

**IN THE COURT OF  
APPEAL AT NAIROBI**

**(CORAM: GATEMBU, OCHIENG & MUCHELULE,  
JJ.A.) CIVIL APPLICATION NO. SUP. E004 OF 2024**

**BETWEEN**

**CAPE HOLDINGS LIMITED.....APPLICANT**

**AND**

**SYNERGY INDUSTRIAL  
CREDIT LIMITED.....RESPONDENT**

*(Being an application for leave to appeal against the  
Ruling of the Court of Appeal of Kenya at Nairobi  
(M'Inoti, Sichale & J. Mohammed, JJ.A.) dated 8<sup>th</sup>  
December 2023*

*in*

***Civil Appeal (Application) No. 81 of 2016)***

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**RULING OF THE COURT**

1. In its application by Notice of Motion dated 30<sup>th</sup> January 2024 as amended on 2<sup>nd</sup> February 2024, the applicant Cape Holdings Limited (Cape Holdings) seeks an order for certification that its intended appeal against the Ruling of this Court dated and delivered on 8<sup>th</sup> December 2023 in Civil Appeal No. 81 of 2016 raises matters of general public importance. It seeks leave to appeal against that ruling to the Supreme Court of Kenya.
2. The matters of general public importance on which the applicant wishes the Supreme Court to pronounce, if leave is granted, include: the question whether an arbitrator can award relief that is not sought by either party; whether a

judgment can override Kenya's international treaty

obligations; what appropriate reliefs a court should grant under Section 35 of the Arbitration Act upon setting aside an arbitral award; and whether an award in excess of jurisdiction contravenes a party's constitutional rights to equity, fair hearing, right to property, equal protection and benefit of the law. The application is supported by an affidavit sworn by a director of the applicant, Vinaychandra Sanghrajka.

3. The respondent, Synergy Industrial Credit Limited (Synergy), opposed the application through a replying affidavit sworn by its legal officer Jacob M. Meme as well as an amended Notice of Preliminary Objection asserting that the application is *res judicata* on account of a ruling of this Court in Civil Application No. E006 of 2020 delivered on 5<sup>th</sup> March 2021 and a ruling of the Supreme Court of Kenya in E007 of 2021 delivered on 8<sup>th</sup> October 2021. The preliminary objection was subsumed in the respondent's reply during the hearing of the application before us on 1<sup>st</sup> April 2025.
4. A summary of the history is that a dispute between the parties was referred to arbitration culminating in an arbitral award in favour of Synergy dated 30<sup>th</sup> January 2015 for Kshs. 1,666,118,183.00 and interest. Cape Holdings successfully applied to set aside that award before the High Court, which did so in a ruling dated 11<sup>th</sup> March 2016.
5. Synergy then moved this Court through Civil Appeal No. 81 of 2016 to challenge that ruling. That appeal was struck out on grounds that there was no right of appeal under

Section

35 of the Arbitration Act. Synergy then successfully moved to the Supreme Court which held that in exceptional and limited circumstances the Court of Appeal has residual jurisdiction to entertain appeals arising from Section 35 of the Arbitration Act. The Supreme Court directed this Court to hear and determine Synergy's appeal from the ruling of the High Court dated 11<sup>th</sup> March 2016. This Court did so and rendered its judgment dated 6<sup>th</sup> November 2020, setting aside the ruling of the High Court dated 11<sup>th</sup> March 2016, with the result that the arbitral award in favour of Synergy remained intact.

6. Cape Holdings was dissatisfied with the judgment of this Court dated 6<sup>th</sup> November 2020. Intending to appeal it before the Supreme Court, it applied, like it has again done now, for certification that the intended appeal from that judgment raises matters of general importance. That application, being Civil Application No. Sup. E006 of 2020 failed and was dismissed by this Court in a ruling delivered on 5<sup>th</sup> March 2021.
7. Cape Holdings then moved to the Supreme Court with an application E007 of 2021 seeking review of this Court's decision declining to certify that its intended appeal from the judgment of this Court dated 6<sup>th</sup> November 2020 raised matters of general public importance. The Supreme Court dismissed that application in its ruling delivered on 8<sup>th</sup> October 2021. In doing so, the Supreme Court cautioned that where this Court exercises its limited residual jurisdiction to hear appeals from decisions under Section



of the Arbitration Act, “no further appeal should ordinarily lie therefrom” to the Supreme Court.

8. It appears that after the ruling of the Supreme Court of 8<sup>th</sup> October 2021, further proceedings were taken before the High Court in relation to execution.
9. In March 2022, Cape Holdings, having failed in its endeavours to appeal to the Supreme Court against the judgment of this Court dated 6<sup>th</sup> November 2020, devised a new strategy and returned to this Court with its application dated 1<sup>st</sup> March 2022 seeking orders for the review and setting aside of the judgment dated 6<sup>th</sup> November 2020. That application was dismissed by the Court in its ruling delivered on 8<sup>th</sup> December 2023. That ruling is the subject of the present application.
10. In dismissing the application for review, the Court stated at paragraph 38:

***“Entertaining applications for review of judgments of this Court on the allegation that the Court has misinterpreted or misapplied the law would be the shortest and surest way to create an illegitimate tier of appeals against the decisions of the Court. There is a good reason why the makers of the Constitution of Kenya did not confer on the Supreme Court, the apex court in the land, ordinary appellate jurisdiction from decisions of the Court of Appeal, to correct perceived errors of the law made by the Court. If the Supreme Court has no jurisdiction to entertain appeals from this Court on grounds that it misapplied the law, how can the Court of Appeal itself be asked to routinely review its decisions on the same grounds? It is also not lost to us that this application for review of the judgment of the Court was made only after*”**

**the Court found that the applicant's intended to appeal to the Supreme Court**

**did not raise any matters of general public importance to justify a certificate to the apex court. The Supreme Court was similarly not convinced it had any basis for entertaining the applicant's intended appeal to that Court."**

11. Cape Holdings did not give up and intends to challenge that ruling before the Supreme Court and hence the present application which was canvassed before us on 1<sup>st</sup> April 2025.
12. During the hearing of the application, learned Senior Counsel **Allen Gichuhi** appeared for Cape Holdings and orally highlighted his written submissions dated 22<sup>nd</sup> February 2024. Learned Senior Counsel **Ahmednassir Abdullahi** appeared with **Ms. Oman** for Synergy and orally highlighted his written submissions dated 16<sup>th</sup> April 2024. As already indicated the preliminary objection was canvassed in the course of hearing the application.
13. Counsel **Gichuhi** submitted that when the Supreme Court in its decision in **Synergy Industrial Credit Limited vs. Cape Holdings Limited [2019] eKLR** remitted the matter back to the Court of Appeal, it held that courts must be guided by Section 35 of the Arbitration Act to ensure that courts are able to correct specific errors of law which left alone would lead to miscarriage of justice. However, it was submitted, that in its judgment delivered on 6<sup>th</sup> November 2020, this Court reinstated the arbitral award in its entirety, holding that the arbitrator had power to award compound interest, income opportunity loss and foreign exchange loss which are outside the express terms of the

contract; that as a result an arbitrator can re-write the contract of the parties which goes against arbitration law; that this Court thereby created new

jurisprudence granting an arbitrator discretion and excess powers to award relief not sought by either party; that the reinstatement of the arbitral award in its entirety by this Court occasioned injustice; that in doing so, the Court invoked jurisprudence from the United States which is based on the Federal Arbitration Act which is not applicable in Kenya.

14. It was submitted that in its application for review, Cape Holdings had sought to correct the errors of law in the judgment of this Court which conflicts with Section 35 of the Arbitration Act, and which has occasioned gross miscarriage of justice. It was urged that the decision goes against public policy in Kenya and that as demonstrated by the issues framed for reference to the Supreme Court in the intended appeal, the applicant has met the criteria for certification established by the Supreme Court in the case of **Hermanus Phillipus Steyn vs. Giovanni Gnechchi-Ruscione [2013] eKLR.**
15. It was submitted that contrary to the claim by Synergy that the application is *res judicata*, the matters raised in the present application have not previously been determined.
16. Counsel **Ahmednassir** for Synergy, on the other hand in invoking the dictum of Lord Templeman in **Ashmore vs. Corp of Lloyd's [1992] 2All E R 486** urged that the present application is no more than a strategy “to obfuscate and cloud germane issues” and is frivolous and the object is to delay the just and fair conclusion of the matter.

17. Counsel submitted that the six issues identified by the applicant for consideration by the Supreme Court in the intended appeal and claimed to be matters of general public importance “touch on the arbitrator’s award dated 30<sup>th</sup> January 2015” and are not issues that were before the Court in dealing with the review application.
18. It was urged that the applicant is not, in its intended appeal to the Supreme Court, challenging the refusal by this Court to allow the review, but rather, the applicant intends to challenge the arbitral award.
19. Moreover, it was submitted, the application is *res judicata* having been the subject of a previous certification applications and rulings by this Court in Civil Application No. Sup E006 of 2020 and by the Supreme Court in E007 of 2021 respectively; that the Supreme Court was clear that arbitration matters should end in this Court. It was submitted that to the extent that this Court is the final court in arbitration matters, and to the extent further that the Supreme Court has pronounced that it has no jurisdiction to hear appeals from this Court on the same, it is a “waste of time and resources” to undertake an evaluation whether the criteria for certification in **Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscione** is met.
20. We have considered the application, the affidavits and the submissions against the established legal principles as pronounced by the Supreme Court in **Hermanus Phillipus**

**Steyn vs. Giovanni Gnechi-Ruscione** (above). Among those

principles is the guidance provided by the Supreme Court that an applicant should identify and concisely set out the specific elements of “general public importance” which he or she attributes to the matter for which certification is sought.

21. In that regard, Cape Holdings in its present application identified five issues, which in its view, qualify as matters of general public importance. These, as already indicated are whether an arbitrator can award relief that is not sought by either party; whether a judgment can override Kenya’s international treaty obligations; what appropriate reliefs a court should grant under Section 35 of the Arbitration Act upon setting aside an arbitral award; and whether an award in excess of jurisdiction contravenes a party’s constitutional rights to equity, fair hearing, right to property, equal protection and benefit of the law.
22. When those issues are considered against the issues Cape Holdings had identified as worthy of consideration by the Supreme Court when it sought certification, in its application, Civil Application No. E006 of 2020, to appeal the judgment of this Court delivered on 6<sup>th</sup> November 2020, it becomes immediately clear that the target in present application, is an attack against that judgment as opposed to the ruling of the Court declining to review that judgment. In its said ruling delivered on 5<sup>th</sup> March 2021 in Civil Application No. E006 of 2020 dismissing Cape Holdings application for certification to appeal to the Supreme Court against that judgment, the Court stated:

***“The specific issues the applicant proposes the Supreme Court will be called upon to determine are: whether the court adhered to the direction of the Supreme Court to undertake minimal intervention to correct an injustice’; what are the guiding principles the High Court should apply when dealing with an application under section 35 of the Arbitration Act?; what are the guiding principles in interpreting the arbitration agreement or dispute resolution clause?; can matters raised in the pleadings extend the scope of the arbitrator?; and finally whether the Court failed to examine issues addressed by the High Court arising out of the award.”***

23. In our view, Cape Holdings is therefore seeking, through a different route, to achieve that which it failed to do through its application in Civil Application No. E006 of 2020, which is to appeal the judgment of this Court delivered on 6<sup>th</sup> November 2020.
24. Similarly, the Supreme Court in its ruling in **Cape Holdings Limited vs. Synergy Industrial Credit Limited (Application 5 (E007) of 2021) [2021] KESC 4 (KLR)** when declining Cape Holdings application to review the said ruling captured the substance of the applicant’s grievance with the judgment of this Court delivered on 6<sup>th</sup> November 2020 thus:

***“It is the applicant’s further case that the court; needs to provide guidelines on the courts’ extent of intervention under section 35 of the Arbitrations Act; clarify whether an arbitral tribunal can completely nullify written agreement in favour of oral agreement and still retain jurisdiction to determine the dispute referred to it; clarify whether arbitration proceedings can be premised on an oral agreement by dint of section 4 of the Arbitrations Act; and whether the Court of Appeal severely restricted the jurisdiction granted to courts under section 35. The applicant therefore submits that these issues transcend***

***the specific proceedings herein requiring this court to invoke its jurisdiction under article 163(4)(b) of the Constitution.”***

25. Those are the very issues Cape Holdings would wish to have the Supreme Court determine based on the present application. There is merit therefore in the preliminary objection taken by Synergy that the matters raised in the present application, though disguised as intended to challenge the ruling declining review, are matters already heard and determined by this Court and by the Supreme Court and the application is therefore *res judicata*.

26. Moreover, in its said ruling in **Cape Holdings Limited vs. Synergy Industrial Credit Limited (Application 5 (E007) of 2021) [2021] KESC 4 (KLR)** the Supreme Court clarified its jurisdiction in matters of this nature thus:

***“The legal position as regards this court’s jurisdiction to hear and determine appeals arising from section 35 of the Arbitration Act Judgment of the High Court was settled in the Geo Chem Middle East case, wherein this court found as follows: Having so stated, we must reiterate that arbitration is meant to expeditiously resolve commercial and other disputes where parties have submitted themselves to that dispute resolution mechanism. The role of courts has been greatly diminished notwithstanding the narrow window created by sections 35 and 39 of the Act. To expect arbitration disputes to follow the usual appeal mechanism in the judicial system to the very end would sound a death knell to the expected expedition in such matters and our decisions in Nyutu and Synergy should not be taken as stating anything to the contrary. In this regard, one issue we did not pronounce ourselves on in the Nyutu and Synergy decisions, is whether a further appeal lies to this court from a determination by the Court of Appeal. For the avoidance of doubt, we now declare that in conformity with the principle of the need for expedition in arbitration matters,***

***where the Court of Appeal assumes jurisdiction  
in conformity with the***

***principle established in these two decisions, and delivers a consequential Judgment, no further appeal should ordinarily lie therefrom to this court. 24. We reiterate our holding in the Geo Chem Middle East case and find that this court lacks jurisdiction to entertain this appeal as it is challenging the Court of Appeal judgment, where the Court of Appeal assumed jurisdiction in conformity with the principles established in the Nyutu and Synergy decisions and delivered a consequential Judgment.*** [Emphasis added]

27. The upshot is that the applicant’s application dated 30<sup>th</sup> January 2024 as amended on 2<sup>nd</sup> February 2024, fails and is hereby dismissed with costs to the respondent.

28. Following the untimely death of the Hon. Mr. Justice Fred Ochieng, JA prior to delivery of this judgment, and the remaining members of the Court being unanimous, this decision is delivered in accordance with Rule 34(4) of the Court of Appeal Rules.

**Dated and delivered at Nairobi this 21<sup>st</sup> day of November 2025.**

**S. GATEMBU KAIRU, FCI Arb, C.Arb.**

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**JUDGE OF APPEAL**

**A.O. MUCHELULE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**