Westmont Holdings SDN BHD v Central Bank of Kenya (Civil Application 10(EO17) of 2021) [2021] KESC 3 (KLR) (8 October 2021) (Ruling)

Neutral citation: [2021] KESC 3 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL APPLICATION 10(EO17) OF 2021

MK IBRAHIM, SCJ, PM MWILU, DCJ & VP, N NDUNGU, I LENAOLA & W OUKO, SCJJ

OCTOBER 8, 2021

BETWEEN

WESTMONT HOLDINGS SDN BHD ..... APPLICANT

AND

CENTRAL BANK OF KENYA ..... RESPONDENT

(Being an application for review of the Ruling of the Court of Appeal at Nairobi (Nambuye, Kiage, Kantai, JJ.A) dated 23rd July 2021 in Civil Application No. 6 of 2021)

A matter about the constitutionality of the award of security for costs is a matter of general public importance that warrants the exercise of the Supreme Court's jurisdiction.

Reported by Beryl Ikamari

Jurisdiction *- jurisdiction of the Supreme Court - appellate jurisdiction - matters of general public importance - whether a matter about the constitutionality of the award of security for costs was a matter of general public importance warranting the exercise of the Supreme Court's jurisdiction - Constitution of Kenya, 2010, articles 163(4)(b), 48, 50 and 159.*

Brief facts

The applicants sought a review of a Court of Appeal decision in which an application for the grant of a certificate for leave to appeal to the Supreme Court under article 163(4)(b) of the Constitution was declined.

The applicant sought certification that its intended appeal raised three matters of general public importance and they were: -

1. Whether the striking out of an appeal on grounds that security for costs was not deposited as directed was an impediment to access to justice and a violation of articles 50 and 159 of the Constitution.
2. Whether prohibitive costs contravened article 48 of the Constitution on access to justice and particularly, whether it was fair or reasonable to require a party that had been defrauded Kshs. 185,500,000 to deposit a further Kshs. 20,000,000 before being heard in a court of law.

3. Whether the fact that a respondent was holding money belonging to an appellant, which was in excess of security for costs awarded, was a relevant factor for the court to consider and whether failure to consider that factor was a contravention of articles 50 and 159 of the Constitution.

At the High Court, the applicant together with Mr. Kamlesh Mansukhlal Pattni sought a refund of Kshs. 185,500,000/= being a deposit paid towards the purchase of the Grand Regency Hotel within Nairobi by Lynwood Development Limited (Lynwood). The suit, which was initially dismissed for want of prosecution, was reinstated by the Court of Appeal in a judgment delivered in 2014. Among the preliminary objections raised by the Central Bank of Kenya (CBK) was the contention that the applicant had been wound up on May 21, 2002 and it was incapable of donating any powers or appointing any agent and therefore Lynwood could not be a party to the suit. CBK also argued that the applicant's suit had abated and that any substitution of the applicant as a party ought to have been done within one year as provided for in the Civil Procedure Rules.

As regards the preliminary objection, the High Court made the finding that there had been material non-disclosure as to who the parties were and it had amounted to the applicant stealing a match against CBK and other parties when seeking reinstatement of the suit. The High Court also found that the agency relationship between the applicant and Lynwood was undisclosed with Lynwood being an undisclosed principal. The High Court noted that at the time of the agreement for the sale of Grand Regency, the applicant did not have a power of attorney to enable it to execute the deed for the sale of the hotel. Since Lynwood was held not to be a proper party to the suit, the suit was dismissed as there was no proper plaintiff. Nonetheless, the High Court assessed the claim on merit and dismissed both the plaint and the counterclaim with costs.

The applicant lodged an appeal at the Court of Appeal. CBK then filed a notice of motion seeking security for costs amounting to Kshs. 87,620,000. The Court of Appeal made a ruling in which it ordered the deposit of Kshs. 20,000,000 as security for costs within 45 days of the ruling. The applicant sought to appeal to the Supreme Court against the ruling and sought certification that would grant it leave to file the appeal from the Court of Appeal. The Court of Appeal found that the intended appeal would not raise any issue that had a bearing on public interest or that would warrant the certification sought.

Issues

Whether a matter about the constitutionality of security for costs was a matter of general public importance that warranted the exercise of the Supreme Court's jurisdiction.

Held

1. Rule 33(5)(b) of the Supreme Court Rules, 2020 provided *inter alia* that an application for certification had to be determined on the basis of written submissions. There was no basis for the court to depart from that rule of procedure and to allow for an oral hearing as requested by CBK.
2. The issue on security for costs was determined by the Court of Appeal and it was not an issue at the High Court.
3. Considering the issues, the constitutional provisions on the issue of costs and the right to access justice, decisions of the superior courts below, the different laws and regulations on the subject matter, it was obvious that the issue of security for costs was likely to affect any litigant approaching a court of law and it therefore had a significant bearing on the general public and transcended the facts of the case. It was in the public interest for the Supreme Court to decide on the intended appeal.
4. Not all the issues raised by the applicant merited a determination by the Supreme Court. The only issue that was of general public importance was on whether an order for security of costs was unreasonable as it impeded a litigant's access to justice by imposing a condition precedent before the latter could be heard contrary to articles 48, 50 and 159 of the Constitution.

Application allowed.

Orders

i. *The originating motion application dated August 6, 2021 was allowed.*
ii. *The decision of the Court of Appeal delivered on July 23, 2021 was set aside.*

iii. *It was certified that the intended appeal involved a matter of general public importance.*
iv. *Upon the appeal being duly filed, the matter had to be heard on a priority basis.*
v. *Costs of the application had to be in the cause.*

Citations

Cases

1. Ndolo v. Ndolo — Cited
2. Vijay Morjaria v. Nansingh Madhusing Darbar & another — Cited

Statutes

1. Appellate Jurisdiction Act — Cited
2. Civil Procedure Rules — Cited
3. Constitution of kenya, 2010 — article 47,48,50,159,163(4)(b)(5) — Interpreted
4. Court of Appeal Rules — Rule 27,42,107(3) — Interpreted
5. Limitation of Actions Act — Cited
6. Supreme Court Act — section 3,15 (1),19 — Interpreted
7. Supreme Court Rules — Rule 33(5)(b) — Interpreted
8. Supreme Court Rules — Rule 24(1), 31 — Interpreted

Advocates

None mentioned

RULING

A. Background

[1] This is an originating motion dated 6th August 2021 contesting the Court of Appeal's decision (Nambuye, Kiage, Kantai, JJA) delivered on 23rd July 2021, which declined to grant a certificate for leave to appeal to this Court under article 163(4)(b) of the *Constitution of kenya, 2010*.

[2] The applicant seeks leave from this court and certification that a matter of general public importance is involved in its intended appeal in Civil Appeal No 37 of 2017 (Visram, Karanja, Koome, JJA) delivered on 8th December 2017. There are three questions proposed as being of general public importance:

a. Whether striking out an appeal, or indeed any matter, without it 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 20,000,000/= before being heard in a court of law;

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.

B. Background

(i) At the High Court

[3] At the High Court, Kamlesh Mansukhlal Pattni (Pattni) and Westmont Holdings SDN. BHD(Westmont) sued the Central Bank of Kenya (CBK) based on a plaint dated 26th October 1998 as amended on 18th October 1999. Westmont sought a refund of a sum of Ksh 185,500,000/= being a deposit paid towards the purchase of Grand Regency Hotel within Nairobi by Lynwood Development Limited (Lynwood). By way of a counterclaim, CBK sued Pattni, Westmont, and Uhuru Highway Development Limited (UHDL).

[4] At one point, the suit was dismissed for failure of any party to move the court in the six-year period between December 2002 and April 2008. An application for reinstatement was dismissed by the trial court. Later, the Court of Appeal, through a Judgment delivered in 2014 in Civil Appeal No 118 of 2013, reinstated the suit and ordered that the hearing of the same be expedited "based on the plaint dated 26th October 1998, as amended on 18th October 1999 with further amendments if necessary". The learned Judge, by consent of the parties, directed parties to submit on the issues of the status of parties and pending pleadings and applications. Having heard and considered the parties' submissions, the Judge vide a ruling dated 3rd October 2015, decided that the proper parties in the claim and counterclaim were those mentioned in the heading of the Judgment that is, Kamlesh Mansukhlal and Westmont as the Plaintiffs in the Plaint with CBK as the Defendant. In the Counterclaim, the parties were CBK as the plaintiff, Mansukhul Pattni, Westmont and UHDL as the defendants. The court also decided that all pending applications in the suit had abated. Parties were granted liberty to complete filing their respective pleadings. Liberty to appeal was also granted but remained unutilized at the close of the hearing, and no appeal was filed against the ruling either.

[5] By a notice of preliminary objection dated 8th May 2015, CBK raised 6 grounds of objection *inter alia*: that pendency of the suit offended the mandatory provisions of the Limitations of Action Act Cap 22 of the Laws of Kenya, and order 24 rule 3(2) of the Civil Procedure Rules; the purported Suit by the 2nd plaintiff, Westmont-Holdings SDB.BHD had abated and non-existent *ab initio*; 2nd plaintiff having been wound up (on 21st May 2002) was non-existent incapable of donating any powers, appointing any agent, or continuing any suit; Lynwood Development Limited(Lynwood) was not, and could not be a party and was an imposter in the suit; the trial court lacked jurisdiction to adjudicate over the suit in the absence of leave to extend the limitation of time; and the Plaintiff's claim was scandalous frivolous, vexatious and an abuse of the process of the court."

[6] The trial court decided that the preliminary objection would be determined together with the merits in the main suit. All parties thereafter filed written submissions in respect of both the objection and the merits, which were highlighted in court on 20th September 2016.

[7] CBK's main argument was that the suit offended the *Limitation of Actions Act* since Westmont was wound up on 21st May 2002 hence, it could not be substituted by any other party through a Power of Attorney. Further, that any substitution ought to have been done within a year as provided for under the *Civil Procedure Rules*. It was also CBK's case that the winding up of Westmont was not brought to the attention of neither the trial Court nor the Court of Appeal during the reinstatement proceedings. CBK challenged the substitution of Westmont with Lynwood as the claim had contractually been barred by the *Limitation of Actions Act*. Kamlesh supported the preliminary objection. Lynwood maintained that Westmont was an agent of Lynwood and stated that it remitted US $ 3, 700,000.00 to CBK for the sale of Grand Regency Hotel. Lynwood relied on a letter appointing Westmont as the agent in the transaction. Lynwood also argued that it amended its pleadings before the close of

pleadings on the strength of the Court of Appeal granting leave to the parties to specifically file a Re-amended plaint.

[8] On the issue of Westmont being wound up, it was Westmont's case that there was no evidence filed in support of this assertion. Further, that Lynwood, as the principal, had naturally stepped in pursuant to the leave of the Court of Appeal. It was further argued for Westmont that under order 1 rule 10 of the Civil Procedure Rules, the court had unfettered discretion, exercisable at its own instance, to substitute or add parties, including where there is a *bona fide* mistake. In a rejoinder, CBK argued that in an application for substitution of Westmont by Lynwood, it was confirmed that Westmont was wound up on 21st May 2002.

[9] In determining the preliminary objection, the High Court outlined two issues for determination: what was the effect of the Court of Appeal's Order; and whether the suit before it was competent. It found that there was material non-disclosure when Westmont maintained a studious silence concerning who the parties were, and the non-disclosure amounted to Westmont stealing a match against CBK and the other parties. The court noted that in its ruling of 3rd October 2014, the pleadings on record were the plaint dated 26th October 1988 and amended on 18th October 1999. The next pleading would have been an amended defence. Instead, what followed was Westmont's Re-amended plaint. Further, that although the court had granted liberty to parties to apply for amendment of pleadings none of the parties did apply.

[10] The court found that the averment by Jasmine See in an affidavit that Westmont was wound up was an admission when she took the stand and asserted the same, and on cross-examination repeated the same. The court found that neither Westmont nor Lynwood could dispute the winding up of Westmont as the deponent was the holder of powers of attorney for both companies that is, attorney for Westmont from 23rd October 2001 and for Lynwood from 5th March 2014. The trial court also noted that when it directed parties to submit in clarification of the parties to the suit, nothing was disclosed by Westmont regarding its status, and whether winding up had occurred.

[11] To answer the question whether there was a competent principal and agency relationship between Westmont and Lynwood and the scope of the agency, first, the trial court found that there was nothing to show that the agency relationship between Lynwood and Westmont had been disclosed. Lynwood was thus an undisclosed principal. The court also found that as per the letter appointing Westmont as an agent of Lynwood, it was to negotiate the purchase of Grand Regency Hotel, sign the agreement and operate the hotel on completion of purchase. As to whether Westmont had the authority as agent to institute legal proceedings, the Court found that at the time of entering into a sale agreement over the Grand Regency Hotel, neither Westmont nor Ms Jasmine appeared to have been in possession of a power of attorney enabling the execution of the deed for sale of the Hotel. Further, that whereas there was an agency relationship between Lynwood and Westmont, the scope of the powers thereunder was insufficient to bind the principal in the purchase of the Grand Regency Hotel. The learned judge concluded that Westmont, in the absence of a power of attorney, did not have the capacity to enter into an agreement for completion of the sale and purchase on behalf of Lynwood. Lynwood was held not to be a proper party to the suit to prosecute the matter or benefit from the Court of Appeal's decision. The suit was dismissed on the ground that there was no competent plaintiff in situ.

[12] Nevertheless, the court proceeded to assess the claim on merit and proceeded to dismiss both the plaint and the counterclaim with costs. Although Mr Kamlesh Mansukhlal withdrew from the case in the middle of the proceedings, he was ordered to pay costs.

(ii) At the Court of Appeal

[13] Aggrieved by the decision of the High Court, Westmont filed Nairobi Civil Appeal No 37 of 2017, *Westmont Holdings SDN BHD vs Central Bank of Kenya*. In the memorandum of appeal dated 9th February 2017, Westmont raised 12 grounds of appeal stating that the learned trial Judge erred in law and in fact in: trying to interpret and second guess the orders of the Court of Appeal that allowed amendment of pleadings, and in failing to understand that "substitution of parties" comes under the generic term of amendment of law; mismanaging the case by entertaining the preliminary objection within a trial thereby convoluting the issues of law and issues of evidence; failing to hear Westmont's application for substitution then holding that the same had abated; failing to appreciate that on the evidence before him, the CBK fully participated, facilitated and was party to the arrangements in which the Grand Regency Hotel was to be sold to Westmont and that to its knowledge , the 10% deposit of Ksh 185, 000,000 was to be paid and was in fact paid by Westmont; failing to appreciate that the Grand Regency Hotel was not a different entity from Uhuru High Way Development Limited as it was trading as the Grand Regency Hotel; failing to appreciate that on the evidence before him, there was a valid relationship between Westmont and Lynwood; holding that the sum of KES 185,000,000/- was not refundable; failing to find and hold, based on the evidence before him, that the sale fell through due to CBK's failure to allow the Westmont to carry out due diligence; failing to consider the relevant material and engaging in irrelevant matters; being overly biased against Westmont and openly favoring CBK; and dismissing the appellant's suit against overwhelming weight of evidence in support of the suit.

[14] Before the appeal could be heard, CBK filed a notice of motion application dated 13th October 2017, under rules 27, 42 and 107(3) of the *Court of Appeal Rules* seeking security of costs in the sum of KES 87, 620,000 being the approximate costs payable under the Advocates Remuneration Order. CBK also prayed that the appeal be stayed pending the deposit of such security and failure thereto, the appeal be struck out with costs. CBK's main argument was that Westmont was wound up on 21st May 2002 a fact clearly supported by the averments contained in the affidavit of Jasmine See sworn on 21st March 2002. That the said affidavit 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 was no possibility of CBK ever recovering costs awarded in the High Court and at the Court of Appeal if Westmont lost the appeal. Furthermore, that 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 maintained that Westmont did not only lack the ability to pay it costs having been wound up, but its purported attorney does not have a fixed abode, and little is known about her. Westmont argued that the application was an afterthought; CBK had not taxed its costs at the High Court; and that Westmont was an appointed agent of Lynwood.

[15] On 8th December 2017, the Court of Appeal, considering the amount in dispute, the fact that there were other costs that were ordered to be paid by the Westmont 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 the appeal, found that this was a suitable case to order 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/=). The Court ordered that 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 stood struck out with costs to CBK.

[16] Aggrieved by the ruling of the Court of Appeal dated 8th December 2017, Westmont filed a notice of appeal on 22nd December 2017 pursuant to rule 31 of the Supreme Court Rules, 2012(now repealed). On 18th January 2018, it lodged at the Court of Appeal, Civil Application No. 6 of 2018 seeking certification that a matter of general public importance is involved pursuant to articles 47, 48, 50, 159 and 163(4)(b) and (5) of the Constitution, sections 15 (1) and 19 of the *Supreme Court Act*, rules 24(1) and 31 of the *Supreme Court Rules* 2017, and the *Appellate Jurisdiction Act*. Westmont raised the following questions to involve matters of general public importance:

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.

[17] On 23rd July 2021, the Court of Appeal in dismissing the application, found the issue of award of costs or an order directing the payment of security for costs not to be a substantial one. Further that 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. It concluded that no issue had been raised for determination which would have any bearing on the public interest, and to warrant certification for determination by the Supreme Court.

C. Parties' Respective Submissions

(a) The applicant's

[18] It is Westmont's submissions that it cannot access justice on account of the obligation placed on its part by the Court of Appeal to pay security of costs of Ksh 20,000,000/-. Westmont contends that the Court of Appeal departed from the constitutional principles of unfettered access to justice and misconstrued its own rules on the question of security of costs, set a minimal threshold evincing the intention not to permit costs to be an impediment to access to justice.

[19] Relying on article 48 of the Constitution, Westmont also submits that the right to access to justice and the question whether a party should be denied a hearing on merits on account of costs is a matter that transcends the interests of the applicant and takes on a constitutional trajectory affecting Kenyans from all walks of life and should be properly weighed and adjudicated upon.

[20] Furthermore, Westmont urges that the issue of access to justice concerns foreign and domestic investors across the country and there is need to protect their investment and have any dispute over the same adjudicated upon without onerous barriers especially that of costs.

[21] While citing section 3 of the *Supreme Court Act*, articles 50, 159(2) and 24 of the Constitution, Westmont contends that this Court needs to address the burden of security of costs as it is a barrier to access to justice. Citing this Court's decision in *Hermanus Philipus Steyn v Giovanni Gnecchi-Ruscone*,

SC Application No 4 of 2012; [2013] eKLR(*Hermanus* case), Westmont maintains that the points of law arising in the intended appeal are substantial and the determination on the same will have a significant bearing on the public interest; the question in the appeal have arisen in the courts below, and have been the subject of determination; this Court should pronounce itself on the important question of costs as an impediment to access to justice; and that Westmont has set out the specific elements of general public importance which it attributes to the matter for which certification is sought.

[22] Finally, Westmont urges us to certify the intended appeal by the applicant as raising matters of general public importance.

(b) The respondent's

[23] In opposing the application, CBK filed a replying affidavit sworn by Kennedy K Abuga, the General Counsel for CBK, on 19th August 2021 and written submissions on even date. Concerning the application before us, it is CBK's submissions that the application for review of certification is a non-starter and beyond redemption, given the admitted facts, upon which the Court of Appeal's Ruling of 8th December 2017 was based. It is submitted that the application arises from the Court of Appeal's decision on security of costs, based on settled principles of law guiding the award for security for costs, which must be distinguished from a claim of access to justice, based on filling fees as espoused in article 48 of the Constitution.

[24] CBK also raises issue with the supporting affidavit Jasmine See filed in the online portal is not commissioned before a Notary public, while the hard copy is sworn before a Consular Assistant, the page containing the jurat and signature of the deponent is different from the rest of the affidavit in terms of the font and numbering of paragraphs are not similar. In response, Westmont urges the Court to rely on the hard copy pursuant to rule 12(3) of the Supreme Court Rules 2020.

[25] CBK also submits that while Jasmine See purports to have the authority by Westmont, or power of attorney by Lynwood, neither of these is annexed and or exhibited to this Court.

[26] On the issue of costs, CBK urges that whereas the state can determine or waive filing fees in respect of filing pleadings as it is enjoined to do under article 48, it has no control over the circumstances of a case, and the established principles for an order for additional security of costs of Ksh 20,000,000/- against a commercial claim of Ksh 3, 845, 862, 342. In response to these submissions, Westmont states that the sum of Ksh 20,000,000/- as ordered by the Court of appeal is a barrier to its appeal being heard.

[27] While citing the *Hermanus* case, CBK submits that the ruling does not raise matters of general public importance warranting the engagement of this Court's appellate jurisdiction, and do not transcend the circumstances of this case, and has no significant bearing on the public interest. Further, that the application does not plead, neither does it demonstrate any points of law, the determination of which will have a significant bearing on the public interest.

[28] CBK also submits that Westmont's allegations that CBK defrauded it a sum of KES 185,000,000/- as a determination of fraud, must be made by a court of law, based on evidence, no such determination has been made, or exists and therefore the application should be struck out. CBK maintains that allegations of fraud must be specifically pleaded and proven and that none was ever pleaded or proven at the High Court. On this CBK relies on the cases of *Ndolo v Ndolo* and *Vijay Morjaria v Nansingh Madhusing Darbar & another* to support its argument.

[29] While urging us to dismiss the application, CBK stated that access to justice cannot be monopolized by Westmont and must be balanced and applied to both the applicant and the respondent. CBK maintains that based on amount claimed, non-existent applicant, and contradictions on the identity of Jasmine

See, the order for security of costs cannot be an onerous financial obligation. CBK concludes by urging that Westmont has failed to demonstrate how a determination to pay additional security for costs is of importance to the general public, and how the consequences of their failure to comply with a validly issued court order is of general public importance.

D. Issues for Determination

[30] Having considered the record of the application before us and the rival submissions of the parties, the single issue for consideration before this court is whether the applicant has made a case to the satisfaction of this court to warrant us to review the denial of certification by the Court of Appeal, set it aside and grant the applicant leave to file its appeal to this Court.

E. Analysis

[31] During the pendency of the originating motion dated 6th August 2021, CBK through its advocates filed a notice of motion application dated 31st August 2021, seeking two orders namely: that this Court holds an oral hearing of the originating motion dated 6th August 2021; and that the Record of the Court of Appeal in Civil Appeal No 37 of 2017 be made available to us, for consideration during the hearing. The application is premised on the grounds that: the Record will aid the court in finding that no matters of great public importance arise therefrom; the Court of Appeal's decision and the ruling on certification sought to be appealed from were made on an examination of the entire record; and that the applicant's narrative is misleading, incomplete, and skewed. Also, in support of CBK's application is a supporting affidavit sworn by Kennedy Kaunda Abuga, CBK's General Counsel, on 31st August 2021.

[32] The procedure for disposing an application for certification is set out under rule 33(5)(b) of the *Supreme Court Rules*, 2020 which provides *inter alia* that:

> " an application for certification shall be determined on the basis of written submissions."
>
> Having considered CBK's application, the grounds in support thereto, and the supporting affidavit, we find no sufficient reason to warrant a departure from the procedure provided for in the rules. Accordingly, the notice of motion application dated 31st August 2021 fails.

[33] Having considered the application before us, the supporting affidavit, the replying affidavit and the respective parties submissions, we note that the issue of security of costs was subject of determination by the appellate court (not at the High Court) leading to the ruling delivered on 8th December 2017, where the that court found *inter alia*: "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 (Kshs 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."

[34] In declining to certify Westmont's appeal under article 163(4)(b) of the Constitution, the learned Judges of Appeal in a ruling delivered on 23rd July 2021, held that the issue of award of costs or an order directing the payment of security for costs not to be a substantial one. Further that 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. It concluded that no issue had been raised for determination

which would have any bearing on the public interest, and to warrant certification for determination by the Supreme Court.

[35] However, in this matter the questions posed by the applicant for determination as matters of general public importance are as follows:

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.

[36] Having considered the issues, the constitutional provisions on the issue of costs and the right to access justice, decisions of the superior courts below, the different laws and regulations on the subject matter it is obvious to us the issue of security of costs is likely to affect any litigant approaching a court of law hence and therefore has a significant bearing on the general public and transcends the facts of this case. We therefore find that it is in the public interest that this court settles this matter by hearing the intended appeal.

[37] Before granting leave, we wish to state that not all the questions framed by the applicant for determination merits appeal to this court. After looking at all the submissions, we hereby determine and certify the following issue as one of general public importance and which we shall consider in the intended appeal:

> " Whether an order for security costs is unreasonable as it impedes a litigant's access to justice by imposing a condition precedent before the latter can be heard, contrary to articles 48, 50 and 159 of the Constitution?"

[38] Consequently, all parties shall submit on this question at the hearing of the appeal and how its determination may affect the impugned decision of the Court of Appeal.

F. Orders

[39] As a result of the foregoing, we find that this application is for allowing which we do in the following terms:

(i) The originating motion application dated 6th August 2021 is hereby allowed.

(ii) The decision of the Court of Appeal delivered on 23rd July 2021 is hereby set aside.

(iii) It is hereby certified that the intended appeal involves a matter of general public importance.

(iv) Upon the appeal being duly filed, this matter shall be heard on a priority basis.

(v) Costs of this application shall be in the cause.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **8th Day** of **October**, **2021.**

.....

P. M. MWILU

DEPUTY CHIEF JUSTICE &

VICE-PRESIDENT

OF THE SUPREME COURT

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA