



REPUBLIC OF KENYA



KENYA LAW
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**Synergy Industrial Credit Limited v Cape Holdings Limited (Civil Application
Sup E004 of 2024) [2025] KECA 198 (KLR) (7 February 2025) (Ruling)**

Neutral citation: [2025] KECA 198 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION SUP E004 OF 2024
PO KIAGE, LA ACHODE & GV ODUNGA, JJA
FEBRUARY 7, 2025**

BETWEEN

SYNERGY INDUSTRIAL CREDIT LIMITED APPELLANT

AND

CAPE HOLDINGS LIMITED RESPONDENT

(An application for certification that the Applicant's intended appeal raises matters of general public importance and for leave to appeal against the Ruling of the Court of Appeal at Nairobi (M'Inoti, Sichale & J. Mohammed, JJ.A) dated 8th December 2023 in Civil Appeal (Apctn) No. 81 of 2016)

RULING

1. By its motion dated 13th February 2024, the Chartered Institute of Arbitrators (K) Branch (CI Arb) hereafter "the Institute; seeks in the main an order that it be admitted as amicus curiae in a pending application for certification of an appeal to the Supreme Court against a ruling of this Court (M'Inoti, Sichale & J. Mohammed, JJ.A) made on 8th December 2023. As a corollary to the said prayer, the Institute prays that it be allowed to make arguments in the certification hearing and in the intended appeal to the Supreme Court.
2. On the face of motion are its founding grounds, relevant to our decision herein; stated thus;
 1. That indeed, we agree with the applicant that the intended appeal raises grave issues of general public importance that relate to the practice and procedures involved in arbitration and especially the scope of contours of independence of an arbitral tribunal in exercise of its mandate and jurisdiction as conferred by the parties to an arbitration reference or agreement, it is on this basis that it seeks leave of this honourable court to come on record as an amicus curiae in the certification application and the intended appeal.



2. The Intended Amicus Curiae possesses unique expertise and specialized knowledge in the realm of arbitration, having been in existence in the Kenyan market since 1984 and with 40 years' experience being in position to offer valuable professional, practical and academic insights into the intricacies of the field of Arbitration. Hence, the honourable court will find its contribution and non-partisan input very valuable in forming a well-informed and grounded determination on the issues raised by the applicant in the intended appeal.
 3. The Intended Amicus Curiae believes that the outcome of the certification application and ultimately the intended appeal as the Supreme Court will not only form a significant legal precedent; but it will greatly shape the public policy of arbitration, foreign investor confidence in the alternative dispute resolution mechanism and the evolution of arbitration law within Kenya.
 4. The Intended Amicus Curiae, advocates for the broader public interest in advancing fair, equitable and efficient dispute resolution mechanisms, ensuring that the court's decision is well informed and considers the welfare of all stakeholders domestically and internationally.
 5. The intended amicus curiae assures the honourable court of its impartiality and neutrality, it will aim to provide objective guidance on arbitration matters, refraining from endorsing the interests of any particular party.
 6. Leveraging on its affiliation with the global Chartered Institute of Arbitrators, as well as the network of international arbitrators generally, the Intended Amicus Curiae will seek to aid the honourable court align judicial decisions and jurisprudence in the area with internationally recognized arbitration standards and best practices across the globe.
 7. Through its participation, the Intended Amicus Curiae will contribute to fostering an informed and balanced jurisprudence in the area of arbitration due to its unique expertise, experience and highly acclaimed stature.
 8. In the premises, it is therefore just and fair that the Intended Amicus Curiae be granted leave to come on record as amicus curiae.”
3. In support of the motion, the Institute's chairman Jacqueline Waihenya swore an affidavit in which she stated that the Institute had learnt of the proceedings before this Court and resolved to join as amicus curiae, and giving her authority to swear the affidavit on its behalf, which resolution she annexed. She went on to state the grounds on the face of the motion.
 4. The respondent opposed the motion by the replying affidavit sworn on 30th April 2024 by Jacob Meeme, its Legal Officer. He swore that the Institute had not “fully comprehended the nature of the application” dated 30th January 2024, to which it seeks to be joined as amicus. The said application seeks leave to appeal, from this Court's ruling of 8th December 2023, which dismissed the Institute's attempt to recall, review and set aside this Court's judgment dated 6th November 2020 in Civil Appeal No. 81 of 2016. Thus, the intended appeal is centered around whether this Court was correct in dismissing the application for review.
 5. The deponent further deposed as follows;
 - “ 15. That the Intended Amicus's proposition that it intends to present a discourse on the practice and procedures in arbitration and especially the scope of independence of an arbitral tribunal in exercise of its mandate and jurisdiction



has no room in this matter owing to the limited scope of the application before this Court.

16. That the Intended Appeal to the Supreme Court will not yield itself to a re-opening of the judgment of the Court of Appeal delivered on 8th November 2020 but rather a consideration of whether the Court of appeal was right or otherwise in its application to the principles for review.”
6. The respondent took the view that a previous application by the applicant seeking certification that an intended appeal against the judgment raised matters of general importance had been dismissed by both this Court and the Supreme Court and, given that finality, what the proposed amicus intends to raise is untenable. It went on to question the Institute’s bona fides by swearing that it is attempting to raise, as a proxy, issues that the applicant ought to have raised at the arbitral proceedings but did not. He termed the Institute’s intervention herein as “telling” and an attempt to supplement, at its instigation and invasion, the applicant’s bid to supplement its arguments. The respondent’s written request to the Institute to provide particulars of matters, if any, where it has applied to be admitted as amicus to ventilate matters of arbitral practice, went unanswered.
7. The respondent thus questions the Institute’s neutrality and terms as ‘defying logic’ the attempt to join these proceedings where the only issue in dispute is whether an application for review was properly dismissed.
8. The respondent also averred that the Institute did not demonstrate which points of law it intends to argue in respect of the certification application, nor did it show that there are novel aspects it intends to raise hitherto unaddressed by the parties. It prayed that the application be dismissed with costs.
9. In its counsel’s written submissions, the Institute is said to be “possessing unique expertise and specialized knowledge in the realm of arbitration” and “being in a position to offer valuable professional, practical, and academic insights into the intricacies of the field of Arbitration.” and that it appeared as an interested party in Petition No. 12 of 2016, Nyutu Agrovet Ltd vs. Airtel Network Ltd where it “submitted expert argument on the interpretation of section 25 of the [Arbitration Act](#) 1996 as well as the Uncitral Model Law Provisions.”
10. In part C of those submissions, the Institute’s objectives and contributions in the present application are stated to be these;
 4. The Intended Amicus is not aligned to any of the parties presently before this Court. The role it seeks to play is to provide independent and impartial submission to aid the Court reach a just determination on the question of the application for the [Arbitration Act](#) 1995. The Uncitral Model law provisions and the greater import of the country’s public policy on arbitration both domestic and international.
 5. The Intended Amicus, advocates for the broader public interest in advancing fair, equitable and efficient dispute resolution mechanisms, ensuring that the court’s decision is well informed and considers the welfare of all stakeholders domestically and internationally.
 6. Amicus shall make brief submissions on the need to interpret the Arbitration Law in a manner that promotes its spirit and tenor, the need to strike a balance between litigation and arbitration by discussing on the roles of parties to arbitration, party autonomy, freedom to contract, the arbitrator and the effect arbitral awards as issued a month others.
 7. Leveraging on its affiliation with the global Chartered Institute of Arbitrators, as well as the network of international arbitrators generally, the Intended Amicus Curiae will seek to aid the



Honourable Court align judicial decisions and jurisprudence in the area with internationally recognized arbitration standards and best practices across the globe.

8. Through its participation, the Intended Amicus Curiae will contribute to fostering an informed and balanced jurisprudence in the area of arbitration due to its unique expertise, experience and highly acclaimed stature nationally and internationally in this area.
9. The Intended Amicus brief to be advanced will give such neutral and impartial assistance to this honourable court as would otherwise not have been available. Further, the Intended Amicus will implore the court to consider the matters of law and principles which may have not been raised in the application but have an implication to its consideration.
10. That in addition, the Intended Amicus will highlight and live up to its mission to promote a culture of arbitration in Kenya. Participating as amicus curiae, it will contribute to fostering a favourable environment for arbitration and encouraging parties to consider arbitration and ADR generally as a preferred method of dispute resolution in Kenya.”
11. In its written submissions, the 1st respondent repeats that the main dispute herein has had a chequered history culminating in the Supreme Court’s rejection of a plea for certification that an intended appeal raised issues of general public importance, by a ruling delivered on 5th March 2021 in Sup. Application No. E007 of 2021. On that basis, it argues that the motion in which the Institute intends to join will suffer a like fate. Moreover, the proposal underpinning the application to join as amicus curiae is misplaced and has no place in the certification application now before us which has a limited scope leaving no room for a discourse on the practice and procedures of arbitration. The Institute, the respondent argues, does not satisfy the guiding principles for admission of amici curiae set out authoritatively by the Supreme Court in *Trusted Society of Human Rights Alliance vs. Mumo Matemu & 5 Others* Supreme Court Petition No. 12 of 2013, [2015]eKLR and reiterated thereby in *Francis Karioko Muruatetu & Anor vs. Republic & 5 OTHERS* Supreme Court Petition No. 15 & 16 of 2015; [2016]eKLR. The respondent questioned the neutrality of the Institute stating that its presence herein “is at the instigation and invitation of the applicant in a bid to supplement its argument under the disguise (sic!) of an amicus.”
12. The respondent concluded its submissions by asserting that an amicus curiae is expected to elucidate points of law that remain unaddressed by the parties by “purely pertinent legal arguments, doctrines or precedents ... so as to expand the court’s understanding of the broader issues in dispute.” However, as what is before this Court is an application for certification to appeal to the Supreme Court there is no unique legal issue to be ventilated by the Institute and it will neither advance the interest of justice nor contribute to the development of the law in the instant application.
13. At the virtual hearing of the application, Senior Counsel Prof. Githu Muigai appeared leading Mr. Njoroge for the Institute while Mr. Ahmednassir Abdullahi, learned Senior Counsel appeared for the respondent. Mr. Kigata appeared holding brief for Mr. Gichuhi, learned Senior Counsel for the applicant. Prof. Muigai indicated that he would rely on the submissions filed on behalf of the Institute and would not highlight the same.
14. On his part, Mr. Ahmednassir, SC repeated his client’s doubts on the neutrality of the Institute, which he termed “clueless” for appearing not to know the exact nature of the application into which it sought to be joined. To him, an amicus cannot participate in an interlocutory application such as the one before us and the quest to do so defeats the Intended Amicus neutrality. He insisted that the Institute has never joined any other matters, and is neither neutral nor impartial as it is supporting one side (the applicant’s) notwithstanding that it is the respondent who first approached it for arbitration services. Senior Counsel reiterated that the Institute was “blindly recruited” and “clueless” as it did not seem to



know what is before court and seems not to have read the judgment from which certification is sought, which is about refusal of review and has nothing at all to do with arbitration.

16. Senior Counsel cited the MATEMU decision (*supra*) for the proposition that an amicus curiae cannot participate in an interlocutory application such as is before court. He rested by asserting that the dispute between the parties herein is over, the decree having already been executed as has been held by this Court in previous rulings.
17. Prof. Githu's only reply was to state that the application for joining the Intended Amicus has been brought in good faith and not at the behest of any party. He left the matter "in the safe hands of the Court."
18. We have given due consideration to the application before us, the rival affidavits, the contending submissions and the applicable law. The issue appears to be simple enough: whether the Institute should be admitted into the proceedings currently before this Court. Central to a determination of that question is an appreciation of the nature and character of the proceedings now pending before us: and they are no more than an application, dated 30th January 2024, by which the applicant, Cape Holdings Ltd, seeks certification to appeal to the Supreme Court against the ruling of this Court (M'Inoti, Sichale & J. Mohammed, JJ.A) dated 8th December 2023. Shorn of all ensuing argumentation, that ruling simply rejected and dismissed the applicant's motion dated 1st March 2022 by which it sought the recall, review and set aside the judgment of the this Court comprising the three learned Judges, dated 6th November 2023 which allowed the appeal by the respondent Synergy Industrial Credit Limited. That appeal was against the Ruling of the High Court (Kariuki, J.) dated 11th March 2016, which had set aside an arbitral award made some nine years ago on 30th January 2015. We need say no more as far as providing the context and contours of what still pends before us save to say there have thereafter been numerous applications made by the applicant, both in this Court and the one above us, but which are not necessary for us to recite.
19. Given that what remains before this Court is the aforesaid application for certification of the intended appeal against the dismissal of the recall, review and setting aside of the judgment of this Court dated 6th November 202, it seems obvious to us that what this Court will have to consider in deciding that application is solely and simply whether it meets the threshold of, and satisfies the requirement for raising a matter of general public importance. What that threshold entails, and the applicable principles in determining the same, have long been established by the Supreme Court in *Hermanus Philipus Styne vs. Giovanni Gnecci Riscone* (Civ. Appln. No. 4 of 2012). We think the question is so firmly settled that it would be strange were one to apply to be amicus curiae to add anything new to this area of law.
20. Indeed, in the matter before us, whereas what will fall for consideration, when gets to be heard the application, is whether the intended appeal raises matters of general public importance, that is not the subject the Institute proposes and hopes to address the Court on. Instead, its intention and plea, as already captured herein from its application, grounds and submissions, is to address the Court on certain aspects of the policy, practice, philosophy, utility and jurisprudence of arbitration, which has invited the respondent's scoffing retort that it has blindly walked into this matter being clueless and not having read the judgment about which certification is sought.
21. With great respect to the Institute, it seems to have fatally misapprehended the nature of the proceedings now before Court, and in particular the application pending, to which it wishes to be joined. Whereas we cannot question and need not interrogate its expertise in matters arbitration, such expertise is entirely of no moment as far as the application now before Court is concerned. From the record, the Institute has not even suggested that it intends, if joined, to address us on any aspect of the



law on certification of appeals to the Supreme Court as raising matters of general public importance. Indeed, when Mr. Ahmednassir, SC, very forcefully made the point that the Institute seems to have been misled into improperly seeking to be joined in the pending motion, which is the essentially interlocutory in nature and contrary to the Matemu (supra) and Muruatetu (supra) decisions, the Institute said nothing to controvert. Well it may have acted in good faith, but as far as wishing, to be joined in this particular application at this particular juncture is concerned, it seems to have been rather gravely mistaken.

22. From what we have said so far, it is inevitable that without going into an unnecessary discussion of the law on the place, role and considerations for admission as amicus curiae in any case, the plea before us cannot possibly succeed.
23. In the result, the motion dated 13th February 2024 be and is hereby dismissed with costs to the respondent.

Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2025.

P. O. KIAGE

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

