



Golden Cara Investments Limited v African Banking Corporation Limited (Commercial Appeal E125 of 2021) [2025] KEHC 16366 (KLR) (Commercial and Tax) (7 November 2025) (Ruling)

Neutral citation: [2025] KEHC 16366 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E125 OF 2021
JWW MONG'ARE, J
NOVEMBER 7, 2025**

BETWEEN

GOLDEN CARA INVESTMENTS LIMITED APPELLANT

AND

AFRICAN BANKING CORPORATION LIMITED RESPONDENT

RULING

Introduction And Background

1. The application for the Court's determination is the Respondent's Notice of Motion dated 26th September 2024 that seeks the Appellant to provide security for the decretal sum of Kshs.4,070,414.07/= and appeal costs of Kshs.300,000.00/= and that these proceedings should be halted until the security is provided, otherwise the appeal should be struck out. The Appellant responded to the application through the replying affidavit of its director, Mohamed Adan Bare, sworn on 7th November 2024. The parties canvassed the application by way of written submissions that I have considered and I will be making relevant references to the same in my analysis and determination below.

Analysis And Determination

2. As submitted by the Respondent, the sole issue of determination is whether the Court should issue an order for security of the decretal sum and costs of this appeal. The Supreme Court in *Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others* [2023] KESC 11 (KLR) set guiding principles that should assist this Court when considering an application by a defendant or respondent for security for costs as follows:



63..... Thus, in determining whether it is appropriate to make an order that a party gives security for costs, the Court may have regard to the following matters and such other matters as it considers relevant in the peculiar circumstances of each case: –

- i. the prospects of success or merits of the proceedings,
- ii. the genuineness of the proceedings
- iii. the impecuniosity of the plaintiff
- iv. whether the plaintiff's impecuniosity is attributable to the defendant's conduct
- v. whether the plaintiff is effectively in the position of a defendant
- vi. whether an order for security for costs would stifle the proceedings and/or impede access to justice
- vii. whether the proceedings involve a matter of public importance
- viii. whether there has been an admission or payment in Court
- ix. whether delay by the plaintiff in commencing the proceedings has prejudiced the defendant
- x. the costs of the proceedings
- xi. whether the security sought is proportionate to the importance and complexity of the subject matter in dispute
- xii. the timing of the application for security for costs
- xiii. whether an order for costs made against the plaintiff would be enforceable within the republic of Kenya
- xiv. the ease and convenience or otherwise of enforcing a Kenyan Court judgment or order in the country of a non-resident plaintiff or appellant
- xv. if the plaintiff is a natural person, an order for security for costs cannot be made merely on account of his or her impecuniosity.
- xvi. security for costs is to be given in such manner, at such time and on such terms (if any) as the Court may by order direct
- xvii. if the plaintiff fails to comply with an order under this rule, the Court may order that the proceeding on the plaintiff's claim for relief in the proceedings be dismissed.
- xviii. the provisions of any Act under which the Court may require security for costs to be given such as the *Elections Act*
- xix. a second motion for security for costs will not succeed unless there is an unforeseen and material change in circumstances since the first order for security. An example of an unforeseen and material change in circumstances might be where a plaintiff has come into a sum of money sufficiently large that they could no longer make an impecuniosity argument.
- xx. the defendant seeking increased security bears the onus of demonstrating a significant gap between the security ordered and the actual expenses which were not foreseeable



and that in hindsight the original request for security for costs was based on an assessment of the complexity of the case which hindsight has established was not realistic.

xxi. the jurisdiction to increase or decrease the amount of security already ordered should not be exercised lightly or be used to second guess the Court that made the original order, whether on consent or otherwise, unless the gap between what was ordered and what later appears to be necessary is significant.

64. We agree with the jurisprudence from other jurisdictions that a Court ought to take into consideration several factors before making an order for security for costs. [My emphasis]
3. From the above, in as much as the apex Court provided guidance on what ought to be considered in an application for security of costs, it was also clear that the aforementioned list was not exhaustive and this Court can still consider "... such other matters as it considers relevant".
 4. The Respondent has stated that the Appellant has not satisfied a decree of Kshs.4,070,414.07/=, that the Appellant and its directors are elusive and dishonest as a warrant of arrest has been issued against the director, Mohammed Aden Barre, for failing to pay the decretal sum, the director has no known address, assets, or place of business, the appeal is frivolous, out of time, and has no prospects of success, the Appellant has a history of filing multiple suits to avoid paying debts and that the Appellant is impecunious and has used litigation as a weapon to avoid contractual obligations. That without an order for security, the Respondent has no hope of recovering the decretal sum or costs.
 5. In response, the Appellant states that the Respondent is using Order 26 of the Civil Procedure Rules improperly, as it does not apply to appellate proceedings, that seeking security as a debt recovery mechanism is an abuse of Court process and imposing a condition to pay the decretal sum before pursuing an appeal would violate Article 48 of *the Constitution*, which guarantees access to justice. The Appellant depones that the appeal arises from an application to set aside a default judgment under Order 10 Rule 11, and that the Rules allow an appeal as of right in such cases. The Appellant avers that it is a separate legal entity from its directors and that the conduct or characteristics of its director should not be attributed to the company.
 6. The Appellant claims that the Respondent is improperly trying to pierce the corporate veil in the wrong forum and it further argues it was never properly served with the plaint and summons in the original suit. That the company's registered address was P.O. Box 41684 Mombasa, but the Respondent attempted service at a different address, P.O. Box 68766-00622, which was incorrect. It contends that the delay is due to pending applications and the unavailability of typed proceedings from the lower Court, not the Appellant's fault and the Court had already accepted the Appellant's explanation for the delay and referred the file for pre-trial.
 7. The Appellant admits that it abandoned a separate judicial review application because it would not address the core issue, that of setting aside of the default judgment, which is the subject of this appeal. The Appellant claims it has a good defence on the merits, arguing that the debt is not owed and that a co-director had sufficient funds to settle it if it were legitimate. For these reasons, the Appellant urges the Court to dismiss the Respondent's application.
 8. Whereas the Appellant states that an order for security for costs is not applicable in appeal proceedings, the Supreme Court in *Westmont Holdings*(supra) clearly stated that this is a discretionary power granted to this Court and other superior Courts as long as this power is exercised within the bounds of administration of justice as expressed under Articles 48, 50 and 159 of *the Constitution*. In any case, I have gone through the rival positions of the parties and I do not think that it would be appropriate to



issue security for costs of the decretal sums and costs of this appeal for a few reasons. First, whereas the Respondent successfully applied to lift the corporate veil in the subordinate Court, and orders were made against Mr. Barre personally, the matter is now before the Court on appeal. While this ruling does not make a final determination on the appeal's merits, it is pertinent to note that the appeal is not, on its face, frivolous. The Appellant has raised a substantive issue regarding improper service of the plaint and summons in the original suit before the subordinate Court.

9. The Appellant has exhibited evidence suggesting that service was attempted at an address, P.O. Box 68766-00622 different from the company's registered address P.O. Box 41684 Mombasa. The fundamental question of whether a company was properly served before a default judgment is entered against it is a serious point of law that deserves to be heard on its merits. Denying the Appellant a hearing by imposing security for costs would be a draconian measure in light of these arguable grounds.
10. Second, I find no evidence of impecuniosity on the part of the Appellant or its directors that would persuade this Court to issue an order compelling it to furnish costs. I believe justice will be served to both parties if the appeal is heard on its merits without the Appellant having the burden of depositing the decretal sum or costs in Court.

Conclusion And Disposition

11. Consequently, the Respondent's application dated 26th September 2024 is hereby dismissed. Costs shall be in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF NOVEMBER 2025

.....

J.W.W. MONGARE

JUDGE

In The Presence Of

Mr. Kiplangat for the Respondent/ Applicant.

N/A for the Respondent.

Amos - Court Assistant

