Case Number:	Civil Application E006 of 2020
Date Delivered:	05 Mar 2021
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Ruling
Judge:	Hannah Magondi Okwengu, Daniel Kiio Musinga, Stephen Gatembu Kairu
Citation:	Cape Holdings Limited v Synergy Industrial Credit Limited [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	Civil Appeal 81 of 2016
Case Outcome:	Applicant’s application dismissed with costs to the respondent
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, MUSINGA & GATEMBU, JJ.A.)

SUP. CIVIL APPLICATION NO. E006 OF 2020

BETWEEN

CAPE HOLDINGS LIMITED.....APPLICANT

AND

SYNERGY INDUSTRIAL CREDIT LIMITED.....RESPONDENT

(Being an application for a certificate and leave to appeal from the Court of Appeal to the

Supreme Court from the Judgment of the Court of Appeal at Nairobi (K. M'Inoti,

F. Sichale & J. Mohammed JJ.A.) delivered on 6th November 2020

in Nairobi Civil Appeal No. 81 of 2016)

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RULING OF THE COURT

1. In its application under certificate of urgency titled Originating Motion and dated 16th November 2020, the applicant, Cape Holdings Limited, seeks an order that a certificate do issue that its intended appeal to the Supreme Court against the judgment of this Court delivered on 6th November 2020 raises a matter of general public importance. The applicant also prays for leave to appeal to the Supreme Court against the said judgment. The applicant cites, as the basis of the application, Rules 32 and 33 of the Supreme Court Rules, 2020, Section 15 and 16 of the Supreme Court Act, Rules 1(2), 40, 42, 57(2), 100, 102 and 104 of the Court of Appeal Rules, Section 3A and 3B of the Appellate Jurisdiction Act, Article 50(1) of the Constitution, paragraph 10 of the Practice Directions of the Court of Appeal and all enabling provisions of the law.

2. The grounds in support of the application are set out at great length on the face of the application and run close to 20 pages and are backed by two equally lengthy supporting affidavits sworn by Elijah Mwangi advocate and by Vinay Sangrajka, a director of the applicant setting out the background to the matter and replicating to a large extent the grounds set out on the face of the application.

3. We have considered the application alongside the applicant's submissions and authorities as well as the respondent's opposing submissions and authorities. Counsel for both parties are in agreement that the legal standard applicable in considering an application of this nature is that set out by the Supreme Court in **Hermanus Phillipus Steyn vs. Giovanni *Gnecchi-Ruscone, Supreme Court Application No. 4 of 2021[2013] eKLR*** from which it is necessary to quote at length, that:

"…a matter meriting certification as one of general public importance, if it is one of law, requires a demonstration that a substantial point of law is involved, the determination of which has a bearing on the public interest. Such a point of law, in view of the significance attributed to it, must have been raised in the Court or Courts below. Where the said point of law arises on account of any contradictory decisions of the Courts below, the Supreme Court may either resolve the question, or remit it to the Court of Appeal with appropriate directions. In summary, we would state the governing principles as follows:

i. for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;

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

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

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

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

vi. the intending applicant has an obligation to identify and concisely set out the specific elements of

"general public importance" which he or she attributes to the matter for which certification is sought;

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

4. The question for us to determine in the present application is whether the applicant's intended appeal to the Supreme Court fulfils that criteria. In addressing that question, a brief background will provide context.

5. A dispute between the parties arising from agreements for the purchase of property along Riverside Drive Nairobi was referred to arbitration following which the arbitrator made his arbitral award on 30th January 2015 in favour of the respondent, Synergy Industrial Credit Ltd, and awarded it an amount of Kshs.1,666,118,183.00 and interest against the applicant. Dissatisfied, the applicant successfully applied to the High Court under Section 35 of the Arbitration Act, to set aside the arbitral award. The ruling setting aside the arbitral award was delivered by the High Court on 11th March 2016. The learned Judge of the High Court in

rendering that ruling held that the arbitral tribunal had exceeded its mandate in giving the award.

6. The respondent was aggrieved by the ruling of the High Court given on 11th March 2016 and appealed against it to this Court in Civil Appeal No. 81 of 2016. Objection was taken regarding the jurisdiction of this Court to entertain an appeal from a ruling of the High Court arising from Section 35 of the Arbitration Act. In its ruling given on 20th December 2016, this Court upheld that objection concluding that there was no right of appeal, that it did not have jurisdiction to entertain the appeal and struck it out. The applicant appealed against that ruling to the Supreme Court in Supreme Court Petition No. 2 of 2017.

7. In its judgment, the Supreme Court interrogated the scope of Section 35 of the Arbitration Act, found fault in the ruling of this Court striking out the appeal, set it aside and directed that the applicant's appeal be determined on merit.

8. In accordance with the directions by the Supreme Court, the matter was then sent back to this Court for consideration of the appeal on merits. After hearing, the Court delivered judgment, the subject of the intended appeal to the Supreme Court, on 6th November 2020. After considering the appeal and synthesizing the rival arguments, the Court (***K.* M'Inoti, F. Sichale and J. Mohammed JJ.A.**) captured the gravamen of the appeal thus:

"…in our view the crisp issue that calls for determination in this appeal is whether the learned judge erred in setting aside the arbitral award on the ground that the arbitral award had determined issues beyond the scope of the reference that the parties submitted to it."

9. Upon analysis, the Court found that the learned Judge of the High Court was not justified in setting aside the arbitral award on grounds that the arbitral tribunal had dealt with a dispute that was not contemplated by the parties, or one beyond terms of the reference to arbitration, or had decided matters beyond the scope of the reference. The result being that the appeal was successful, the ruling of the High Court setting aside the award was overturned, and the arbitral award in effect reinstated.

10. It is against that background that the applicant wishes to return to the Supreme Court on what it says is a matter of great public importance. As stated by the Supreme Court in **Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone** (above) it is incumbent upon the applicant, in an application of this nature, to ***"identify and concisely set out the specific elements of "general public importance" which he or she attributes to the matter for which certification is sought".*** In a bid to fit the bill, the applicant says that it requires leave to appeal to the Supreme Court in order to protect itself from the impending execution and enforcement of the judgment; that the sum in issue is substantial and if the judgment is enforced it will severely undermine the business operations of the applicant; that in its judgment, the subject of the intended appeal to the Supreme Court, this Court did not undertake the intervention required of it by the Supreme Court when the latter Court directed the appeal to be heard on merits; that there is inconsistency in decisions of this Court and of the High Court with respect to interpretation of dispute resolution clauses in general and, in particular on the scope of an arbitrator when he or she exceeds the scope of arbitration. In that regard decisions exemplifying what the applicant says are instances where the courts have restricted the arbitrator's jurisdiction on the one hand and those expanding the arbitrator's jurisdiction on the other hand were cited to support the proposition that "*it is imperative for the Supreme Court to provide guidance on the issue of applicability and interpretation of dispute resolution clauses and arbitration agreements*."; and that the Court failed to deal conclusively with the issue whether an arbitrator's jurisdiction can be expanded through the parties pleadings.

11. The specific issues the applicant proposes the Supreme Court will be called upon to determine are: whether the court adhered to the direction of the Supreme Court to undertake 'minimal intervention to correct an injustice'; what are the guiding principles the High Court should apply when dealing with an application under section 35 of the Arbitration Act"; what are the guiding principles in interpreting the arbitration agreement or dispute resolution clause"; can matters raised in the pleadings extend the scope of the arbitrator"; and finally whether the Court failed to examine issues addressed by the High Court arising out of the award.

12. We are not persuaded that those issues fit the criteria for certification as enunciated by the Supreme Court in ***Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone*** (supra). The applicant seems, with respect, to misconstrue the decision of the Supreme Court as having directed this Court to determine the appeal in its favour. Whether or not the appeal from the ruling of the High Court was merited is what the Court was called upon to determine and that is what it did. It cannot be that the Court did not adhere to the direction of the Supreme Court because the outcome after the merit hearing was unfavourable to the applicant. We reiterate that the Supreme Court did not direct this Court to determine the appeal in favour of the applicant. What it directed the Court to do was to hear the allegations of *"manifest unfairness"* and pronounce itself on the same. It did so.

13. As regards interpretation of arbitration agreement clauses and dispute resolution clauses, we take the view that the question whether an arbitral tribunal has exceeded its mandate is a matter for determination on a case-to-case basis based on the interpretation of specific dispute resolution clauses. Furthermore, as submitted by counsel for the respondent, the Supreme Court has already provided guidance on the parameters for intervention when dealing with an application to set aside an arbitral award under Section 35 of the Arbitration Act, in **Synergy Industrial Credit Limited vs. Cape Holdings *Limited [2019] eKLR*** and also in **Nyutu Agrovet vs. Airtel Networks Limited [2019] eKLR**.

14. The upshot is that we are not persuaded that the intended appeal to the Supreme Court raises a matter or matters of general public importance to warrant certification. We decline the applicant's application dated 16th November 2020. It is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF MARCH, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR