Cape Holdings Limited (Under Administration) v Synergy Industrial Credit Limited (Civil Appeal (Application) 81 of 2016) [2023] KECA 1497 (KLR) (8 December 2023) (Ruling)

Neutral citation: [2023] KECA 1497 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 81 OF 2016

K M'INOTI, F SICHALE & J MOHAMMED, JJA

DECEMBER 8, 2023

BETWEEN

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

AND

SYNERGY INDUSTRIAL CREDIT LIMITED ..... RESPONDENT

(Application for review of the Judgment of the Court of Appeal at Nairobi (M'Inoti, Sichale & J. Mohammed, JJ.A.) dated 6th November 2020)

RULING

1. The motion on notice by the applicant, Cape Holdings Ltd (Under Administration) dated March 1, 2022 seeks recall, review and setting aside of the judgment of this Court dated November 6, 2020. A short background to the application is necessary to properly contextualise the application and the issues raised therein.

2. After hearing a dispute between the applicant and the respondent which they referred to arbitration, on January 30, 2015, an arbitral tribunal awarded the respondent against the applicant Kshs 1,666,118, 183.00 together with compound interest at 18% p.a. for the whole or part of the total award that shall be unpaid from January 1, 2015 until payment in full, together with costs on the High Court scale.

3. The applicant was aggrieved and applied to the High Court of Kenya at Nairobi, under section 35 of the *Arbitration Act*, to set aside the arbitral award. By a ruling dated March 11, 2016, the High Court (Kariuki, J.) set aside the arbitral award on the grounds that the arbitral tribunal had determined issues beyond the scope of the terms of the reference to arbitration. The respondent then moved to this Court on appeal and filed Civil Appeal No. 81 of 2016, but the appeal was struck out on the ground that there was no right of appeal under section 35 of the *Arbitration Act*. The matter ultimately ended up in the Supreme Court, which, by a majority judgment dated December 19, 2019, held that while not every decision of the High Court was appealable to this Court under section 35 of the *Arbitration Act*,

in exceptional and limited circumstances and for the sake of correcting palpable injustice, this Court has residual jurisdiction to entertain such appeals. The Supreme Court then directed this Court to hear and determine the respondent's appeal against the ruling of the High Court dated March 11, 2016.

4. The appeal was heard on the two broad issues raised by the respondent, namely:

   i. whether the High Court exceeded its jurisdiction under section 35 of the *Arbitration Act* by treating the application before it to set aside the arbitral award as an appeal on merits of the the arbitral award; and

   ii. whether the High Court erred by holding that the arbitral clauses in the agreements, the subject of the arbitration, did not confer on the arbitral tribunal jurisdiction to determine issues that were addressed in the arbitral award.

5. It is appropriate to point out at this juncture that the applicant did not file any cross-appeal or notice of grounds for affirming the decision of the High Court, so as to enable this Court to address issues beyond the two issues raised by the respondent. Equally, the applicant did not, for that purpose, avail itself the option offered by rule 4 of the Rules of this Court of seeking extension of time to file a cross-appeal or notice of grounds for affirming the decision of the High Court.

6. After hearing the appeal, this Court, in a judgment dated November 6, 2020, which the applicant now seeks to be recalled, review and set aside, allowed the appeal. The Court expressed itself thus:-

> "Where the terms of the arbitral agreement are clear and unrestricted, it is not open to the court to look for and impose its own strictures and restrictions on the arbitral agreement. If the parties wished to restrict the arbitration to only the written agreements, we would have expected them to state so expressly in the arbitral agreement itself. Furthermore, a look at how the learned judge dealt with the question leaves no doubt in our minds that he did not confine himself to the real question, namely the terms of the arbitral agreement, but instead went into a determination that amounts to saying the arbitral award was erroneous under the law of contract. This was tantamount to undertaking a merit review of the arbitral award, based on consideration of provisions of the written agreements far removed from the arbitral agreement itself, so as to reach a different finding from the arbitral tribunal, which we think the learned judge was not entitled to do." (Emphasis added).

7. The applicant was still aggrieved and on 16th November 2020 it filed in this Court Civil Application No. Sup. E006 of 2020 for a certificate to enable it appeal to the Supreme Court on the grounds that its intended appeal raised matters of general public importance. That application was dismissed vide a ruling dated March 5, 2021 when the Court found that the intended appeal did not raise any matters of general public importance to warrant certification.

8. The applicant next proceeded to the Supreme Court seeking review of the ruling of this Court denying it certification. Pursuant to Article 163(5) of *the Constitution*, the applicant requested the Supreme Court to certify the intended appeal as fit and proper for hearing and determination by the Supreme Court as a matter of general public importance. In a ruling dated December 8, 2021, the Supreme Court dismissed the application after finding it had no jurisdiction to entertain the same. The Court stated:

> ...[O]ne issue we did not pronounce ourselves on in the Nyutu and Synergy decisions, is whether a further appeal lies to this court from a determination by the Court of Appeal. For the avoidance of doubt, we now declare that in conformity with the principle of the need for expedition in arbitration matters, where the Court of Appeal assumes

jurisdiction in conformity with the principle established in these two decisions, and delivers a consequential Judgment, no further appeal should ordinarily lie therefrom to this Court. We reiterate our holding in the [*Geo Chem Middle East v. Kenya Bureau of Standards* [2020] eKLR] case and find that this Court lacks jurisdiction to entertain this appeal as it is challenging the Court of Appeal judgment, where the Court of Appeal assumed jurisdiction in conformity with the principles established in the [*Nyutu Agrovet Ltd. v. Airtel Networks Kenya Ltd. & another* [2019] eKLR] and [*Synergy Industrial Credit Ltd v. Cape Holdings Ltd* [2019] eKLR] decisions and delivered a consequential Judgment." (Emphasis added).

9. After the decision of the Supreme Court, on March 25, 2021, the High Court issued a decree for Kshs 4, 497,776, 260.35. Thereafter execution proceedings followed and a notice to show cause was issued against the applicant, resulting, on January 5, 2022, in the High Court issuing a prohibitory order against the applicant's property known as LR No. 209/19436. That prohibitory order attaching the said property was registered against the title of the said property on January 14, 2022.

10. Undeterred, on January 11, 2022, the applicant filed a memorandum of appeal in the High Court against the attachment of its property as well as an application to set aside the decree issued by the High Court, almost one year earlier. According to the respondent, the High Court subsequently ordered those documents expunged from the record, marked the execution completed, and directed the file to be closed.

11. Having reached the end of the road, on March 1, 2022, the applicant changed its advocates and returned to this Court once more, this time seeking, in the application now before us, the recall, review and setting aside of the judgment of the Court dated November 6, 2022. Specifically, the applicant urges the Court to make the following four orders:

    i. to vary the judgment and reduce the Kshs 1,088.918.183 awarded by the arbitral tribunal because that amount was beyond what was contemplated in the agreements between the parties, leaving the sum of Kshs 577,200,000;

    ii. To set aside the commercial rate of interest of 185 p.a. and replace it with interest at court rates of 12% p.a. with effect from January 20, 2015 until payment in full of the sum of Kshs 577,200,000.

    iii. To limit computation of interest to six years in accordance with section 4(4) of the *Limitation of Actions Act*; and

    iv. To direct each party to bear its own costs in the arbitration and the appeal.

12. The grounds on which the application is based are found in the face of the application, the supporting affidavit of Mr. Vruti Shantilal Shah sworn on March 1, 2022, the applicant's written submissions dated June 8, 2022 and the oral submissions by the applicant's learned counsel, Mr. Gichuki, SC. The grounds, without repetition or duplication are that:

    i. the applicant has no recourse to the Supreme Court because both this Court and the Supreme Court dismissed its application for certification to appeal to the Supreme Court;

    v. this court has inherent and equitable jurisdiction to review its judgment because it has occasioned miscarriage of justice;

    vi. the judgment of the Court occasioned miscarriage of justice because it unjustly enriched the respondent by awarding a rate of interest that was unconscionable, punitive rather than compensatory, and contrary to public policy. The rate of interest was also based on illegal

commercial rates which were neither pleaded nor proved but were irregularly introduced in submissions;

vii. the judgment violated article Article 40(3) of *the Constitution* which prohibits deprivation of property without due process as well as Articles 48 and 50 of *the Constitution* which guarantee the right to fair trial;

viii. neither the Court nor the arbitral tribunal had jurisdiction to rewrite the contract between the parties;

ix. the arbitral tribunal erred by ignoring section 3(3) of the *law of Contract Act* and sections 97 and 98 of the *Evidence Act*;

x. the Court erred by relying on the case of *Telenor Mobile Communications As v. Strom LLC*., 524 F. Sup. 2d 332 (2007) which is contrary to the Model Law and the public policy of Kenya in so far as it allows an arbitral tribunal to fashion remedies;

xi. the arbitral tribunal and the Court erred in awarding, in breach of the doctrine of privity of contract, damages which were not proved and also by awarding damages in foreign currency contrary to the public policy of Kenya;

xii. the Court erred by holding that the High Court had dealt with the merits of the arbitral award whereas setting aside of arbitral awards on grounds of public policy or exceeding the scope of the terms of reference requires evaluation of both facts and law.

13. Expounding on the above grounds, which he perceived as valid grounds for review of a judgment of the Court, and in particular a judgment rendered in arbitral proceedings, counsel for the applicant submitted that there was a miscarriage of justice which resulted in the unjust enrichment of the respondent contrary to Article 10 of *the Constitution*. It was submitted that the arbitral tribunal erred by awarding damages and interests that were not pleaded by the respondent and by relying on parole evidence whilst the agreements between the parties constituted the entire agreement to the exclusion of any representations or agreements made before or after the agreements. It was counsel's further submission that the arbitral tribunal also ignored the fact that the agreements, the subject matter of the arbitration, excluded award of any damages for economic loss suffered by the respondent.

14. Counsel further contended that the damages, dollar rates and rates of interests awarded by the arbitral tribunal were based on the Independent Accounts Report which was introduced in submissions but treated as evidence. In addition, he submitted, although the agreements were in Kenya shillings, the arbitral tribunal awarded USD 1,526,888 that was alleged to have been paid to Icarus Equities Inc., without any evidence and whilst the said entity was not a party to the arbitration. For those reasons it was submitted that the judgment of this Court led to unjust enrichment of the respondent and resulted in a miscarriage of justice. Relying on the decision of this Court in *Willy Kimutai Kitilit v. Michael Kibet* [2018] eKLR, the applicant submitted that Article 10(2) (b) of *the Constitution* has elevated equity to a constitutional principle which the Court is obliged to protect and promote. It was also contended, on the authority of *Kenya Commercial Finance Co. Ltd. v. Ngeny & another* [2002] eKLR, that the Court has power to set aside unconscionable bargains.

15. Counsel further submitted that an award like that of the arbitral tribunal which violated the applicant's right to property and his right to fair trial was contrary to *the Constitution* and laws of Kenya and could be set aside under the *Arbitration Act* for being inconsistent with the public policy of Kenya. It was the applicant's further submission that by acting contrary to the contract and deciding matters beyond the agreement, the arbitral tribunal had acted without jurisdiction.

16. Next, the applicant submitted that this Court erred by overlooking the fact that contracts relating to land must be in writing and that they exclude parole evidence. It was contended that the arbitral tribunal erred by relying on oral evidence to defeat a written contract. In the applicant's view, the decision in *Telenor Mobile Communications As v. Strom LLC* (supra) relied upon by the Court was per incuriam because it is contrary to the Model Law and the Kenya *Arbitration Act* which do not allow an arbitral tribunal to award remedies outside the agreement.

17. Lastly, counsel submitted that the arbitral tribunal erred by imposing the terms of one contract over another whereas there was no privity of contract, and equally, this Court erred by failing to separate the offensive parts of the award that deserved to be set aside. For the above reasons, the applicant urged the Court to recall, review and set aside the judgment dated November 6, 2022, and substitute therefor the prayers proposed by the applicant, which we have already set out above.

18. The respondent opposed the application vide a replying affidavit sworn on June 14, 2022 by its legal officer, Mr. Jacob M. Meme and written submissions of even date. The substance of the response was that the purported application for review }was a disguised attempt to re-open and re-litigate the dispute settled by the arbitral tribunal and was also an abuse of the process of the court, being the applicant's fourth attempt to set aside the arbitral award. The respondent also contended that the applicant was guilty of material non-disclosure, because, to its knowledge, the decree it was attempting to set aside had already been executed. In the respondent's view, this application for review is moot because, by dint of Order 22 rule 48 of the Civil Procedure Rules, the execution of the judgment sought to be reviewed was completed upon registration of the prohibitory order.

19. Highlighting the respondent's written submissions, learned counsel, Mr. Ahmednasir, SC., submitted that the application for review was frivolous, and full of irrelevant and misconceived arguments, intended to obfuscate the germane issues before the Court. In the respondent's view, none of the grounds on which the application was based could ever justify review of the judgment of this Court dated November 6, 2020. It was contended that while the application purported to seek review of the said judgment of this Court, in reality it was seeking the review and setting aside of the arbitral award dated January 30, 2015.

20. The respondent further submitted that the issues now raised by the applicant were never raised by the parties or determined by the Court in the judgment of November 6, 2020 where the only issue was whether the High Court erred by setting aside the arbitral award on the grounds that the arbitral tribunal had determined issues beyond the scope of the terms of the reference to arbitration.

21. The respondent further submitted that the application for review was moot and overtaken by events because, after failing to show cause why the decree arising from the arbitral award should not be executed by attachment of the applicant's property known as LR No. 209/19436, the said property was attached and the court set the terms for its auction. In the respondent's view, review of the Court's judgment cannot undo the execution, which is already complete. It was also contended that there was no longer any live controversy for resolution by the Court and that the application was a mere academic enterprise. The respondent relied on the judgments of the East African Court of Justice in *Alcon International Ltd. v. Standard Chartered Bank of Uganda & 20 others*, Appeal No. 3 of 2021, the High Court in *Daniel Kaminja & 3 others v. County Government of Nairobi* [2019] eKLR, and the Supreme Court of Canada in *Borowski v. Canada* [1989] 1 SCR 353 and submitted, as regards the doctrine of mootness, that courts exist to resolve live disputes and not to give futile, hypothetical or abstract expositions of the law.

22. The respondent concluded by submitting that although this court has held that it has residual jurisdiction to reopen a concluded matter in the interest of justice and that an appropriate balance

must be struck between the "finality of litigation" principle and "the need to do justice" principle, in the circumstances of this application, the finality of litigation principle must prevail.

23. As we turn to consider the merits of this application, there are a number of issues that we must first set clear. The application before us seeks to recall, review and set aside a judgment of this Court that arose from arbitral proceedings. It also seeks some four specific prayers, the grant of which would substantially alter the arbitral award. There is also need for some clarity on the interface between the jurisdiction of this Court to entertain an appeal from a decision of the High Court under section 35 of the *Arbitration Act* and the general jurisdiction of the Court to review its own judgments. Those two jurisdictions are distinct and should not be confused, although the Judgment which the applicants seeks to review and set aside arose from a decision of the High Court under section 35 of the *Arbitration Act*.

24. The Supreme Court clarified in *Nyutu Agrovet Ltd v. Airtel Networks Kenya Ltd. & another* (supra) and *Synergy Industrial Credit Ltd v. Cape Holdings Ltd.* (supra) that although there is a narrow jurisdiction for this Court to entertain an appeal from a decision of the High Court in arbitral proceedings, that jurisdiction is narrow, exceptional and circumscribed. In both cases the issue before the Supreme Court was whether this Court has jurisdiction to entertain an appeal from the decision of the High Court under section 35 of the *Arbitration Act*. The Supreme Court held as follows, in the Nyutu case:

> "(72) Furthermore, considering that there is no express bar to appeals under Section 35, we are of the opinion that an unfair determination by the High Court should not be absolutely immune from the appellate review. As such, in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness. However, such jurisdiction should be carefully exercised so as not to open a floodgate of appeals thus undermining the very essence of arbitration. In stating so, we agree with the High Court of Singapore in [*AKN & another v ALC & others* [201] SGCA 18] that circumscribed appeals may be allowed to address process failures as opposed to the merits of the arbitral award itself...
>
> (74) As we have stated above, there has to be exceptional reasons why an appeal should be necessary in a matter arising from arbitration proceedings which by its very nature discourages court intervention." (Emphasis added).

The Court concluded thus:

> 77. In concluding on this issue, we agree with the Interested Party to the extent that the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction.
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> 78. In stating as above, we reiterate that Courts must draw a line between legitimate claims which fall within the ambit of the exceptional circumstances necessitating an appeal and claims where litigants only want a shot at an opportunity which is not deserved and which completely negates the whole essence of arbitration as an expeditious and efficient way of delivering justice."

25. The Supreme Court further emphasised the limited nature of the jurisdiction of this Court to interfere with a decision of the High Court under section 35 of the *Arbitration Act*, in *Geo Chem Middle East v. Kenya Bureau of Standards* (supra) when it held that appeals to this Court from decisions of the High Court under section 35 of the *Arbitration Act* are "not open-ended" and that "the window of appeal is severely restricted." The Supreme Court gave the rationale for the restriction as follows:

> "...[W]e must reiterate that arbitration is meant to expeditiously resolve commercial and other disputes where parties have submitted themselves to that dispute resolution mechanism. The role of courts has been greatly diminished notwithstanding the narrow window created by sections 35 and 39 of the Act. To expect arbitration disputes to follow the usual appeal mechanism in the judicial system to the very end would sound a death knell to the expected expedition in such matters and our decisions in Nyutu and Synergy should not be taken as stating anything to the contrary."

26. Back to the current application, after the arbitral tribunal rendered its award on January 30, 2015, by dint of section 35 of the Act, the applicant had the leeway to challenge that award on any of the following eight grounds.

i. incapacity of one of the parties to the arbitration agreement;

ii. invalidity of the arbitral agreement under the law chosen by the parties, or, where such law has not been specified, the laws of Kenya;

iii. the applicant was not properly notified of the appointment of the arbitrator, or of the arbitral proceedings, or was unable to present his case;

iv. the arbitral award dealt with a dispute not contemplated or falling within the terms of reference, or contained matters beyond the scope of the reference;

v. the composition of the arbitral tribunal or arbitral procedure was contrary to the parties agreement;

vi. the arbitral award is vitiated by fraud, bribery, under influence or corruption;

vii. the dispute was incapable of settlement by arbitration under the law of Kenya;

viii. the award conflicts with the public policy of Kenya.

27. The applicant elected to challenge the arbitral award in the High Court only on the ground that it dealt with a dispute not contemplated or falling within the terms of reference, or contained matters beyond the scope of the reference. The High Court set aside the award on that very ground, and when the respondent's appeal came before this Court, the Court identified the issues raised by the respondent as follows, in page 7 of the judgment dated 6th November 2020:

> In this appeal, the appellant (current respondent) impugns the ruling of the High Court on 12 grounds, which it concedes raises only two broad issues. The first is whether the learned judge exceeded his jurisdiction under section 35 of the *Arbitration Act* by treating the application to set aside the arbitral award as an appeal on the merits from the arbitrator's decision. The second is whether the learned judge erred by holding that the arbitration clauses in the 14 written agreements did not confer the arbitrator jurisdiction to determine the issues addressed in the award."

28. Those are the issues in the appeal that the parties presented to this Court for resolution. As earlier indicated, when the appeal came up for hearing, it proceeded on those issues. The applicant, who was the respondent to the appeal did not file a cross appeal or grounds for affirming the judgment of the High Court, so as to place before the Court for determination other issues beyond the two issues. Therefore, the question of the High Court having stepped outside the confines of section 35 of the *Arbitration Act* did not arise. The only issue was whether in addressing the issue which was properly before it, the High Court strayed into consideration of the merits of the arbitral award. After hearing the appeal, this Court concluded that the High Court had purported to undertake a merit review of the award by the arbitral tribunal and that a proper evaluation of the arbitral award, as contemplated by section 35 of the *Arbitration Act*, showed that the arbitral tribunal had not exceeded its scope under the reference. From the precise nature of the issue presented to this Court for determination in the appeal, the question of the Court having failed to consider any other issues by dint of the Supreme Court judgments in *Nyutu Agrovet Ltd. v. Airtel Networks Kenya Ltd. & another* (supra) and *Synergy Industrial Credit Ltd. v. Cape Holdings Ltd.* (supra) does not arise. It is too late in the day for the applicant to contend that the Court erred by failing to find that the arbitral award conflicts with the public policy of Kenya because that is a distinct ground for challenging the award under section 35 of the *Arbitration Act*. For reasons best known to itself, the applicant did not challenge the arbitral award in the High Court on that ground, and therefore this Court had no basis for addressing the issue.

29. This brings us to the general jurisdiction of this Court to review its own judgments, which is the direct jurisdiction invoked in this application. There is no doubt that the Court has the jurisdiction to review its judgments, but only in exceptional cases. In *Benjoh Amalgamated & another v. Kenya Commercial Bank Ltd.* [2014] eKLR, the Court was invited to review and set aside its judgment on the grounds that a consent order, the subject of the appeal, was entered into by an advocate who did not have instructions. The Court considered the circumstances under which a court of appeal, though not the apex court, may review its decisions. The Court concluded that it had residual jurisdiction to review its decisions but in exceptional circumstances. The Court held 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)." (Emphasis added).

However, the Court dismissed the application after finding that the applicant had not put forth any grounds to justify invoking the residual jurisdiction of the Court.

30. The decision in *Nguruman Ltd v. Shampole Group Ranch & another* [2014] eKLR, is of limited relevance to this appeal because the issue therein was review of an order rather than a judgment of the Court. Nevertheless, the Court stated that it has residual jurisdiction to review its decisions in exceptional circumstances. In that case the Court reviewed and set aside its order for stay of proceedings under rule 5(2)(b) of the *Court of Appeal Rules* because the order was made when there was no notice of appeal, meaning that the order was made without jurisdiction.

31. In *Standard Chartered Financial Services Ltd & another v Manchester Outfitters (Suiting Division) Ltd & 2 others* [2016], eKLR, the Court followed its earlier decision in *Benjoh Amalgamated & another v. Kenya Commercial Bank Ltd* (supra) and reiterated that is has residual jurisdiction to review its judgments in exceptional circumstances. In the Standard Chartered Financial Services case, the Court set aside its judgment on the grounds that it was made without jurisdiction and that there was genuine apprehension of bias on the part of the Court due to undisclosed contact, specifically on the matters in contest, between one of the judges and a litigant, when the judge was a private practitioner. Clearly a decision made without jurisdiction or where glaring bias is established, would constitute exceptional circumstances justifying invocation of the residual jurisdiction of the Court.

32. On the other hand, in *Mukuru Munge v. Florence Shingi Mwawana & 2 others* [2016] eKLR the applicant invited the Court to review and set aside its judgment on the ground that it had misapprehended the law on limitation of actions. The Court reiterated as follows:

> " The residue power of the Court to reopen its decisions is ... a circumscribed power to be exercised in exceptional cases. That power is not intended to circumvent the principle that, save in those cases where *the Constitution* allows an appeal to the Supreme Court, decisions of this Court are otherwise final." (Emphasis added).

In dismissing the application for review, the Court held:

> " The central question in this application is whether it falls within the restricted categories under which the Court can re-open its judgment. The primary ground upon which the Court is being asked to exercise its residual jurisdiction is that its application of the law of limitation is erroneous. That, with respect, cannot constitute a ground for re-opening the judgment for two reasons. Firstly, to proceed as the applicant invites us to do amounts to this Court sitting in appeal from its own decision, which clearly is not the purpose of the Court's special and residual jurisdiction." (Emphasis added).

33. Similarly, in *Niels Bruel v. Moses Wachira & 2 others* [2018] eKLR, the applicant sought review of a judgment of this Court on the ground that the Court had failed to evaluate evidence as it was duty bound to do in a first appeal. It was contended, as in the present application, that because of that failure, the applicant's constitutional rights, among them the right to fair hearing were violated. In rejecting the argument, the Court stated:

> Starting with the first prayer to re-open the appeal and review the judgment of this Court, it is axiomatic that this Court has jurisdiction to do so. But that jurisdiction is exceptional and has to be exercised sparingly and with circumspection to thwart disaffected parties who merely seek a second bite of the cherry or who invite the Court to sit on appeal from its own judgment. (Emphasis added)

34. The last example in this line of cases is *Jedidah Wambui Karanja & another v. Esther Njoki Kinuthia & another,* [2020] eKLR, where the Court refused to entertain an application to review its judgment. The applicant contended that the Court had erred by holding that a suit was not res judicata and by failing to consider all the issues raised in the memorandum of appeal, thereby depriving the applicant of his right to property. Reiterating that an application for review of a judgment of this Court is not an appeal from the merits of the decision sought to be reviewed, the Court stated:

> " If we had any doubt that what the applicants were inviting us to do was to sit on appeal from the judgment of this Court dated February 8, 2019, that doubt evaporated when

> the application was argued orally on December 9, 2019. Both the 1st appellant and Mr. Nyaburi, learned counsel for the respondents, argued the application as though it was an appeal, one party striving to demonstrate how the Court erred in the judgment, the other defending the judgment of the Court on it's merits." (Emphasis added).

The Court then concluded as follows:

> "We have carefully considered the application and we are satisfied that, much as this Court has jurisdiction to review its judgments, that jurisdiction is exceptional and is not available in a case like the present where the applicants are literally seeking to reopen the litigation and take a second bite of the cherry, without relying on anything exceptional, other than that they are dissatisfied by the judgment of the Court. When it rendered its judgment of February 8, 2019, the Court considered all the issues that were raised by the applicants on appeal, and it found, on merits, that it was in agreement with the trial court. We have no jurisdiction to reopen that judgment and come to a different conclusion on the merits of the appeal." (Emphasis added).

35. In this application, there is absolutely no doubt in our minds that what the applicant has presented is nothing short of an invitation to the Court to sit on appeal from its judgment dated November 6, 2020, although in most instances it appears to be simultaneously an appeal against the decision of the arbitral tribunal as well as against the judgment of this Court. The grounds for review advanced by the applicant are that the Court, or the arbitral tribunal, misapprehended the law and erred by: awarding punitive and illegal interest rates, determining unpleaded and unproved issues, rewriting the contract between the parties, ignoring the *Law of Contract Act* and the *Evidence Act*, relying on per in curium decision and failing to apply correctly the law on award of damages. It is that alleged misapprehension of the law that is contended to amount to violation of the applicant's right to property and right to a fair hearing. The applicant also contends that the arbitral award is in violation of the public policy of Kenya.

36. It is patently clear from the judgment of November 6, 2020 that this Court deliberately declined to address the merits of the arbitral award because, by their own conscious decision, the parties had made determination of the merits or demerits of the arbitral reference the exclusive remit of the arbitral tribunal.

    So, it is a misnomer for the applicant to claim, as it does in its application, that this Court erred in doing this or failing to do that, regarding the merits of the arbitral award.

37. Further, as this Court explained in the decisions we have cited above, allegations that the Court has misapprehended the law constitutes grounds for appeal, not grounds for invocation of the exceptional residual review jurisdiction of the Court. From those decisions, the exceptional residual jurisdiction of the Court will be triggered in the rare instances where the Court is satisfied that the judgment in question was made without jurisdiction, or is tainted by fraud, corruption, violation of the rules of natural justice or other grounds of similar genus that result in a glaring miscarriage of justice, such as what the Supreme Court described in the Nyutu case as "process failures as opposed to the merits of the arbitral award itself."

38. Such review must be on a case by case basis. Entertaining applications for review of judgments of this Court on the allegation that the Court has misinterpreted or misapplied the law would be the shortest and surest way to create an illegitimate tier of appeals against the decisions of the Court. There is a good reason why the makers of *the Constitution* of Kenya did not confer on the Supreme Court, the apex Court in the land, ordinary appellate jurisdiction from decisions of the Court of Appeal, to

correct perceived errors of the law made by the Court. If the Supreme Court has no jurisdiction to entertain appeals from this Court on the grounds that it misapplied the law, how can the Court of Appeal itself be asked to routinely review its decisions on the same grounds? It is also not lost to us that this application for review of the judgment of the Court was made only after the Court found that the applicant's intended appeal to the Supreme Court did not raise any matters of general public importance to justify a certificate to the apex Court. The Supreme Court was similarly not convinced it had any basis for entertaining the applicant's intended appeal to that Court.

39. The respondent has, lastly, contended that this application is moot and an academic exercise whose primary aim is to have the Court issue orders in vain. It is the respondent's submission that the application has been overtaken by events and that the Court cannot be asked to review and set aside a judgment which has already been executed.

40. The applicant does not dispute that the judgment that it seeks to recall, review and set aside has already been executed. The respondent has deposed in its replying affidavit in opposition to the application that on January 5, 2022 the High Court issued an order for attachment of the applicant's property, LR No. 209/19436 in satisfaction of the decree arising from the arbitral award. The prohibitory order was registered against the said title on January 14, 2022. Order 22 Rule 48 of the *Civil Procedure Rules* provides as follows:

> "Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment debtor from transferring or charging the property in any way and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be completed and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property."

41. By dint of that provision, the execution of the decree is complete and we agree with the respondent that this application is moot.

42. Before we conclude, we must apologise to the parties that this ruling has taken an uncharacteristically long period to deliver. Arising from a regrettable failure in the bring-up system, coupled with national and regional official duties of one member of the Bench, the application escaped its due attention. The delay is regretted.

43. For the reasons set out above, we do not find any merit in the applicant's application to recall, review and set aside the judgment of this Court dated November 6, 2020. Accordingly, the application fails and is dismissed with costs to the respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER 2023.

K. M'INOTI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR