



**Synergy Industrial Credit Ltd v I & M Bank & another (Civil Appeal  
(Application) E459 of 2021) [2023] KECA 661 (KLR) (9 June 2023) (Ruling)**

Neutral citation: [2023] KECA 661 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E459 OF 2021  
HA OMONDI, M NGUGI, KI LAIBUTA, JM MATIVO & GV ODUNGA, JJA  
JUNE 9, 2023**

**BETWEEN**

**SYNERGY INDUSTRIAL CREDIT LTD ..... APPELLANT**

**AND**

**I & M BANK ..... 1<sup>ST</sup> RESPONDENT**

**CAPE HOLDINGS LIMITED (UNDER ADMINISTRATION) .... 2<sup>ND</sup>  
RESPONDENT**

*(Being an application to review and set aside the decision of the Court of Appeal at Nairobi  
(Coram: Musinga, P., Karanja and Murgor JJ.A.) dated 15th April 2022 in Civil Appeal  
Application No. E459 of 2021 in respect of the Application dated 16th December 2021)*

**RULING**

1. The background to this matter was substantially set out in the ruling of this Court (Musinga (P.), Karanja and Murgor, JJ.A.) delivered on April 1, 2022. That ruling arose from a Notice of Motion dated September 16, 2021 made the 1<sup>st</sup> Respondent herein, I & M Bank Limited. The substantive prayer as sought by the Applicant was that:

“Pending the hearing and determination of the substantive appeal, there be a stay of execution against Cape Holdings Limited [Under Administration] in High Court Misc. Application No. 114 of 2015 consolidated with High Court Misc. Application No. 126 of 2015; *Cape Holdings Limited v Synergy Industrial Credit Limited*.”

2. The matter before us is a Notice of Motion dated 7<sup>th</sup> April, 2022, expressed to be brought pursuant to Articles 48 and 159(2) (d) of the [Constitution](#), Sections 3A and 3B of the [Appellate Jurisdiction Act](#), Section 3 of the [Judicature Act](#), rules 1(2), 31, 42, 43 and 47 of the [Court of Appeal Rules](#) and other enabling provisions of law. It substantially seeks that this Court reviews, re-examines, re-opens and sets



aside the aforesaid decision. We wish to state that none of the aforesaid provisions expressly donates to this Court the power to grant the orders in the manner sought. We shall however return to this matter later in our ruling.

3. The Motion is based on the grounds that the order granted was for the benefit of a third party, the 2<sup>nd</sup> Respondent herein; that the orders sought by the 1<sup>st</sup> Respondent in their application was different from that which was being appealed against; that, instead of specifying the date of the order or decree sought to be stayed, the 1<sup>st</sup> Respondent sought a generic or omnibus stay of execution in a blanket form, and hence the orders sought and issued are too wide in scope to be understood by the Applicant (sic); that the 1<sup>st</sup> Respondent did not participate and was not a party to the consolidated suits which it was seeking to stay; that, as a result of the expansive nature of the order issued, the Court has in the process interfered with and predetermined two applications and an appeal that are both before the High Court and this Court, hence bringing the administration of justice into disrepute; that, as the 1<sup>st</sup> Respondent did not file any Notice of Appeal against the many rulings, orders and decree issued by the Court in the consolidated suits, the court had no jurisdiction to grant the orders it issued, hence the said orders are a nullity and liable to be set aside *ex debito justitiae*; that the Court did not consider the Applicant's submissions and, hence, it violated its right to a fair trial pursuant to Article 50 of the Constitution; that there are glaring factual errors in the ruling which entail gross miscarriage of justice; and that the application raises weighty constitutional issues under Articles 27 and 50 of the Constitution.
4. The application was supported by an affidavit sworn by Jacob Mbae Meeme, the Applicant's Head of Legal Services (?). He deposed, based on legal advice, that the said order was granted without jurisdiction in that no Notice of Appeal was filed by the 1<sup>st</sup> Respondent against the decree or any of the many Rulings rendered in High Court Misc. Application No. 114 of 2015 as consolidated with Misc. Application No 126 of 2015- Cape Holdings Limited -v- Industrial Credit Limited ("the consolidated suits"), to warrant the 1<sup>st</sup> Respondent to apply for, and eventually be granted, a stay of execution by the Court. To the deponent, the grant of the said order was a radical unprecedented departure from well-established and long list of this Court's precedent and statutory framework that determine the jurisdiction of the Court under rule 5(2)[b] of the Court of Appeal Rules to the effect that this court would be acting without jurisdiction if it grants a stay of execution when a party does not file a Notice of Appeal.
5. It was further averred, based on the same advice, that the provisions of rule 5 of the Court of Appeal Rules are aimed at providing an interim relief where the Superior Court has determined a matter, and the party against whom the determination is made has either appealed or intends to appeal. Therefore, if there is no appeal or no intention to appeal, this Court would have no jurisdiction to meddle in a decision made by the Superior Court. As a result, since the Court had no jurisdiction to grant the stay of execution in its ruling of 1<sup>st</sup> April 2022, the said order must be discharged and vacated as of right since, as this Court has held several times, orders granted without jurisdiction will be discharged once that is brought to the Court's attention.
6. Based on the foregoing, it was averred that the Court granted the 1<sup>st</sup> Respondent preferential treatment and placed it on a pedestal that is not known in law by extending favours to a litigant outside the four corners of the law. This, it was contended, is in violation of the equal protection law under Article 27(1) of the Constitution since the Applicant was not accorded its right and benefits under the law, and that the 1<sup>st</sup> Respondent was treated as a special class of litigants to whom favours will be done, the law of the land notwithstanding. By not adhering to precedents, it was deposed, disorder and uncertainty is bound to be created.



7. It was averred in addition, that the Court in a uniquely and very unusual manner gave a stay of execution order to the 1<sup>st</sup> Respondent, I&M Bank Kenya Limited, not for its benefit but for the benefit of the 2<sup>nd</sup> Respondent, thereby creating a new legal notion- based surrogacy, whereby one party can seek orders for another party and the Court grants it. To the deponent, the 1<sup>st</sup> Respondent had no legal right to seek the orders it sought (and granted by the Court) for and on behalf of the 2<sup>nd</sup> Respondent. The result is that the Court stayed execution of a decree of the High Court at the instance of the 1<sup>st</sup> Respondent, but for the benefit of the 2<sup>nd</sup> Respondent, an action which, according to the deponent, amounted to a grave breach of the law and visits great injustice to the Applicant.
8. It was further averred that, from the reading of the Ruling and the proceedings since inception, the Court, in its ruling dated 1<sup>st</sup> April 2022, did not consider at all both the oral and written submissions of the Applicant, and hence violated the Applicant's right to a fair hearing under Article 50 of the [Constitution](#). In particular, it was deposed that the following errors were noted:
  - a. Contrary to the Court's assertion, the Notice of Motion sought a stay of execution against Cape Holdings Limited [under administration] and not against the Applicant/1<sup>st</sup> Respondent, Synergy Industrial Credit Limited as the Court wrongly stated.
  - b. The Court stated that the parties herein were locked in a decade long litigation over the sale of LR . Number Z09/194-36 (LR 120877) the charged property, yet the dispute between the parties was for the enforcement of an arbitral award, and that the property only came into focus at the execution stage before the Deputy Registrar. The property was not in issue before the High Court and, more fundamentally, the property was not charged to any bank or financial institution, and was free from any encumbrances.
  - c. Contrary to what the Court of Appeal asserted, the Application dated October 22, 2021 filed by the Applicant/1<sup>st</sup> Respondent herein in E049 of 2021 - In the Matter of [Cape Holdings Limited](#) [under Administration] [the insolvency case) did not seek leave to proceed with execution "against the charged property". To the contrary, it sought that leave be granted to the Applicant to proceed and continue with the execution against the company, Cape Holdings Limited.
  - d. The Court referred to the 1<sup>st</sup> Respondent's standing in seeking the stay order and referred to rules 75(1) and 77 of the [Court of Appeal Rules](#), but failed to interrogate whether the 1<sup>st</sup> Respondent filed a Notice of Appeal, which it did not.
  - e. The Court wrongly implied that it had jurisdiction to hear the application even though the 1<sup>st</sup> Respondent was not a party to the High Court proceedings in the consolidated suits, which was not the case because the 1<sup>st</sup> Respondent ought to have filed the Notice of Appeal and served it.
  - f. The Court was totally confused by referring to the order issued by Honourable Justice Mabeya in the Insolvency Case E049 of 2021 while the one the 1<sup>st</sup> Respondent wanted to stay was on a different matter that sought stay of execution against Cape Holdings Limited [Under Administration] in High Court Misc. Application No. 114 of 2015 consolidated with Misc. Application No. 126 of 2015: [Cape Holdings Limited v Synergy Industrial Credit Limited](#).
9. In the deponent's view, these glaring factual errors are the defining characteristics or features of the court's Ruling of 1<sup>st</sup> April 2022, and the same singularly and collectively entail a gross miscarriage of justice that warrants this Court to revisit its said ruling by way of review. It was his view that the Court was totally lost as to what order or decree it was staying and oscillated between the Order of



- December 10, 2021 by Justice Mabeya in High Court Insolvency Case E049 of 2021 and a general stay of execution of the decree in the consolidated suits.
10. It was noted that the Court stayed execution of a decree that the Supreme Court in Application No 5 of 2021, [E007 of 2021] - *Cape Holdings Limited v Synergy Industrial Credit* - refused to stay and thus allowed the very application the Supreme Court dismissed in disregard of Article 163(7) of the *Constitution*.
  11. According to the deponent, the decree of the High Court in the consolidated suits stands at over Kshs. 5.5 billion and accrues interest at Kshs. 85 million per month, which decree was drafted by consent of all the parties. The value of the land as it stands is not enough to satisfy the decree, and the more this matter delays, the more the rights of the Applicant will be compromised.
  12. It was disclosed that following the issuance of the decree and the subsequent execution by the Applicant against the 2<sup>nd</sup> Respondent, the 2<sup>nd</sup> Respondent filed an Appeal in the High Court against the order of the Deputy Registrar, Ms. E. M Nyakundi, issued on 5<sup>th</sup> January 2022. Simultaneously, the 2<sup>nd</sup> Respondent, Cape Holdings Limited, filed a review application before the High Court seeking stay of execution of the decree over LR Number 209/19436 (IR 120877), and for the decree to be set aside. On 15<sup>th</sup> March 2022, the 2<sup>nd</sup> Respondent, Cape Holdings Limited, filed an application to review the judgment of the Court of Appeal dated November 6, 2020 in Civil Appeal (Application) No. 81 of 2016. In the deponent's view, the ruling of this Court delivered on April 1, 2022 has the net effect of interfering in the matter that is before the High Court and the Court of Appeal where the Court has given direction on the case management of the substantive appeal in Civil Appeal No. E758 of 2021 - *I & M Bank Limited v Cape Holdings Limited & Another*. The deponent asserted that the errors made by the Court that tilt the scale of justice in favour of the 1<sup>st</sup> Respondent must be addressed and corrected, and cannot be allowed to stand.
  13. Based on legal advice, it was averred that the application raises weighty constitutional issues of Articles 27 and 50 of the *Constitution* with regard to equality before the law, non- discrimination, equal protection of the law, favouritism, the right to be heard and the right to a fair hearing by an impartial court, which are some of the serious requirements of a judicial system since it creates certainty in the law and confidence in the courts. It was urged that a strong case for review of the court's decision of 1<sup>st</sup> April 2022 had been made, and that it was in the interest of justice that this application be allowed.
  14. Submitting on behalf of the Applicant, Senior Counsel, Ahmednassir Abdullahi, who appeared with Ms Osman, relied on the written submissions of the Applicant and highlighted the same during the virtual hearing before us.
  15. In support of the position that the jurisdiction of this court in applications brought pursuant to rule 5(2) (b) of the Court's rules is only triggered when the Applicant files a Notice of Appeal against the decision of the superior court, Learned Senior Counsel relied on *John N. Liboyi v The Board of Governors of St. John College*, Civil Application No. Nai 13 of 2009 (UR 92/2009); *Rueben & 9 others v Nderitu & Another* [1989] KLR 459; *Nguruman Ltd v Shampole Group Ranch & Another* [2014] eKLR; and *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] eKLR.
  16. To support the submission that a decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and that such a decision is amenable to setting aside *ex debito justitiae*, reliance was placed on *Public Service Commission & 4 others v Cheruiyot & 32 others* (Civil Appeal 119 & 139 of 2017 (Consolidated)) [2022] KECA 15 eKLR) (8 February 2022) (Judgment) and *Phoenix of E.A Assurance Company Limited v S.M Thiga t/a Newspaper Service* [2019] eKLR.



17. Regarding the differential treatment, Learned SC cited *Manchester Outfitters (Suiting Division) Ltd [now known as King Wollen Mills Ltd] & another v Standard Chartered Financial Service Ltd & 2 others* [2019] eKLR; *Nguruman Ltd v Shampole Group Ranch & Another* [2014] eKLR and *Standard Chartered Financial Services & another v Manchester Outfitters (Suiting Division) Ltd (Now Known as King Woollen Mills Ltd) & 2 Others*.
18. In opposition, the 1<sup>st</sup> Respondent filed both a replying affidavit and submissions which were highlighted by its counsel, Mr. William Kabaiku. According to the 1<sup>st</sup> Respondent, the instant application is a knee jerk response from the Applicant after the unfavourable decision delivered on April 1, 2022. Consequently, this Court needs to exercise restraint while exercising its jurisdiction in reviewing interlocutory application as was held in Kisumu Civil Application No 74 of 2019 - *Alfred Mincha Ndubi v The Standard Limited*. Nevertheless, in the event that the Court is inclined to exercise its residual jurisdiction to reopen and/or review its concluded decision, it was the 1<sup>st</sup> Respondent's position that the same should be exercised in exceptional circumstances, cautiously and with circumspection, and only where the interest of justice demands, but which circumstances do not obtain in the present matter. Furthermore, the residual jurisdiction can only be set in motion once the established threshold is met, to wit: that the decision has occasioned injustice or a miscarriage of justice; that the said injustice/or miscarriage of justice has eroded public confidence in the administration of justice; and that no appeal lies against the decision in issue.
19. The 1<sup>st</sup> Respondent maintained that the Applicant had not met and/or established the aforesaid threshold, and cannot purport to disturb the sound decision of this Court with no basis whatsoever for the reason that the Applicant sought leave before the High Court in Insolvency Cause No. E049 of 2021 to be allowed to continue with execution against the 2<sup>nd</sup> Respondent in High Court Misc. Application No 114 of 2015 consolidated with High Court Misc. Application No. 126 of 2015, and that the High Court Judge delivered his ruling dated December 10, 2021 allowing the Applicant to proceed with its execution. Being aggrieved with the said decision, the 1<sup>st</sup> Respondent preferred an appeal against the said decision by lodging a Notice of Appeal on December 14, 2021. Therefore, the learned Judge having rendered his decision on the application within the same Cause, it was only reasonable that the Appeal, if any, lie in the ruling resulting therefrom. Consequently, the argument that the Notice of Appeal ought to relate to the consolidated suits is misplaced and has no legs to stand on.
20. It was the 1<sup>st</sup> Respondent's case that the proposition that a Notice of Appeal should have been filed in the consolidated suits to stay the execution allowed to proceed by Mabeya, J in an insolvency matter is flawed and misplaced since the Deputy Registrar before whom the Notice to Show Cause was pending for issuance of a Prohibitory Order in the consolidated suits was not clothed with jurisdiction to "grant leave to proceed with execution against the 2<sup>nd</sup> Respondent" in light of the Insolvency Proceedings commenced against the 2<sup>nd</sup> Respondent. Consequently, the 1<sup>st</sup> Respondent's application under rule 5(2) (b) dated December 16, 2021 seeking stay of Mabeya, J's ruling, which is now the subject of the impugned ruling, was properly laid before the Court having been anchored on the Notice of Appeal dated December 10, 2021. Nevertheless, the 1<sup>st</sup> Respondent argued that, since no application had been filed by the Applicant to strike out the aforesaid Notice of Appeal in terms of the procedure laid down in rule 83 or 84 of the *Court of Appeal Rules*, this Court should decline the invitation to fault the Notice of Appeal on which the 1<sup>st</sup> Respondent's application was anchored. Furthermore, an Appeal (E758 of 2021) raising fundamental issues of law is on record and, in the spirit of justice and fairness, the Applicant cannot be allowed to frustrate the rights of parties to be heard without any basis.



21. The 1<sup>st</sup> Respondent also maintained that it was a secured creditor to the 2<sup>nd</sup> Respondent, having advanced USD 25,000,000 and obtained a debenture over all the assets of the Company, and that the charged property has been at the heart of the dispute between the Applicant and the 2<sup>nd</sup> Respondent. Therefore, attempts to dis-associate the charged property from the proceedings is an academic exercise since the charged property is the only property held by the 2<sup>nd</sup> Respondent and held by the Bank as security, and it would not be in the interest of justice for the Applicant to execute against the 2<sup>nd</sup> Respondent in exclusion of other creditors.
22. On the issue of contravention of the decision of the Supreme Court by the Court, it was stated that the proceedings herein are parallel to those before the Supreme Court since the proceedings at the Supreme Court arose from proceedings in respect of recognition and enforcement of an Arbitral award and the right of appeal to the Court of Appeal. However, the appeal and application for stay herein relate to the insolvency proceedings initiated by the Bank in Cause No. E049 of 2021 which placed the 2<sup>nd</sup> Respondent under Administration. Consequently, the factors obtaining in the separate proceedings are fundamentally different and, as a result, there is no contravention of the *Constitution*.
23. Similarly, the 2<sup>nd</sup> Respondent opposed the application by way of a replying affidavit and submissions which were highlighted by its learned counsel, Mr. Allen Gichuhi, SC.
24. It was the 2<sup>nd</sup> Respondent's case that the application by the Applicant in the Insolvency Court was prompted by the fact that the 1<sup>st</sup> Respondent herein (I & M Bank Limited), a holder of a floating debenture over the 2<sup>nd</sup> Respondent's assets, placed the 2<sup>nd</sup> Respondent under Administration by virtue of Section 534 of the *Insolvency Act*, No.17 of 2015. The Applicant herein therefore sought, in Insolvency Cause No. E049 of 2021 vide application dated October 22, 2021 orders, inter alia, that leave be granted for it to proceed and continue with the execution against the 2<sup>nd</sup> Respondent in High Court Misc. Application No. 114 of 2015 consolidated with High Court Misc. Application No. 126 of 2015: *Cape Holdings Limited -v- Synergy Industrial Credit Limited*.
25. According to the 2<sup>nd</sup> Respondent, upon the appointment of the Administrator, an automatic moratorium was placed on all legal processes, including any execution proceedings contemplated by the 1<sup>st</sup> Respondent in High Court Misc. Application No. 114 of 2015 consolidated with High Court Misc. Application No. 126 of 2015: *Cape Holdings Limited -v- Synergy Industrial Credit Limited*. However, the High Court in the ruling dated 10<sup>th</sup> December 2021 granted the Applicant leave to proceed with the execution against the 2<sup>nd</sup> Respondent in the consolidated suits, which is the subject of the appeal filed. Nevertheless, at the hearing of the application, the subject of this review, Counsel for the Applicant through submission duly raised the issue of lack of a Notice of Appeal and counsel for the other parties duly addressed this issue. Therefore, the Applicant is relitigating the issue of jurisdiction involving the Notice of Appeal.
26. It was the 2<sup>nd</sup> Respondent's case that there is no review in interlocutory applications, and that the Applicant is inviting this Court to prejudge matters already raised in the appeal, which is a clear waste of judicial time and against the overriding objective of the Court as espoused under Sections 3A and 3B of the *Appellate Jurisdiction Act*. Consequently, the present application is an appeal clothed as a review application and, should this Court proceed to allow the application, it shall be tantamount to this Court opening a Pandora's box.

### **Analysis And Determination**

27. We have considered the issues raised in this application.



28. There is no doubt that this Court has the jurisdiction to review its decision. However, as was held in *Benjob Amalgamated Ltd v. Kenya Commercial Bank Limited* [2014] eKLR, the residual jurisdiction of the Court to review its own decisions “should be invoked with circumspection”. In that case, the Court, after reviewing decisions from different jurisdictions, expressed itself as follows:

“The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court).”

29. In *Ndubi v Standard Limited* (Civil Application No. 74 of 2019) [2021] KECA 364 (KLR) Kiage, JA expressed himself as hereunder:

“I reiterate the constant refrain of this court that reviews are not provided for in our rules. They must never be thought of as common place exercises to be sought as knee- jerk response to decisions of the court that do not flatter a party’s fancy. We entertain applications for review only in exceptional circumstances where it is apparent that the usual principle of finality might work injustice... See also *Benjob Amalgamated Ltd & another v Kenya Commercial Bank Ltd* [2014] eKLR. I think that the court ought to be even less inclined to revisit and review rulings made at interlocutory stages such as the one sought to be reviewed herein. The court exists to determine appeals and does not have the luxury of engaging in such applications, and twice over at that. On point of principle therefore, I stand disinclined to the grant of this kind of application.”

30. In reaching its decision, the Court relied on *Mohammed Jawayd Iqbal (personal Representative of The Estate of The Late Ghulam Rasool Jammohamed) v George Boniface Mbogua* [2020] eKLR in which this Court held that:

“...the power to review, re-open and/or set aside judgments in concluded appeals is one that is exercisable only in exceptional circumstances. The court embarks on it cautiously, with circumspection and, we dare add, in the most compelling cases where the justice of the case patently demands that the court turn back and re-examine what is declared with finality. The burden to convince the court to do must lie with the applicant...”

31. It is contended that this Court in its ruling dated 1<sup>st</sup> April, 2021 had no jurisdiction to entertain the matter since the 1<sup>st</sup> Respondent, the applicant in those proceedings, had not filed a Notice of Appeal and hence had no locus before the Court. It is not contended that there was no Notice of Appeal at all filed. That there was a Notice of Appeal filed in the proceedings appealed from is not disputed. What is in contention is that the said Notice was filed by the 1<sup>st</sup> Respondent in respect of a decision in which the 2<sup>nd</sup> Respondent was not a party. In other words, the Notice of Appeal on the file was in respect of another decision. To the Applicant, the Court granted a stay in respect of a matter in which no Notice of Appeal was filed. That this Court’s jurisdiction flows from the filing of a Notice of Appeal is quite



clear from the decision of Omolo, JA in *Safaricom Limited v. Ocean View Beach Hotel Limited and two others* Civil Application No. 327 of 2009 [2010] e KLR in which the application of rule 5(2) (b) was explained in very simple terms thus:

“At the stage of determining an application under Rule 5(2)(b) there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be intention to appeal which is manifested by lodging a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under Rule 5(2)(b) because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgement of the notice of appeal the Court of Appeal would have no business to meddle in the decision of the High Court.”

32. Our understanding of the decisions cited as well as the decision sought to be reviewed is that once a Notice of Appeal is filed against a particular decision, the jurisdiction of this Court is thereby triggered, and an application seeking to stay the decision intended to be appealed against may be entertained. That is the gist of the decision in *Nairobi City Council v Resley* [2002] EA 494 in which it was held that:

“There is no provision for allowing a notice of appeal lodged in a later decision to be used in an application for stay of execution of an earlier decision...It is trite law that without a notice of appeal against particular orders, we would have no Jurisdiction to grant a stay of those orders and we cannot, therefore accept Mr. Oduol's argument to the effect that the notice of appeal against the ruling of 11th April, 2002 entitles him to apply for a stay of execution of orders made on 11th March, 2002...In this matter, the notice of appeal relates to the decision of the High Court given on 2nd December, 2010 dismissing the application for review. The order for stay that is sought is in relation to the Judgment delivered on 2nd December, 2009. No appeal has been preferred against that judgment.”

33. We agree with that decision that a stay of execution ought to be granted only in respect of the order against which a Notice of Appeal has been lodged and, in our view, unlike an injunction, one cannot rely on a Notice of Appeal lodged against one decision to stay another decision against which there has not been an expression of an intention to appeal. However, in this case, it is not in dispute that the 1<sup>st</sup> Respondent lodged a Notice of Appeal against the order issued in the aforesaid Insolvency Cause. Based on that Notice, the 1<sup>st</sup> Respondent could competently seek to stay the proceedings or execution in those proceedings.
34. During his oral address, Mr. Ahmednassir, SC. submitted that the Notice of Appeal that was filed was against the decision of Mabeya, J in which the Learned Judge granted leave to the Applicant to proceed with execution against the 2<sup>nd</sup> Respondent. However, it was contended that the stay granted was in respect of the consolidated suits to which the 1<sup>st</sup> Respondent was not a party. The result was that the stay granted was issued in favour of the 2<sup>nd</sup> Respondent who had not sought the same. Further, that the order stayed execution in the consolidated suits when no Notice of Appeal had been filed against an order therein.
35. To fully appreciate the matters in contention herein, it is important to understand the relationship between the parties herein. The original dispute arose between the Applicant and the 2<sup>nd</sup> Respondent, and the Applicant obtained favourable orders which it is intent on executing against the 2<sup>nd</sup> Respondent. One of the properties of the 2<sup>nd</sup> Respondent is LR . Number Z09/194-36 (LR 120877), and the execution seems to be targeted at that property which, according to the 2<sup>nd</sup> Respondent, is the only property that the 2<sup>nd</sup> Respondent has. That dispute is the subject of the consolidated suits. On the



- other hand, the 1<sup>st</sup> Respondent alleges that it is a debenture holder over all assets of the 2<sup>nd</sup> Respondent pursuant to a Debenture dated December 15, 2020 and in order to protect its interest, on October 12, 2021, it placed the 2<sup>nd</sup> Respondent under Administration. The matter is the subject of Insolvency Cause No. E049 of 2021.
36. By an Application dated October 22, 2021 in the Insolvency proceedings, the Applicant prayed that "leave be granted to the Applicant to proceed and continue with the execution against the Company, Cape Holdings Limited, in High Court Misc. Application No. 114 of 2015 consolidated with High Court Misc. Application No. 126 of 2015: *Cape Holdings Limited -v - Synergy Industrial Credit Limited.*" That is the order that was granted on December 10, 2021. Aggrieved by that order, the 1<sup>st</sup> Respondent lodged a Notice of Appeal on 14<sup>th</sup> December, 2021 and followed it with the application for stay, whose ruling is the subject of this review application. In that application, the 1<sup>st</sup> Respondent sought orders against the Applicant herein, staying execution in High Court Misc. Application No. 114 of 2015 consolidated with High Court Misc. Application No. 126 of 2015, *Cape Holdings Limited v Synergy Industrial Credit Limited* pending the hearing and determination of an appeal.
37. In the Applicant's view, the 1<sup>st</sup> Respondent could only seek to stay the order in respect of the Insolvency Matter since it was in that matter that it was a party, and its Notice of Appeal was filed in the said matter.
38. It is not lost to us and it bears repetition that in its application before the High Court, which application was made in the Insolvency Cause, the Applicant sought leave to proceed and continue with the execution against the 2<sup>nd</sup> Respondent in the consolidated suits, being High Court Misc. Application No. 114 of 2015 consolidated with High Court Misc. Application No. 126 of 2015: *Cape Holdings Limited -v - Synergy Industrial Credit Limited.* Having been granted the green light to proceed with execution in the consolidated suits, the Applicant cannot be heard to complain when the 1<sup>st</sup> Respondent, who is aggrieved with that very execution triggered by the leave sought by the Applicant, challenges that leave and in the meantime seeks a stay of the consequences of the leave that the Applicant obtained. The consequences of the grant of that leave will invariably be the execution in the consolidated suits. In our view, the natural consequence of staying the order issued on 1<sup>st</sup> April, 2022 would be to stay the execution in the consolidated suits since, without that leave, execution against the property of the 2<sup>nd</sup> Respondent in the consolidated suits cannot proceed. In our view, and in practical terms, it does not matter whether the Court stayed the decision in the Insolvency proceedings or the execution in the consolidated suits as the effect would have been the same. Accordingly, we find no merit in this ground.
39. As to whether the decision had the effect of benefiting the 2<sup>nd</sup> Respondent, it is our view that a grant of stay may not only benefit the applicant, but may benefit other parties to the proceedings as well. The mere fact that other parties stand to benefit from the stay is not necessarily a ground for declining an otherwise merited application. It is not contended that the 1<sup>st</sup> Respondent had no benefit to reap from the stay. It cannot be gainsaid that a debenture holder has interest in a property at the risk of being sold in execution of a decree. The mere fact that there is convergence between its interest and that of the judgement debtor does not mean that the stay is only beneficial to, and was meant only for, the benefit of the judgement debtor. We find no merit in this contention either.
40. On the allegations that the Court in rendering the impugned ruling sat on an appeal against a decision made by the Supreme Court contrary to Article 163(7) of the *Constitution*, it is clear that the two sets of proceedings, though related, are not the same. While the proceedings in the High Court in the consolidated suits and, by extension, at the Supreme Court arose from recognition and enforcement of an arbitral award and certification of an appeal to the Supreme Court, the present proceedings were triggered by the application by the Applicant seeking green light to proceed with the execution



in respect of the same decision, notwithstanding the fact that the 2<sup>nd</sup> Respondent had been placed under administration by the 1<sup>st</sup> Respondent. In our view, the impugned ruling before us and the ruling delivered on October 8, 2021 by the Supreme Court in Application No. 5 of 2021, though arising from related parallel proceedings, are not the same.

41. It was pointed out to us that, in the said ruling, this Court misconceived the proceedings before it by incorrectly referring to the manner in which the proceedings were originated, the actual orders and the parties who were before the Court. While we agree that the factual exposition of the dispute as reproduced in the said ruling was not entirely correct, the law in such matters, as we understand it, was laid down by this Court in *Mabinda v. Kenya Power & Lighting Co. Ltd* [2005] 2 KLR 418 where the Court expressed itself as follows:

“The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made.”

42. The question that we have to deal with is whether or not the alleged misconceptions, had they not been committed by the Court, would have led the Court in arriving at a different conclusion of the matter. In other words, by reviewing the decision of 1<sup>st</sup> April, 2021, based on the said misconceptions, would we be giving effect to this Court’s intention at the time the decision was made? To answer that question, one needs to understand the nature of the application that was before the Court. The said application was brought under rule 5(2) (b) of the Rules of this Court. In such applications, the law as restated by Omolo, JA. in *Safaricom Limited -Versus- Ocean View Beach Hotel Limited and two others* Civil Application No. 327 of 2009 [2010] e KLR in which the Learned Judge cited with approval an earlier decision of the Court in *Ruben & 9 Others v. Nderitu & Another* [1989] KLR 459 is that:

“In dealing with rule 5(2) (b) applications, this Court exercises original jurisdiction and this has been so stated in a long line of cases decided by this Court. Once an applicant has properly come before the Court, the Court has jurisdiction to grant an injunction or make an order for a stay on such terms as the Court may think just. We have to apply our minds de novo (anew) on the propriety or otherwise of granting the relief sought. And as we have always made clear, this exercise does not constitute an appeal from the trial judge’s discretion to ours. In such an application, the applicant must show that the intended appeal is not frivolous, or put the other way round, he must satisfy the Court that he has an arguable appeal. Secondly, it must be shown that the appeal, if successful, would be rendered nugatory: see *Stanley Munga Githunguri v. Jimba Credit Corporation Limited* Civil Application No. Nai 161 of 1988.”

43. We have considered the factual errors pointed to us by Mr. Ahmednassir, SC. And, while we regrettably appreciate the same, it is our view that those errors did not go to the root of the matter that the Court was dealing with. In determining whether or not the errors go to the root of the decision, the Court is required to consider the ruling holistically as opposed to merely picking out certain sentences out of context. We have done so in this matter and, notwithstanding the errors pointed out, and based on our findings in this ruling, we hold that the said factual errors, had they not been committed, would not have materially affected the outcome of the decision.



44. We associate ourselves with the view expressed in The Code of Civil Procedure, Volume III Pages 3652-3653 by Sir Dinshaw Fardunji Mulla that:

“The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure... The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper.”

45. In order to justify a review of this Court’s decision, the applicant must show that there exist exceptional circumstances. What constitute exceptional circumstances were identified by the Supreme Court in Fredrick Otieno Outa v Jared Odoyo Okello & 3 Others [2017] eKLR where the Court held that:

“Such circumstances shall be limited to situations where:

- i. the Judgment, Ruling, or Order, is obtained, by fraud or deceit;
- ii. the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;
- iii. the Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto;
- iv. the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision.”

46. In this case, based on the above decision, the only ground which was relevantly submitted to us was that the order granted by the Court was a nullity on the ground that it was issued without jurisdiction as there was no Notice of Appeal lodged against the decision which was sought to be appealed against. We have found that not to be the case. The issue of discrimination was similarly based on the submission that in prior decisions, this Court had found that a stay cannot be granted in the absence of a Notice of Appeal, and that in the decision sought to be reviewed, the court did not adhere to that precedent. We have already found that, in this case, there was a Notice of Appeal duly lodged on the basis of which the stay order could be grounded by considering the circumstances holistically.

47. Having considered the issues raised before us in this application, we find no merit in them. Consequently, we dismiss the Motion dated April 7, 2022 with costs to the Respondents.

48. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF JUNE, 2023.**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**



**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

**J. MATIVO**

.....

**JUDGE OF APPEAL**

**G. V. ODUNGA**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

