**Vio Tech Ltd v Upperhill Chambers Ltd & another (Civil Application E026 of 2024) [2025] KECA 698 (KLR) (11 April 2025) (Ruling)**

Neutral citation: [2025] KECA 698 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPLICATION E026 OF 2024**

**FA OCHIENG, WK KORIR & JM NGUGI, JJA**

**APRIL 11, 2025**

**BETWEEN**

**VIO TECH LTD ..... APPLICANT**

**AND**

**UPPERHILL CHAMBERS LTD ..... 1ST RESPONDENT**

**CHINA WU YI LTD ..... 2ND RESPONDENT**

***(Being an application for certification as a matter of general public importance and leave to appeal to the Supreme Court against the decision of the Court of Appeal at Nairobi (Musinga (P), Asike-Makhandia & M'Inoti, JJ.A.) dated 25th October 2024 in Nairobi Civil Application No. E026 of 2024)***

**RULING**

1. The notice of motion before us is dated 7th October 2024 and supported by the affidavit of Samson Njoroge of even date. It is brought pursuant to Articles 163 (3) (b) and (4) (b) of *the Constitution* of Kenya, sections 15 and 15B of the *Supreme Court Act*, rule 33 of the *Supreme Court Rules*, sections 3A and 3B of the *Appellate Jurisdiction Act* and rules 41, 42, 43, and 44 of the *Court of Appeal Rules*, 2022. Through the motion, the applicant, Vio Tech Ltd, seeks to stay execution of the decree ensuing from the ruling of J.W. Mongare, J. dated 11th January 2024 in Nairobi High Court Misc. Application E162 of 2022; certification that its proposed appeal against the ruling of the Court (Musinga (P), Asike-Makhandia & M'Inoti, JJ.A.) dated 25th October 2024 raises questions of general public importance; and leave to appeal the said decision of this Court before the Supreme Court.

2. A subcontract agreement between Vio Tech and China Wu Yi Limited led to arbitration proceedings before Mr. John Ohaga, SC. Upperhill Chambers Limited was later joined in the proceedings. On 30th August 2021, the arbitrator dismissed Vio Tech's claim, partially allowed China Wu Yi's counterclaim, and fully allowed Upperhill Chambers' counterclaim. Notably, the award stated that: "The costs of

the reference, if not agreed within 60 days, shall be assessed by the Tribunal." Upperhill Chambers Limited subsequently applied to the High Court to have the award recognised as a court order and for leave to enforce the award. On 11th January 2024, J.W. Mongare, J. allowed the application, finding that there was no pending issue for determination between the parties. Dissatisfied with the ruling, Vio Tech Limited moved this Court vide Civil Application E026 of 2024 seeking leave to appeal the High Court's decision before this Court. In a ruling delivered on 25th October 2024, this Court dismissed the application, noting that Vio Tech Limited had not met the threshold for invoking the Court's limited jurisdiction to hear appeals arising from arbitration matters, specifically finding that the High Court decision could not be said to be so grave, so manifestly wrong and to be one that had completely closed the door of justice to either of the parties.

3. The applicant is now before us seeking to appeal that decision to the Supreme Court, contending that the ruling by the Court raises specific exceptional points of public significance that substantially transcend the facts of this case. According to the applicant, the issues raised are of general public importance because they involve the interpretation of the *Arbitration Act*, the finality and enforceability of arbitral awards, and the consistency of judicial precedent in arbitration matters. Some of the issues the applicant proposes for deliberation by the Supreme Court include whether an award in which the issue of costs has not been determined is capable of enforcement and can be set aside; whether section 36 of the *Arbitration Act* qualifies the types of awards that can be enforced; whether a party has recourse against an already enforced award after the reserved matter of costs is determined; whether multiple enforcement proceedings can arise from the same award where the issue of costs is determined later; and the proper interpretation of the holding by this Court in Kenfit and Ezra Odondi Opar vs. Insurance Company of East Africa Ltd [2020] eKLR and Ezra Odondi Opar vs. Insurance Company of East Africa Ltd [2020] eKLR that the High Court can only recognize and enforce a final award by an arbitrator if the award does not reserve any matter for consideration by the arbitrator or any other person.

4. The applicant argues that this Court's alleged failure to consider its holdings in previous decisions led to a decision that has "completely closed the door of justice to the applicant." It is the applicant's averment that the application has therefore met the threshold set in Mtana Lewa vs. Kahindi Ngala Mwagadi [2016] eKLR.

5. Regarding the application for an order of stay, the applicant contends that if a stay is not granted, the successful parties in the High Court will execute the award, potentially leading to the applicant's liquidation, and rendering any appeal nugatory.

6. The 1st respondent opposed the application through a replying affidavit sworn by its Facilities Manager, Carolyne Mallo on 21st January 2025. She avers that the dispute at hand has no element of general public importance because it relates to a contract arising from the relationship between the parties herein and that the breach of contract does not transcend the circumstances of this particular case, nor does it have any element of public interest. She asserts that the issues could be determined based on resolution of factual scenarios and therefore fell outside the profile of matters of general public importance. Further, that the issue of finality of arbitral award does not stand in a state of uncertainty warranting clarification. Additionally, it is her deposition that the 1st respondent was not granted costs in the arbitral award, and, therefore, there were no pending issues for determination between the applicant and the 1st respondent. She, thus, urges that the application be dismissed with costs.

7. On its part, the 2nd respondent opposes the application through an affidavit sworn by Rhodes Ndambuki, a Quantity Surveyor, on 24th January 2025. Mr. Ndambuki avers that the application is an abuse of the court process and is res judicata. He deposes that the application cannot be allowed since

there is no notice of appeal on record upon which the prayers sought can be anchored. According to Mr. Ndambuki, the applicant did not challenge the arbitral award within 90 days from 30th November 2021, when the award was published as required by section 35 of the *Arbitration Act*, and consequently lacked locus standi to challenge the award on appeal. Finally, he avers that the application does not meet the threshold for obtaining leave to appeal to the Supreme Court and should therefore be dismissed with costs.

8. When the matter came up for hearing on 27th January 2025, learned counsel Mr. Waigwa appeared for the applicant while Mr. Ngatia, Senior Counsel, appeared for the 1st respondent. Learned counsel Mr. Mwangi and learned counsel Ms. Njagi jointly appeared for the 2nd respondent. Counsel relied on the filed submissions accompanied by brief oral highlights.

9. Through the submissions dated 23rd January 2025, learned counsel Mr. Waigwa urged that the intended appeal to the Supreme Court raises significant issues of general public importance, particularly concerning the finality and enforceability of arbitral awards in which the issue of costs has not been determined, the interpretation of the *Arbitration Act*, and whether suspending the issue of costs has the potential for double enforcement and premature closure of avenues for challenging awards. Counsel argued that this Court's ruling contains errors and fails to adequately address these crucial legal questions, warranting the Supreme Court's intervention to provide clarity and resolve these matters of public interest within the realm of arbitration law.

10. Mr. Waigwa referred to the requirements for certification set in Steyn vs. Ruscone [2013] KESC 11 (KLR), and submitted that the intended appeal meets the threshold set by the Supreme Court therein. According to counsel, the dispute transcends the interests of the parties as the appeal seeks to clarify the uncertainty in the decisions of this Court and will also help avert a miscarriage of justice. Counsel referred to the holdings by this Court in Kenfit Limited vs. Consolata Fathers [2015] eKLR and Ezra Odondi Opar vs. Insurance Company of East Africa Ltd [2020] eKLR that an arbitral award can only be adopted by the High Court where there are no pending issues, urging that the Supreme Court ought to settle the law on when an arbitral award becomes executable. According to counsel, the applicant has been exposed to irreparable damage, which may not be rectified should it be successful in setting aside the award after assessment of costs, and that the 2nd respondent may bring further enforcement proceedings once the fees are assessed by the arbitrator, leading to double enforcement of the award.

11. Mr. Ngatia, Senior Counsel, relied on the submissions dated 23rd January 2025 to urge the 1st respondent's case. Counsel submitted that the applicant has never challenged the arbitral award pursuant to section 35 of the *Arbitration Act*, and there was, therefore, no controversy for the Supreme Court to resolve. Counsel also pointed out that the applicant withdrew the notice of appeal to this Court and, therefore, there is no notice of appeal upon which an order of stay can be anchored. Additionally, counsel reiterated the doctrine of finality of arbitral proceedings and awards by referring to the Supreme Court holdings in *Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch* [2019] KESC 11 (KLR) and *Geo Chem Middle East vs. Kenya Bureau of Standard*s [2020] KESC 1 (KLR). Counsel also submitted that this application is similar to the one dismissed by the Court in the ruling that is the subject of this application and is, therefore, an abuse of the court process. Finally, counsel urged that the application does not meet the threshold set by the Supreme Court in Steyn vs. Ruscone (supra) for granting certification for an appeal before the Supreme Court and should therefore be dismissed with costs.

12. On his part, learned counsel Mr. Mwangi relied on written submissions dated 24th January 2025 to urge the 2nd respondent's case. Counsel expressed his concurrence with the submissions of Mr. Ngatia, Senior Counsel. Turning to his submissions, Mr. Mwangi pointed out that the Court lacks jurisdiction

to entertain the application as there is no proper notice of appeal on record. Counsel additionally submitted that the matter does not meet the Supreme Court's pronouncement in the Nyutu Agrovet Limited and Geo Chem Middle East cases on when a decision of the High Court on an arbitral award can be appealed to this Court. According to counsel, the applicant, having not challenged the award, is barred from appealing to this Court or the Supreme Court. Counsel further reiterated that the intended appeal is not arguable and that the application is an abuse of the Court process and should be dismissed with costs.

13. We have considered the motion, the pleadings by the parties, the detailed submissions by counsel, and the law. Before we delve into the merits of the application, it is prudent that we dispense with the question of the effect of the alleged absence of a notice of appeal. The respondents have vehemently opposed the application on the ground that there is no proper notice of appeal and, therefore, the Court lacks jurisdiction to entertain the application. The 1st respondent went further to assert that the applicant withdrew the notice of appeal dated 19th January 2024 through a notice of withdrawal dated 5th March 2024. This contention by the 1st respondent is, in our view, water under the bridge for what is before us relates to an intended appeal to the Supreme Court and not an appeal to this Court.

14. In respect of an appeal to the Supreme Court, rules 36 (1) & (2), and 37(1) of the *Supreme Court Rules* requires an appellant to file the notice of appeal within 14 days with the Registrar of the Supreme Court or with the tribunal from which the appeal originates and thereafter serve the notice upon all persons affected by the appeal within 7 days. When this issue came up during the hearing, Mr. Waigwa for the applicant, informed the Court that a notice of appeal dated 8th November 2024 was filed with the Registrar of the Supreme Court, and service upon the persons affected by the appeal was done on 13th November 2024. Counsel being an officer of the Court, we take his word at face value and proceed on the presumption that, indeed, the requisite provisions were complied with and our jurisdiction is properly invoked. In doing so, we are aware that were leave to be granted to appeal to the Supreme Court, the respondents are still at liberty to impeach the notice of appeal allegedly filed by the applicant since the determination of the validity of a notice of appeal file in the Supreme Court does not fall within the jurisdiction of this Court.

15. As regards the merits of the application, we will first address the prayers for certification and leave to appeal to the Supreme Court. This application is one founded on the provisions of Article 163(4) (b) of *the Constitution*. The applicant asserts that the intended appeal raises matters of general public importance. The meaning of "a matter of general public importance" and the principles underlying the certification of such a matter were highlighted by the Supreme Court in Steyn vs. Ruscone (supra) as follows:

> " 58. ...Before this Court, "a matter of general public importance" warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern.
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> 59. ...
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> 60. ...In summary, we would state the governing principles as follows:
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> i. For a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the

Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;

ii. Where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;

iii. Such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;

iv. Where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

v. Mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of *the Constitution*;

vi. The intending applicant has an obligation to 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;

vii. Determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."

16. The above excerpt is the test upon which we must interrogate the present application. We must also point out that the intended appeal is against the ruling of this Court dated 25th October 2024. The impugned ruling dismissed the applicant's application seeking the admission of an appeal to this Court against a ruling of the High Court recognizing and enforcing an arbitral award as a decree of that court under section 36 of the *Arbitration Act*. In the ruling of this Court, it was held that the application had neither raised a point of law pursuant to section 39 of the *Arbitration Act* nor an issue arising from the recognition and enforcement of an arbitral award under section 35 of the *Arbitration Act* as the applicant had not challenged or applied to set aside the arbitral award.

17. According to the applicant, the point of law of general public importance in the ruling dated 25th October 2024, is that the Court erred by failing to appreciate and uphold that the High Court deviated from the decisions of this Court in Kenfit Limited and Ezra Odondi Opar cases which held that an arbitral award may only be recognized and enforced if the arbitral tribunal has not reserved any issue for further consideration. The applicant contends that since the arbitral tribunal reserved the issue of costs between the applicant and the 2nd respondent, there is a risk of double enforcement against it by the 2nd respondent.

18. In our view, this contention by the applicant lacks merit. We have looked at the ruling by the High Court, the ruling of this Court, and the decisions in the Kenfit Limited and Ezra Odondi Opar cases and find no incoherence as alleged by the applicant. The decisions in the Kenfit Limited and Ezra Odondi Opar cases must be read in tandem with section 3(1) of the *Arbitration Act*, which defines an arbitral award to include an interim arbitral award. Additionally, and as was pointed out by this Court in the ruling, the applicant intends to appeal, the genesis of the controversy before us was an application by the 1st respondent, and not the 2nd respondent, for recognition and enforcement of the arbitral award in question. Since the 1st respondent was not awarded costs, the applicant's argument that the arbitral award was incomplete because the issue of costs was pending stands on quicksand and is thus unpersuasive.

19. Additionally, it is also important to acknowledge that the Supreme Court has firmly established its jurisdiction in arbitration matters. For instance, in *Geo Chem Middle East vs. Kenya Bureau of Standards* (supra), the Supreme Court demarcated its jurisdiction as follows:

> "47. In the above context, it is our considered view that, the leave, whether rightly or wrongly granted (an issue to which we shall return) could only have empowered the Court of Appeal to determine whether the High Court ought to have interrogated the arbitral award or not. If it were to determine that the High Court had wrongly declined jurisdiction to so do, the proper and indeed only course of action open to the Court of Appeal, was to remit the matter back to the High Court with directions that the latter, hears the substantive application for setting aside the arbitral award on its merits. Instead, the Court of Appeal stepped into the shoes of the High Court and proceeded to determine a matter that had not been substantively decided by the latter. In so doing, the Appellate Court usurped the jurisdiction of the High Court, as it was not open to it, to take over an arbitration dispute and determine it on its merits when the High Court had not done so. As is the practice in all other disputes, where an Appellate Court holds that a lower Court has wrongly declined to determine a matter in the "mistaken" belief that it lacks jurisdiction to do so, the Court has to remit that matter to the lower Court, directing it to exercise its jurisdiction. Only after the lower Court has complied with such an order would a substantive appeal lie to the Appellate Court.
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> 48. In the premises, we have no option but to hold that the judgment of the Court of Appeal, to the extent to which it purported to interrogate the merits of an arbitral award, in the absence of the High Court's pronouncement on the same, was rendered in excess of jurisdiction. This means that even if we had found that we had jurisdiction to decide the appeal on its merits, this jurisdictional conundrum would have stopped us in our tracks." (Emphasis ours)

20. As we have already pointed out in this matter, the intended appeal is against the decision of this Court declining to hear an appeal against the ruling of Monga're, J., which recognized the arbitral award. The issues identified by the applicant for determination by the Supreme Court go beyond the scope of the said ruling. They are matters that this Court did not address in its ruling and cannot, therefore, form the basis of an appeal to the Supreme Court.

21. In our view, the standard for grant of leave in circumstances similar to those before us was settled by the Supreme Court in *Kampala International University vs. Housing Finance Company Limited* [2024] KESC 11 (KLR) when it held that:

> " 61. We are, in agreement with the respondent to the effect that indeed, the only issue that was before the Court of Appeal was whether the applicant had met the threshold for grant of leave as established by this court in the Nyutu and

Synergy cases [Supra]. We see no constitutional issue that had been canvassed at the High Court, the determination of which, was substantively decided by the Court of Appeal.

62. ... The appeal herein does not fall within any of the exceptions which would justify this court's assumption of jurisdiction over a ruling by the Court of Appeal, there being no pending or intended substantive appeal therefrom."

22. Earlier, the Supreme Court in *Njibia vs. Kimani & Another* [2015] KESC 19 (KLR) had also affirmed the above position when it held that:

"21. We are in agreement with the Court Appeal. For a party to be granted leave to appeal to this Court, there must be a clear demonstration that such a question of law, whether explicit or implicit, has arisen in the lower tiers of Courts, and has been the subject-matter of judicial determination. It is clear to us that this Court had not been conceived as just another layer in the appellate - Court structure. Not all decisions of the Court of Appeal are subject to appeal before this Court. One category of decisions we perceive as falling outside the set of questions appealable to this Court, is the discretionary pronouncements appurtenant to the Appellate Court's mandate. Such discretionary decisions, which originate directly from the Appellate Court, are by no means the occasion to turn this Court into a first appellate Court, as that would stand in conflict with the terms of *the Constitution*.

23. Besides, on the terms of the applicant's case, even if we assume that the intended question "of general public importance" is whether the Land Registrar can transfer land without the consent of the owner, we would still not admit the plea before us, for the reason that such a question has at no time been the subject of appeal before the Appellate Court, neither has there been any decision upon such an issue, before that Court." (Emphasis ours)

24. Additionally, the parameters upon which courts can interfere with arbitral awards were determined by the Supreme Court in *Synergy Industrial Credit Limited vs. Cape Holdings Limited* [2019] KESC 12 (KLR), where it held that:

" 59. Having analyzed the law in the identified jurisdictions, we find that there is generally no express right of appeal against the decision of the High Court in setting aside or affirming an award.

Leave to appeal would, however, only be granted in very limited circumstances. In that regard therefore, courts have held that leave to appeal may be granted where there is unfairness or misconduct in the decision-making process and in order to protect the integrity of the judicial process. In addition, leave would be granted in order to prevent an injustice from occurring and to restore confidence in the process of administration of justice. In other cases, where the subject matter is very important as a result of the ensuing economic value or the legal principle at issue, leave would also be granted. A higher court would also assume jurisdiction in order to bring clarity to the law where there are conflicting decisions on an issue. In all these instances, care must be taken not to delve into the merits of an arbitral award because that is not the purview of courts...

64. A reading of the above explanation read with article 5 means that beyond the instances identified above, no Court shall intervene in matters governed by the Model Law. That further, article 5 was enacted for purposes of "protecting the

> arbitral process from unpredictable or disruptive court interference" against parties who choose arbitration "especially foreign parties." We have no doubt in our minds that just like article 5, section 10 of our *Arbitration Act* is meant to ensure that the judicial process will only be resorted to where the Act so provides and only within the parameters provided. For example, once an arbitrator has made an award, the Act provides that the only way of challenging that award is through an application for setting it aside and only on the grounds narrowly subscribed."
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> See also the Nyutu Agrovet Limited case.

25. We have said enough to show that the application for leave to appeal to the Supreme Court cannot succeed. For the avoidance of doubt, our conclusion is informed by the fact that, first, the applicant has not demonstrated any issue of law of general public importance. Secondly, the intended appeal seeks the Supreme Court's audience on issues which were not the subject of the impugned ruling contrary to the Supreme Court's own directive in Geo Chem Middle East case. Thirdly, the intended appeal offends the Supreme Court's own directive regarding appeals against this Court's exercise of discretion without a substantive appeal as held in Kampala International University vs. Housing Finance Company Limited (supra). Fourthly and finally, the applicant has not demonstrated the existence of uncertainty in the law emanating from the impugned ruling. Consequently, the application for certification and leave is hereby denied.

26. Having determined the issues of certification and leave to appeal in the manner we have done, the question as to whether we should stay the decision of the High Court to adopt the arbitral award becomes moot and falls by the wayside.

27. The issue that remains is that of costs. The general principle is that costs follow the event unless the court, for good reason, orders otherwise. The applicant has not placed before us any reason to warrant departure from the general principle on the award of costs. Consequently, we order the applicant to meet the costs incurred by the 1st and 2nd respondents in defending this application.

28. Ultimately and for the reasons above, the notice of motion dated 7th October 2024 lacks merit and is hereby dismissed with costs to the 1st and 2nd respondents.

**DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF APRIL 2025**

**F. OCHIENG**

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**. JUDGE OF APPEAL**

**W. KORIR**

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**.. JUDGE OF APPEAL**

**JOEL NGUGI**

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**. JUDGE OF APPEAL**

I certify that this is a True copy of the original

Signed

**DEPUTY REGISTRAR**