Cape Holdings Limited (Under Administration) v Synergy Industrial Credit Limited & 2 others (Civil Appeal (Application) E967 of 2024 & Civil Application E700 of 2024 (Consolidated)) [2025] KECA 738 (KLR) (2 May 2025) (Ruling)

Neutral citation: [2025] KECA 738 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E967 OF 2024 & CIVIL APPLICATION E700 OF 2024 (CONSOLIDATED)

PO KIAGE, J MOHAMMED & WK KORIR, JJA

MAY 2, 2025

BETWEEN

CAPE HOLDINGS LIMITED (UNDER ADMINISTRATION) ..... APPLICANT

AND

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

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

OFFICIAL RECEIVER ..... 3RD RESPONDENT

(Being an application for stay of execution and other orders under rule 5(2)(b) of the Court of Appeal Rules, 2022 pending the hearing and determination of appeals from the ruling and or order of the High Court of Kenya (J.W.W. Mongare, J.) dated 9th December 2024 in HCCOMMIP No. E010 of 2024)

RULING

1. Before us are two applications seeking to invoke the Court's powers under rule 5 (2) (b) of the Court of Appeal Rules, 2022. The notice of motion dated 11th December 2024 in Civil Appeal (Application) No. E967 of 2024 was filed by Cape Holdings Ltd (Under Administration) ("Cape Holdings"). Synergy Industrial Credit Limited ("Synergy"), I&M Bank Ltd ("Bank"), and the Official Receiver are named as the 1st to 3rd respondents, respectively. The second notice of motion dated 12th December 2024, being Civil Appeal (Application) No. E700 of 2024, was filed by the Bank. Synergy, Cape Holdings, and the Official Receiver are named as the respective 1st to 3rd respondents in the application. The two applications seek orders in respect of a ruling delivered on 9th December 2024 by J.W.W. Mongare, J. In that regard, the two applications, were, with the consent of the parties, consolidated and

heard together on 19th February 2025. In this ruling, we will, where necessary, refer to Cape Holdings and the Bank as the applicants.

2. To do justice to the applications, a rehash of the background of the chequered history of the dispute between the parties, which started over a decade ago, is necessary. At the centre of the dispute between the parties is L.R. No. 209/19436 ("the suit property") at 14 River Side, here in Nairobi. The core parties to the dispute, Cape Holdings and Synergy entered into a sale agreement in which Synergy was to purchase the suit property from Cape Holdings. However, the sale did not go through, leading to Synergy demanding payment of Kshs. 750 million that it had paid to Cape Holdings towards the purchase of the suit property in the year 2010. The dispute was, as per the agreement of the parties, referred to arbitration where an award of Kshs.1,666,183,000 was made in favour of Synergy in a decision published by the arbitrator on 30th January 2015. There were also other awards made by the arbitral tribunal. Aggrieved by the outcome of the arbitration, Cape Holdings moved the High Court (Kariuki, J.) to set aside the arbitral award in its entirety, which application was allowed on the ground that the arbitral tribunal went beyond the scope of issues which were available for its determination.

3. The dispute did not end there as Synergy challenged the decision of the High Court before this Court through Civil Appeal No. 81 of 2016. However, the appeal was struck out by this Court (G. B. M. Kariuki, Mwilu & Azangalala, JJ.A.) on the ground that section 35 of the *Arbitration Act* did not confer upon parties to arbitration proceedings a right to appeal to this Court. Dissatisfied with that holding, Synergy escalated the legal battle to the Supreme Court, where in a judgment rendered on 19th December 2019 in Synergy Industrial Credit Ltd vs. Cape Holdings Ltd [2019] eKLR, the majority of the bench declared the existence of a residual right of appeal to the Court of Appeal under section 35 of the *Arbitration Act*. Consequently, the Supreme Court remanded the case to this Court for hearing within the parameters set in the judgment.

4. Pursuant to the directive by the Supreme Court, this Court (M'inoti, Sichale and J. Mohammed, JJ.A.) heard the matter and in a judgment delivered on 6th November 2020 allowed Synergy's appeal and set aside the order of the High Court, thereby reinstating the arbitral award.

5. This would not be the end of the legal voyage at hand. After this Court delivered its judgment on 6th November 2020, Cape Holdings unsuccessfully moved this Court seeking certification of its intended appeal to the Supreme Court as raising matters of general public importance. The same fate would befall a similar application before the Supreme Court, which was dismissed in a ruling dated 8th December 2021. Since then, the parties have oscillated between the High Court and this Court with numerous applications, some of which have been decided while others are pending determination.

6. In the impugned ruling, which is the subject of the instant applications, the learned Judge addressed five applications. On behalf of Synergy, there was an application dated 11th March 2024, which sought to discharge, vary, and/or set aside the orders issued on 23rd July 2024 by the High Court restraining it from dealing or interfering with the suit property. The other application by Synergy, dated 2nd July 2024, sought the revocation of the appointment of Mr. Ponangipalli Venkata Ramana Rao and Mr. Swaroop Rao Ponangipalli as joint administrators of Cape Holdings, the discharge of Cape Holdings from administration and an order restraining the Bank from appointing an administrator for Cape Holdings under the Debenture dated 15th December 2020. The other three applications were by Cape Holdings, with the one dated 26th July 2024 seeking the recall and determination of the pending application dated 6th May 2024 in Misc. 114 of 2015 - Cape Holdings Ltd (Under Administration) vs. Synergy Industrial Credit Ltd together with or in consolidation with the application dated 14th March 2024 regarding the setting aside of the decree and taking of accounts. In the applications dated 6th June 2024 and 14th March 2024, Cape Holdings essentially sought to admit the administrators'

Report and Minutes of the Creditors Meeting and grant of leave to the administrators to dispose of the suit property, set out proposals to all creditors for the settlement of all lawful debts, and mediation if Synergy declined the settlement offer. In the impugned ruling dated 9th December 2024, the learned Judge determined the applications as follows:

> " 1. The applications dated 14th March 2024, 6th June 2024 and 22nd July 2024 by Cape Holdings are dismissed.
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> 2. The applications dated 11th March 2024 and 26th July 2024 by Synergy Industrial Credit Limited are allowed.
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> 3. The appointment of Mr. Ponangipalli Venkata Ramana Rao And Mr. Swaroop Rao Ponangipalli as Joint Administrators of Cape Holdings Limited be and are hereby revoked.
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> 4. Cape Holdings Limited be and is hereby discharged from Administration.
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> 5. I&M Bank Limited be and is hereby restrained from appointing and (sic) Administrator to Cape Holdings Limited under the Debenture dated 15th December 2020.
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> 6. The costs of the aforementioned applications and this petition shall be borne by Cape Holdings Limited and I&M Bank Limited jointly and severally."

7. Those are the orders that are the subject of the two applications before us. We find it necessary for the applications to speak for themselves. In Civil Appeal (Application) No. E967 of 2024, Cape Holdings seeks orders as follows:

> 1. The Application be certified and heard ex parte in the first instance.
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> 2. Pending the hearing and determination of the appeal or further orders of this honourable court, the status quo ante prior to the delivery of the Ruling by Hon. Mr. (sic) Justice J. W. W. Mongare on 9th December 2024 be granted and the revocation of the administrators Ponangipalli Venakata Ramana Rao and Swaroop Rao Ponangipalli as joint administrators of Cape Holdings Limited be stayed.
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> 3. Pending the hearing and determination of the appeal and until further orders of this court, the 1st Respondent, its servants, agents, advocates and employees be restrained from trespassing on the Applicant's property Land Reference Number 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 appeal permit the Applicant to:
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>> a. Appoint Knight Frank Valuers Limited to carry out an updated valuation report in respect of the Applicant's property 14 Riverside on LR No. 209/19436.

b. Sell by open advertisement or by private treaty the moveable and immovable assets of the Applicant's property 14 Riverside on LR No. 209/19436 within 90 days of the order of the court with liberty to extend time until such time the property is sold.

c. Deposit the entire sale proceeds in an interest earning escrow account maintained by the Applicant's administrators pending the taking of accounts of the amounts due to the 1st and 2nd respondents and all creditors.

d. Maintain in an escrow account any disputed amount pending the taking of accounts after payment of the lawful undisputed amounts to all creditors in accordance with the law on distribution under the *Insolvency Act*.

1. The court be pleased to refer the parties to court annexed mediation under Rule 108 of the Court of Appeal Rules, 2022.

2. Pending the delivery of the Ruling, the court be pleased to grant the application and give reasons later in the interest of expeditious disposal of the application.

3. Costs of this application be in the cause.

8. As for Civil Appeal (Application) No. E700 of 2024, the Bank seeks orders as follows:

a. That the application be certified urgent and be heard on priority basis.

b. That pending hearing and determination of this Application, the Honourable Court do grant stay of the Ruling and Orders of the Honourable Lady Justice J.W.W. Mongare delivered on 9th December 2024 in Milimani High Court Commercial Insolvency Petition No. E010 of 2024.

c. That pending hearing and determination of the substantive Appeal, the Honourable Court do grant stay of the Ruling and Orders of the Honourable Lady Justice J.W.W. Mongare delivered on 9th December 2024 in Milimani High Court Commercial Insolvency Petition No. E010 of 2024.

d. That an order be and is hereby issued reinstating the appointment of Mr. Ponangipalli Venkata Ramana Rao and Swaroop Rao Ponangipalli as Joint Administrators of Cape Holdings Limited pending the hearing of the application and appeal.

e. That the cost of this application be provided for.

9. The application of Cape Holdings was supported by an affidavit sworn by Ponangipalli Venakata Ramana Rao while that of the Bank was supported by an affidavit sworn by the Head of its Legal Department, Peris Wairimu Chege.

10. Cape Holding argues in its application that the intended appeal is crucial to the entire banking sector. According to Cape Holdings, the ruling in question fundamentally contradicts established statutory and common law principles, which recognize that registered debentures take precedence over unsecured creditors. Further, that the trial court had no jurisdiction to grant orders injuncting the appointment of administrators. Cape Holdings also argues that the execution of the High Court decree by Synergy will cause profound irreparable loss to the Bank and occasion total loss, leading to Cape Holdings being declared bankrupt. Additionally, it is contended that Cape Holdings was denied a fair hearing, and execution of the decree will injure the applicant's right to property. Still urging that the appeal is arguable, Cape Holdings contends that the learned Judge contravened Articles 10 (2) (b), 40, and 50 of *the Constitution* by failing to act justly and equitably, thereby condemning the applicant

unheard. It is Cape Holdings' averment that the learned Judge misconstrued the Court of Appeal judgment delivered on 12th July 2024 in Nairobi Civil Appeal No. E758 of 2021, as consolidated with Civil Appeal No. E788 of 2021. According to Cape Holdings, the said judgment never declared the Bank's debentures null and void as held by the High Court. Cape Holdings deposes that the learned Judge was biased in favour of Synergy in ordering the removal of administrators. Finally, Cape Holdings contends that Synergy will suffer no prejudice if the orders sought are granted because its claim will be settled under the *Insolvency Act*, which will also take care of the interests of all the other creditors.

11. The Bank, on its part, faults the learned Judge for alleged misapprehension of the judgment of this Court in Nairobi Civil Appeal No. E758 of 2021 to the effect that it invalidated its Debenture. According to the Bank, the judgment did not actually invalidate the Debenture. It is the Bank's case that the orders injuncting it from exercising its rights under the Debenture have far-reaching consequences beyond the relationship between the parties and sets a dangerous precedent in the banking sector. Additionally, the Bank avers that, together with Cape Holdings, they have filed Nairobi Civil Appeal (Application) No. E758 of 2021 seeking review/clarification of the judgment therein. The Bank maintains that without the orders sought, Synergy will proceed with execution to its detriment and that of other creditors.

12. In opposing the applications, Synergy filed notices of preliminary objection, replying affidavits, and further affidavits. In the notices of preliminary objection, Synergy asserts that the applications are barred by the principle of res judicata and that the issues raised therein have been adjudicated by this Court in Civil Appeal No. 758 of 2021 as consolidated with Civil Appeal No. 788 of 2021; Civil Appeal (Application) No. E415 of 2023; and Civil Appeal (Application) No. 81 of 2016, all between the parties herein. In the affidavits sworn by Jacob Mbae Meeme, Synergy's Legal Officer, it is averred that Civil Application E967 of 2024 is incompetent and was filed without authority because the term of the administrators had lapsed. Mr. Mbae avers that the application is marred with insincerity and brought in bad faith. He also avers that Cape Holdings has not advanced reasons why it should again be placed under administration hence, the applications lack merit. Additionally, he deposes that the Court cannot issue an order of status quo ante. Mr. Mbae further asserts that the intended appeal is not arguable because there cannot be an appeal against a consent order, and that the Court had determined the issues raised therein in previous decisions. He also deposes that the intended appeal will not be rendered nugatory because execution was completed through an order issued on 5th January 2022. Mr. Mbae additionally avers that the Bank cannot derive interests or legal rights from the Debenture because it had been invalidated, and the Bank has no subsisting legal rights registered over the suit property. In the alternative, Mr. Mbae avers that the Bank's alleged interests cannot be protected because it was aware of Synergy's interests and claim over the suit property when it advanced loans to Cape Holdings. Synergy, therefore, prays that the two applications be dismissed with costs.

13. When the consolidated applications came up for hearing, Senior Counsel Mr. Allen Gichuhi appeared for Cape Holdings while Senior Counsel Prof. Githu Muigai, instructed by learned counsel Mr. William Kabaiku, appeared for I&M Bank alongside Mr. David Angwenyi and Ms. Wambui Githu. For Synergy, Senior Counsel Ahmednasir Abdulahi appeared alongside learned counsel Ms. Asli Osman. Counsel for the parties, while relying on the filed submissions, also made extensive oral highlights of the same.

14. On behalf of Cape Holdings Ltd, Mr. Allen Gichuhi, Senior Counsel, relied on submissions dated 17th December 2024. In advancing the submission that the applicant has an arguable appeal, Senior Counsel reiterated the grounds in support of the application, to wit, that the learned Judge erred in failing to appreciate that the decree was limited to Synergy Square and did not encompass the

whole property, which was built with loans from the Bank. Senior Counsel also urged that the learned Judge denied Cape Holdings a fair hearing and the right to property, resulting in the possibility of profound irreparable loss were Synergy to be allowed to execute against the property, which will be to the detriment of the Bank and other creditors. Mr. Gichuhi, Senior Counsel, argued that the learned Judge failed to determine the applications before her on merit and, in the process, misconstrued the decision of the Court of Appeal in Nairobi *CA No. 758 of 2021*. He submitted that the orders of the learned Judge were biased, unlawful and issued in disregard to the provisions of section 4 (4) of the *Limitation of Actions Act*. In conclusion to this aspect of the application, Senior Counsel rehashed the grounds of appeal and referred to various decisions to urge that Cape Holdings' appeal is arguable.

15. Addressing the nugatory aspect, Mr. Gichuhi, Senior Counsel, referred to Kenya Pipeline Company Ltd vs. Stanley Munga Githunguri [2011] eKLR; Sicpa Securities Sol. Sa vs. Okiya Omtatah Okoiti & 2 Others [2018] eKLR and Peter Njunguna Njoroge vs. Zipporah Wangui Njuguna [2013] eKLR to urge us to adopt the proportionality test and consider the expense and length of time it may take to reverse the execution. Senior Counsel submitted that the value of the alleged debt, being Kshs. 8 billion, is humongous, and if execution by Synergy is allowed to proceed, it will be detrimental to other creditors, thus contravening the *Insolvency Act*. In essence, the counsel's plea was for the application to be allowed as prayed.

16. Senior Counsel Githu Muigai led the charge on behalf of the Bank and relied on the submissions dated 12th December 2024. Senior Counsel pointed to the memorandum of appeal and submitted that it disclosed an arguable appeal. In buttressing this proposition, Senior Counsel urged that the learned Judge's misapprehension of the judgment of this Court informed the erroneous findings in the impugned ruling. Senior Counsel reiterated that the impugned orders undermine the sanctity of a debenture as a security and will prejudice the rights of all debenture holders across the entire banking sector. Senior Counsel urged that the orders contravened the holding in Nakumatt Holdings Limited & Another vs. Ideal Locations Limited [2019] eKLR that the administration of an insolvent company is for the benefit of all the creditors of the company and a situation where creditors separately attack or take assets of a company would defeat the overall object of the administration.

17. Regarding the nugatory aspect of the application, Senior Counsel submitted that as a money lending institution, the Bank stood to lose billions advanced and secured by the Debenture, given that Cape Holdings remains indebted to the Bank. Reference was made to the case of Peter Njuguna Njoroge vs. Zipporah Wangui Njuguna [2013] eKLR to urge that we strike a balance between the rights of Synergy that have accrued from the judgment and the Bank's constitutional right to appeal that judgment, and arrive at a just determination that best guarantees the interest of both parties. Senior Counsel also referred to the holding in Kenya Pipeline Company Ltd vs. Stanley Munga Githunguri (supra) to urge that we adopt the proportionality test and find that the appeal will be rendered nugatory if the subject matter is not preserved by issuance of an order of stay.

18. Senior Counsel Ahmednasir Abdulahi filed relatively similar submissions advancing Synergy's opposition to the two applications. Preliminarily, Senior Counsel asserts that the applications have not been filed in good faith and are an abuse of the Court process. To buttress this point, counsel asserted that the deponent of the affidavit in support of Application No. E967 of 2024 had ceased being an administrator and therefore lacked locus standi to bring the application on behalf of Cape Holdings. Relying on this Court's holding in I&M Bank Kenya Limited & another vs. Synergy Industrial Credit Limited & 2 Others [2024] KECA 855 (KLR), Senior Counsel submitted that an order of status quo ante is not available under rule 5 (2) (b) of the Court of Appeal Rules. Senior Counsel placed reliance on Thika School of Medical and Health Sciences Ltd (Under Administration) & Another vs. Ramana Rao & 2 Others [2022] eKLR to urge that a permanent injunction is equally unavailable under rule 5

(2) (b). According to Senior Counsel, the Court in I&M Bank Kenya Limited & Another vs. Synergy Industrial Credit Limited & 2 Others [2024] KECA 855 (KLR) invalidated the Debenture in question, and the learned Judge of the High Court cannot therefore be faulted for abiding by the decision of this Court.

19. Turning to the merits of the applications, Mr. Ahmednasir, Senior Counsel, submitted that the appeals are not arguable because the issues raised are res judicata as they have been determined by the Court in I&M Bank Kenya Limited & Another vs. Synergy Industrial Credit Limited & 2 Others [2024] KECA 855 (KLR) and Cape Holdings Limited (Under Administration) vs. Synergy Industrial Credit Limited & 2 Others [2024] KECA 165 (KLR). Senior Counsel relied on Bellevue Development Company Ltd vs. Gikonyo & 3 Others; Kenya Commercial Bank & 3 Others (Interested Parties) (2018) KECA (KLR) in urging us to abstain from determining matters which other benches of the Court have already defined.

20. As to whether the appeals will be rendered nugatory should the impugned ruling not be stayed, Senior Counsel once again stressed that the applicants' appeals are moot by virtue of this Court's decision in I&M Bank Kenya Limited & Another vs. Synergy Industrial Credit Limited & 2 Others [2024] KECA 855 (KLR). Additionally, Senior Counsel relying on Kenya Commercial Bank Ltd vs. Tamarind Meadows Ltd & 7 Others [2016] eKLR held the view that the High Court issued negative orders which are not capable of being stayed. Finally, while appreciating that as held in Teachers Service Commission vs. Kenya National Union of Teachers & 3 Others [2015] KESC 29 (KLR), stay orders are aimed at the preservation of the substratum of an appeal, Senior Counsel submitted that the negative orders issued by the High Court left nothing to be preserved by an order of stay. We were consequently urged to dismiss the applications.

21. We have reviewed the consolidated applications, the submissions by counsel for the parties, and the law. Ordinarily, a rule 5 (2) (b) application is determined by considering whether the appeal or intended appeal is arguable, and if so whether, absent stay orders, the appeal will be rendered nugatory should it eventually succeed.

    However, in the consolidated applications before us, the parties have submitted beyond these twin principles. In the circumstances, we identify the issues for determination as follows:

    i. Whether the applications are res judicata;

    ii. Whether NAI CA Application No. E967 of 2024 is competent;

    iii. Whether the orders of the High Court can be stayed;

    iv. Whether the pending appeals are arguable;

    v. Whether the appeals will be rendered nugatory;

    vi. Whether the Court can issue an order of status quo ante;

    and

    vii. Whether the Court can order mediation under rule 5(2)(b).

22. We start by addressing Synergy's preliminary objection that the consolidated applications are barred by the principle of res judicata. According to Synergy, the issues raised by the applicants are res judicata, having already been determined by the Court in Cape Holdings Limited (Under Administration) vs. Synergy Industrial Credit Limited & 2 Others [2024] KECA 165 (KLR); 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).

23. The principle of res judicata applies, with certain exceptions, not only to issues that the court was explicitly required to address and rule upon but also to all matters relevant to the subject of the litigation that the parties, exercising reasonable diligence, could have raised in the previous litigation. It serves to prevent endless litigation between the same parties over the same issues, thus ensuring finality in court decisions. Parties are, therefore, required to present their entire case before the court, and there is no room for preserving part of the case for future agitation through a different suit. All the issues that need to be litigated ought to be brought forth at once, and failure to do so will result in the litigant being barred from reopening the issues through subsequent litigation, even if the omission was due to negligence, inadvertence, or accident.

24. In our considered view, the question is not whether the subject matter of the litigation that has given rise to the consolidated applications has been litigated before but whether the consolidated applications are res judicata. As was held in Safaricom Ltd vs. Ocean View Beach Hotel Ltd & 2 Others [2010] eKLR, this Court draws its jurisdiction to entertain an application under rule 5 (2)

(b) from a notice of appeal duly filed pursuant to rule 77 of the Court of Appeal Rules. Such a notice must be in respect of a specific decision appealed from or to be appealed from. Addressing the issue as to whether an application for stay was res judicata, the Court in Kenya Bureau of Standards vs. Kwale International Sugar Company Ltd & 4 Others [2022] KECA 526 (KLR) held as follows:

> "As to the contention that the application is an abuse of the process of the court and is res judicata on account of the previous application in Civil Application 84 of 2019, we observe that that application related to stay of "judgment" delivered on 7th March, 2019 and in dismissing it, the court expressed that what the High Court had delivered on the 7th March 2019 though labelled or titled as a "judgment", was not a judgment "as understood in law". The present application relates to the subsequent judgment of the High Court in the same matter delivered on 7th November 2019 which could not have been the subject of an earlier application of 16th September 2019 that resulted in the ruling of December 4, 2020. We are not persuaded that the present application is either res judicata or an abuse of the process of the court."

25. The Court in Kandie vs. Lekakeny [2022] KECA 994 (KLR) adopted similar reasoning when it dismissed a plea of res judicata raised in respect to an application brought under rule 5(2)(b) of the Court of Appeal Rules. In the matter before us, we observe that Synergy has not averred that an application seeking orders against the impugned ruling of Mongare, J. has been heard and determined by this Court, thus rendering the consolidated applications res judicata. Whereas Synergy may plead that issues addressed in the ruling of Mongare, J. dated 9th December 2024 were res judicata in light of the decisions of this Court in Cape Holdings Limited (Under Administration) vs. Synergy Industrial Credit Limited & 2 Others [2024] KECA 165 (KLR); 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), that would, in our view, be an issue to be determined in the substantive appeals. We think that exploring the issue at this stage may take the wind out of the applicants' sails and will also amount to embarrassing the bench that will eventually be tasked to hear and determine the substantive appeals. Consequently, we find no merit in the plea of res judicata as raised by Synergy.

26. The next issue relates to the competency of NAI CA Application No. E967 of 2024. Mr. Ahmednasir, Senior Counsel raised an objection on the ground that the former administrators of Cape Holdings and specifically Mr. Ponangipalli Venakata Ramana Rao could not make the application because his tenure had lapsed by operation of the impugned ruling. In support of this argument reference was made to a letter dated 9th December 2024, authored by Mr. Ponangipalli Venakata Ramana Rao, informing the Official Receiver that he and his co-administrator had ceased acting as joint administrators of Cape Holdings with effect from the date of the letter. From the pleadings and submissions before us, it is apparent that Cape Holdings did not address the contents of the said letter. However, a perusal of the letter does not in any way express the author's agreement with the impugned ruling. The letter of itself did not take away Cape Holdings' right to approach the Court through its application in order to challenge the decision that removed the administrators. We would, in the circumstances, think that a detailed consideration of this argument is best left to a proper application, if any, on the competence of the appeal. As matters stand, we have an unimpeached notice of appeal, and that is what grants us jurisdiction to entertain Cape Holdings' application. We say no more.

27. We now turn to the substance of the consolidated applications. In doing so, we are minded of the holding in Nairobi Metropolitan PSV Saccos Union Limited & 25 Others vs. County of Nairobi Government & 3 Others [2014] KECA 871 (KLR) and Stanbic Bank Kenya Limited vs. Kenya Revenue Authority [2008] KECA 183 (KLR) that where the decision appealed or intended to be appealed resulted in a dismissal order or striking out orders, or where the court did not order any of the parties to do or refrain from doing something capable of being restrained, the Court cannot grant relief under rule 5 (2) (b). We are also aware that as has been held in several decisions of the Court, including Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] KECA 378 (KLR), for an applicant to qualify for the grant of the relief provided under rule 5 (2) (b), it must, firstly, be demonstrated that the appeal or intended appeal is arguable, and secondly, that the appeal will be rendered nugatory in the absence of the relief sought. Having stated the applicable principles, we proceed to address the remainder of the issues as to whether the orders of the High Court were negative orders; whether the pending appeals are arguable; whether the appeals will be rendered nugatory should the orders sought be declined; whether the Court should issue an order of status quo ante; and, whether the Court should issue an order referring the parties to mediation.

28. The first question, therefore, is whether the impugned ruling was negative in nature and incapable of being stayed. As already stated, the learned Judge addressed five applications in the impugned ruling. In our view, there is no doubt that the orders issued by the learned Judge were not negative in nature. For instance, one of the consequences of the orders was the removal of the administrators of Cape Holdings thus allowing Synergy to proceed with execution. In essence, the orders therein required the performance of certain obligations by the parties and are therefore capable of being stayed by the Court.

29. We now move to consider the application on its merits. In addressing the issue as to whether the appeal is arguable, we are guided by the precedent set in Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] KECA 378 (KLR), which establishes that an arguable appeal is not one guaranteed to succeed but rather one that is not frivolous in nature and warrants full examination by the Court. It is sufficient for a single bona fide arguable ground of appeal to be presented. Furthermore, the Court should, at this stage, refrain from making definitive or final determinations of fact or law, as such findings may compromise the integrity of the substantive appeal.

30. Upon review of the applications and the annexures, specifically the memorandum of appeal and the impugned ruling, we agree that the intended appeal meets the threshold of an arguable appeal. We say so on the basis that upon perusal of the exhibited memoranda of appeal, and being cognizant that the threshold of arguability is decidedly low, we cannot dismiss off hand the issues raised therein. We

therefore find that the applicants have surmounted the first of the two hurdles by demonstrating that they have arguable appeals.

31. 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.

32. At the heart of the nugatory issue is Cape Holdings' plea for an order of status quo ante and the submission that we adopt the proportionality test and find that the appeal will be rendered nugatory if the subject matter is not preserved with an order of stay. We appreciate that by dint of the holdings in Kenya Pipeline Company Ltd vs. Stanley Munga Githunguri [2011] eKLR; Sicpa Securities Sol. vs. Okiya Omtatah Okoiti & 2 Others [2018] eKLR and Peter Njunguna Njoroge vs. Zipporah Wangui Njuguna [2013] eKLR, some of the factors to be considered in determining whether an appeal is likely to be rendered nugatory are the proportionality test and the expense and length of time it may take to reverse an execution. However, in this case, execution has already been achieved. Perhaps this informs the applicants' deliberate move to seek not an order of stay but an order of status quo ante.

33. Turning to the prayer of status quo ante, even though the Court has granted such an order in some instances, the circumstances of this case do not provide us with such an option. We appreciate that in Kasigau Ranching (D.A.) Ltd vs. John Gitonga Kihara, Mary Wanjiku Mbugua, Olongida Ngilorti, Mishen Musa & Baraka Mining Co. [1998] KECA 135 (KLR) and Serah Wanjiru Kung'u vs. Godfrey G. Gichana Akuma [2021] KECA 632 (KLR), the Court granted status quo ante to meet the ends of justice. However, in this case, granting an order of status quo ante is not tenable. First, the removed administrators were appointed on 26th February 2024, and by operation of section 593 of the *Insolvency Act*, their term was to end on 26th February 2025. In that case, granting status quo ante would amount to usurping the powers of the High Court by extending the tenure of administrators. Secondly, the provisions of sections 593 and 594 of the *Insolvency Act* do not grant the Court power to reinstate an administrator in the manner requested of us in this application. Therefore, we decline to issue an order reinstating the administrators.

34. We also appreciate that as held in Peter Njuguna Njoroge vs. Zipporah Wangui Njuguna [2013] eKLR, the Court is bound to consider both the rights of the respondent accruing from the judgment and the applicant's constitutional right to appeal that judgment. In this case, Synergy's right accrued from the judgment delivered by this Court on 6th November 2020, over four years ago. Of course, this should be considered in the face of the Bank's assertion of its rights as a Debenture holder. Despite the applicants' assertion of the rights under Debenture and the colossal decretal sum involved, it is important to note

that no averment has been made of any impecunity on the part of Synergy. Additionally, and as matters stand, Cape Holdings is not under administration and remains a going concern. Therefore, the Bank will still have the opportunity to levy its claim over Cape Holdings. In our view, considering the history of the dispute, the scales of justice tilt towards letting Synergy enjoy the fruits of a judgment it has held since 6th November 2020. In so holding, we are mindful of the fact that Cape Holdings' attempt to recall, review, and set aside the judgment dated 6th November 2020 was rejected on 8th December 2023 by the bench that had delivered the judgment.

35. Lastly, on the application by Cape Holdings for referral of the dispute to mediation, we refer to the decision in Thika School of Medical and Health Sciences Ltd (Under Administration) & Another vs. Ramana Rao & 2 Others [2022] eKLR to reiterate that the scope of this Court's jurisdiction under rule 5 (2) (b) is limited to issuing an order of stay of proceedings or execution and injunction. Additional orders as prayed are beyond this Court's remit. Furthermore, as per the provisions of rule 108 of the Court of Appeal Rules, an order referring a matter for arbitration can only be made by the Registrar or the bench seized of the appeal and not in an interlocutory application like the one before us. Our finding that the jurisdiction of this Court under rule 5 (2) (b) is limited to grant of the reliefs stated therein puts the issue to bed and results in the dismissal of the applicants' prayers for orders of valuation and sale of the suit property pending the hearing and determination of the appeals.

36. In conclusion, we find that whereas the applicants have established that their appeals are arguable, they have fallen short of establishing that the appeals will be rendered nugatory should the orders sought be declined. Consequently, we find that the consolidated applications fail to meet the dual requirements for granting an order of stay and are bound for dismissal. As such, the consolidated applications are dismissed with costs to Synergy.

DATED AND DELIVERED AT NAIROBI THIS 2 ND DAY OF MAY 2025

P. O. KIAGE

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR