IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 37 OF 2017

BETWEEN

WESTMONT HOLDINGS SDN. BHD.....APPELLANT

AND

CENTRAL BANK OF KENYA.....RESPONDENT

(Being an Appeal from the judgment and decree (Mwongo J.,)

delivered at Nairobi on 16th December 2016

in

Milimani HCC No. 642 of 1998)

****

RULING OF THE COURT

[1] This ruling will dispose an interlocutory application by way of Notice of Motion dated 13th October, 2017 taken out by Central Bank of Kenya who is the applicant (hereinafter referred to as **CBK**). The application is brought under **Rules 27, 42** and **107 (3)** of the Court of Appeal Rules. It is seeking several orders but the long and short of them, is a prayer to secure the costs, that is, the appellant, Westmont Holdings SDN, BHD (hereinafter referred to as **Westmont**) be ordered to provide security for costs in the sum of Kshs 87, 620,000 being the approximate costs payable under the Advocates (Remuneration Order) be deposited with the court within 30 days. The CBK also prayed the **Civil Appeal No. 37 of 2016** be stayed pending the deposit of such security and failure thereto the appeal be struck out with costs.

[2] A brief background to place this matter in perspective is as follows; on 26th October, 1998, **Civil Suit No 642 of 1998** was filed at the High Court Milimani by **Kamlesh Mansukhlal Pattin** (Patni) and Westmont being the 1st and 2nd plaintiffs respectively. They were seeking a sum of Kshs.185,500,000.00 being a refund of certain sums of money paid to CBK as deposit towards the purchase of a property within Nairobi by Lynwood Company. The respondents also sought interest at commercial rates and damages for repudiation of an agreement. It seems from the record that **Patni** withdrew his claim during the course of the hearing but he was ordered to pay costs of the suit as the learned Judge found he had filed the notice of withdrawal while the matter was at an advanced stage. The suit took a good 18 years to conclude as it was at one time dismissed for want of prosecution. The suit was nonetheless reinstated by

an order of this Court differently constituted on 21st February, 2014. Thereafter the suit was heard in earnest by **Mwongo P.J.,** and the following orders were issued.

> **"a) That the plaintiffs' case fails in its entirety and is hereby dismissed.**
>
> **b) That the counterclaim fails in its entirety and is hereby dismissed.**
>
> **c) That costs follow the events. The 1st plaintiff withdrew as plaintiff during the course of the hearing, and therefore cannot escape liability for costs. The defendant CBK shall have the costs of the claim and shall pay the costs of the counterclaim."**

[3] Aggrieved, Westmont appealed against the aforesaid orders, but before the appeal could be heard, counsel for **CBK** filed the above application and insisted on its being heard first. Mr. Murgor, learned counsel teaming up with Mr. Ouma for CBK, submitted that the instant appeal is being pursued by a party or parties who do not exist in law or by individuals hiding behind the shadows of non-existing companies. According to counsel, it is common ground **Westmont** was wound up on 21st May, 2002. This fact was clearly supported by the averments contained in an affidavit of Jasmine See sworn on 21st March, 2002. The said affidavit clearly demonstrated that **Westmont** lacked capacity to commence, maintain or otherwise conduct an appeal, either directly, through an attorney or firm of advocates. That being the case, there is no possibility of **CBK** ever recovering costs awarded in the High Court, exacerbated with further litigation in the present appeal as a non-existing entity continues to engage with endless litigation for the last 19 years.

[4] Mr Murgor went on to argue that the fact that **Westmont** was wound up was well known to one **Jasmine C. See** who appeared during the trial as an agent of Westmont having been appointed vide a power of attorney. However, the said Jasmine See is a foreigner who purportedly holds multiple United States of America passports, a Malaysian national, and she does not reside in Kenya. The purported principal of Westmont that is **Lynwood Development Ltd** is also a foreign company with no registered office or assets in Kenya. For the foregoing reasons, CBK is apprehensive that Westmont does not only lack the ability to pay its costs having been wound up, its purported attorney who does not have a fixed abode and little is known about her as her particulars kept shifting from the various documents she filed in the High Court which are part of record of appeal among them the following;-

> **a) Affidavit sworn on 11th June, 2012 she is resident of Malaysia.**
>
> **b) Affidavit sworn on 11th June, 2012 she is resident of Nairobi and of P.O Box 52001 – 00100 Nairobi.**
>
> **c) Westmont Power of Attorney, 23rd October, 2001 she was of P.O Box 84199 Mombasa.**
>
> **d) Letter dated 30th March, 2009, of P.O Box 25132-00603 Nairobi.**
>
> **e) 16th December, 2011 her address is "Westmont Holdings SDN BHD".**
>
> **f) Power of Attorney; holder of American passport No. 102679283.**
>
> **g) Power of Attorney; holder of American passport No.488843903.**

From the foregoing multiple identities of Jasmine See, her true identity or place of residence are unverifiable, and in the absence of legal status of the **Westmont** counsel for CBK urged us to grant an order for security for costs as sustaining this litigation on tax payers' expense with shadowy litigants is prejudicial not only to CBK but the tax payers.

[5] This motion was opposed; Mr. Muite, learned Senior Counsel teaming up with Mr. Muriethi for

Westmont relied on the grounds of opposition filed on 1st November, 2017. Counsel went on to submit that the instant application was filed as an afterthought. For example, this application was filed almost ten months after the appeal was filed in January, 2017 and had been fixed for hearing; thus, the present application was merely filed to scuttle the hearing and determination of the main appeal. Moreover, the main case went on for hearing for many years before the High Court and no application for security for costs was ever made; counsel for CBK has not bothered to tax the costs thus the application was made in bad faith.

[6] According Mr. Muite SC, Westmont was an appointed agent of Lynwood Development LTD which was substituted by way of an amendment of pleadings and failure by the High Court to accept/admit the amendment is at the centre of the instant appeal. The appeal is over a deposit towards a purchase price which was made by the appellant's principal in 1997, thus, it offends justice for CBK to seek security for costs while sitting on this colossal sum of money with earned interests. Counsel urged us to dismiss the application and proceed to hear the appeal on its merit.

[7] We have considered this application with anxious minds while balancing the overarching objectives in the administration of justice as enunciated under **Article 50** and **159** of the Constitution that courts should aim to dispense substantive justice by allowing parties to ventilate their cases while aiming to address the core issues in dispute as opposed to peripheral issues colloquially referred to as *sideshows*. This application is principally brought under **Rule 107 (3) of Court of Appeal Rules, 2010** which deals with security for costs as follows;-

> **(3) <u>The Court may at any time if it thinks fit, direct that further security for costs be given and may direct that security be given for the payment of past costs relating to the matters in question in the appeal.</u>**
>
> **(4) Where security for costs has been lodged, the Registrar may pay out the same either by consent of the parties or in conformity with the decision of the Court and having regard to the rights of the parties thereunder."** (Emphasis added).

We are also mindful of the letter and spirit of our Constitution as stipulated under **Articles 48** which provides that**:**

> **The state shall ensure access to justice for all persons and, if any fee is required it shall be reasonable and shall not impede access to justice.**

Also **Article 50 (1**) provides that:

> **Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.**

[8] It is necessary to state that the exercise of this Court's power under **Rule 107** is discretionary. This much was stated by this Court in the case of **<u>Marco Tools & Explosives Ltd V Mamujee Brothers Ltd</u>**, [1988] KLR 730 held:

> **"As the cases show the Court has unfettered judicial discretion to order or refuse security.**
>
> **Much will depend upon the circumstances of each case, though the guidance from Noor Mohamed's case is that the final result must be reasonable and modest."**

[9] In a more recent case of:- **<u>Gatirau Peter Munya V. Dickson Mwenda</u> <u>Githinji And 2 Others,</u>** Civil Appeal No. (Application) No. 38 of 2013 [2014] eKLR this Court emphasized that in an application for further security for costs, the applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful. And the *onus* is on the applicant to prove such

inability or lack of good faith that would make an order for security reasonable.

[10] The reasons for seeking an order for security for costs was predicated on several grounds as summarized here above. First, it was submitted **Westmont**, who is the appellant was wound up and does not exist in law; secondly its agent Jasmin See who purportedly holds a Power of Attorney is a foreigner who is not resident in Kenya, has no fixed abode or known assets. The question to be answered is whether these are sufficient reasons to warrant the grant of the orders sought to furnish further security for costs. This Court in the case of **Mama Ngina Kenyatta And Another V. Mahira Housing Company,** Civil Application No. Nai 256 of 2003 [2005] eKLR gave some guidelines to be taken into account when exercising discretionary power under **Rule 107 (3).** The Court did so by appreciating and citing with approval some of the principles as set out in an English case of; **Sir Lindsay Parkinson And Company Limited V Triplan Ltd,** [1973] 2 WRR at p. 684: where Lord Denning M.R indicated the parameters that should guide the court in determining whether to order security for costs as follows;-

i. whether the claimant's claim was bona fide and not a sham;

ii. whether the claimant had a reasonably good prospect of success;

iii. whether there was admission by the defendant on the pleadings or elsewhere that money was due;

iv. whether there was a substantial payment into court or an "open offer" of a substantial amount;

v. whether the applicant for security was being used oppressively, for example so as to stifle a genuine claim;

vi. whether the claimant's want of means had been brought about by the conduct of the defendant's,such as delay in payment or in doing their part of the work;

vii. Whether the application for security was made at a late stage in the proceedings.

[11] We have also drawn some further insights from another English case which has for several years now been regarded as modern and pragmatic guide in a matter for security for costs in the case of; **Keary Developments V. Tarmac Construction,** [1995] 3 All ER 534 . The guidelines enunciated therein were to guide a court while exercising discretion on whether to order a plaintiff which was a limited liability company, to provide security for costs to a defendant in a suit. The said principles are:-

1. The court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.

2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without a more sufficient reason for not ordering security. It is implicit that a company may have difficulty meeting an order.

3. The court must balance the injustice to the plaintiff prevented from pursuing a proper claim against the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover his costs. The power must neither be used for oppression by stifling a claim particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity, nor as a weapon for the impecunious company to put pressure on a more prosperous company.

4. The court will look to the prospects of success, but not go into the merits in detail.

5. In setting the amount it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a

substantial amount.

6. Before refusing security the court must be satisfied that, in all the circumstances, the claim would be stifled. This might be inferred without direct evidence, but the court should also allow that external resources might be available.

7. The lateness of the application can properly be taken into account.

[12] 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 Jasmin 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 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.

[13] We have also considered the second line of argument that the only disclosed agent/ attorney is one **Jasmin 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 Jasmin 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 appellants as no replying deposition was filed but only grounds of opposition. Going by the information given in the affidavit in support of the application, part of which is reproduced here above, which was not controverted by Westmont, it is obvious to us that Jasmin See's identity, place of abode, and ability to guarantee the payment of costs remained questionable. It is the way Jasmin 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 un-successful and she is ordered to pay the costs.

[14] We have also taken into account the submissions by counsel for **Westmont** to the effect that this application was filed on the threshold of the hearing merely to scuttle the hearing but not to advance the interest of justice. We note this appeal was filed on 10th February, 2017 and the instant application was filed on 17th October, 2017. It is clear from the record, immediately the appeal was filed, it was settled for case management, a fact that did not augur well with counsel for CBK who questioned the motive for expediting the appeal that seemed to have been given priority over other older appeals. We do not wish to get into that controversy, all we have observed is that since the appeal was filed, there has been a flurry of activities, CBK filed a supplementary record of appeal, and several correspondence were exchanged with the Court Registry on how the appeal should proceed. In the circumstances, we are not persuaded the instant application was brought after undue delay or to abuse the court process by scuttling the hearing.

[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 twentyMillion** (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 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.

Dated and delivered at Nairobi this 8th Day of December, 2017.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR