Cape Holdings Limited v Synergy Industrial Credit Limited & another (Civil Application E423 & E422 of 2025 (Consolidated)) [2026] KECA 385 (KLR) (27 February 2026) (Ruling)

Neutral citation: [2026] KECA 385 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E423 & E422 OF 2025 (CONSOLIDATED)

DK MUSINGA, M NGUGI & GV ODUNGA, JJA

FEBRUARY 27, 2026

BETWEEN

CAPE HOLDINGS LIMITED ..... APPLICANT

AND

SYNERGY INDUSTRIAL CREDIT LIMITED ..... 1ST RESPONDENT

I & M BANK KENYA LIMITED ..... 2ND RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPLICATION E422 OF 2025

BETWEEN

CAPE HOLDINGS LIMITED ..... APPLICANT

AND

SYNERGY INDUSTRIAL CREDIT LIMITED ..... 1ST RESPONDENT

I & M BANK KENYA LIMITED ..... 2ND RESPONDENT

(Being an application for injunction against the Ruling of the High Court of Kenya at Nairobi (J. W. W. Mongare, J.) delivered on 26th June 2025 in Misc. Application 114 & 126 of 2015 (Consolidated)

RULING

1. Before this Court are two identical applications both dated 14th July 2025, and which seek to invoke the jurisdiction of this Court under rule 5(2)(b) of the Court's Rules. In both applications, Cape Holdings Limited (Cape Holdings) is the applicant, while Synergy Industrial Credit Limited (Synergy) and I &

M Bank Kenya Limited (the Bank) are named as the 1st and 2nd respondents respectively. We reproduce the identical orders sought in both applications hereunder:

> " 1. .....
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> 2. Pending the hearing and determination of the appeal or further orders of this Honourable Court, there be a stay of execution of the Ruling and Orders by Hon. Justice J.W.W. Mongare issued on 26th June 2025 save as to the carrying out of an updated valuation report over the suit property L.R No. 209/19436 (IR No. 120877) in the name of Cape Holdings Limited.
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> 3. Pending the hearing and determination of the appeal and until further orders of the court, the 1st respondent, its servants, agents, advocates and employees be restrained from trespassing on the applicant's property L.R No. 209/19436 (the suit property) in any manner whatsoever by interfering with the management of the suit property, the tenancies or attempting to take possession or selling the suit property in any manner whatsoever, contravening the sub judice rule by making any comments in print and social media regarding the suit property or any of the parties in the suit whether their agents, servants or employees in any manner whatsoever.
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> 4. The Court in the interest of justice and under its inherent powers in settling all claims owed to the 1st and 2nd respondents and all creditors prior to the determination of the intended appeal permit the applicant to:
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> a. Sell by open advertisement or by private treaty the movable and immovable assets of the applicant's property L.R No. 209/19436 (IR No. 120877) within 90 days of the order of the court with liberty to extend time until such time the property is sold.
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> b. Deposit the entire sale proceeds in an interest earning escrow account with the 2nd respondent pending determination of the intended appeal less the sum of Kshs. 1 billion to be paid to the 1st respondent from the sale proceeds after completion of the sale.
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> 5. Costs of this application be in the cause."

2. The dispute between the parties herein has had a long and protracted journey through the courts, involving arbitration proceedings, challenges to the arbitral award before the High Court, multiple appeals to this Court, applications for certification to the Supreme Court and subsequent execution proceedings arising from the reinstated award.

3. The dispute originates from a failed transaction for the sale of L.R. No. 209/19436 (IR No. 120877), Nairobi (the suit property) in which the 1st respondent had paid substantial sums toward the purchase price. When the transaction collapsed, the dispute was referred to arbitration pursuant to the parties' agreement. On 30th January 2015, the arbitral tribunal rendered an award in favour of the 1st respondent for the sum of Kshs. 1,666,118,183.00 together with interest. Aggrieved by the award, the applicant moved to the High Court under section 35 of the *Arbitration Act*, seeking to set it aside. In a ruling delivered on 11th March 2016, the High Court allowed the application on the ground that the arbitral tribunal had exceeded the scope of its mandate.

4. The 1st respondent challenged that decision before this Court, through Civil Appeal No. 81 of 2016 but the appeal was initially struck out on the basis that section 35 of the *Arbitration Act* did not confer a right of appeal. The 1st respondent then moved to the Supreme Court which, in its judgment of 19th December 2019, held that in exceptional circumstances, this Court retained a limited residual jurisdiction to entertain appeals arising from section 35 proceedings, and remitted the matter to this Court for determination. Upon rehearing, this Court, in its judgment dated 6th November 2020, allowed the appeal, set aside the High Court ruling, and reinstated the arbitral award.

5. Dissatisfied with that outcome, the applicant, vide Civil Application No. Sup. E006 of 2020, sought certification from this Court to appeal to the Supreme Court on the basis that its intended appeal raised matters of general public importance. This Court, in its ruling delivered on 5th March 2021, dismissed that application. A subsequent application before the Supreme Court, to wit, E007 of 2021 seeking review of this Court's decision declining to certify that its intended appeal from the judgment of this Court dated 6th November 2020 raised matters of general public importance was also dismissed. The Supreme Court, in dismissing the said application, emphasized that where this Court exercises its residual jurisdiction under section 35 of the *Arbitration Act*, a further appeal to the Supreme Court will ordinarily not lie. Following those decisions, execution proceedings were undertaken in the High Court resulting in the issuance of a decree and subsequent attachment measures against the applicant's property.

6. In the impugned ruling which is the subject of the instant applications, the learned judge considered four consolidated applications filed respectively by Cape Holdings, Synergy and the Bank. Vide its application dated 25th November 2024, Cape Holdings sought a review of the court's earlier ruling delivered on 4th November 2024 which had dismissed its application dated 6th May 2023, contending that the earlier application had not been properly considered and requesting that it be heard afresh. Synergy, vide its Notice of Motion dated 20th February 2025, sought prohibitory orders restraining the transfer, alienation, charging, or any dealings with specified properties owned by the interested parties, including properties known as Plots A, B, and C on Nairobi/Block 218/455 [formerly LR No. 17/67] and apartments erected on LR No. 1870/II/188 in order to secure realization of the decretal amount which it asserted exceeded Kshs. 9 billion. Separately, both Cape Holdings and the Bank, through two separate applications both dated 21st March 2025 sought orders staying execution of the decree and lifting the warrants of attachment and sale issued in respect of property L.R. No. 209/19436 registered in the name of Cape Holdings.

7. In its ruling, the trial court declined Cape Holdings request for review, holding that the application was effectively an invitation for the court to sit on appeal over its own decision and therefore failed to meet the statutory requirements for review. In relation to Synergy's application for prohibitory orders, the court held that although the law permits the issuance of prohibitory orders in execution proceedings, such orders may only issue where the property sought to be attached belongs to the judgment debtor, or where it is demonstrated, with sufficient evidence, that property registered in the name of third parties is in fact beneficially owned by or acquired using funds belonging to the judgment debtor. The court accepted, in principle, that prohibitory orders could extend to third-party properties in appropriate circumstances, particularly where there is proof of asset dissipation or concealment through nominees or related persons.

8. However, the learned judge found that the orders sought by Synergy were premature. The court noted that several properties belonging to the judgment debtor and some properties associated with the interested parties had already been subjected to attachment and had not yet been realized. In those circumstances, the court held that it would not be prudent to authorize attachment of additional

third-party properties before Synergy demonstrated that execution against the already attached assets had been completed and that a balance of the decretal sum remained unsatisfied. Accordingly, while recognizing that Synergy had raised an arguable basis for seeking prohibitory orders, the court declined to grant the relief at that stage on the ground that the execution process against existing attached properties had not been exhausted and therefore the application was premature.

9. With regard to the prayers for stay of execution, the trial court held that no substantive stay could issue because execution of the decree had already been confirmed as complete following the attachment of the judgment debtor's property and the subsequent pronouncements of this Court affirming the position that execution had been finalized. In those circumstances, the learned judge held that the High Court lacked jurisdiction to stay an execution process that had already been concluded and confirmed by this Court, and therefore the applications seeking a general stay of execution were found unsustainable.

10. The above notwithstanding, the court proceeded to consider the procedural objections raised by Cape Holdings and the Bank concerning the manner in which the intended sale of the attached property was to be conducted. The court held that although execution itself could not be stayed, the actual realization of the property through sale had to comply strictly with the Auctioneers Rules. In particular, the learned judge found merit in the contention that the valuation of the property relied upon for purposes of sale was outdated, noting that a current professional valuation was necessary to determine an appropriate reserve price and to safeguard the interests of all parties. Accordingly, while declining to grant a substantive stay of execution, the court lifted the existing warrants of attachment and sale, directed that a fresh valuation be undertaken, and ordered that the proposed auction remain suspended pending completion of the valuation and issuance of fresh warrants in compliance with the law.

11. The final orders issued by the trial court were thus:

> " a. Cape holdings application dated 25th November 2024 is dismissed.
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> b. Synergy's application dated 20th February 2025 is dismissed.
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> c. The applications by Cape Holdings and the Bank dated 21st March 2025 and 25th March 2025 are allowed to the extent that the Warrants of Attachment and Sale concerning property L.R. No. 209/19436 [I.R. 120877] in the name of Cape Holdings are hereby lifted and set aside.
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> b. An independent, professional valuation of the property known as LR. No. 209/19436 [I.R. 120877] be forthwith conducted by a Valuer appointed by Synergy within 30 days from the date of this Order. The costs of the said valuation shall be borne by Cape Holdings.
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> b. The intended sale/auction of the subject property be and is hereby stayed pending the completion and presentation of the valuation report to this Court upon which the court shall proceed to issue fresh warrants of sale in accordance with the law.
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> b. There is no order as to costs in respect of the applications.

12. It is the above orders that precipitated the two applications. Both applications are supported by affidavits sworn by Vinaychandra Sanghrajka, a director of the applicant. In Civil Application No. E423 of 2025, it is contended that on 3rd July 2025, the 1st respondent's advocates initiated the process

of appointing valuers to conduct a valuation of the suit property L.R. No. 209/19436 in preparation for a public auction, and that upon expiry of the 30 days' period, the respondent will proceed with the intended sale.

In this regard, the applicant contends that the intended sale is unlawful and irregular, asserting that the last Notice to Show Cause was determined on 5th January 2022 and that subsequent execution steps, including the issuance of warrants of sale, were undertaken without compliance with mandatory procedural requirements such as settlement of terms of sale, service of the statutory 45-days redemption notice, and proper notification to the judgment debtor. It is further alleged that the sale period was improperly shortened, encumbrances affecting the property were not disclosed, and the decree holder's interest relates only to specified portions of the property rather than the entire title.

13. As regards arguability, the applicant contends that the intended appeal is arguable on several substantive legal and procedural grounds. It is contended that the learned judge erred in law by, inter alia, finding that the applicant's review application failed to meet the statutory threshold for review under the *Civil Procedure Act* and Rules; failing to consider the constitutional duty of the court to revisit its own decision in order to avert a miscarriage of justice; failing to determine on the merits the Notice of Motion dated 6th May 2024 which, according to the applicant, required a hearing de novo; occasioning a miscarriage of justice by permitting execution of a decree said to include time-barred and unconscionable interest contrary to section 4 of the *Limitation of Actions Act* and equitable principles; failing to appreciate that the High Court retains jurisdiction under section 34 of the *Civil Procedure Act* to determine all questions relating to the execution and satisfaction of the decree; and delivering the impugned ruling in disregard of the constitutional principles of substantive justice, equity, fairness, and access to justice.

14. On the nugatory aspect, the applicant asserts that unless interim relief is granted, the 1st respondent will proceed with execution, including the imminent public auction of the suit property once the valuation process is completed, thereby irreversibly interfering with the applicant's proprietary interests before the appeal is heard. It is argued that such execution would effectively deprive the applicant of its entire property on the basis of what is alleged to be an unlawful and excessive decretal computation, thereby rendering the intended appeal academic and incapable of providing meaningful relief. The applicant further contends that preservation of the property is necessary to maintain the status quo pending determination of the appeal, invoking principles of proportionality, fairness, and the doctrine of lis pendens, while maintaining that it remains willing to satisfy any properly ascertained lawful decretal sum following accurate accounting and lawful computation of interest.

15. In opposing the application, the 1st respondent relies on the replying affidavit sworn by Jacob Mbae Meeme, its Legal Officer. The 1st respondent asserts from the outset that this application is premature, unmeritorious, and intended to frustrate execution of a lawful decree.

16. The 1st respondent depones that the origin of the dispute arises from an arbitration concerning the applicant's failure to deliver certain property units agreed between the parties. The arbitral tribunal awarded the 1st respondent approximately Kshs. 1.66 billion together with compound interest at 18% per annum, which award was subsequently upheld in various matters by this Court. The parties later consented to the terms of a decree issued in March 2021 in accordance with the award, and the decretal amount has since grown significantly because of accrued interest.

17. The 1st respondent avers that execution of the decree was lawfully undertaken when a prohibitory order against the applicant's property was registered on 14th January 2022 pursuant to Order 22 rule 48 of the Civil Procedure Rules, thereby completing attachment of the property. The 1st respondent relies on several subsequent decisions of this Court confirming that the attachment became complete upon

registration of the prohibitory order, and that the decree was therefore executed within the statutory period. It is asserted that subsequent challenges to execution cannot reopen that issue.

18. It is further deponed that since issuance of the decree, the applicant has repeatedly filed numerous applications in the High Court, this Court, and insolvency proceedings which the 1st respondent characterizes as attempts to delay realization of the judgment debt. These repeated applications are said to have resulted in substantial delay while the decretal sum has continued to rise, now reaching approximately Kshs. 9.49 billion, thereby raising the risk that recovery may ultimately become impracticable if execution continues to be obstructed.

19. On the issues related to interest computation, taking of accounts, and the legality of the decretal sum, it is averred that they have already been conclusively determined in earlier decisions of the High Court and this Court. According to the 1st respondent, the applicable interest rate was affirmed by this Court, and any renewed attempt to recalculate the decretal amount amounts to an impermissible attempt to reopen the arbitral award and decree, contrary to the doctrine of res judicata.

20. With respect to creditor priority and the alleged debenture held by the 2nd respondent, the 1st respondent avers that this Court previously determined that the debenture relied upon was fraudulent, created in bad faith, and incapable of conferring any valid security interest or priority over the decree holder's rights. The 1st respondent therefore contends that the 2nd respondent cannot assert any competing proprietary claim capable of defeating execution against the property. It is further deponed that earlier court findings indicated that no other substantial creditors were identified whose interests would be prejudiced by execution, thereby undermining the applicant's argument that realization of the property would unfairly affect a broader body of creditors.

21. In response to the allegations of procedural impropriety in the execution process, the 1st respondent avers that the applicant was served with a notice to show cause; that the terms of sale were settled by the court; and that the Civil Procedure Rules governing attachment and sale of immovable property were strictly followed. It is maintained that execution of a lawful monetary decree cannot constitute unlawful deprivation of property since the property is being realized solely in satisfaction of a valid judgment debt.

22. On the question of arguability, the deponent avers that the intended appeal does not raise any arguable issues because every matter relied upon by the applicant, including execution of the decree, computation of interest, taking of accounts, the priority of creditors, and the validity of the attachment has already been conclusively determined by prior rulings of this Court. It is averred that this application is an attempt to relitigate settled issues and is an abuse of the court process.

23. On the nugatory aspect, the 1st respondent avers that the intended appeal will not be rendered nugatory if the injunction or stay sought is refused because execution of the decree has already been completed through attachment of the subject property. In this regard, the 1st respondent relies on the consistent position adopted by this Court in earlier proceedings that once the prohibitory order issued against the suit property was registered on 14th January 2022, the attachment became complete and execution was thereby effected. As a result, the property had already been lawfully subjected to execution and could no longer be treated as property whose preservation is necessary to safeguard the substratum of the appeal.

24. The deponent specifically cites the ruling of this Court of 8th December 2023 in Civil Appeal (Application) No. 81 of 2016 where this Court held that execution of the decree was complete upon registration of the prohibitory order against the title, and that any subsequent attempt to challenge execution would be moot because the attachment had already crystallized the decree holder's rights.

Reliance is also placed on the judgment of this Court of 12th July 2024 in Civil Appeal No. 788 of 2021 and the ruling of 2nd May 2025 in Civil Appeal (Application) No. E967 of 2024, both of which reaffirmed that attachment of the property was completed upon registration of the prohibitory order, and that the decree holder had already actualized its rights over the property.

25. In addition, the 1st respondent refers to the Court's ruling of 2nd May 2025 in Civil Appeal (Application) No. E967 of 2024, where this Court declined to grant a stay of execution on the basis that the appeal would not be rendered nugatory since execution had already been completed when the prohibitory order was registered, meaning the property had effectively left the applicant's hands. The 1st respondent therefore contends that the same reasoning applies to the present application, and that there is no risk of the appeal being rendered nugatory because the applicant's proprietary rights in the property were already lawfully curtailed through completed execution.

26. Turning to Civil Application No. E422 of 2025, the applicant reiterates the grounds set out hereinabove to demonstrate that the intended sale of the suit property is unlawful and irregular. On arguability, it is contended in the motion, the affidavit in support, and in the draft memorandum of appeal that the learned judge erred in law by failing to order the taking of accounts to determine the lawful decretal amount and instead permitted unjust enrichment through inclusion of time-barred interest; by failing to consider that the in duplum principle applies to court decrees as a matter of public policy; by failing to consider evidence that the suit property had existing debentures, and that the 1st respondent's interest was allegedly limited to a specific portion of the property; by allowing the sale of the suit property contrary to the mandatory statutory conditions governing execution sales, thereby occasioning a miscarriage of justice; and by failing to properly consider the appellant's submissions on the material issues raised in the application.

27. With regard to the nugatory aspect, the applicant reiterates the grounds set out hereinabove and asserts that it has always been ready and willing to settle the just and lawful decretal amount after the taking of accounts and setting the correct interest amount that was allegedly illegally awarded.

28. Vide a supplementary affidavit sworn by Vinaychandra Sanghrajka, the applicant contends that there had been material developments arising after the filing of the Notice of Motion dated 14th November 2025. In this regard, it is deposed that an updated valuation report dated 17th September 2025 was obtained in respect of L.R. No. 209/19436; that Synergy filed additional Notices to Show Cause with a view to executing the decree and subsequently lodged an application dated 27th November 2025 seeking orders for sale of the suit property. In response, the applicant filed a Notice of Motion dated 26th November 2025 seeking among other reliefs, approval of sub-leases over the suit property to facilitate phased sales of individual blocks and the transfer of the block known as Grosvenor, formerly Synergy Square, valued at Kshs. 1,050,000,000, to the decree holder upon creation of long- term leases and the taking of accounts.

29. The applicant further avers that it is making genuine efforts to lawfully settle the decree without compromising its constitutional rights to property, fair trial, and access to justice. According to the applicant, the application dated 26th November 2025 was intended to complement the Prohibitory Order of 5th January 2022 which permits sale of the property either as a whole or in units. However, all the blocks are held under a single title and cannot be sold individually unless there is conversion and the creation of long- term leases. It is therefore averred that implementation of the Prohibitory Order requires commencement of the conversion process so as to enable transfer of one block to the decree holder while preserving the remainder of the property.

30. The applicant also deposes as to correspondence from the decree holder's advocates dated 14th October 2025 proposing a joint auction process to allow partial realization of the decretal sum. The applicant

responded on 14th November 2025 proposing conversion, geo-referencing, and creation of long -term leases as a more practical solution to avoid sale of the entire property. The applicant states that there was no response to that proposal and that the 1st respondent proceeded with its application for sale, which was fixed for directions on 10th February 2026.

31. The applicant reiterates that it is ready to transfer Grosvenor in partial settlement of the decree pending the taking of lawful accounts to ascertain the true indebtedness. A concern is raised that interest has been claimed for a period of fifteen years, and it is asserted that the in duplum rule and the statutory limitation period on recovery of interest are applicable herein.

32. Opposing the application, the 1st respondent substantially reiterates the averments made in Civil Application No. E423 of 2025. However, and in addition to the averments made in E423 of 2025, the 1st respondent depones that contrary to the applicant's assertion in paragraph 1 of its Certificate of Urgency, the trial court did not, in its ruling of 26th June 2025, dismiss an application seeking the taking of accounts. The prayer for the taking of accounts had been contained in the applicant's application dated 6th May 2024 which was dismissed by the court in its ruling delivered on 19th November 2024. No appeal was filed against that ruling. Instead, the applicant filed an application dated 25th November 2024 seeking a review of the said decision, which review application was subsequently dismissed by the trial court in its ruling of 26th June 2025.

33. The 1st respondent therefore avers that the present application amounts to an indirect attempt to challenge the ruling of 19th November 2024, notwithstanding that no appeal was ever lodged against it, and that by electing to pursue review proceedings, the applicant forfeited any right of appeal against that decision. It is further averred as a preliminary matter that this Court's appellate jurisdiction has therefore not been properly invoked in respect of the issues arising from the dismissal of the application for the taking of accounts.

34. The 1st respondent also depones that in Civil Application No. E423 of 2025 and in the substantive appeal, to wit, Civil Appeal No. E542 of 2025, the applicant has already lodged proceedings challenging the trial court's dismissal of the review application. In the circumstances, the present application constitutes a duplicative attempt to place before this Court matters over which it lacks jurisdiction.

35 When the consolidated applications came up for hearing, Senior Counsel Mr. Allen Gichuhi and Mr. Kioko Kilukumi appeared for Cape Holdings, while Senior Counsel Mr. Ahmednasir Abdullahi appeared alongside learned counsel Ms. Asli Osman for Synergy. Learned counsel Mr. William Kabaiku was present for the Bank. Save for Mr. Kabaiku who elected not to make any submissions in the matter, counsel for the other parties made brief oral highlights of their respective clients' written submissions.

36. Highlighting written submissions on behalf of Cape Holdings, Senior Counsel, Mr. Allen Gichuhi, submitted that a central issue in both applications was the failure to take accounts. He maintained that no proper accounts have ever been taken despite the age of the debt, now over fifteen years. He asserted that the learned judge erred in declining to review earlier decisions in a manner that effectively shut out consideration of the taking of accounts under section 34 of the *Civil Procedure Act*. In his view, this amounted to a miscarriage of justice because the court declined to interrogate issues relating to limitation of interest, the in duplum rule, and the statutory restriction on recovery of penalties.

37. He maintained that the decretal amount has escalated dramatically due to what he termed unconscionable and unproven interest. According to his computation, the principal deposits were about Kshs 577 million, and even on his calculations, without applying the in duplum rule, the amount would be approximately Kshs 1.4 billion. Yet the respondent now claims in excess of Kshs 10 billion.

He contended that the 18% compound interest applied to both Kenya shilling and dollar components was never pleaded or proved in evidence but was introduced through submissions. From the foregoing, the applicant reiterated that its appeal was arguable.

38. In relation to irreparable harm, counsel argued that continued execution without determination of accounts makes redemption impossible. He pointed to alleged non-compliance with mandatory provisions under Order 22 of the Civil Procedure Rules and the Auctioneers Rules, including failure to issue proper notices. He also argued that the prohibitory order had been improperly extended to the entire property whereas only a portion of it was the subject of the arbitral proceedings, the remainder having been financed through bank loans and secured by legal charge.

39. Responding to questions from the Court, Senior Counsel maintained that Cape Holdings has consistently sought to take accounts and has filed applications specifying what it considers to be the lawful rates of interest. He stated that these efforts were dismissed summarily, and that attempts at negotiation had not elicited a response. He confirmed that the applicant's position is that, even without applying the in duplum rule, the payable sum would be about Kshs 1.4 billion, and that the applicant has offered to transfer property valued at approximately Kshs 1.05 billion in partial settlement pending the taking of accounts. He added that the total value of the development, according to the latest valuation, is about Kshs. 7 billion, and that an application is pending to facilitate subleases to enable orderly realization, if necessary.

40. On his part, Senior Counsel Ahmednasir for the 1st respondent began by submitting that the present applications are part of a long pattern of repetitive and abusive litigation. Citing the dictum of Lord Templeman in Ashmore v Corporation of Lloyd's (1992), 145 N.R. 344 (HL), he contended that counsel have a duty to simplify issues for the court rather than multiply arguments in the hope that one might succeed. In his view, the applicant has, over the past decade, filed numerous applications, reviews, and suits arising from the same arbitral award, repeatedly raising matters that have already been conclusively determined.

41. Counsel recounted the genesis of the dispute which he stated arose from his client's payment of approximately Kshs. 750 million as purchase price for a development which was never transferred. An arbitral award of about Kshs. 1.6 billion was issued in his client's favour. Since then, instead of satisfying the award, the applicant has challenged the matter at every level, going all the way to the Supreme Court. He emphasized that the decree remains unsatisfied and has escalated over time because no payment has been made.

42. On procedure, counsel contended that both applications challenge the same High Court ruling and seek identical relief, thereby constituting an abuse of process. He also pointed out that the impugned ruling dismissed the applicant's review application and was therefore a negative order incapable of being stayed. He submitted that this Court has repeatedly held, in prior proceedings between the same parties, that negative orders cannot be stayed under rule 5(2)(b). He further contended that the applicant was improperly seeking injunctive and other substantive relief that was never sought in the High Court, yet this Court lacks original jurisdiction to grant fresh orders under rule 5(2)(b).

43. Senior Counsel relied on several prior decisions of this Court to demonstrate that the issues now being raised in the two applications have already been considered and rejected. He referred to Civil Appeal No. 81 of 2016 in the context of the sums determined at that stage, and to show that the dispute has already traversed the appellate hierarchy. He also cited a ruling by M'Inoti, Sichale & Jamila Mohammed, JJ.A. in which arguments on unconscionable interest, limitation, and in duplum were raised in a review application and rejected. In that ruling, this Court held that such matters ought to have been canvassed before the arbitrator and were not proper grounds for review. He submitted that

those determinations effectively disposed of the applicant's present arguments on accounts, interest and limitation.

44. On the nugatory aspect, Senior Counsel relied on the decision of this Court (Kiage, Jamila Mohammed, & Korir, JJ.A.) where it was held that execution was completed upon registration of the prohibitory order against the title on 5th January 2022 pursuant to Order 22 rule 48 of the Civil Procedure Rules. The Court concluded that once the prohibitory order was registered, attachment of the immovable property was complete and execution was finalized. On that basis, he argued that the applicant cannot now contend that execution is incomplete or that the appeal would be rendered nugatory.

45. Senior Counsel concluded by submitting that the escalating decretal sum is a direct consequence of the applicant's prolonged refusal to satisfy the judgment. He urged this Court to recognize that the issues of execution, interest, and arguability have already been determined in earlier decisions of this Court and not to permit further abuse of process. He prayed that both applications be dismissed with costs and that execution be allowed to proceed without further delay.

46. We have reviewed the consolidated applications, the submissions by counsel for the parties, and the law. It is trite law that in an application under rule 5(2)(b), an applicant must satisfy both limbs of that provision, viz, that the intended appeal is arguable and that, absent the orders sought, the appeal, if successful, will be rendered nugatory.

47. On arguability, the complaints advanced by the applicant, in our view, fall into three broad categories. First, that the learned judge erred in dismissing the application for review. Second, that the court failed to order the taking of accounts and to interrogate the computation of interest. Third, that the execution process is unlawful or irregular.

48. The impugned ruling dismissed an application for review dated 25th November 2024. It did not impose any fresh obligation nor did it confer new rights on the decree holder. It is well settled that the dismissal of a review application, by itself, is not a proper basis for interim relief under rule 5(2)(b). The learned judge found that the legal threshold for review was not met, and no clear error has, in our view, been shown in that finding.

49. The issue of taking of accounts and the challenge to the applicable rates of interest were previously raised in the trial court vide the application dated 6th May 2024. In that application, Cape Holdings sought, among other reliefs, to set aside interest at 18% per annum, to substitute lower rates on both Kenya Shilling and United States Dollar amounts, and to have accounts taken in accordance with section 4(4) and (5) of the *Limitation of Actions Act* and the in duplum rule.

50. In a ruling delivered on 19th November 2024, the trial court held that the application was, in substance, an attempt to reopen and unsettle an award that had already been recognized, adopted and embodied in a decree, and whose validity had been affirmed through proceedings before the High Court, this Court and the Supreme Court. The court observed that the grounds now relied upon were available to Cape Holdings at the stage of setting aside the award and at the stage of recognition and enforcement, and ought to have been raised then. It was further held that it was too late to challenge the contents of the decree, particularly in light of this Court's decision in I&M Bank Kenya Limited & Another v Synergy Industrial Credit Limited & 2 Others [2024] KECA 855 (KLR) which confirmed that execution had already been completed.

51. The record shows that no appeal was filed against the ruling of 19th November 2024. Instead, the applicant chose to seek a review. Once that review was dismissed, the applicant could not treat the review process as a substitute for an appeal on issues that had already been decided. The judge was

entitled to conclude that the legal requirements for review had not been met. We doubt whether any arguable issue arises from dismissal of the review application.

52. The present arguments on limitation of interest, the in duplum rule, and the alleged unconscionable computation are not new. They go to the substance of the arbitral award and the decree issued in March 2021. In Cape Holdings Limited (Under Administration) v Synergy Industrial Credit Limited [2023] KECA 1497 (KLR), this Court was categorical that it would not reopen or revisit the merits of the arbitral award under the guise of review or constitutional complaint. The Court held that the parties, by their own conscious choice, had committed the determination of the merits of the dispute to the arbitral tribunal, and that the Court's earlier judgment of 6th November 2020 had deliberately declined to interrogate those merits. It rejected as misconceived the invitation to vary the principal sum, to set aside or reduce the 18% compound interest, or to limit the computation of interest on limitation grounds, describing the application as an attempt to have the Court sit on appeal over its own judgment and over the arbitral tribunal.

53. Those issues having been litigated through the High Court, this Court, and up to the Supreme Court, there is no basis upon which this Court can properly be invited to revisit what has already been finally pronounced upon. The decree of March 2021 was issued in line with an arbitral award that has survived challenge at every judicial level. The questions of interest, limitation and computation were either expressly determined or were matters that ought to have been raised at the appropriate stage of challenge to the award. They cannot now be revived through execution proceedings or reframed as novel points of law. We do not think that these issues are arguable.

54. As for the alleged irregularities in execution, the impugned ruling did not sanction any unlawful sale. On the contrary, the learned judge lifted existing warrants and directed that a fresh independent valuation be undertaken before any fresh warrants could issue. The intended sale was effectively halted pending compliance with the law. It is difficult to discern an arguable error in the directions that reinforce procedural safeguards.

55. Taken as a whole, the intended appeals do not, with due respect, raise bona fide issues that have not already been addressed and determined. We state so being well alive to the numerous holdings of this Court that an arguable appeal must present at least one point that merits serious judicial consideration. These applications do not meet that standard.

56. Turning to the nugatory limb, the applicant contends that unless an injunction is granted, the property will be sold and the appeals rendered academic. This argument, with respect, overlooks this Court's consistent findings on the status of execution. In Cape Holdings Limited (Under Administration) v Synergy Industrial Credit Limited & 2 others [2025] KECA 738 (KLR), this Court affirmed that execution was completed upon registration of the prohibitory order against the title on 5th January 2022. The Court held thus:

> " Turning to the nugatory aspect of the applications, the applicants are apprehensive that Synergy will take possession of the suit property to the exclusion of other creditors who hold legitimate claims over the suit property. On the other hand, Synergy contends that the appeals will not be rendered nugatory because execution was completed through an order dated 5th January 2022. As to whether execution is complete, we concur with the findings of this Court on two previous occasions that the execution was completed by attachment on 14th January 2022 when the prohibitory order was registered against the title of the suit property. The said holding is found in the decisions of different benches in Cape Holdings Limited (Under Administration) vs. Synergy Industrial Credit Limited [2023] KECA 1497 (KLR) and I&M Bank Kenya Limited & another vs. Synergy Industrial Credit Limited &

2 Others [2024] KECA 855 (KLR). We have no basis to depart from that finding. We can only add that, in our view, this is the proper interpretation of Order 22 Rule 48 of the Civil Procedure Rules, which dictates that once a prohibitory order is registered against the title of an immovable property, the attachment of that property becomes complete.

Therefore, the prohibitory order having been registered on 5th January 2022, the attachment of the said property was complete, and so was the execution. That being the case, Synergy having actualized its right over the suit property, we do not think that the Bank's apprehension is live at the moment. It cannot be apprehensive of what may happen to a property that has already left its hands and has been executed against." [Emphasis added]

57. We fully associate ourselves with the above holding. It is clear to us beyond any peradventure that attachment of the property was completed on 14th January 2022 when the prohibitory order was registered against the title of the suit property, and the decree holder's rights under the decree were actualized at that point. What remains is realization in accordance with the law.

58. In the circumstances, the applicant cannot properly contend that the intended appeals will be rendered nugatory by steps taken towards realization of property that has already been lawfully attached. The apprehension of sale does not operate to revive proprietary rights that were curtailed upon completion of attachment. In any event, the High Court has stayed the intended sale pending the undertaking of a fresh valuation and the issuance of fresh warrants and there is no material before us to suggest that any step is being taken outside the supervision or authority of that court. Should realization at a later stage be conducted in a manner inconsistent with the law, appropriate remedies would lie. The mere prospect of lawful realization of attached property in satisfaction of a valid and subsisting decree cannot, without more, render an appeal nugatory.

59. In the end, the applicant has failed to satisfy either limb of rule 5(2)(b). Consequently, the two applications both dated 14th July 2025 are devoid of merit and are hereby dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 27th day of February 2026.

D. K. MUSINGA (PRESIDENT)

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

G. V. ODUNGA

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*8JUDGE OF APPEAL**

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

Signed

DEPUTY REGISTRAR.