# IN THE COURT OF APPEAL

**AT NAIROBI**

**(CORAM: OUKO (P), MAKHANDIA & SICHALE, JJ. A)**

**CIVIL APPLICATION NO. NAI 6 OF 2018 (UR 5/2018)**

**BETWEEN**

**WESTMONT HOLDINGS SDN. BHD.....APPLICANT**

**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 at Nairobi (Alnashir Visram, W. Karanja & M.* ***K. Koome, JJ. A****) delivered on 8th December 2017*

*in*

Civil Appeal No. 37 of 2017)

**********

**RULING OF THE COURT**

October, 1998 one, **Kamlesh Mansukhlal Pattni** and **Westmont Holdings SDN.BHD** "*the applicant*" instituted a suit in the High Court seeking a sum of Kshs. 150,000,000 being a refund of monies paid to Central Bank of Kenya "*the respondent*" as deposit towards the purchase of Grand Regency Hotel within Nairobi by Lynwood Development Limited "*Lynwood*", a Malaysian investor, pursuant to an advertisement placed in a local newspaper by the respondent. From the record, it is apparent that **Kamlesh Mansukhlal Pattni** withdrew his claim during the pendency of the suit leaving the applicant to soldier on. The suit was eventually heard and determined in favour of the respondent. In a nutshell, the claim was dismissed with costs to the respondent.

Aggrieved by the decision, the applicant proffered an appeal to this Court against the judgment and decree. However, before the appeal could be heard, the respondent filed an interlocutory application for security for costs in the sum of Kshs. 87,620,000. It is also prayed that the appeal be stayed pending the deposit of such security and failure thereto the appeal be struck out with costs.

The application came for *inter partes* hearing before **Visram, Karanja** and **Koome, JJ.A.** The arguments advanced by **Mr. Murgor**, learned counsel for the respondent were that the appeal was being pursued by a party or parties who do not exist in law or by individuals hiding behind the shadows of non-existing companies. That the applicant was wound up on 21st May 2002. That by an affidavit dated 21st March, 2002, one, **Jasmine C. See**, an agent of the applicant confirmed that the applicant had been wound up and accordingly lacked capacity to commence, maintain or otherwise conduct an appeal, either directly, through an attorney or firm of advocates. That being the case, there was no possibility of the respondent recovering costs awarded to it in the High Court.

It was the respondent's further case that though **Jasmine C. See** had been appointed as an agent of the applicant through a Power of Attorney, she was nonetheless a foreigner who held multiple Unites States of America passports, was a Malaysian National, and did not even reside in Kenya. That the purported principal of the appellant, Lynwood was a foreign company with no registered office or assets in Kenya.

The motion as expected was opposed. **Mr. Muite**, learned Senior Counsel submitted that the application was an afterthought, having been filed almost 10 months after the appeal was filed and when it had been fixed for hearing. According to the appellant, the application had been filed to scuttle the hearing and determination of the appeal. It was submitted that the applicant was substituted by way of an amendment of pleadings and failure by the High Court to admit the amendment was at the centre of the appeal pending hearing. That the appeal was over a deposit towards the purchase price that was paid by the applicant in 1997, thus, it offended justice for the applicant to seek security for costs while sitting on the appellant's deposit.

Having considered the application, the respective submissions thereof and the relevant law, the court ruled that:

> **"…Having considered all the foregoing guidelines and constitutional underpinnings, we do not wish to be drawn into the merits of the appeal, as that would prejudice or embarrass the Bench that will deal with it save to state that the issues raised regarding the Winding Up of Westmont which is the appellant and the multiple identities of Jasmine See who is the named agent/attorney are weighty matters in regard to the issue at hand that is security for costs. We do not think that 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 substituted 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…**
>
> **We have also considered the second line of argument that the only disclosed agent/attorney, is one Jasmine C. See who was given the Power of Attorney by Westmont to act on its behalf in this matter. In the event that Westmont lacks capacity, would the said Jasmine C. See pay the legal costs? Or whose agent is she, who is the appellant or the beneficiary of the appeal proceedings? Unfortunately, those questions were not answered by the appellant as no replying deposition was filed but only grounds of opposition. Going by the information given in the affidavit in support of the application, .... which was not controverted by Westmont, it is obvious to us that Jasmine See's identity, place of abode, and ability to guarantee the payment of costs remained questionable. It is the way Jasmine See described herself variously in the proceedings and documents before the High Court and the fact that she is a foreigner with two nationalities and multiple passports that brings into question her identity and ability to pay the costs, should the appeal be unsuccessful and she is ordered to pay the costs…**
>
> **For the foregoing reasons, we are satisfied that this is a suitable case to order the appellant, be it Westmont or Jasmine See, to deposit security to guarantee the costs of the appeal in the sum of Kenya Shillings Twenty Million (Kshs. 20,000,000)"**

Unhappy with the ruling and order aforesaid, the applicant took out a motion on notice dated 18th January 2018 seeking that this Court certifies that the following matters of general public importance are involved in the appellant's intended appeal 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 standards 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 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 Kshs. 185,500,000 be required to deposit a further Kshs. 20,000,000 in order to be heard by 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.

The grounds in support of the application are that the matters set out above were substantial ones, the determination of which will have a significant bearing on the public interest. Secondly, that the issue of security for costs in litigation is an issue of public interest and is currently settled *ad hoc* on the basis of oscillating parameters, and lastly, that it was a matter of general interest that costs should never been an impediment to access justice.

In response, the respondent filed a lengthy affidavit consisting of 85 paragraphs. Suffice to say that it gave the background of the events leading to the ruling sought to be impugned in the Supreme Court. It maintained that the order for security for costs in the sum of Kshs. 20,000,000/- was made following an application filed by the respondent pending the hearing and determination of the appeal owing to the admitted fact that the purported applicant was wound upon 21st May, 2002, and that its surrogate **Jasmine C. See** was a foreigner who did not ordinarily reside in Kenya.

Contemporaneously with the filing of the replying affidavit, the respondent also filed a notice a preliminary objection in these terms:

> 1. The purported appeal in respect of which certification is sought does not lie, as the purported notice of appeal dated 21st December 2017, by Westmont Holdings Limited is filed by a non-existent entity, and in any event, was neither a party to the proceedings in the High Court, nor the Court of Appeal.
>
> 2. Civil Appeal No. 37 of 2017 was by the order of this Court dated 8th December, 2017 struck out on 23rd January, 2018 and therefore non-existent.
>
> 3. The purported appellant in Civil Appeal No. 37 of 2017, Westmont Holdings SDN.BHD was wound up in 21st May 2002, is non-existent and therefore lacks capacity to commence, maintain or otherwise conduct this application and appeal, either directly, or through an attorney or firm of advocates.

When the application came before us for plenary hearing, **Mr. Murgor** orally submitted that; the applicant had conceded its winding up; the affidavit sworn in support of the application was incompetent since the advocate who swore the same deposed to matters that were contentious and outside his purview.

Countering the preliminary objection, **Mr. Muite** argued that the applicant was substituted by Lynwood. That the preliminary objection was not raised properly as the court had already ruled that the question of amendment of the plaint that brought on board Lynwood were matters for merit hearing and determination within the appeal itself. To counsel, therefore, the preliminary objection was not well taken

We have considered the preliminary objection, the respective submissions made thereof and this is our view;

At the heart of this matter is whether the preliminary objection was properly raised. **Newbold, J.A** (as he then was) gave us the most commonly cited definition of what a preliminary objection entails when he surmised in oft-cited case of **Mukisa Biscuit Co. Ltd. v West End Distributors Limited [1968] 986** that:

> **"…A preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all factors pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."**

He went on to warn the practitioners of law that:-

> **"The improper raising of points by way of preliminary objection does nothing but unnecessary increase costs and, on occasion confuse issues…"**

See also **William Kiprono Towett & 1579 Others v Farmland Aviation Limited & 2 Others (2016) eKLR** and **G4s Security Services (K) Ltd. V Joseph Kamau & 468 Others [2018] eKLR**.

It would appear therefore, that the test to be applied in determining whether the preliminary objection is properly raised, is whether the preliminary objection raises a pure point of law; secondly, that all facts pleaded by the other side are correct and no fact requires to be ascertained, and lastly, that what is sought does not involve the exercise of judicial discretion.

Applying the above principles to the matter at hand, the record is explicit that the issue as to whether the applicant was wound up and therefore not competent to initiate, and prosecute the appeal has previously been canvassed before **Visram, Koome** and **W. Karanja JJ.A** in the appeal pending before this Court. The same goes with the issue of the applicant being substituted with Lynwood. This was, as already stated, in the application for security for costs. The said bench did not make definitive findings with regard to the winding up of the applicant as well as whether the Lynwood was substituted in place of the appellant. The learned Judges only made preliminary findings that the applicant may well have been wound up, going by the documents filed by the respective parties and the concession by the applicant to that effect. They too made no findings whether preliminary or definitive, on the question of substitution of the applicant by Lynwood. They took the view that the two were live issues in the pending appeal and were comfortable to leave their determination to the bench that will ultimately hear the appeal. This was out of abundant caution so as not to embarrass the said bench by making findings on issues pending in the appeal.

Before this Court, **Mr. Murgor** maintained the same arguments, that he made in his application for security for costs. Similarly, **Mr. Muite** countered the objection by the same arguments he had made in the High Court in opposition to the application for security for costs. The twin issues have been reserved for determination in the main appeal. Therefore, they cannot be said to have passed the threshold of pure point of law argued on the assumption that pleaded facts are agreed. Similarly, it would appear that whether or not Lynwood came on board in place of the appellant, if at all it was wound up, is not an agreed fact and will require ascertainment.

It is therefore crystal clear to us that the preliminary objection raised was not well founded. It was not anchored on pure points of law or agreed set of facts that require no ascertainment. In the result, the preliminary objection fails and is dismissed with costs to the applicant.

**Dated and delivered at Nairobi this 19th day of July, 2019.**

**W. OUKO, (P)**

**.....**

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

**.....**

**JUDGE OF APPEAL**

**F. SICHALE**

**.....**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**