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| Case Number: | Civil Application 6 of 2018 |
| Date Delivered: | 23 Jul 2021 |
| Case Class: | Civil |
| Court: | Court of Appeal at Nairobi |
| Case Action: | Ruling |
| Judge: | Roselyn Naliaka Nambuye, Sankale ole Kantai, Patrick Omwenga Kiage |
| Citation: | Westmont Holdings Sdn.BHD v Central Bank of Kenya [2021] eKLR |
| Advocates: | - |
| Case Summary: | - |
| Court Division: | Civil |
| History Magistrates: | - |
| County: | Nairobi |
| Docket Number: | - |
| History Docket Number: | Civil Appeal 37 of 2017 |
| Case Outcome: | Motion dismissed with costs to the respondent. |
| History County: | Nairobi |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, KIAGE & KANTAI, JJ.A.)**

**CIVIL APPLICATION NO. 6 OF 2018**

**BETWEEN**

**WESTMONT HOLDINGS SDN.BHD.....APPELLANT**

**AND**

**CENTRAL BANK OF KENYA.....RESPONDENT**

(Being an application for a certificate that a matter of general public importance is involved

pursuant to Article 163 (4) (b) of the Constitution of Kenya with respect of the proposed

appeal against the Ruling of the Court of Appeal (Visram, W. Karanja & Koome, JJ.A.)

dated 8th *December, 2017* **in Civil Appeal No. 37 of 2017)**

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**RULING OF THE COURT**

The suit at the High Court of Kenya at Nairobi (**HCCC No. 642 of 1998**) has had a rather chequered history. The suit had been dismissed for want of prosecution but was reinstated by this Court in a Judgment delivered in 2014 in **Civil Appeal No. 118 of 2013**. Various applications then followed but we shall not go into them as they not relevant to the issue before us.

The respondent (Central Bank of Kenya) filed an application in this Court where it sought orders to secure its costs (security for costs) in the sum of **Ksh.87,620,000** being what it considered approximate costs payable under the Advocates (Remuneration) Order. In the suit at the High Court the applicant (**Westmont Holdings SDN.BHD** – as 1st plaintiff) with **Kamlesh Mansukhlal Pattni** (2nd plaintiff) sued the respondent for Ksh.185,500,000, a sum they claimed as a refund of certain sums of money paid to the respondent as deposit towards purchase of a certain property in Nairobi. It was claimed that the property had been purchased by a company called Lynwood. The 2nd plaintiff withdrew his suit in the course of the proceedings but he was ordered to pay costs of the suit to the respondent. The suit by the 1st plaintiff (applicant here) proceeded for hearing but was dismissed as was a counterclaim by the respondent. The applicant appealed. The respondent took certain objections to the effect that the applicant had been wound up and had no capacity to sue or file the appeal and in the event the respondent could not recover its costs in the appeal. In a considered ruling of this Court (Visram, W. Karanja and Koome, JJ.A.) delivered on 8th December, 2017 the Motion by the respondent succeeded. The Court ordered:

**"[15] For the foregoing reasons, we are satisfied this is a suitable case to order the appellant, be it Westmont or Jasmin See, to deposit security to guarantee the costs of the appeal in the sum of Kenya Shillings twenty Million (Ksh.20,000,000/-). In arriving at the said sum, we have considered the amount in dispute, the fact that there are other costs that were ordered to be paid by the appellant in the High Court and more importantly, the enormous amount of resources in terms of professional services and attendant costs likely to be incurred in defending an appeal such as this one.**

**Accordingly, we order the said sum to be deposited in Court as security for costs in this appeal within 45 days of this ruling, failing which the appeal will stand struck out with costs to CBK."**

By Motion said to be brought under various provisions of law including **Articles 47, 48, 50, 159** and **163(4) and (5)** of the **Constitution of Kenya, 2010, Sections 15(1)** and **19** of the **Supreme Court Act, Rule 24(i)** and **31** of the **Supreme Court Rules, 2017** and the **Appellate Jurisdiction Act** we are asked to be pleased to certify that the following matters are of general public importance raised in the appellant's intended appeal against the said ruling delivered on 8th December, 2017 to the Supreme Court:

**a. Whether striking out an Appeal; or indeed any matter, without its being heard if security for costs is not deposited; is a direction that is an impediment to a party's access to justice and stands in contravention of Articles 50 and 159 of the Constitution for imposing a condition precedent or a stringent qualification to a litigant's fundamental right to justice.**

**b. Whether a prohibitive cost tag to access to justice is in contravention of Article 48 of the Constitution which provides that fees to access justice should be reasonable and shall not impede access to justice and whether it is fair or reasonable that a party who has already been defrauded of Ksh.185,500,000/= be required to deposit a further Ksh.20 Million in order to be heard by a court.**

**c. Whether admissions by a Respondent that it is holding an Appellant's monies in excess of the security for costs awarded is a relevant factor to consider and whether failure to consider such relevant factors is a travesty of justice contravening Articles 50 and 159 of the Constitution.**

We are also asked to stay that ruling pending hearing and determination of an intended appeal.

In grounds in support of the Motion it is said that the matters intended to be heard at the Supreme Court are substantial ones, the determination of which will have a significant bearing on the public interest; that the issue of security for costs is an issue of public interest **"… and is currently settled ad hoc on the basis of oscillating parameters"**; and that it is a matter of general public interest that costs should not be an impediment to access to justice.

It is interesting to note that the supporting affidavit is by **Anthony M. Muriithi, Advocate**, who says that the matters involved are legal "… and information I have come across in the process of executing my brief as counsel for the appellant ….". We say it is interesting because in the Motion by the respondent the subject of the impugned ruling the allegation was that the applicant (here) had been wound up and did not exist and the locus of a supposed agent was questioned and found to be wanting. It would have helped matters if a real party, not a lawyer, had filed the affidavit in support of the Motion.

Mr. Muriithi deposes that the applicant intends to appeal the order where the applicant was ordered to pay security for costs; that the order is harsh, draconian and punitive intended to deny the applicant access to justice; he relates the factual history of the case at the High Court and in this Court giving details of how a Malaysian investor called Lynwood Development Limited was involved in a certain transaction with the respondent. He deposes at paragraphs 11 and 12 of the affidavit:

**"11. Following the terms of the contract, after payment of the deposit price, the Applicant approached the Grand Regency Hotel to look at their books and records of account as was a requirement before the sale could continue with there being an understanding that the deposit price would be returned back to the Applicant if such due diligence did not go through.**

**12. The Applicant approached the Respondent to have the deposit price returned to them but the Respondents refused to do so and the matter had been instituted in the High Court and has been in contention till now where the matter is in the Court of Appeal."**

These, with respect, are not issues that an advocate retained in a matter by a disclosed client should speak to; the client should emerge and speak loudly and forthrightly to such matters of fact.

**Mr. Kennedy Abuga**, the respondent's director, Governor's Office in charge of legal services, in a rather unnecessarily long replying affidavit which contains details which are not necessary in an application of this nature says that the appeal does not lie as the appellant does not exist; that the appeal stood struck out; that the applicant had donated a power of attorney to a Malaysian national who also held a United States of America passport; that Lynwood Development Limited was not a party to the proceedings here or in the court below and had been struck off the register in the Virgin Islands. It is denied that there are matters of general public importance calling for the attention of the Supreme Court and there was no possibility of the respondent recovering its costs. Several documents are attached to the replying affidavit.

The respondent also filed a Preliminary Objection where matters which Mr. Abuga has taken in the replying affidavit are set out.

We have considered the record of the Motion, the affidavits and written submissions filed on behalf of both parties.

In the ruling delivered on 8th December, 2017 this Court found as follows;

**"We do not think this application was brought on the basis that the appellant or its agent were merely impecunious. It is predicated on the fact that Westmont who is the appellant does not exist in law and this being a common ground counsel for CBK submitted quite strongly that in the event the appeal is dismissed, public tax payers' money will have been expended in pursuing an appeal filed by a phantom. This argument that Westmont was wound up was not discounted by counsel for the appellant, save to state that there was an amendment whereby Westmont was submitted by Lynwood Developers Ltd. Whereas those are matters for merit determination within the appeal itself, our preliminary view of the matter is, this appeal, as it appears in this record of appeal, is filed in the name of Westmont who is the appellant; it is undisputed that Westmont was wound up and in our view this state of affairs lends credence to CBK's anxiety regarding its ability to recover costs in the event that the appeal was unsuccessful."**

On the issue of security for costs **rule 107** of the **rules of this Court** requires that security for costs be lodged on the institution of a civil appeal. **Sub rule** (3) of that rule allows the Court to direct payment of further security for costs.

On the material placed before the bench that delivered the said ruling the court found it necessary to direct payment of further

security for costs.

The appellant requests that we certify that there are matters of general importance that call for consideration by the apex court in the land.

The principles that apply in an application of this nature were well laid out in the case of ***Hermanus Phillipus Steyn v Giovanni Gnecchi –Ruscone***

**[2013] eKLR** 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 a significant bearing on the public interest;**

**iii. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;**

**iv. 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;**

**v. mere apprehension of miscarriage of justice, a matter most apt for resolution in [other] 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;**

**vi. 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;**

**vii. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”**

This Court in the case of **Malc*om Bell v Daniel Toroitich Arap Moi & Others* Supreme Court Application No. 1 of 2013** pronounced:

**“It is now sufficiently clear that, as a matter of principle and of judicial policy, the appellate jurisdiction of the Supreme Court is not to be invoked save in accordance with the terms of the Constitution and the law, and not merely for the purpose of rectifying errors with regard to matters of settled law”.**

The issue of award of costs or an order directing the payment of security for costs cannot be a substantial one. There is no

uncertainty in law on that issue as the Court of Appeal Rules are clear on the issue of costs or payment of additional costs or security for costs. There is no issue raised for determination which would have any bearing on the public interest and likewise we see no issue raised that would call for attention or determination by the Supreme Court.

We find the Motion to have no merit and it is accordingly dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JULY, 2021**

**R.N. NAMBUYE**

**.....**

**JUDGE OF APPEAL**

**P.O. KIAGE**

**.....**

**JUDGE OF APPEAL**

**S. ole KANTAI**

**.....**

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**