REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola SCJJ)

PETITION NO. 16 (E023) OF 2021

—BETWEEN—

WESTMONT HOLDINGS SDN BHD .... APPELLANT

—AND—

CENTRAL BANK OF KENYA .... 1ST RESPONDENT

KAMLESH MANSUKHLAL PATTNI......................... 2ND RESPONDENT

UHURU HIGHWAY DEVELOPMENT LIMITED ...... 3RD RESPONDENT

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*(Being an Appeal from the Ruling of the Court of Appeal Kenya sitting at Nairobi (**Visram, Karanja and Koome JJ. A**) delivered on 8th December 2017, in **Civil Appeal (Application) No. 37 of 2017**)*

Representation

Mr. Paul Muite, SC and Mr. Kithinji Marete for the appellants
(Kithinji Marete & Co. Advocates)

Mr. Philip Murgor, SC and Mr. George Ouma for the 1st respondent
(Murgor & Murgor Advocates)

JUDGEMENT OF THE COURT

A. INTRODUCTION

[1] This Petition of Appeal is dated 2nd November, 2021 and was lodged on 5th November, 2021. The appellant seeks to set aside the Ruling of the Court of Appeal (*Visram, Karanja and Koome JJ.A*) in **Civil Appeal (Application) No. 37 of 2017** delivered on 8th December 2017.

[2] Upon the appellant challenging the Court of Appeal's decision (*Nambuye, Kiage and Kantai JJ.A*) which declined to grant certification for leave to appeal to this Court under Article 163 (4) (b) of the Constitution, this Court through its ruling dated 8th October 2021 certified this matter as one of general public importance paving way for the filing of this appeal.

B. BACKGROUND

[3] On 11th December 1996, through a public advertisement in the local newspapers, the 1st respondent (CBK) announced its intention to sell property Number L. R. 209/9514 and all buildings comprising the Grand Regency Hotel (GRH). This was in exercise of its statutory power of sale under a charge over the said property by Uhuru Highway Development Limited (UHDL), the 3rd respondent. The charge over the property, securing the debt to CBK was executed on 21st October 1993 and was registered against the title on 31st December 1993 as IR No. 36755/17. The amount secured was Kshs. 2.5 Billion stated as owing by Exchange Bank and Kamlesh Pattni, being the balance due and owing as per the decision in ***High Court Civil Case No. 29 of 1995.***

[4] In January 1997, the 2nd respondent, Kamlesh Pattni, made a proposal to CBK for settlement of all disputes between CBK and treasury on the one hand, and himself and Pan African Bank Group (*in liquidation*), UDHL, Safariland Club Hotel Limited and Pansal Investments Limited on the other hand which would include the redemption of the suit property from the charge held by CBK. On 26th

February 1997, CBK stated its agreement that UDHL would pay to CBK the value of the suit property as determined by a joint valuation carried out by Tysons Ltd & Lloyd Masika Ltd. This was accepted by Kamlesh Pattni vide his letter dated 14th March 1997 except for unilateral charges. The terms of the agreement between CBK and Pattni on his own behalf and as an agent of UDHL, shareholder and directors of Pan Africa Group and Pansal Investment Limited were settled on 7th May 1997.

[5] Subsequently, Lynwood Development Limited (hereinafter *"Lynwood")* as the agent for the sale and purchase of UDHL, the company which is the proprietor of the hotel situated on LR No.209/9514 transacting under the name of GRH appointed the appellant as its agent for the purchase of GRH. The appellant then entered into negotiations with the 1st and 2nd respondents, culminating in the sale and purchase agreement signed on March 25, 1997 (*GRH Agreement*). The agreement was entered into between Pansal Investments Limited, Hotel Enterprises Development and Management Limited and one Mukesh Vaya, on the part of the vendors in their capacity as the shareholders of UDHL and the appellant, on behalf of Lynwood. On 1st April, 1997 Lynwood transferred a sum of Kshs. 185,000,000 to CBK as deposit towards the purchase of GRH through their respective Advocates.

[6] It is the appellant's contention that the GRH Agreement was entered into with the knowledge and participation of CBK which agreed that the deposit and the entire purchase price was being made by Lynwood directly to CBK. On the other hand, CBK acknowledged that the deposit received was in accordance with an agreement made on 7th May 1997 between it and Mr. Pattni on his own behalf and as an agent of the UDHL, shareholder and directors of Pan Africa Group (*now in liquidation*) and Pansal Investment Limited. It is their contention that it had entered into an agreement with Mr. Kamlesh Pattni and not with the appellant and therefore it did not owe the appellant any amount

[7] Subsequently, the sale having fallen through and the 1st respondent failing to refund the deposit led to the filing of a suit before the High Court.

C. LITIGATION HISTORY

(i) Proceedings at the High Court

[8] In October 1998, Kamlesh Mansukhlal Pattni and the appellant instituted a suit in the High Court seeking refund of Kshs. 185,000,000 paid to the 1st respondent as deposit towards the purchase of Grand Regency Hotel by Lynwood. They made the following prayers:

(i) *The principal sum of Kshs. 185,000,000.00 to be refunded to the 2nd plaintiff.*

(ii) *Interest at commercial rates.*

(iii) *Damages for repudiation of the agreement between the 2nd plaintiff and the defendant.*

(iv) *Costs of the suit plus interest on costs.*

(v) *Any other or further relief the Honourable court may deem just and fit to grant.*

[9] By way of a counterclaim, the 1st respondent sued Kamlesh Pattni, the appellant and the 3rd respondent citing, among other reasons, the appellant's lack of legal competence to file the lawsuit as it had already been wound up on 21st May 2002 and that, in its opinion, the lawsuit had abated. Furthermore, the 1st respondent contended that it had entered into an agreement with the 2nd respondent and not with the appellant and therefore it did not owe the appellant any amount of money.

[10] Neither of the parties took steps to progress the suit between December 2002 and April 2008. As a consequence, thereof the suit was dismissed for non-prosecution. An application to reinstate the suit was dismissed. On appeal, the Court of Appeal in ***Civil Appeal No. 118 of 2013*** reinstated the suit and ordered that the hearing of the same be expedited.

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[11] The trial judge, vide a ruling dated 3rd October 2015, determined that the proper parties in the claim and counterclaim were those mentioned in the heading of the judgment, that is, Kamlesh Pattni and Westmont as plaintiffs with CBK as the defendant. As for the counterclaim, the parties as determined by the court in the said ruling were CBK as the plaintiff, Kamlesh Pattni, Westmont and the 3rd respondent as the defendants.

[12] CBK took out a preliminary objection raising six grounds, *inter alia*: that pendency of the suit offended the mandatory provisions of the Limitations of Action Act CAP 22 Laws of Kenya, and order 24 rule 3(2) of the Civil Procedure Rules; the purported suit by the appellant had abated and was non-existent *ab initio*; the appellant having been wound up was non-existent incapable of donating any powers, appointing any agent, or continuing any suit; 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 limitation of time; and the appellant's claim was scandalous frivolous, vexatious and an abuse of the process of the court.

[13] The court determined the preliminary objection together with the merits of the suit. In determining the preliminary objection, the trial court outlined two issues for determination: what the effect of the Court of Appeal's order was; and whether the suit before it was competent. It found that Jasmine See, holder of the powers of attorney for the appellant and Lynwood, admitted that the appellant was wound up. The court noted that when it directed the parties to submit to clarify the parties to the suit, nothing was disclosed by the appellant regarding the status, and whether winding up had occurred.

[14] To answer the question whether there was a principal and agency relationship between the appellant and Lynwood and the scope of the agency, the court found that there was nothing that had been disclosed. In that regard, Lynwood was an undisclosed principal. Additionally, the letter appointing the appellant as an agent

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of Lynwood was to negotiate the purchase of GRH, sign the agreement and operate the hotel on completion of purchase.

[15] As to whether the appellant had the authority to institute legal proceedings, the court held that at the time of entering into the sale agreement neither the appellant nor Jasmine See appeared to have been in possession of a power of attorney enabling the execution of the deed for sale of the hotel. Additionally, 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 hotel.

[16] The trial judge concluded that the appellant, 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. In that regard, Lynwood was held not to be a proper party to the suit to prosecute the matter or benefit from the Court of Appeal decision. The suit was thus dismissed on the ground that there was no competent plaintiff *in situ*.

[17] Regardless, the court proceeded to assess the claim on merit and proceeded to dismiss both the plaint and counterclaim with costs. Although Kamlesh Pattni withdrew from the case in the middle of the proceedings, he was ordered to pay costs. The court proceeded to issue the following orders:

> 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.*

(ii) Proceedings at the Court of Appeal

[18] Being dissatisfied with the decision of the High Court the appellant filed **Nairobi Civil Appeal No.37 of 2017** on the following grounds citing the trial Judge for:

(a) Wholly misconstruing the claim before him by treating the same as an offshoot of what he termed as the hydra-headed Goldenberg Scandal yet it was no more than a claim for the money demonstrably and irrefutably paid to CBK in respect of which it has enjoyed benefit from 12th May, 1997.

(b) Holding that there was nothing before him to show that the agency relationship between Lynwood and the appellant had been disclosed.

(c) Having erred in law in holding that Lynwood could only enable the appellant to act as its agent by way of power of attorney thereby negating Lynwood's undisputed letter of instruction and appointment of the appellant as its agent in the matter.

(d) By holding that Lynwood and the appellant's agency agreement was imperfect.

(e) Contradicting himself by holding on the one hand that it was abundantly clear that there was an agency relationship between Lynwood and the appellant yet holding that the appellant in the absence of a power of attorney was incapable of concluding the agreement of sale and purchase of GRH.

(f) In holding that Lynwood was not competent to sue in the matter before him or to benefit from the decision of the Court of Appeal in Civil Appeal No. 118 of 2013.

(g) By disregarding the evidence before him of the 1st respondent's representations relied on by the appellant and the acknowledgement of the sum of Kshs. 185,000,000.00 yet proceeded to hold that there was no justiciable agreement with the appellant.

(h) *In holding that the 1st respondent was aware of the agreement between the parties for the sale of the GRH yet failing to hold CBK liable from the attendant representations and obligations in the said agreement.*

(i) *Misconstrued and misplaced the law of contracts in holding that the agreements for the sale of the GRH and that between 1st and 2nd respondents created through correspondence were wholly distinct and separate yet the evidence before him demonstrated that they inextricably intertwined.*

(j) *In holding that despite there being no doubt that the 1st respondent was fully aware of the GRH Agreement and facilitated the same, they were entitled to treat the amounts received on account thereof as part of a wider debt despite their full knowledge that the same was paid pursuant to the terms of the said GRH Agreement.*

(k) *Countenanced the unjust enrichment of CBK by Kshs. 185,000,000.00 that it had benefited from since 12th May, 1997 despite the overwhelming evidence that the same was paid by Westmont's principal, Lynwood, in reliance of assurances and representations made by the 1st respondent.*

(l) *Perpetrated a grave miscarriage of justice by holding that the principal sum of Kshs. 185,000,000.00 paid to the 1st respondent and interest thereof was irrecoverable.*

(m) *Misconstrued and misapplied the facts and the rules against the weight of the evidence before him and on the whole failed to do justice to Westmont and its principal.*

[19] Before the appeal could be heard on its merits, the 1st respondent filed an application dated 13th October, 2017 seeking the following orders:

i. *That the Respondent /Appellant be ordered to provide security for costs for the Applicant's costs in the High Court in the sum of Kshs.*

87,620,000/=, being the approximate costs payable under the Advocates (Remuneration) Order, deposited with this Hon. Court within 30 days.

ii. *That in the alternative to prayer 1 above, the Appellant's purported Attorney/Agents including Jasmine C. See, and its Advocates on record be ordered to provide security for the Applicant's costs in the High Court in the sum of Kshs. 87,620,000/= being the approximate costs payable under the Advocates (Remuneration) Order, deposited with this Hon. Court within 30 days.*

iii. *That the Respondent/Appellant be ordered to provide the necessary and reasonable security for the Applicant's costs for the Appeal, in the event that this Hon. Court makes an order of costs against the Respondent/Appellant.*

iv. *That in the alternative to prayer 3 above, the Appellant's purported Attorney/Agents including Jasmine C. See, and its Advocates on record be ordered to provide the necessary and reasonable security for the Applicant's costs for the appeal, in the event that this Hon. Court makes an order of costs against the Respondent/Appellant.*

v. *That the Civil Appeal No. 37 of 2016 be stayed pending the deposit of such security, failure of which, the appeal be struck out with costs.*

vi. *That the costs of this application be provided for.*

[20] In support of the application, the 1st respondent stated that they were awarded costs in the High Court which are approximately Kshs. 87,620,000. It was their assertion that the sum is not recoverable from the appellant due to its lack of existence since being wound up on 21st May 2002. As a result, it cannot legally own any assets in Kenya. In addition, the appellant's agent, Jasmine C. See, is a foreigner and does not reside in Kenya while the appellant's purported principal, Lynwood Development Ltd, is a foreign company with no registered office or assets in Kenya.

[21] The appellant in opposing the application filed grounds of opposition stating that the application had been brought too late in the day with the intent to delay the hearing which was scheduled for the next day whereas the appeal had been served upon the 1st respondent way back in February 2017. Nonetheless, the amount of Kshs. 87,620,000 had not been taxed and the 1st respondent had not requested security for costs in the High Court. On top of that, the High Court failed to accept/admit the substitution of the appellant with Lynwood, the principal, as per the re-amended plaint which issue is at the heart of the appeal.

[22] The court being mindful of the provisions of Articles 48 and 50(1) of the Constitution and placing reliance on the case of ***Gatirau Peter Munya v. Dickson Mwenda Githinji and 2 Others***, Civil Appeal No. (Application) No. 38 of 2013; drawing insights from the English cases of ***Sir Lindsay Parkinson and Company Limited v Triplan Ltd*** [1973] 2 WRR and ***Keary Developments V. Tarmac Construction*** (1953) 3 ALL ER 534; 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 the enormous amount of resources in terms of professional services and attendant costs likely to be incurred in defending the appeal, allowed the 1st respondent's application to the extent that the appellant deposits the sum of Kshs. 20,000,000 in court as security for costs failure to which the appeal would stand struck out.

(iii) Proceedings before the Supreme Court

[23] Dissatisfied with the decision of the Court of Appeal on the award for security for costs, the appellant sought certification of the matter as one of general public importance at the appellate court in **Civil Application No. 6 of 2018**. On 23rd July 2021, the Court of Appeal in dismissing the application found that the issue of award of costs or an order directing the payment of security for costs not to be a substantial one.

[24] Upon review of the decision by this Court, the matter was certified as one of general public importance and framed the issue as: *"Whether an order for security for 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"*.

[25] Based on the framed issue, the appellant raises the following grounds of appeal:

(a) *Breach of Articles 10 and 40 of the Constitution*

The appellant contends that in placing the obligation upon the appellant to deposit Kshs.20,000,000.00 before its appeal can be sustained, the Court of Appeal exonerated the 1st respondent from its obligation to ensure transparency and accountability in its dealings for the sum of Kshs. 185,000,000 paid to it by Lynwood, its principal. In so doing, it breached its proprietary rights over the same as guaranteed under Article 40 of the Constitution.

(b) *Breach of the appellant's rights under Article 48 of the Constitution*

It is the appellant's contention that its right to access to justice was subjugated when the Court of Appeal imposed the onerous obligation to deposit security for costs in the sum of Kshs.20,000,000 before its appeal could be heard and aggravated the situation by decreeing that the said appeal would stand dismissed with costs in the event the appellant did not deposit the said security for costs.

(c) *Breach of the appellant's rights under Article 50 of the Constitution*

The appellant avers that every person is guaranteed to have any dispute that can be resolved by application of the law decided in a fair and public hearing before a court. Additionally, the appellant holds the position that by imposing the requirement for the deposit of security for costs, the Court of Appeal diminished and in fact defeated the appellant's rights under Article 50.

(d) *Breach of the appellant's rights under Article 159 of the Constitution*

The appellant states that the appellate court in considering the application for security for costs before it, was enjoined not to delve into technicalities or merits of the appeal or dispute before it. It evidently strayed to the minute legal technicalities as would arise in the appeal and thereby instead of ensuring that justice was done and seen to be done proceeded to impede the appellant's quest for justice by undue regard to procedural technicalities contrary to Article 159(2)(d).

(e) *Breach of Article 259 of the Constitution*

The appellant avers that by imposing the condition of further deposit of security for costs, the Court of Appeal defeated the appellant's quest for justice thereby failing to promote the purpose, values and principles of the Constitution and also failed to advance the rule of law, human rights and the fundamental freedoms which in the appellant's view did not contribute to good governance contrary to Article 259 (1) (a) (b) (c) and (d).

[26] The appellant prays for the following reliefs:

1. *A declaration that an Order for security for costs is unreasonable as it impedes a litigant's access to justice by imposing a condition precedent before a matter can be heard contrary to Articles 48, 50 and 159 of the Constitution of Kenya.*

2. *This Appeal be allowed and the Order of the Court of Appeal in Civil Application No. 37 of 2017 delivered on 8th December 2017 be set aside and in its place an Order do issue dismissing the Notice of Motion Application dated 13th October 2017.*

3. *Pursuant to Section 21(1)(a) of the Supreme Court Act, this Court be pleased to allow Civil Appeal No. 37 of 2017 Westmont Holdings Limited Vs Central Bank of Kenya as prayed in the Memorandum of Appeal dated 9th February 2017 filed therein.*

4. *The Costs of this Appeal be awarded to the Appellant.*

5. *Any other Order this Honourable Court shall deem mete and just.*

D. SUBMISSIONS

(a) Appellant

[27] The appellant's submissions are dated 17th December 2021 and were filed on 20th December, 2021. The appellant submits that the appellate court in directing that it deposits the sum of Kshs.20,000,000.00 as security for costs before its appeal could be heard, places an impediment to its access to justice as guaranteed under Article 48 of the Constitution, which right is non-derogable under Article 24. It relies on the Canadian Supreme Court case of ***Hryniak v Mauldin (2014) 1. S. C. R*** and ***Apollo Mboya v Attorney General & 2 Others [2018] eKLR*** to buttress its argument that access to justice cannot be compromised.

[28] According to the appellant, the appellate court in exercise of its powers under Rule 107(3) of the Court of Appeal Rules 2010 (repealed) to impose additional security by one million times, was neither judicious nor in consonance with the constitution, given that the appellant had already deposited the nominal security for costs as required under Rule 107(1) of the said Rules at the time of filing the appeal.

[29] The appellant is of the view that the Court of Appeal failed to balance the interests of the parties before it ordered the appellant to pay Kshs. 20,000,000.00 as security bearing in mind that the 1st respondent holds a lien over the sum of Kshs. 185,000,000.00 which is the subject of the suit and continues to unlawfully benefit from it. Relying on the decision of ***Guff Engineering (East Africa) Ltd v Amrik Singh Kalgi & another*** [1976] eKLR, the 1st respondent submits that even in the absence of a guarantee to access to justice, the imposition of costs is not mandatory as the appellate court appears to suggest. To that end, the appellant asserts that the Supreme Court Act bestows upon this Court power to determine

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the appeal and grant the prayers sought. Whence, it prays for the appeal to be allowed.

(b) 1st Respondent

[30] The 1st respondent submissions are dated 18th January 2022 and filed on even date. The respondent states that since the appellant was wound up on 21st May 2002, there is no legal person currently before the Court. To support its assertion, the respondent referred to the case of ***Kenya Power Lighting Co. Ltd v. Benzene Holdings Ltd t/a Wyco Paints*** [2016] eKLR, where the court cited with approval the case of ***Fort Hall Bakery Supply Co. v. Fredrick Muigai Wangoe*** (1959) EA 474 to cement the position that a party seeking to maintain an action must be a party in the eyes of the law not just in name only.

[31] In any case, the 1st respondent declares that the issue of Lynwood being a proper party to prosecute the appeal was determined by the High Court's order of 3rd October 2015 which established the proper parties in the suit before it; and there was never an application filed to substitute the appellant with Lynwood or any other party for that matter. According to the 1st respondent, Lynwood has never been a party in the suit before the High Court or the Court of Appeal and cannot be party before the Supreme Court.

[32] Equally, it is the 1st respondent's argument that the right to access justice accrues to it as well because just as much as it is expensive to prosecute a claim it is also equally expensive to defend. To that end, an order for security for costs enhances the rights under Article 50 by ensuring that there is a consideration and balance of the right to access to justice and Article 159 which obligates the court to ensure justice shall be done to all irrespective of status. Similarly, the prayer for security for costs is not novel because it is given based on settled legal principles and on the circumstances of every case; and this Court's Rules also provide for them.

[33] The 1st respondent further states that the orders of the Court of Appeal which took the form of an *"unless Order"*, in striking out the appeal on failure to pay costs within 45 days, dates back to the nineteenth century in the case of ***Whistler v. Hancock*** (1878) 3 QBD 83 which recognized that once a condition on which the order was depended had been satisfied, the sanction became effective without the need for any further order. Consequently, in the 1st respondent's view, the order of the Court of Appeal on costs should be upheld.

[34] Then again, the 1st respondent asserts that with regard to the prayer that this Court allows **Civil Appeal No. 37 of 2017,** it is an affront to this Court's ruling of 8th October 2021, and to the 1st respondent's right of appeal to the Supreme Court. It cites the decision of ***Daniel Kimani Njihia v. Francis Mwangi Kimani and Another*** SC Civil Application No. 13 of 2014, where it was held that this Court had not been conceived as just another layer in the appellate court structure and decisions of the Court of Appeal should not turn this Court into a first appellate court. Similarly, the 1st respondent submits that the prayers as framed by the appellant would entail comments from the Court on the merits prematurely on issues yet to be adjudicated before the Court of Appeal.

E. ANALYSIS AND DETERMINATION

[35] The Court defined one issue for determination pursuant to its ruling dated 8th October 2021 as follows:

> "*Whether an order for security for 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*."

[36] Jurisdiction of the Court of Appeal to award security for costs and specifically in regard to the nominal amount is provided for in the law. The requirement for security for costs including additional security is not strange. Rule 107 (3) of the Appellate Jurisdiction Act states:

> *"(3) <u>The Court may at any time if it thinks fit</u>, 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."*

[37] This legislation gives the Court of Appeal authority to exercise its discretionary jurisdiction in determining whether to award further security for costs above the set nominal amount, which is set at Shs.2,000/-. This discretion ought not to be exercised whimsically but in a manner that would not impede a party's access to justice. In ***Marco Tools & Explosives Ltd v Mamujee Brothers Ltd***, [1988] KLR 730 it was stated that in exercising this discretion, it depends upon the circumstance of each case with the final result being reasonable and modest.

[38] Moreover, courts stand guided by established principles set out in two jurisprudential cases to which the appellate court directed its mind in this matter. In ***Sir Lindsay Parkinson And Company Limited V Triplan Ltd,*** [1973] 2 WRR, Lord Denning M.R set out the parameters that should guide a 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 application 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 doing their part of the work;*

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

Also, in ***Keary Development v Tarmac Construction*** (1995) 3 ALL ER 534, guidelines were laid down to guide a court while exercising discretion on whether to order a plaintiff, which is a limited liability company, to provide security for costs to a defendant in a suit as follows:

1. *The court has 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.*

[39] On that account, there being no contention as to the court's power to grant orders of security for costs as laid down in legislation, guided by the principles stated in the foregoing cases; also taking into account that this matter arises from a first appeal from the appellate court based on its discretionary pronouncements, falling outside the set of questions appealable to this Court (see ***Daniel Kimani Njihia v Francis Mwangi Kimani & another***; SC Civil Application No. 13 of 2014 [2015] eKLR); what then warrants this Court's intervention on this matter of security for costs as a matter of general public importance?

[40] In answering this question based on what this Court established as an issue for determination as a matter of general public importance, three issues arise: is imposition of additional security for costs in itself unconstitutional? What about imposing security for costs as a condition precedent to the hearing of the matter? And when does it become unreasonable and/or stifling to impose security for costs? We now proceed to address the said issues.

(a) Is it unconstitutional to impose an order for security for costs?

[41] In regard to interpretation of the Constitution, Article 259(1) of the Constitution lays down the rule of interpretation as follows: *"This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance."* In interpreting the Constitution and developing jurisprudence therefore, a court ought to take a purposive interpretation as guided by the Constitution. This was expressed by this Court in ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate***, SC Advisory Opinion No. 2 of 2012 [2012] eKLR as well as ***In the Matter***

of Interim Independent Electoral Commission, SC Const. Application No. 2 of 2011 [2011] eKLR.

[42] Courts being the entities empowered with the duty to adjudicate disputes and dispense justice, are required to be mindful of the spirit, values, and principles of the Constitution; and stand guided by the principles prescribed under Article 159 of the Constitution while exercising their judicial authority. This ensures that justice is done to all irrespective of status and in a manner that protects and promotes the purpose and principles of the Constitution. The Constitution safeguards a person's right to have any dispute resolved by the application of law decided in a fair and public hearing as provided under Article 50 of the Constitution, thereby, ensuring a party's access to justice is not violated.

[43] Article 48 states that "*the State should ensure access to justice for all persons and, if any fee is required,* ***it shall be reasonable and shall not impede access to justice***". (emphasis ours) A person as defined under Article 260 of the Constitution includes a company, association or other body of persons whether incorporated or unincorporated. A perusal of the CKRC Final Report shows that it was the intention of the drafters of the Constitution to have a properly functioning judicial system that is accessible to all persons to ensure and promote equality of all persons before the law. In their views, Kenyans stated that access to courts could be improved by reducing court fees or paying fees in instalments. The significance of the provision in Article 48 is that "poverty is no bar to litigation" and therefore, courts should consider the issue of a litigant's impecuniosity when ordering security for costs.

[44] While there is a distinction between filing fees and costs, the use of *'and'* in the constitutional provision indicates that every citizen first and foremost is entitled to access to justice. However, if any fees are required to facilitate the access to justice, then the fee should be reasonable and not impede access to justice. Hence, we can construe the fees contemplated under the constitution to

encompass any monetary payment made as a condition to access justice. This, in our view, extends to both filing fees and costs inclusive of the application for additional security for costs which is payable in the course of proceedings in the wider context of access to justice.

[45] Security for costs is defined in the **Black's Law Dictionary** Ninth Edition at page 1478 as *money, property, or a bond given to a court by a plaintiff or an appellant to secure the payment of court costs if that party loses*. The purpose of security for costs order is to alleviate the concerns of potential difficulties in seeking to recover costs. An applicant of such an order, is required to establish that the respondent, if unsuccessful in the proceedings will be unable to pay costs. The objective is to protect a party from circumstances where one is dragged to court and made to incur costs due to litigation. It is meant to prevent frivolous and vexatious litigation.

[46] In ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others:*** Civil Appeal(Application) 38 of 2013; [2014] eKLR, the Court of Appeal gave the rationale for security for costs which is to ensure firstly, *that a party is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same due to poverty; secondly, it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, is disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party.* Further, the court stated that in an application for 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. In ***Kibiwott & 4 others v The Registered Trustees of Monastery of Victory Nakuru,*** HCCC No 146 of 2004 the court there observed that for a party to succeed in an application for security for costs has to prove that the opposing party will not be able to pay the costs to be awarded in the event of the suit filed by such a party being dismissed.

[47] The rationale for security for costs therefore is aimed at balancing the overarching objectives in the administration of justice as expressed under Articles 48, 50 and 159 of the Constitution, that courts should aim to dispense justice. As such, the costs protect the defendant or a respondent against the risk that a costs order made in its favour may be rendered ineffective by the plaintiff's impecuniosity. An order for security for costs will normally affect the interest of plaintiff's access to the court system, regardless of their financial status; shield a successful defendant from litigation costs; and conserve the courts processes: costs and security for costs may discourage frivolous claims, and encourage the parties to conduct litigation in a manner that is proportional to the matters at issue.

[48] On balancing the right to access to justice and the right to security for costs, Article 24 (1) (d) of the Constitution, provides: -

> *"24 (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-*
>
> *a.* ......
>
> *d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others..."*

[49] Beyond Articles 48 and 24, what is the law governing security for costs in Kenyan courts? Does the same impede access to justice?

[50] In our judicial system, the legal position on the subject of security for costs is inexplicit. In certain instances, the amount payable is provided for in legislation or Regulations, in other cases the same is left to the discretion of the concerned court.

An example is Section 78(1) of the Elections Act which specifically provides that a person who presents a petition to challenge an election shall deposit security for costs of: *one million shillings*, in the case against a presidential candidate; *five hundred thousand shillings*, in the case of a petition against a Member of Parliament or a County Governor; or *one hundred thousand shillings* in the case of a petition against a member of county assembly. The Act also provides that "*where a petitioner does not deposit security as required, or if an objection is allowed and not removed, no further proceedings shall be heard on the petition and the respondent may apply to the election court for an order to dismiss the petition and for the payment of the respondent's costs*."

[51] In civil proceedings before subordinate courts and the High Court, the Civil Procedure Act provides that costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge has full power to determine *by whom, and out of what property and to what extent such costs are to be paid*, and shall follow the event unless the court or judge shall for good reason otherwise order under Section 27. However, Order 26 of the Civil Procedure Rules 2010, provides that in any suit the court may order for *the whole or any part of the costs any defendant or third party be given by any other party*. In any suit brought by a person not residing in Kenya, if the claim is founded on a bill of exchange or other negotiable instrument or on a judgment or order of a foreign court, *any order for security for costs* shall be *in the discretion of the court*. If the security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit. If *a suit is dismissed and the plaintiff proves that he was prevented by sufficient cause from giving the required security of costs, the court may set aside the order dismissing the suit and extend the time for giving the required security*. Here we see the Rules giving an option to have a dismissed suit reinstated if the plaintiff shows cause that he was prevented from giving the required security for costs.

[52] At the Court of Appeal, under Order 42, Rule 14, at any time after the memorandum of appeal has been served, *in its discretion, the court may order the appellant to give security for the whole or any part of the costs of such appeal.* If the appellant is *not ordinarily resident in Kenya* and *has no sufficient property in Kenya* (other than the property to which the appeal relates) the court shall order the giving of security for the whole or part of the costs of the appeal within a time to be limited in the order. *If security for costs is not given within the time ordered the court may dismiss the appeal.*

[53] Rule 107 of the Court of Appeal Rules provides that, subject to Rule 115, there shall be lodged in court on the institution of a civil appeal as *security for the costs of the appeal the sum of two thousand shillings*. Where an appeal has been withdrawn under Rule 96 after notice of cross-appeal has been given, the Court may, on the application of any person who is a respondent to the cross-appeal, direct the cross-appellant to lodge in Court as *a security for costs* the sum of *two thousand shillings* or *any specified sum less than two thousand shillings*, or may direct that *the cross-appeal be heard without security for costs being lodged*.

[54] Rule 115 provides that if in any appeal from a superior court, in its original or appellate jurisdiction in any civil case the Court is satisfied *on the application of an appellant that he lacks the means to pay the required fees or to deposit the security for costs* and that the appeal is not without reasonable possibility of success, *the Court may by order direct that the appeal may be lodged without prior payment of fees of court*, or any payment of any specified amount less than the required fees; *without security of costs being lodged*, or *on lodging of any specified sum less than the amount specified by Rule 107.*

[55] The approach in other jurisdictions is different. In New South Wales, procedural regulations provide for security for costs and the factors a court has to consider before making such an order. In that regard, r. 42.21 of the Uniform Procedure Rules 2005 makes provision on security for costs as follows:

(1) If, in any proceedings, it appears to the court on the application of a defendant-

(a) that a plaintiff is ordinarily resident outside Australia, or

(b) that the address of a plaintiff is not stated or is mis-stated in his or her originating process, and there is reason to believe that the failure to state an address or the mis-statement of the address was made with intention to deceive, or

(c) that, after the commencement of the proceedings, a plaintiff has changed his or her address, and there is reason to believe that the change was made by the plaintiff with a view to avoiding the consequences of the proceedings, or

(d) that there is reason to believe that a plaintiff, being a corporation, will be unable to pay the costs of the defendant if ordered to do so, or

(e) that a plaintiff is suing, not for his or her own benefit, but for the benefit of some other person and there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if ordered to do so, or

(f) that there is reason to believe that the plaintiff has divested assets with the intention of avoiding the consequences of the proceedings,

the court may order the plaintiff to give such security as the court thinks fit, in such manner as the court directs, for the defendant's costs of the proceedings and that the proceedings be stayed until the security is given.

(1A) In determining whether it is appropriate to make an order that a plaintiff referred to in sub-rule (1) give security for costs, the court may have regard to the following matters and such other matters as it considers relevant--

(a) the prospects of success or merits of the proceedings,

(b) the genuineness of the proceedings,

(c) the impecuniosity of the plaintiff,

(d) whether the plaintiff's impecuniosity is attributable to the defendant's conduct,
(e) whether the plaintiff is effectively in the position of a defendant,
(f) whether an order for security for costs would stifle the proceedings,
(g) whether the proceedings involves a matter of public importance,
(h) whether there has been an admission or payment in court,
(i) whether delay by the plaintiff in commencing the proceedings has prejudiced the defendant,
(j) the costs of the proceedings,
(k) whether the security sought is proportionate to the importance and complexity of the subject matter in dispute,
(l) the timing of the application for security for costs,
(m) whether an order for costs made against the plaintiff would be enforceable within Australia,
(n) the ease and convenience or otherwise of enforcing a New South Wales court judgment or order in the country of a non-resident plaintiff.
(1B) If the plaintiff is a natural person, an order for security for costs cannot be made merely on account of his or her impecuniosity.
(2) 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.
(3) 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.
(4) This rule does not affect the provisions of any Act under which the court may require security for costs to be given."

[56] We are also persuaded by the finding of the Family Court of Australia in ***Stapleton & Bryant (Security for Costs)*** [2009] FamCAFC 63; (28 April 2009) where the court found that in considering whether or not to make an order

for security for costs, matters which maybe relevant include the following: the means of an applicant to satisfy an order for costs if he or she is unsuccessful (ordinarily the means of the applicant is not alone sufficient to justify an order for costs because of the rule that poverty should not be a bar to justice; however, the financial weakness maybe relevant, for example, if the applicant is a company); the prospects of success is a relevant matter to take into consideration(ordinarily, the court will not undertake a detailed assessment of the likelihood of the applicant's success unless it can be demonstrated that there is a high probability of success or failure); whether the applicant's claim is made bona fide, whether it is genuine and not trivial, vexatious or a sham; whether or not an order for costs would be oppressive or stifle the litigation; whether or not the litigation may involve a matter of public importance; whether or not there has been delay in bringing the application; and any difficulties of enforcing an order for costs and the amount of costs to be incurred.

[57] In Canada, Rule 56 of the Civil Procedure Chapters, the court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that, the plaintiff or applicant is ordinarily resident outside Ontario; the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere; the defendant or respondent has an order against the plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay costs of the defendant or respondent; or a statute entitles the defendant to security for costs.

[58] In ***Ontario Inc. v. Ross*,** 2017 ONSC 1295, (S.C.J.), Justice Henderson stated that when making an order for security for costs, the initial onus is on the defendant to satisfy the court that it appears there is good reason to believe that the matter comes within one of the circumstances enumerated in Rule 56.01…;

once the first part of the test is satisfied, the onus is on the plaintiff to establish that an order for security for costs would be unjust…; the plaintiff can meet the onus by demonstrating that: (a) the plaintiff has appropriate or sufficient assets in Ontario or in a reciprocating jurisdiction to satisfy any order of costs made in the litigation; (b) the plaintiff is impecunious and the plaintiff's claim is not plainly devoid of merit… or (c) if the plaintiff cannot establish that it is impecunious, but the plaintiff does not have sufficient assets to meet a costs order, the plaintiff must satisfy the court that the plaintiff's claim has a good chance of success on the merits.

[59] In ***Cigar500.com inc. v. Ashton Distributors*** (2009), 2009 CanLII 46451 (ON SC), 99 O.R. (3d) 55, (S.C.J.), the court observed that when making an order for security for costs, the court should be guided by two principles namely, everyone should be able to have their day in court; and defendants need reasonable protection from claims that have no merit.

[60] Furthermore, r. 56 of the Canadian Civil Procedure Chapter, makes provision for the amount and form of security for costs in that a court has discretion in determining the amount of security, form of security, and timing for having any funds paid into court. Typically, security for costs orders are made as "pay-as-you-go" orders, providing that a certain amount is to be paid up until a given stage of the proceedings. In ***Websports Technologies v. Cryptologic Inc.,*** [2005] O.J. No. 1320 (S.C.J., Ont. master) it was observed as follows:

> *"For at least the last 20 years, the court has responded to motions for security for costs with "pay as you go" orders…Thus, if the motion is brought at an early stage in the proceedings, the quantum of costs to be posted generally does not include all costs incurred and to be incurred up to completion of trial. Instead, the quantum awarded usually covers the cost of what has been done to-date and the anticipated cost of the next step or the next few steps in the litigation process. As a result, if, after the completion of that event,*

the parties are unable to agree, they can return to court, via motion, in order to revisit the issue of quantum. If the plaintiff's financial position has not improved since the initial motion, the quantum of security to be posted is usually increased to take the parties through the next event or series of events. It is also open to the plaintiff, at the return of the motion, to demonstrate that they are now financially stable, such that no further security is required and that which has been posted may be ordered released. As a result, it is well understood that orders for security for costs are not, and cannot, be final. Circumstances change and it is therefore appropriate to revisit the issue of whether security is merited, and, if so, in what amount, from time to time (see Rule 56.07)."

[61] In ***Spot Coffee Park Place Inc. v. Concord Adex Investments Ltd.***, 2021 ONSC 978 (S.C.J. Ont. master) the court set principles and factors to apply to a motion for increased security for costs under Rule 56.07 as follows:

(i) 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;

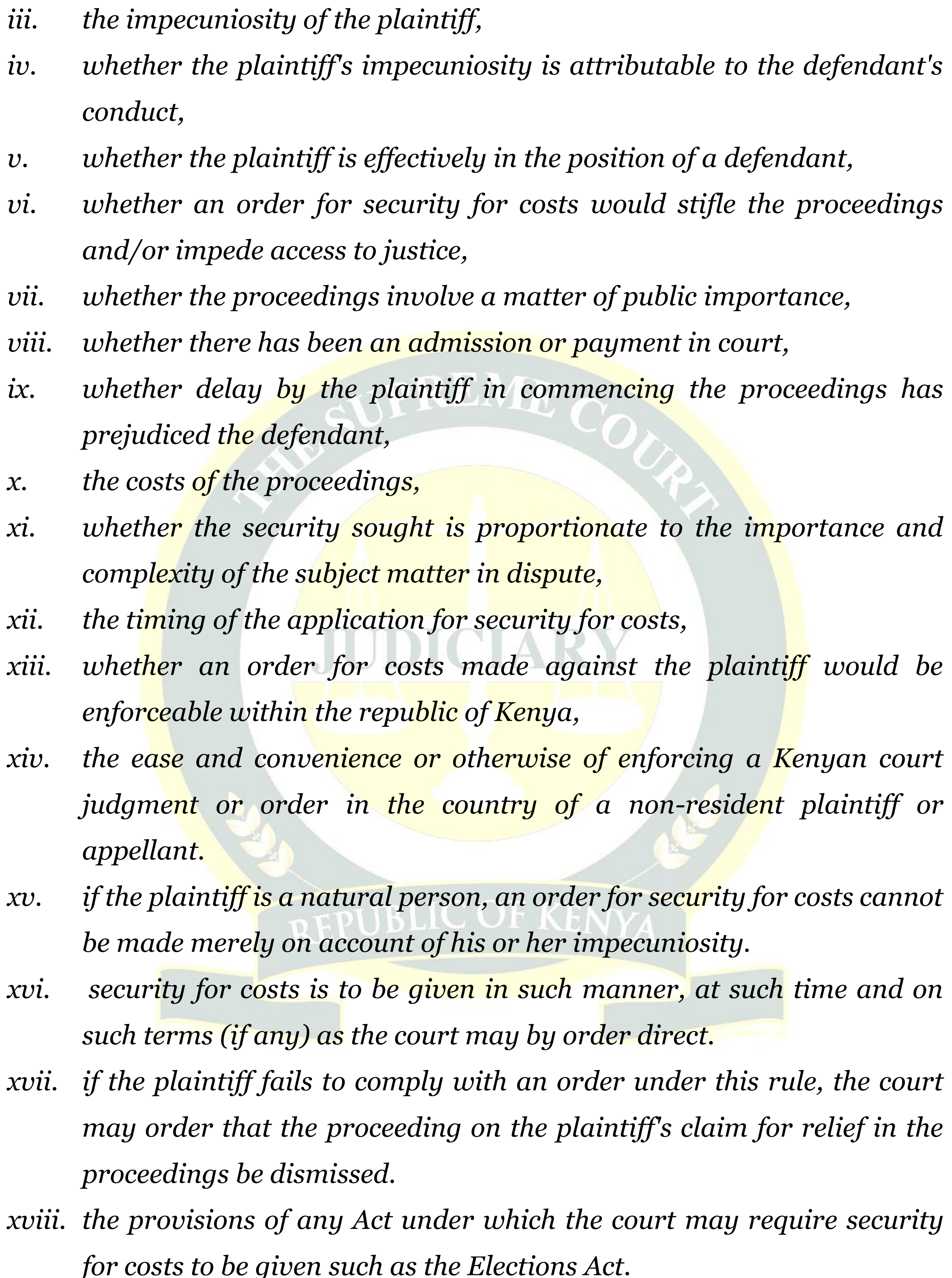
(ii) the defendant seeking increased security bears the onus of demonstrating a significant gap between the security ordered and the actual expenses which were not foreseeable and that in hindsight the original request for security for costs was based on an assessment of the complexity of the case which hindsight has established was not realistic;

(iii) 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…".

[62] Having considered the various legal provisions in Kenya and noting the jurisprudence elsewhere, this is what we make of it: the imposition of security for costs by a court is in itself constitutional; there are no clear guiding principles on what a court considers when making an order for security for costs; at times the amount payable is left to the discretion of the court; in other times, the amount payable is set out in statute or regulations; in other times, although the amount payable is prescribed by legislation or regulation, the court has the discretion of reducing or enhancing the same or even waiving payment of the same; a suit maybe dismissed for non-payment of security for costs; and a dismissed suit may be reinstated upon the appellant or plaintiff showing cause for the non-payment of ordered costs. We are also cognizant of the fact that different courts in our judicial system have crafted their own rules of procedure to govern them including those of security for costs. However, there are no standard guidelines on factors to be considered whilst making an order for security for costs.

[63] In the result, and conscious of this Court's core mandate under Section 3 of the Supreme Court Act as the Court with final judicial authority, we deem it fit to set guiding principles which will assist courts below when considering an application by a defendant or respondent for security for costs. 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.

(b) The constitutionality of imposing a condition precedent

[65] The Court of Appeal in granting the order for additional security for costs of Kshs.20,000,000 added a condition precedent in its impugned ruling. It directed as follows:

> *"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."*

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This in essence affirmed what the respondent had sought in the application before the appellate court. Is it constitutional to impose a condition precedent to an order for security for costs?

[66] Rule 107 of the Appellate Jurisdiction Act which was relied upon does not expressly provide for any condition to be imposed when the court makes an order for security for costs. We have had occasion to peruse the Appellate Jurisdiction Act, Chapter 9 of the Laws of Kenya and note that the same does not expressly make provision for the limitation of the right to access justice on the basis of security for costs. The same is, however, as demonstrated elsewhere in this Judgment extensively provided for in the Rules guiding the Court. We reiterate our finding in the case of ***Gladys Shollei v Judicial Service Commission & another, SC. Petition 34 of 2014;*** **[2022] eKLR,** that a right or fundamental freedom cannot be limited through regulations, in this case Rules.

[67] This is in contradistinction with, for instance, Rule 7 of the Supreme Court (Presidential Election Petition) Rules 2017 which stipulates that before filing a petition a petitioner shall deposit a sum of one million as security for costs. This is a prerequisite before filing a presidential election petition arising from an election as mandated under Article 163(3)(a) of the Constitution over which this Court has original and exclusive jurisdiction. However, it is important to point out that in these circumstances, the statute expressly fixes an amount payable as security, as it does for matters challenging elections arising out of an election held under the Constitution. It is therefore not left to the Court to determine the costs to be deposited as security for costs.

[68] Imposition of a condition precedent to a court order is an *'unless'* order which is defined in the English case of ***Marcan Shipping (London) Ltd v Kefalas & Anor*** [2007] EWCA Civ 463 as:

> *"Unless" orders have a long history, dating back well into the nineteenth century and it was recognized at an early stage that once the condition on*

which it depended had been satisfied, the sanction became effective without the need for further order. In ***Whistler v Hancock (1878)*** *3 Q. B. D. 83 the defendant obtained an order that unless the statement of claim were delivered within a week the action should be at an end."*

[69] To that end, we are of the considered view that a court may impose a condition precedent when imposing an order for security for costs in special and exceptional circumstances such as extraordinary and important cases, for instance, election petitions. The same should, however, be done in a manner that is reasonable and not to punish or subdue a genuine claim. In that regard, imposing a condition precedent is not in itself unconstitutional provided it is not unreasonable to the extent that it impedes a party's access to justice. The question then becomes, when does the condition precedent become unreasonable?

(c) When then does it become unreasonable?

[70] In the Supreme Court of Uganda ***Goodman Agencies Ltd v Attorney & Anor*** (Constitutional Application 1 of 2012) [2014] UGSC 124 (03 July 2014) stated as follows:

> *"If the Supreme Court were to turn away an appellant who is dissatisfied with a decision of the Constitutional Court and to strike out a Constitutional Appeal without hearing its merits merely because the appellant has not deposited further security for costs as was ordered by the Court in this case, this would be contrary to not only the spirit, but also the letter of the Constitution, as clearly provided for under Article 132(3). Access to the Supreme Court of Uganda, sitting as a final appellate court to determine constitutional appeals or applications, should not depend on how deep a constitutional appellant's pocket is. Otherwise, it would mean that those who are loaded with cash will have their constitutional appeals heard by this Court because they can overcome the financial barriers imposed by an*

order of the Court requiring payment of further security for costs of the other party."

[71] Equally, the issuance of bail and bond in criminal matters is not a tool that is to be used to punish an accused person who is regarded innocent until proven guilty; but to secure the attendance of an accused person in court. In the same way, security or further security for costs should not be used (a) to discriminate; (b) to punish; (c) to castigate; and (d) as a penal measure against a party in a manner that would deter such a party to pursue its claim as a result of failure to deposit the prerequisite costs. Instead, it should be used as an instrument that ensures that there is a balance of interests between parties in the suit. Any directive by the court that places a barrier on the path to justice obstructs the right to access justice and defeats the purpose to have the dispute determined on its merits. Such an order would be contrary to the spirit and letter of the Constitution.

[72] From the foregoing, reasonability is a matter to be determined on a case to case basis based on judicious parameters embodied elsewhere in this judgment.

[73] Turning to the case at hand, was the order for further costs by the appellate court unreasonable? It is the appellant's submission that the appellate court failed to balance the parties' interests because it ordered the appellant to pay Kshs.20,000,000 before the appeal could be heard yet the appellant had already paid Kshs. 185,000,000 to the 1st respondent, which amount is the subject of the dispute before court. However, according to the 1st respondent, the appellant has no *locus standi* as it was wound up and does not exist. What's more, the appellant's purported agent, Jasmine See, is a foreign national. It is for this specific reason that an order for security was issued.

[74] The appellate court in awarding further security for costs of Kshs. 20,000,000/- was of the preliminary view that the appellant was wound up and in their view its state of affairs placed anxiety on the 1st respondent in its ability to

recover costs in the event that the appeal was unsuccessful; Jasmine See's identity, place of abode, and ability to guarantee the payment of costs remained questionable; the amount in dispute; and the fact that there are other costs that were ordered to be paid in the High Court. The appellate court noted that it was not drawing into the merits of the appeal.

[75] This matter having been filed in October 1998, has been in the corridors of justice for over twenty years. By the time it was being reinstated by the Court of Appeal in 2013, the appellant was already wound up as it is alleged to have been wound up on 21st May 2002. Also, Jasmine See was already the holder of powers of attorney for both the appellant and Lynwood from 23rd October 2001. Bearing that in mind, no order for further security for costs was issued at the High Court when it was reinstated and heard on merit in 2013 and the time of the filing of the application for security for costs before the Court of Appeal. Therefore, the status was the same when the matter proceeded to the appellate court on appeal. Secondly, the 1st respondent alleged that Kshs.87,620,000/- was the approximate costs payable at the High Court. However, the same has not been taxed. Thirdly, the sum of Kshs. 185,000,000/- which is the subject matter of the suit is already in the possession of the 1st respondent, whether as part payment of debt or as deposit towards purchase price. Lastly, the appellate court did not elaborate how it came up with the figure of Kshs. 20,000,000.00 which is one million times above the set nominal amount of Kshs. 2,000.00 already paid at the time of filing the appeal.

[76] We are conscious of the fact that the Central Bank of Kenya, the main respondent herein, is an institution established under Article 231 of the Constitution, to which the alleged sum of money the appellant is claiming was deposited. Likewise, we cannot close our eyes to the issue of public interest while endeavouring to give the appellant access to the court system. This is a fundamental aspect of our democracy which is recognized in our Constitution.

[77] Towards that end, it is our finding, that this is a perfect example where an order of security for costs would stifle the proceedings and completely lock out the appellant out of the doors of justice. The Court of Appeal's order put an end to the appellant's litigation journey before being heard on merit thereby denying them opportunity to secure their legal rights. We must fault the Court of Appeal's finding on security for costs in this regard. Of particular interest is paragraph [12] where the Court states as follows:

> *[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. [Emphasis added]

[78] Despite acknowledging that the substitution and winding up of the appellant and their subsequent substitution by Lynwood were matters for determination on merit in the pending appeal, the Court of Appeal still proceeded to determine the same itself, an unfortunate embarrassment to the eventual trial bench.

[79] We also take issue with the Court of Appeal's finding at paragraph 13 where it is stated as follows:

> *"[13] We have also considered the second line of argument that* ***<u>the only disclosed agent/ attorney is one</u> 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."*

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[80] In the instant application, the burden of proving the appellant's inability to pay any awardable costs should the appellant fail in their appeal, was on the 1st respondent. However, in the foregoing paragraph, it is obvious to us that the 1st respondent did not discharge their burden of proof that is why, to us, the pertinent questions **"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?"** remained unanswered. The learned Judges of appeal did not consider the fact that the appellant's impecuniosity if any, may have been contributed to by the 1st respondent's action who, if proved, could be holding lien of Kshs. 185,000,000/- which the appellant alleges to have deposited to it.

[81] In our view, there ought to be a balance for the two competing rights that is, the right to access to justice and the right to security for costs. Unlike the right for security for costs, the right to access to justice is guaranteed in the Constitution and as demonstrated in Article 24 above, can only be limited by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

[82] Borrowing from these constitutional tenets above, it is our view that the grant of the said costs was unreasonable to the extent that it impacted against the appellant's appeal in the negative and sought to punish it, considering it is allegedly wound up and substitution of the appellant with its principal Lynwood is in contention. With the inability to pay the security for costs, the appellant, despite being entitled to pursue an appeal from the decision of the High Court, no longer

had recourse to litigate for the court's ultimate determination of the issues raised. Resultantly, the order for further security for costs did impede its right to access to justice contrary to Articles 48, 50 and 159 of the Constitution as the appeal stood struck out in the failure of the payment of the security for costs as ordered.

[83] We have shown that it is the duty of the Court to balance the injustice to the plaintiff pursuing a proper claim. We state that the final result in such a balance must be reasonable and modest. An order for additional security must neither impede access to justice nor stifle genuine claims and most definitely must not be oppressive. A court is not bound to make an order of a substantial amount. It is paramount that the order be just and not impede access to justice.

F. REMEDIES

[84] Taking all the above into consideration and the nature of this matter as that involving general public importance, our finding transcends beyond the parties before the court. We note that the appellant seeks us to allow Civil Appeal No. 37 of 2017 ***Westmont Holdings Limited Vs Central Bank of Kenya*** as prayed in the Memorandum of Appeal dated 9th February 2017 filed therein. Aware that the appellant's appeal before the Court of Appeal was never heard on merit, the Court of Appeal having previously acknowledged that this is a matter that should be determined on the merits, we would allow the appeal to facilitate the reinstatement, hearing and determination of ***Civil Appeal No. 37 of 2017*** at the Court of Appeal. In doing so, the circumstances call for the setting aside in entirety the order meted on the appellant by the Court of Appeal requiring it to pay a further security for costs in the sum of Kshs.20,000,000.00 as being unreasonable particularly to the extent that such further security for costs was payable as a condition precedent to the disposal of the appeal. The appellant had already paid the nominal sum of Shs.2,000.00 towards security for costs as permitted under the Rules.

[85] We were invited to determine the appeal still pending before the Court of Appeal. We are, however, not persuaded to assume jurisdiction over the merits of the appeal. Owing to the considerable nature of the dispute, the parties involved and the immense public interest, it is only proper that each of the parties be allowed to ventilate their cases to the full extent of the law. Despite the fact that the matter may have taken time in the court corridors, we reiterate the position we took in ***Hon. Gitobu Imanyara & 2 others v The Hon. Attorney General (supra)*** that:

> *"Cognizant of the period it has taken for this matter to be prosecuted, and in order to do justice for all the parties involved herein, we direct that the High Court hears and determines this matter on a priority basis."*

We add that the question which was before us, by way of certification as opposed to an outright appeal, related to the order for security for costs, as we had specifically framed. Extending the case to the merits at this stage is in our view not called for. The Court of Appeal was ready to dispose of the appeal on the merits and we see no reason to interfere with that. Moreover, considering the possible right to appeal to this court, determining the matter at this stage would deny the parties that opportunity and to an extent interfere with their right to access justice, the very essence of the dispute before us.

[86] On the issue of costs, this Court has in the past settled the law, that costs follow the event, and that, a Judge has the discretion in awarding costs as we stated in the decision in the case of ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others Petition No. 4 of 2012;*** *[2014]* eKLR. We note that the appeal has aided clarification on grey areas of our justice system and for that reason, we shall not award any costs. Each party shall bear their own costs

G. ORDERS

[87] In consideration of the foregoing, it is our considered view that there was a violation of the appellant's rights in the manner expressed above and issue orders as follows:

a) ***The petition of appeal dated 2nd November 2021 be and is hereby allowed in the following specific terms:***

   (i) A declaration be and is hereby made that the order for the security of costs made in Civil Application No. 37 of 2017 delivered on 8th December 2017 is unreasonable as it impedes the appellant's access to justice by imposing a condition precedent before a matter can be heard contrary to Articles 48, 50 and 159 of the Constitution of Kenya.

   (ii) This Appeal be allowed and the Order of the Court of Appeal in Civil Application No. 37 of 2017 delivered on 8th December 2017 be set aside and in its place an Order do issue dismissing the Notice of Motion Application dated 13th October 2017.

b) ***The matter is hereby remitted to the Court of Appeal for determination of the appeal on merit.***

c) ***Each party shall bear their own costs.***

THE SUPREME COURT JUDICIARY REPUBLIC OF KENYA

It is so ordered

DATED and **DELIVERED** at **NAIROBI** this **17th** day of **February, 2023.**

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P.M. MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

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S.C. WANJALA
JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

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I. LENAOLA
JUSTICE OF THE SUPREME COURT

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

REGISTRAR
SUPREME COURT OF KENYA