REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ &P, Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

APPLICATION NO. E036 OF 2025

–BETWEEN–

CAPE HOLDINGS LIMITED..... APPLICANT

–AND–

SYNERGY INDUSTRIAL CREDIT LIMITED ..... RESPONDENT

(Being an application for review of the Ruling of the Court of Appeal at Nairobi ***(Kairu & Muchelule, JJ. A),*** *delivered on 21st November 2025 in Civil Appeal (Application) No. Sup. E004 of 2024, declining certification and leave to appeal to the Supreme Court)*

Representation:

Mr. Allen Gichuhi SC for the applicant
(Wamae & Allen LLP)

Ms. Asli Osman for the respondent
(Ahmednasir Abdulahi Advocates LLP)

RULING OF THE COURT

[1] UPON PERUSING the Notice of Motion dated 1st December 2025 and filed on 3rd December 2025, brought under Article 163 (4)(b) & (5) of the Constitution, Sections 3A, 21, 15 & 15B of the Supreme Court Act, and Rule 33 (2) & (3) of the Supreme Court Rules, 2020, seeking *to review the ruling of the Court of Appeal* ***(Kairu & Muchelule, JJ.A)*** *delivered on 21st November 2025 in Civil Appeal (Application) No. Sup. E004 of 2024, under Rule 34(4) of the Court of Appeal Rules following the death of Hon. Mr. Justice F.A. Ochieng, declining to certify an appeal to this Court against the review ruling by the Court of Appeal in Civil Appeal (Application) No. 81 of 2016, as constituting matters of general public importance; certification that the intended appeal raises matters of general public importance; and costs;* and

[2] UPON EXAMINING the grounds on the face of the application, and supporting affidavit sworn by *Vinaychandra Sanghrajka* on 1st December 2025, wherein it is contended that by declining to review its Judgment dated 6th November 2020, the Court of Appeal: upheld an arbitral award conferring unjust enrichment to the respondent, and depriving the applicant property contrary to Article 40(2)(a); violated the applicant's rights to fair hearing under Articles 25(c) and 50, equality under Article 10(2)(b) and access to justice under Article 48 of the Constitution. Further, the order set a precedent based on American jurisprudence contrary to the Arbitration Act, Model Law and New York Convention; allowed an arbitrator to, without jurisdiction, rewrite a contract between two parties and to grant unpleaded and unproven reliefs outside the parties' contract; upheld a Judgment that is *per incuriam* and against Article 159 of the Constitution, the Arbitration Act and International treaties on arbitration; failed to separate offensive parts of an award thereby occasioning a miscarriage of justice; and disregarded this Court's directions to determine the appeal on its merit; and

[3] UPON FURTHER EXAMINING the questions of general public importance set out by the applicant, to wit:

i. *Is a miscarriage of justice a constitutional imperative and predominant test to be applied in a review application?*
ii. *Is it a miscarriage of justice when a court refuses to comply with an appellate court's directives to hear a dispute on the merits?*
iii. *Can an arbitrator award a relief not sought by either party, so long as the relief lies within the broad discretion conferred by the American Federal Arbitration Act or is his jurisdiction circumscribed by the terms of the contract, the Kenya Arbitration Act No. 4 of 1995, or international treaties ratified by Kenya – United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the UNICITRAL Model Law on International Commercial Arbitration (1985)?*
iv. *Can a judgment override Kenya's international treaty obligations on arbitration in preference to the American Federal Arbitration Act and American Jurisprudence that does not follow the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the UNICITRAL Model Law on International Commercial Arbitration (1985)?*
v. *What test should the court use to separate or set aside parts of the arbitral award that deal with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contain decisions on matters beyond the scope of the reference to arbitration?*
vi. *What appropriate relief should a court grant under Section 35(2)(a)(iv) of the Arbitration Act when it has set aside part of the arbitral award that is manifestly unjust, unconscionable and amounts to unjust enrichment;*

vii. *Does an arbitrator cause substantial injustice when he acts in excess of jurisdiction and party autonomy when he rewrites terms of the contract and awards relief outside the terms of the contract without consent of the parties to exercise such discretion?*

viii. *Does an award in excess of jurisdiction contravene a party's fundamental constitutional rights to equality, fair hearing, right to property, equal protection and equal benefit of the law when it is upheld by a court? (sic);* and

[4] UPON CONSIDERING the applicant's submissions dated 1st December 2025, restating the grounds on the face of the application, and further contending that the applicant has met the test for the grant of certification in ***Hermanus Phillipus Steyn Vs Giovanni Gnecchi-Ruscone*** [2013]eKLR. Particularly, the questions framed are substantial and have a significant bearing on public interest; the impugned Judgment is against Kenya's public policy that an arbitrator cannot act arbitrarily, irrationally, capriciously or independent from the contract, and to do so would be to act without jurisdiction; the Judgment is founded on the reasoning in ***Telenor Mobile Communications As Vs Stram LLC***., 524 F. Supp. 2d 332 (2007) and by implication the Federal Arbitration Act, which has no applicability in Kenya; the Judgment has been applied widely by the superior courts, including in ***Coastal Bottlers & 9 others Vs Greenplast International Limited*** [2021] KEHC 12672 (KLR), and ***Idrata Developers Limited Vs Najmuden Dhanji Jiwa*** [2021] KEHC 4097 (KLR), with the effect of rendering arbitral awards from Kenya unenforced internationally; and has occasioned a trend where contracting parties are excluding arbitration clauses; and

[5] NOTING the respondent's replying affidavit sworn by *Jacob M. Meeme* on 7th January 2026, wherein it is deponed that the matters upon which the applicant seeks review of certification do not emanate from the ruling of the Court of Appeal of 8th December 2023, for which leave for certification was sought and denied by the Court of Appeal; rather, the questions emanate from the Judgment of the Court

of Appeal of 6th November 2020; consequently the application is *res judicata*, this Court having conclusively determined an application for review of denial of certification against the said Judgment in ***Supreme Court Application No. E007 of 2021***; moreover, this Court is *functus officio* as the arbitral award and the resultant decree have been fully executed, and a prohibitory order of 5th January 2022 issued against L.R No. 209/19436 pursuant to Order 22 rule 48 of the Civil Procedure Rules. The respondent further submits that, be that as it may, the questions posed as raising matters of general public importance have no bearing on public interest and do not transcend the litigation interest of the parties; the application is an abuse of the court process; and is calculated to delay the satisfaction of a lawful decree; and

[6] FURTHER NOTING the respondent's submissions dated 7th January 2026, wherein it is contended that, as guided by the decision in ***Geo Chem Middle East Vs Kenya Bureau of Standards***, SC Petition No. 47 of 2019 [2020] eKLR, this Court lacks jurisdiction to entertain an appeal challenging the Court of Appeal decision where the appellate court assumed jurisdiction on matters emanating from Section 35 of the Arbitration Act; the application lacks merit and fails to meet the guiding principles for certification enunciated in ***Hermanus Phillipus Steyn Vs Giovanni Gnecchi Ruscone*** [Supra]; and

[7] BEARING IN MIND that the crux of this matter is a dispute that arose from the sale and purchase of an office block known as 14 Riverside, which was referred to arbitration; by an arbitral award published on 30th January 2015, the arbitrator found in favour of the respondent and awarded Kshs. 1,666,118,183.00 together with compound interest at an annual rate of 18%; consequently, two applications were filed before the High Court, the applicant seeking to set aside the arbitral award under Section 35 of the Arbitration Act, and the respondent seeking enforcement of the award; by a ruling delivered on 11th March 2016, *C. Kariuki, J.* set aside the award on grounds that the arbitral tribunal had acted beyond the scope of the terms of the reference to arbitration; and

[8] NOTING that, the respondent moved to the Court of Appeal (*Civil Appeal No. 81 of 2016*) seeking to overturn the High Court; in response, the applicant sought to strike out the appeal on the grounds that there was no right of appeal from a decision arising under Section 35 of the Arbitration Act. By a ruling delivered on 20th December 2016, the Court of Appeal held that it lacked jurisdiction to entertain an appeal filed under Section 35 of the Arbitration Act. On appeal, this Court, by a majority Judgment delivered on 19th December 2019, defined the parameters of appeal under Section 35 of the Arbitration and remitted the appeal to the Court of Appeal for determination on merit, limited to the issues identified; and

[9] CONSIDERING that, upon hearing the appeal, the Court of Appeal, in its Judgment dated 6th November 2020, overturned the High Court and found that the High Court did not limit itself to the four corners of Section 35 of the Arbitration Act, but undertook a merit review of the arbitral award. Thereafter, the applicant filed *Civil Appeal No. Sup E006 of 2020* seeking leave and certification to appeal to this Court; by a ruling dated 5th March 2021, the appellate court declined to grant certification for reasons that the intended appeal did not raise any matters of general public importance; the applicant moved to the Supreme Court in *SC Application No. E007 of 2021* seeking to review the decision declining certification; and by a ruling dated 8th October 2021, this Court dismissed the application on the ground of lack of jurisdiction; and

[10] FURTHER CONSIDERING that execution was instituted, and the High Court issued a prohibitory order against the applicant's property, LR No. 209/19436, which was registered on 14th January 2022; aggrieved, the applicant filed an appeal before the High Court challenging the execution and attachment of its property; and the court ordered the expungement of the pleadings and marked the execution completed. Dissatisfied, the applicant moved back to the Court of Appeal seeking a review of the Judgment dated 6th November 2020, and by a ruling dated 8th December 2023, the Court of Appeal dismissed the application, finding

that execution of the said Judgment had been completed. Thereafter, the applicant filed *Civil Appeal No. Sup E004 of 2024* seeking leave and certification to appeal to the Supreme Court; and by a ruling dated 21st November 2025, the Court of Appeal dismissed the application for reasons that the Supreme Court in *SC Application No. E007 of 2021* and the Court of Appeal in *Civil Appeal No. Sup E006 of 2020* had declined to grant certification, and the application was *res judicata*; and

[11] GUIDED by the provisions of Article 163(4)(b) and (5) of the Constitution, Section 15B of the Supreme Court Act and Rule 33 of the Supreme Court Rules 2020, and this Court's guiding principles on grant of certification and leave to appeal to the Supreme Court as settled in ***Steyn (supra)*** and ***Malcolm Bell Vs Daniel Toroitich Arap Moi & another***, SC Appl. No. 1 of 2013 [2013] eKLR; to the effect that:

> ***"...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;***
>
> ***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."***

[12] FURTHER GUIDED by this Court's clear, unambiguous, and authoritative pronouncement on its jurisdiction to hear appeals arising from Section 35 of the Arbitration Act in ***Geo Chem Middle East Vs Kenya Bureau of Standards***, SC Petition No. 47 of 2019 [2020] eKLR that:

> ***"....In this regard, one 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. <u>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</u>."***

[13] HAVING CONSIDERED the decisions of the superior courts, the totality of the pleadings, affidavits, and submissions by the parties herein, **WE NOW OPINE** as follows:

i. On the authority of ***Geo Chem Middle East*** *(supra),* this Court lacks jurisdiction to entertain an appeal challenging a decision of the Court of Appeal, where the appellate court assumed jurisdiction to determine an appeal emanating from Section 35 of the Arbitration Act;

ii. In any event, the applicant having filed an application for review of the Judgment by the Court of Appeal dated 6th November 2020, and the appellate court having pronounced itself therupon, we reiterate our finding in ***University of Eldoret & another Vs Sitienei & 3 others*** (Application 8 of 2020) [2020] KESC 76 (KLR), that a party must only elect one avenue, either to seek a review or lodge an appeal, they cannot seek both as this defeats the essence of the principle of finality of litigation;

iii. Yet again, the applicant filed ***Supreme Court Application No. E007 of 2021***, seeking review of certification to appeal against the Judgment of the Court of Appeal delivered on 6th November 2020, and having

pronounced ourselves with finality on 8th October 2021, this application is *res judicata* and cannot be relitigated;

iv. For avoidance of doubt, this Court lacks jurisdiction to determine this application.

[14] ACCORDINGLY, we make the following **Orders**:

(i) The Motion dated 1st December 2025 and filed on 3rd December 2025 is hereby dismissed.

(ii) The Ruling of the Court of Appeal delivered on 21st November 2025, denying certification and leave to appeal to this Court, is hereby upheld.

(iii) The applicant shall bear the costs of the application.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **24th** Day of **March, 2026.**

.....
M. K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....
P. M. MWILU
DEPUTY CHIEF JUSTICE &
VICE-PRESIDENT
OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA