 4 of 2012 where the Supreme Court outlined the principle to be applied when faced with an application for certification.

12. Counsel further submitted that: there is no way the finding of this Court with regard to specific assessment can transcend the circumstance of the case; the respondent during the hearing in this Court demonstrated that royalty was paid by the appellant in order for it to be able to access the system which royalty is chargeable to tax; the respondent was able to identify the services which the issuing bank offers to the applicant which constitute management or professional fees; the issues raised in

this Court do not transcend the circumstance of the particular case; the finding was based on specific evidence as supporting a specific assessment directed to a particular taxpayer and the same should not warrant certification; and that there is therefore no question of law with significant public bearing to be addressed by the Supreme Court.

13. It was counsel's further submission that the applicant created mere apprehensions on how the judgment would affect the public which was frowned upon in *Malcolm Bell-vs-Daniel Toroitich Arap Moi & Another* (supra); and that there was no nexus between the applicant's assessment that was the subject of litigation and other banks since the evidence adduced is case specific. This Court was invited to apply the threshold in *Joreth Limited vs Patrick Magu Mwangi Kimunyu* [2015] eKLR wherein it was held inter alia that the jurisdiction of the Supreme Court should only be raised in exceptional cases that raise cardinal issues of law or of jurisprudential moment.

Determination

14. We have considered the application, the rival arguments by the parties, the authorities cited and the law. It is common ground that an appeal to the Supreme Court can arise via two avenues, that is, as of right where the issue involves the interpretation and application of the Constitution; and with leave either by this Court or the Supreme Court itself where a matter of general public importance is involved. See Article 163(4) of the Constitution.

15. A broad criteria of gauging whether an issue is of general public importance has been set out by the Supreme Court itself in the *Malcom Bell case* [supra] as follows:-

> " i. for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;
>
> ii. where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have significant bearing on the public interest;
>
> ii. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;
>
> iii. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may
>
> either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;
>
> iv. mere apprehension of miscarriage of justice, a matter most apt for resolution [at earlier levels of the] superior Courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163(4)(b) of the Constitution;
>
> v. the intending applicant has an obligation to identify and concisely set out the specific elements of "general public importance" which he or she attributes to the matter for which certification is sought;

vi. determinations of fact in contests between parties are not, by [and of] themselves, a basis for granting certification for an appeal before the Supreme Court;

vii. issues of law of repeated occurrence in the general course of litigation may, in proper context, become"matters of general public importance", so as to be a basis for appeal to the Supreme Court;

viii. questions of law that are, as a fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or as litigants, may become "matters of general public importance", justifying certification for final appeal in the Supreme Court;

ix. questions of law that are destined to continually engage the workings of the judicial organs, may become "matters of general public importance", justifying certification for final appeal in the Supreme Court;

x. questions with a bearing on the proper conduct of the administration of justice, may become "matters of general public importance," justifying final appeal in the Supreme Court."

16. Applying the above criteria to the instant application, only one issue arises for our determination namely, does the intended appeal involve matters of general importance? We do not think so. Firstly, the burden lay with the applicant to demonstrate lacunae or uncertainty in the law.

17. In *Nduttu & 6000 Others v Kenya Breweries Ltd & Another*, Supreme Court Petition No.3 of 2012 [2012] eKLR, theSupreme Court stated that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court. The only other instance when an appeal may lie to the Supreme Court is one contemplated under Article 163(4) (b) of the Constitution, where it is certified that the appeal involves a matter of general public importance.

18. This Court may only issue a Certificate under the above law in the following instances.

" (i) Where the intended appeal to the Supreme Court concerns a matter of law of great Public importance.

ii. Where the intended appeal raises a matter of law of general importance"

19. For this Court to grant the Certificate sought by the applicant herein, it must be satisfied that the intended appeal to the Supreme Court concerns a matter of law, of great public importance or of general importance.

20. In the circumstances, we find that the issues raised by the applicant in the intended appeal to the Supreme Court are no more than facts which were in contest between the parties and do not transcend the circumstances of the case. The upshot is that the applicant has not made out a case to warrant the certification sought. Accordingly, the application dated 10th November, 2020 is devoid of merit and is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

P. KIAGE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR