

**IN THE COURT OF APPEAL
AT NAKURU**

CORAM: MATIVO, JA (IN CHAMBERS)

CIVIL APPLICATION NO. NAK E065 OF

2025 BETWEEN

**JOHANA KIPROTICH RONO &
JOSEPH RONO LANGAT** (Suing as
the legal representatives of the
Estate of Mathias Kimnyole Langat).....**APPLICANT**
AND

**COVE INVESTMENTS LIMITED.....1ST
RESPONDENT ROYAL SIAN
LIMITED.....2ND RESPONDENT
THE ATTORNEY GENERAL.....3RD
RESPONDENT THE LAND REGISTRAR,
NAKURU COUNTY.....4TH
RESPONDENT JOSHUA CHELELGO
KULEI.....5TH RESPONDENT
KENNEDY KIPRUTO KULEI.....6TH
RESPONDENT**

*(Being an application for leave against the ruling in
the Environment and Land Court of Kenya at Nakuru
(M. A.
Odeny, J.) dated 15th October 2024*

in

ELC Petition No. 360 of 2017).

RULING

1. By an application dated 25th June 2025 the subject of this ruling, Johana Kiprotich Rono & Joseph Rono Langat (the applicants) seek two substantive reliefs namely: (a) leave

to file a fresh notice of appeal and a record of appeal against the ruling and orders issued by *Odeny, J.* on 15th October 2024

in Nakuru ELC Petition No. 360 of 2017, Cove Investments Limited vs Johana Kiprotich Rono & Others and (b) stay of execution of the above ruling and orders. The applicant also prays for costs of the application to be provided for. The application is premised on articles 25 (c), 50 and 159 of the Constitution, Sections 3, 3A & 3B of the Appellate Jurisdiction Act and Rule 4 of the Court of Appeal Rules, 2022.

2. It is supported by grounds listed on the face of thrifths body and a supporting affidavit sworn on 25th June 2025 by Johana Kiprotich Rono, the legal representative of the estate of Mathias Kimnyole Langat. The application is opposed by a replying affidavit sworn on 8th July 2025 by Kenneth Kiplagat, the 1st respondent's asset manager. The respondent has also filed a notice of preliminary objection dated 18th September 2025.
3. This application is omnibus in nature. It seeks a variety of orders that cannot under this Court's rules, be heard and determined by a single judge. Therefore, the prayer seeking stay of execution of the ruling and orders issued on 15th October 2024 by *Odeny, J.* in Nakuru ELC Petition No. 360 of 2017 is not properly before me. Consequently, I will

only

determine the prayer seeking leave to file a fresh notice of appeal and a record of appeal against the said ruling/orders.

4. In order to put the application before me into a proper context, a brief background is necessary. *Ohungo, J.* in a judgment dated 18th May 2023 issued in ELC Petition 360 of 2017 allowed the 1st respondent's petition and that equitable doctrines of constructive trust and proprietary estoppel were applicable and that the 1st respondent was entitled to a declaration that the appellants held the suit property in trust for the 1st respondent. The learned judge also granted an order for extension of time to apply for the consent of the Land Control Board. The learned judge was emphatic that the deceased having sold the suit property to the 1st respondent, having received almost the entire purchase price and having put the 1st respondent in possession for about 21 years, the applicants in this application had a duty in equity to complete the transaction. Consequently, the learned judge ordered: (a) the 1st respondent to deposit Kshs.782,425/- being balance of the purchase price due to the applicants within 21 days from the date of delivery of the judgment; (b) time within

which the parties were to obtain consent of the Land Control Board was extended by 6 months from the date of the delivery of the

judgment; (c) the applicants were ordered to execute all the necessary forms and transfer instruments for obtaining the said consent within 30 days from the date delivery of the judgment. In default, the Deputy Registrar of the Court would execute the said documents on behalf of the applicants; (d) a declaration issued that the applicants herein held the said land in trust for the 1st respondent; (e) the applicants herein were directed to formally transfer the land to the 1st respondent and to execute the transfer document within 30 days from the date of delivery of the judgment. In default, the Deputy Registrar of the Court to execute the transfer document; (f) upon transfer being registered in favour of the 1st respondent and issuance of title in its name, the sum of Kshs.782,425/- referred to under order number (a) above be released to the applicants herein; (g) costs of the petition awarded to the 1st respondent to be borne by the applicants herein.

5. After the judgment, the 1st respondent filed an application dated 5th October 2023 seeking orders *inter alia* that the Joshua Chelule Kuilei and Kennedy Kipruto Kulei be enjoined in the post judgment proceedings, on grounds that they had acquired the suit property from the applicants, and

that the

title passed to them be cancelled forthwith. Vide ruling delivered on 15th October 2024, the learned judge allowed the application directing the 2nd respondent to surrender the original certificate of lease for cancellation by the Land Registrar, Nakuru and for the issuance of a new title in favour of the 1st respondent herein. Aggrieved by the said ruling, the applicants and 2nd respondent filed notices of appeal and the record of appeal.

6. By an application dated 7th February 2025 filed before this Court, the 1st respondent sought orders that the applicant's substantive appeal against the ruling and orders issued on 15th October 2024 by *Odeny, J* on 15th October 2024 be struck out for reasons that the notice of appeal dated 22nd October 2024 was not served upon it and that it only became aware of it when it was served with a replying affidavit sworn on 4th February 2025 in response to Civil Application No E002 of 2025. The 1st respondent also stated that the notice of appeal was first brought to its attention when it perused through a bundle of documents accompanying Civil Application No.109 of 2024 filed by the 2nd respondent.

7. By a ruling delivered on 20th June 2025, this Court (*Mativo, Gachoka & Odunga JJ.A.*) were persuaded that the applicant did not serve its notice of appeal upon the 1st respondent herein. Consequently, the notice of appeal dated 22nd October 2024 was struck out thus rendering the applicants' appeal non-existent.
8. In their application dated 25th June 2025, the subject of this ruling, the applicants seek leave to file a fresh notice and record of appeal against the ruling and orders issued by *Odeny, J.* on 15th October 2024 in Nakuru ELC Petition No. 360 of 2017 citing the following grounds:
- a) ***The applicants' appeal ought to be heard on merit since the mistakes of a counsel ought not to be visited on a party, especially where the party has taken all the necessary steps to instruct the counsel on time.***
 - b) ***The suit in in High Court Civil Suit No. 158 of 2005, Mathias Kimyole Langat versus Cove Investments Limited was dismissed for want of prosecution. However, the counter-claim by the 1st respondent remained alive and unprosecuted, and there being no transfer of the suit property, when Mathias Kimyole died, the applicants petitioned for grant of letters of administration for the purposes of administering the estate of the late Mathias Kimyole. Having invited objections and there being none, the applicant was issued with a rectified Certificate of Confirmation of Grant dated 13th November 2015, with the suit property passing on to them to hold in trust for the beneficiaries.***

- c) ***The applicants entered into an agreement for sale dated 17th July 2017 with the 2nd respondent on the strength of the rectified Certificate of confirmation.***
- d) ***That the 2nd respondent conducted due diligence and even obtained a letter of consent from the Land Control Board in a meeting held on 14th September 2019 and subsequently, there being no encumbrance the applicants' interests in the suit property were transferred to the 2nd respondent on 31st October 2017 and a certificate of title was issued on 31st October 2017.***
- e) ***The 1st respondent filed petition dated 22nd September 2017 on 27th September 2017 being fully aware of the changes in circumstances well after the caution had been removed and the 1st respondent opted not to join the 2nd respondent in the proceedings.***
- f) ***From the impugned judgment, the court erroneously arrogated upon itself jurisdiction of a civil court instead of limiting itself to the constitutional issues before it.***
- g) ***There is need for this court to determine whether the learned judge had jurisdiction to cancel the applicants' title and direct that the 1st respondent was the owner.***
- h) ***The application has been brought without undue delay and the respondents stand to suffer no prejudice if the applicant is allowed to file and serve fresh notice of appeal & a record of appeal. On the other hand, the applicants are exposed to compensation demands from the 2nd respondent for a whopping sum of Kshs.200,000,000/= on account of a mistake wholly attributable to an oversight by previous counsel.***
9. In opposing the application, the 1st respondent filed a notice of preliminary objection dated 18th September 2025 citing

the following grounds:

- a) ***There is no jurisdiction for a single judge of the Court of Appeal to countermand or in any manner negate a decision already made by a full bench.***
- b) ***A single judge of the Court of Appeal cannot assume jurisdiction in a matter that has already been referred to the supreme court on the very same subject matter and where the decision of the supreme court is awaited.***
- c) ***The instant application seeks to reverse the settled doctrine of lis pendens by reopening a closed case.***
- d) ***The applicant has already been adjudged by a full bench of the Court of Appeal in its decision of 20th June, 2025 as being guilty offending the doctrine of lis pendens and is without jurisdiction by reason express prohibition in order 20 rule 85 of the Civil Procedure Rules.***

10. The 1st respondent also filed a replying affidavit sworn on 8th July 2025 deponing that:

- a) ***The application is a nullity and for dismissal since it seeks to overturn a final decision of this Court delivered on 20th June 2025.***
- b) ***The court having declared that the purported transfer of the suit property to the applicant herein was “pendete lite” without permission and in total violation of the doctrine of lis pendens and contrary to a court order and therefore no cause of action can be subsequently premised on a declared illegality.***
- c) ***The court having declared the purported transfer of the suit property as an abuse of process, no cause of action can subsequently be maintained.***
- d) ***By continuing with court proceedings after selling the subject property without express permission of the court, a party is effectively trying to manipulate the court into a situation where it cannot fully and fairly determine the issues before it. Therefore, no valid cause of action can arise from such misconduct.***

- e) **The ruling of this Court of 20th June 2025 subsumed and determined all issues in this matter, and there can be no issue or matter that survives the decision of 20th June 2025.**
- f) **The instant motion is based on the same and exact issues raised and finally determined by this Court in the decision of 20th June 2025.**
- g) **No cause of action can be maintained by a third party that obtained a transfer against a court order during the pendency of a case whether such a party was aware or not aware of a pending suit. In fact, in this case, the applicant is not an innocent purchaser for value since once the doctrine of *lis pendens* applies, it follows that the doctrine of innocent purchaser for value collapses and becomes unavailable.**
- h) **Execution process cannot countermand, vary, amend or otherwise challenge a judgment that has been delivered and against which appeal filed has been struck out since execution is not an independent process that can give rise to an independent appeal. Therefore, a judgment cannot be challenged at the execution phase.**
- i) **The instant application has plainly been brought as surrogate proceedings for and on behalf of the 2nd respondent which is impermissible since the surrogate had a chance to be heard before the Environment and Land Court in the main suit but opted not to join because they were all jointly intent on concealing their fraudulent schemes.**
- j. **The applicant used the same lawyers as its co-conspirators during the entirety of the Environment and Land Court case.**
- k. **The exact argument being made here were the exact arguments made before the Environment and Land Court. Therefore, the applicants cannot claim they were not heard simply because their joint positions and claims were dismissed.**
- l) **The applicant's advocate M/S Olonyi & Co Advocates in the purported illegal transaction**

were the same

lawyers for the 2nd respondent and they knew the interests of the 1st respondent because they even wrote to the 1st respondent vide letter dated 28th June 2017 seeking for an out of court settlement between the 1st and 2nd respondent.

- m) That when the 1st respondent protested the illegal invasion of the suit property, the 5th respondent who is a director/ shareholder of the applicant replied to the formal written protest letter through the firm of M/s Gordon Ogola Kipkoech & Co. Advocates, and signed by one Kipkoech B. Ng'etich the same lawyer who subsequently conducted the hearing on behalf of the 2nd respondent. Therefore, all along the applicant knew of the ongoing Environment and Land Court case but concealed the applicant's actions by not joining the suit.**
- n) In the execution process, the firm of Prof. Tom Ojienda & Associates Advocates appears for both the applicants and the 2nd respondent and at every stage in this matter the applicants and the 2nd respondent have always acted in concert, retained a common advocate and jointly aligned their arguments.**
- o) The applicants have also admitted to the existence of High Court No. E158 of 2005 in which the 1st respondent filed its counterclaim and to that extent, the applicants have confirmed that the doctrine of lis pendens would have barred the purported fraudulent transfer between the applicants and the 2nd respondent.**
- p) There is no evidence of payment of the purchase price and therefore the loss of Kshs.200,000,000/= is a sham since the parties entered into a wager to only consummate the sale after their fraud passes judicial inquiry and not otherwise.**
- q) That the applicant prosecuted their defence on the basis that they were the owners of the suit property and at no point did they disclose that they had sold the property to the 2nd respondent. Additionally, after delivery of Judgment, the**

applicant proceeded to seek stay of execution on the grounds that they would suffer irreparable loss if the suit property is

transferred to the 1st respondent before their appeal was heard and determined as there was an apprehension that the 1st respondent might subdivide and dispose of the suit property.

- r) The applicants are parties who unjustly by stealth and deception sought to defeat justice and are therefore not worthy of the exercise of this Court's discretion.**
- s) Succession proceedings cannot determine land rights; therefore, the applicants cannot justify their secret fraud by saying that they obtained a grant from the High Court in succession proceedings which they purport gave them "authority" to commit fraud.**
- t) The instant application has regurgitated the exact same arguments that it made before this Court and which were dismissed vide ruling delivered on 20th June 2025 and there cannot be jurisdiction to reopen a matter that has been conclusively dealt with by another full bench of this Court.**

11. In support of the application, the applicant's counsel Prof. Ojienda, SC in his submissions dated 11th July 2025 reiterated the contents of the affidavits in support of the application and maintained that indeed the instant application was filed without undue delay on 25th June 2025 barely five days after delivery of the ruling. Counsel cited **Jedida Alumasa & 3 Others vs. S.S. Kositanyi [1997]** eKLR in submitting that since the applicants' appeal was struck out, they be allowed extension of time to lodge a fresh notice of appeal.

12. Prof. Ojienda submitted that the intended appeal has high chances of success contending that the learned judge having summarily cancelled the 2nd respondent's title to the suit property, the applicants are exposed to a refund claim from the 2nd respondent yet in this case the learned judge erroneously assumed constitutional jurisdiction over a purely contractual dispute despite being informed that the petition was in fact *sub judice*. Prof. Ojienda SC contended that the right of appeal ought not to be summarily curtailed through interlocutory applications.
13. Counsel maintained that no prejudice will be suffered by 1st the respondent, unlike the applicants who will be prejudiced if the appeal is not heard of merit. To buttress his argument, counsel cited the case of **Jedida Alumasa & 3 Others vs. S.S. Kositanyi** (supra) and submitted that a party whose appeal has been struck out on a procedural technicality has a right to commence the appeal process de novo for the purpose of hearing the appeal on merit.
14. The 1st respondent's counsel Mr. Kairaria in his submissions dated 22nd July 2022 reiterated the contents of the 1st respondent replying affidavit and the preliminary objection

and contended that through out the proceedings the applicants alleged that they were paid Kshs.200,000,000 but failed to provide supporting evidence despite numerous opportunities granted to them to avail such evidence.

15. Mr. Kairaria also submitted that the applicant is inviting this Court to re-hear the same facts and considerations and arrive at a different decision from the decision of the full bench dated 20th June 2025. Mr. Kairaria maintained that the intended appeal has no chances of success because it was not necessary for the applicant to participate in the proceedings for the doctrine of *lis pendens* to apply nor can the applicant's anchor their claim on an illegality and ask this Court to exercise its discretion in its favour.
16. Counsel maintained that the intended appeal stands no chance of succeeding since all issues were determined with finality by this Court. Therefore, the intended appeal seeks to challenge the judgment of *Ohungo, J.* delivered on 18th May 2023 yet there is no appeal against the said judgment. Mr. Kairaria maintained that the 1st respondent continues to suffer serious prejudice on account of the applicant's confirmed fraud which affected the 1st respondent 's rights to property,

therefore, the applicant cannot be allowed to continue benefiting from fraudulent conduct.

17. I have considered the application, the affidavits on record and submissions by counsel and the law. This Court has discretion under Rule 4 of the Court of Appeal Rules, 2022 to extent time. However, the discretion must be exercised in conformity with the spirit of the law and in a manner to serve rather than to defeat substantial justice. It should be guided by law and inspired by a desire to promote justice. It should not be arbitrary, vague and fanciful and should not be ruled or governed by humour. It must be exercised in accordance with legal principles and not in an arbitrary or capricious manner. (See **Sila Mutiso vs. Hellen Wangari Mwangi [1999] 2EA 231**; and **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**).

18. True, an applicant is required to demonstrate he has an arguable appeal. This Court in **Athuman Nusura Juma vs. Afwa Mohamed Ramadhan [2016] eKLR** stated the following regarding the existence of an arguable appeal:

“This Court has been careful to ensure that whether the intended appeal has merits or not is

an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”

19. However, the existence of an arguable appeal alone will not suffice. The Court must be satisfied with the explanation for the delay. A Court may decline an application for extension of time if the applicant fails to provide a good reason for the delay. In this case, there is no dispute that this application was filed without delay, that is, within 5 days from the date of this court’s ruling dated 20th June 2025. However, absence of delay or a satisfactory explanation for the delay is not the only requirement. Even if sufficient cause is shown, party is not automatically entitled to have the delay condoned. Grant or refusal to grant the leave remains within the Court’s discretion. Condoning delay is an exceptional remedy, not a right. The Court will also consider the *bona fides* of the explanation, the history and peculiar facts of the case.

20. It is important to bear in mind that this is a matter that has been in Court for several decades. In its ruling dated 20th June 2025 in Civil Appeal (Application) No. E051 of 2025

this Court (*Mativo, Gachoka & Odunga JJ.A.*) subsumed and determined

all issues currently being raised by the applicants. In a nutshell, the Court stated:

- (a) the applicant has persuaded us that the 1st and 2nd respondents transferred the suit property pendete lite without the permission of the Court in total violation of the doctrine of lis pendens, and contrary to a court order,**
- (b) that the said action constitutes abuse of court process,**
- (c) that by parting with the property, the subject of this appeal, the 1st and 2nd respondents constructively abandoned their appeal,**
- (d) by transferring the suit property, the 1st and 2nd respondents basically abandoned the cause of action, a sine qua non for the ultimate success of the suit,**
- (e) the 1st and 2nd respondents' interest in the subject matter, and therefore, this appeal, ceased the moment they transferred the property, which means, they lost their standing in this appeal, and,**
- (f) an appeal is a remedy sought to address a grievance, and if that grievance no longer exists, the appeal loses its purpose,**
- (g) the pursuit of this appeal may well only be for its nuisance value.**

20. The applicants were parties in the said proceedings and they were fully heard. To this extent, I agree with the 1st respondent's submissions that the applicants prosecuted their defence on the basis that they were the owners of the suit property and at no point did they disclose that they had sold the property to the 2nd respondent. Additionally, after delivery of the trial courts' Judgment, the applicants applied

for stay of

execution on the grounds that they would suffer irreparable loss if the suit property is transferred to the 1st respondent before their appeal was heard and determined as there was an apprehension that the 1st respondent might subdivide and dispose of the land. Therefore, this court in its ruling dated 20th June 2025 declared that the purported transfer of the suit property to the 2nd respondent *pendete lite* was in total violation of the doctrine of *lis pendens* and contrary to a valid court injunction restraining the applicants from *inter alia* in any manner transferring the land. The purported sale and transfer were not disclosed to the trial court or this Court, despite the protracted litigation. The same parties are now before this Court seeking leave to institute another appeal to be heard on merit. Two things come to mind. One, the applicants' conduct. What inevitably comes to mind is the principle that where a court is called upon to exercise its discretion, the court will consider the overall conduct of the parties.

21. Two, the rationale for judicial discretion, as articulated in various decisions of this Court is to allow judges to make a fair, individualized decisions that are tailored to the unique facts of each case. It fosters fairness and equity by

preventing

mechanical application of rigid rules, allowing the Court to consider the specific facts and nuances of a situation to reach an equitable outcome, essentially securing ends of justice. The primary purpose of the discretion is to do “right” and undo “wrong” ensuring that the legal process achieves justice rather than becoming a victim of rigid technicality or abuse of court process. The history of this case is well detailed in the various decisions of this Court and the trial court.

23. The Court is obligated to balance competing interests. This Court is required to consider the unique facts of each case and ensure that justice is not applied in a mechanical fashion. Fair play and good sense are safe guides for the exercise of discretion, dictated by the exigency of the situation and the facts and circumstances of this case.

24. Talking about the conduct of the parties, a litigant must not come to court with unclean hands. A litigant must come to court with clean hands to receive the court’s equitable assistance. A reading of the history and decisions of this Court and the trial court shows an uncontroverted fact that the applicants sold the land in question in total disregard of a

subsisting court order and during the pendency of active litigation. I say no more about the said conduct.

25. Upon analyzing the facts before me and the law, I find that the applicants are undeserving of the exercise of the discretion of this Court in their favour because they have not approached this Court with clean hands. Consequently, the application dated 25th June 2025 lacks merit and is accordingly dismissed with costs to the 1st respondent.

Dated and delivered at Eldoret this 27th day of November, 2025.

J. MATIVO

.....
**. JUDGE OF
APPEAL**

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

Signed.

DEPUTY REGISTRAR.