



**Cape Holdings Limited (Under Administration) v Synergy Industrial Credit Limited;
Sanghrajka (Interested Party) (Miscellaneous Application 114 & 126 of 2015 (Consolidated))
[2024] KEHC 14590 (KLR) (Commercial and Tax) (19 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14590 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 114 & 126 OF 2015 (CONSOLIDATED)
JWW MONG'ARE, J
NOVEMBER 19, 2024**

BETWEEN

CAPE HOLDINGS LIMITED (UNDER ADMINISTRATION) APPLICANT

AND

SYNERGY INDUSTRIAL CREDIT LIMITED RESPONDENT

AND

JAYSUKHLAL BHAICHAND SANGHRAJKA INTERESTED PARTY

RULING

Introduction & Background

1. This ruling relates to the applications dated 5th July 2023, 6th May 2024 and 8th May 2024 by the parties herein. The three applications for the court's determination by the Applicant ("Cape Holdings"), the Respondent ("Synergy") and the Interested Party (MR. Jaysukhlal Bhaichand Sanghrajka). Before delving into the same, I think it will be germane to set out a brief historical and factual background of the dispute involving the parties for context and ease of reference.
2. This background has been captured by various superior courts, however, the recent Court of Appeal decision dated 12th July 2024 in I&M Bank Kenya Limited & another v Synergy Industrial Credit Limited & 2 others [2024] KECA 855 (KLR) in my view aptly captured the whole case in detail and I will rehash the same. The dispute between the parties involved the aborted sale of a certain prime property on "14 Riverside," in Nairobi's Westlands area being L.R. No. 209/19436 (IR 120877) (the suit property). Since the sale fell through, Synergy as the buyer demanded payment of some Kshs. 750 million that it had paid to Cape Holdings as the seller. Thus, was birthed a gigantic legal battle that has lasted for nearly a decade and a half.



3. The dispute was first referred to a sole arbitrator, Mr. Ochieng Oduol who, by an award made and published on 30th January 2015 allowed Synergy's claim and awarded it Kshs.1,666,183,000.00/= in full and final settlement of its claim against Cape Holdings, which sum was to attract compound interest at the rate of 18% per annum from 1st January 2015 until payment in full. Cape Holdings' counterclaim was dismissed with costs. Dissatisfied, Cape Holdings applied to this Court to set aside the Award in its entirety, which application was allowed by Kariuki, J. in *Cape Holdings Limited v Synergy Industrial Credit Limited* [2016] KEHC 8530 (KLR). Synergy was aggrieved with this decision and appealed to the Court of Appeal which ruled that there was no right of appeal thereto under section 35 of the *Arbitration Act* and therefore, the appeal was struck out.
4. Aggrieved, Synergy escalated the matter to the Supreme Court and in a majority decision dated 19th December 2019 in *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] KESC 12 (KLR) faulted the Court of Appeal and declared that there does exist a residual right of appeal to the Court of Appeal under section 35 of the *Arbitration Act* but under very narrow and circumscribed grounds, which must first be demonstrated to the Court of Appeal's satisfaction in limine. The apex court then directed the Court of Appeal to hear Synergy's stricken appeal against the Court's (KARIUKI,J.) setting aside of the Award which was done in *Synergy Industrial Credit Limited v Cape Holdings Limited* [2020] KECA 208 (KLR) and a judgment delivered on 6th November 2020 where Synergy's appeal was allowed and in effect, the Award was reinstated.
5. Cape Holdings was dissatisfied with this judgment and filed Sup. Civil Application No. E006 of 2020 dated 16th November 2020 seeking the Court of Appeal's certification that it had an appeal from the aforesaid judgment that raised matters of general public importance. Unpersuaded, Court of Appeal dismissed the application on 5th March 2021(*Cape Holdings Limited v Synergy Industrial Credit Limited* [2021] eKLR).
6. Undeterred, Cape Holdings approached the Supreme Court invoking Article 163(5) of *the Constitution* for the apex court to review this Court of Appeal's refusal of certification and itself certify the intended appeal thereto as one raising matters of general public importance. By a ruling dated 8th October 2021 the apex court in *Cape Holdings Limited v Synergy Industrial Credit Limited* [2021] KESC 4 (KLR) disallowed that application and clarified that once the Court of Appeal assumes the limited and exceptional jurisdiction of entertaining an appeal under section 35 of the *Arbitration Act*, no appeal would lie from the Court of Appeal's consequential judgment to the Supreme Court from such judgment, and the apex court was in fact bereft of jurisdiction to entertain such an appeal.
7. With the Supreme Court having pronounced itself, the Court of Appeal's affirmation of the Award crystalized and the said award was on 25th March 2021 adopted as a decree of this court in this matter where the decretal sum was stated to be Kshs. 4,497,776,260.35/=. As Cape Holdings did not pay the decretal sum, Synergy instituted execution proceedings under Order 22 Rule 48 of the Civil Procedure Rules, in consequence of which a Notice to Show Cause was issued.
8. The execution application sought to attach the suit property over which the arbitration dispute arose, as it was the only property in Cape Holding's name at the time, that was unencumbered. Synergy had earlier obtained an order on 1st September 2011 in *Synergy Industrial Credit Limited v Cape Holdings Limited* (Environment & Land Case 440 of 2011) by which a caveat was registered on the suit property on 7th September 2011. It had also published a 'Caveat Emptor' in the 13th September 2011 issue of the Daily Nation Newspaper.
9. While the execution process was ongoing, it came to Synergy's attention, vide an advertisement carried in the 12th October 2021 issue of the Daily Nation, that Cape Holdings had been placed under



Administration by I & M Bank ('the Bank') effective that date. This was on the claim that the Bank had on 15th December 2020 created a fixed and floating debenture over all the assets in the aggregate sum of 25 million US Dollars and registered it at the Companies registry on 8th January 2022.

10. The Bank appointed MS. vruti shantilal shah, as Administrator over Cape Holdings and this development meant that Synergy could not proceed and continue with the execution that was underway unless with leave of this Court, which it promptly sought through an application filed on 22nd October 2021. In a ruling of the court (MABEYA J.,) dated 10th December 2021 in re Cape Holdings Limited [2021] KEHC 366 (KLR), Synergy's application was allowed and leave was granted for it to proceed with execution against Cape Holdings in the present suit. The aggrieved parties filed consolidated appeals before the Court of Appeal referred to above(I&M Bank Kenya Limited & another v Synergy Industrial Credit Limited(supra)] but the said appeals were dismissed on 12th July 2024.
11. With the above background, I now turn to the present applications. Cape Holdings' application is dated 6th May 2024 and is made under Articles 10(2)(b), 25,40, 50 and 159 of *the Constitution*, sections 1A, 1B, 3A and 26 of the *Civil Procedure Act*, Order 21 Rules 7,8 and 17 of the Civil Procedure Rules and section 4(4) & (5) of the *Limitation of Actions Act* and seeks to set aside the Decree dated 25th March 2021 and that the terms of the decree be settled to correctly reflect the substance of the Award and limit the recoverable interest rate in accordance with the sections 4(4) & (5) of the *Limitation of Actions Act*.
12. It further seeks the court to set aside the interest at commercial rates of 18% per annum and apply interest at court rates of 12% per annum on the Kenya Shilling amounts and interest at United States Dollar rate of 3.5% applied by I & M Bank for the dollar amounts. That the court do order and specifically direct that an account be taken on the various amounts for each amount paid on diverse dates and limited in accordance with sections 4(4) & (5) of the *Limitation of Actions Act* and in accordance with the in duplum rule provided that the period of 6 and 2 years respectively is not exceeded as tabulated in the application therein.
13. Cape Holdings further seeks that the court should only issue a prohibitory order limited to Synergy's former purchaser's interest under the 14 Agreements for Sale dated 8th February 2011 in respect of the "A" Wing & "B" Wing on Ground Floor and on the First, Second, Third, Fourth, Fifth and Sixth Floor of the Building called Synergy Square on the suit property to which land is registered as Number LR 120877/ 1.
14. Cape Holdings' application is supported by the grounds on its face and the supporting affidavit of PONANGIPALLI VENAKATA RAMANA RAO, one of its Administrators, sworn on 6th May 2024. It is opposed by Synergy through the replying affidavit of its Legal Officer, JACOB MBAE MEEME, sworn on 20th May 2024 and Grounds of Opposition of the same date.
15. Synergy's application dated 8th May 2024 is made under section 1A, 1B and 3A of the *Civil Procedure Act*, and Order 51 of the Civil Procedure Rules and seeks that pending the execution of the decree issued by the court on 25th March 2021, the court do issue a Prohibitory Order prohibiting the Cape Holdings whether by itself or its agents from transferring, charging, alienation, renting, possessing, selling, divesting, dissipating, registration of any dealings and/or any further dealings in respect of all the properties known as Kajiado/Olchore Onyore/4604, Kajiado/Olchore Onyore/4634, Kajiado/Olchore Onyore/1416, and Kajiado/Olchore Onyore/26902 and registered in the name of Cape Holdings Limited.
16. The application is supported by the affidavit of JACOB MBAE MEEME sworn on 8th May 2024 and it is opposed by Cape Holdings through the Notice of Preliminary Objection dated 17th May 2024.



17. The interested Party's application is dated 5th July 2023 and filed under Section 1A, 1B, 3A, section 80 of the Civil Procedure Act, Order 40 Rule 7, Order 45 Rule 1 and Order 51(1) of the Civil Procedure Rules 2010. The application seeks to stay execution and review of the orders of the Ruling of this court (CHEPKWONY, J.) on 14/6/2023 and resultant order thereof in so far as the Court issued a prohibition order stopping any further dealings and/or otherwise dealing with all that property known as LR Nairobi/Block 92/259 registered names of BIPINCHANDRA BAICHAND SANGRAJKA, VIPINCHANDRA BAICHAND SANGRAJKA and JAYSUKHLAL BAICHAND SANGRAJKA (the suit property) pending further orders of the Honourable Court among other orders. The said application was premised on the grounds set out on its face and the supporting affidavit of JAYSUKHLAL BAICHAND SANGRAJKA. The application was opposed by Synergy Industrial Credit through a replying affidavit sworn by its legal officer.
18. The applications were canvassed by way of oral and written submissions which are on record and which I will make relevant references to in my analysis and determination below.

Analysis and Determination

19. I have carefully gone through the applications, the responses thereto and submissions. I propose to first deal with Cape Holdings' application that seeks to review the interest awarded in the arbitral proceedings and the removal of the prohibition order issued by the court on 5th January 2022. On the issue of review of interest, I have gone through the grounds advanced by Cape Holdings in its application and I am inclined to agree with Synergy's submission that this is yet another attempt by Cape Holdings to review and upset the Award when the same has been affirmed by this court through the decree issued and the decisions of the Court of Appeal and the Supreme Court. Such grounds now being raised by Cape Holdings were always available to it when it sought to set aside the Award before the Court of Appeal and ought to have been raised then. The same could also have been raised by Cape Holdings when Synergy applied to have the Award recognized and adopted as an order of the court. I agree with Synergy's submission that it is too late in the day to challenge the Award when the same has already been challenged and superior courts have rendered merit-based decisions on these challenges. It would indeed be an affront to the doctrine of res judicata for the court to review the interest awarded to Synergy when the same was determined or ought to have been determined earlier on.
20. It is also late in the day to challenge the contents of the decree when the Court of Appeal in I&M Bank Kenya Limited & another v Synergy Industrial Credit Limited (supra) confirmed that the decree has already been executed and that the execution was complete. This also puts to rest Cape Holdings' quest to remove the prohibition order as the Court of Appeal already declared that the propriety of the prohibition order was never challenged and the execution was completed by attachment on 14th January 2022 when the prohibitory order was registered against the title of the suit property. This prayer by Cape Holdings is obviously spent and overtaken by events and cannot be granted in light of this pronouncement by the Court of Appeal.
21. Without further belabouring of these points, I find that Cape Holdings' application to review the interest awarded in the Award and remove the prohibition order registered against the suit property have no merit in light of the Court of Appeal's previous findings on the merits of the Award and its pronouncement that the attachment of the suit property and registration of the prohibition order were proper. Cape Holdings' application dated 6th May 2024 therefore fails.
22. The finding by the Court of Appeal above also disposes of the Interested Party's application dated 5th July 2023 that sought to review the ruling of this court dated 14th June 2023 based on the ruling by



the Court of Appeal dated 9th June 2023 in Synergy Industrial Credit Ltd v I & M Bank & another [2023] KECA 661 (KLR). The stay of execution orders being relied upon by the Interested Party have now been discharged by the Court of Appeal's decision and Synergy can now continue with executing the decree meaning that it can complete execution of the property Title Number Nairobi/Block 92/259(viously LR. No. 5884/16) by attaching the same.

23. I now turn to Synergy's application that seeks prohibition orders in respect of various properties to wit; Kajiado/Olchore Onyore/4604, Kajiado/Olchore Onyore/4634, Kajiado/Olchore Onyore/1416 and Kajiado/Olchore Onyore/26902. I do not think it is in dispute that Order 22 of the Civil Procedure Rules provides for execution of decrees and orders and that Rule 48 therein provides that: "Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property".
24. Synergy deponed that the aforementioned properties belong to Cape Holdings, and whereas I am agreement with Cape Holdings' Objection that the search annexed by Synergy in its deposition as being for the Kajiado properties belong to a different property, I note that in Synergy's application dated 18th June 2024, they annexed search copies indicating that said Kajiado properties belong to Cape Holdings. It should not be lost that for the court to acquiesce to an application for attachment, the court must be satisfied that the property sought to be attached belong to the respondent (see Eco Bank Kenya Limited v Harvey Engineering Limited, Stanley Nduati Mwangi & Joseph Mburu Muigai [2018] KEHC 5359 (KLR)). As the said searches of the Kajiado properties in that application by Synergy form part of the record, I find no prejudice in finding that it was has been demonstrated to the court's satisfaction that the Kajiado properties belong to Cape Holding. I find therefore this application has merit and I allow the same.

Conclusion and Disposition

25. In the upshot, it is my finding that the application by Cape Holdings dated 6th May 2023 and that of the Interested Party dated 5th July 2023 lack merit and hereby dismissed. Subsequently Synergy's application dated 8th May 2024 is therefore allowed. Effectively the Court grants that a prohibition order do issue prohibiting Cape Holdings whether by itself or its agents from transferring, charging, alienation, renting, possessing, selling, divesting, dissipating, registration of any dealings and/or any further dealings in respect of all the properties known as Kajiado/Olchore Onyore/4604, Kajiado/Olchore Onyore/4634, Kajiado/Olchore Onyore/1416 and Kajiado/Olchore Onyore/26902 and registered in the name of Cape Holdings.
26. Costs follow the event. This matter has been in court for a very long time and the court notes that the same has been litigated to the highest courts and back to this court severally. The court finds therefore that Synergy which is the successful party herein is deserving of costs of the applications herein and directs that the same be paid to Synergy by the Respondent (Cape Holdings) and the Interested Party.

DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 19TH DAY OF NOVEMBER 2024

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-



Mr. Ahmed Nassir (SC) and Ms. Asli Osman for the Applicant-Synergy Industrial Credit Ltd.

Mr. Wawire holding brief Mr. Allen Gichuhi (SC) for the Respondent- Cape Holdings.

Mr. Mikwa holding brief for Mr. Gitonga for the Interested Party.

Amos - Court Assistant

