IN THE COURT OF APPEAL
AT NAKURU

CORAM: MATIVO, JA (IN CHAMBERS)

CIVIL APPLICATION NO. NAK E066 OF

2025 BETWEEN

ROYAL SIAN LIMITED.......................................APPLICANT
AND

COVE INVESTMENTS LIMITED.....................1ST RESPONDENT JOHANA KIPROTICH RONO & JOSEPH RONO LANG'AT *(Sued as the legal representatives of the Estate of Mathias Kimnyole Langat)*..................................**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 extension of time against the judgment in the Environment and Land Court of Kenya at Nakuru ***(D. Ohungo, J.)*** *dated 18th May 2023*

in

ELC Petition No. 360 of 2017).
****

RULING

1. Royal Sian Limited (the applicant) in its application dated 25th June 2025 seeks two substantive reliefs namely: (a) leave to lodge a notice of appeal and a record of appeal

against the judgement and orders issued by *Ohungo, J.* on

18th May 2022

in Nakuru ELC Petition No. 360 of 2017, Cove Investments

Limited vs Johana Kiprotich Rona & Others out of time, and (b) stay of the execution of the above Judgment pending hearing and determination, of the application. The application is premised on article 25 (c), 50 and 159 of the Constitution, sections 3, 3A & 3B of the Appellate Jurisdiction Act and Rule 4 of this Court's Rules, 2022.

2. The application before me what is referred to as an omnibus application, brought under a number of rules seeking a variety of orders that cannot under this Court's rules, be heard and determined together by a single judge. Therefore, I will only address the prayer seeking leave.

3. 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 held 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.

4. Aggrieved by the said verdict, the 2nd respondent herein filed a notice of appeal dated 24th May 2021 in **Civil Appeal No. E051 of 2022, Johana Kiprotich Rono and Another vs. Cove Investments Limited and Others.** seeking to appeal against the entire judgment. They also filed an appeal against the said decision. In response, the 1st respondent filed an application dated 5th October 2023 seeking orders that the appeal be struck out for lack of cause of action. On 20th June 2025 this Court *(Mativo, Gachoka and Odunga JJ.A)* in Civil Appeal (Application) E051 of 2025 allowed the said application and struck out the 2nd respondent's appeal. 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.

5. The applicant is aggrieved by the above verdict for reason that it never took part in the trial proceedings, was never made aware of the Judgment or the appeal instituted by the 2nd respondents until the application dated 5th October 2023 was scheduled for hearing on 19th May 2025 when the same was canvassed before the Court.

6. The applicants' plea for leave to file a notice of appeal and a record of appeal against the Judgement and orders issued by *Ohungo, J* on 18th May 2023 in Nakuru ELC Petition No. 360 of is premised on the grounds:

a) The applicant as the current proprietor of the suit property is directly affected by Justice

Ohungo's decision and has a claim under the doctrine of innocent purchaser for value having purchased the

suit property for a total sum of Kshs.200,000,000/=, which claim they intend to defend before this Court.

b) ***The applicant conducted due diligence before taking vacant possession of the suit property and having the suit property registered in its name on 31st October 2017. Due diligence which included visiting the suit property, ensured there were no encumbrance on the suit property***

c) ***the applicant has an arguable appeal which is demonstrated by Justice Ohungo's decision to erroneously interpret Section 6 of the Land Control Act and assume jurisdiction over a purely contractual claim. These are pertinent questions of law that warrant determination through hearing of a substantive appeal.***

d) ***The applicant enjoyed quiet possession until the 19th October 2020 when one Kenneth Kiplagat accused the Chairperson of Sovereign group of all manner of things including illegally entering, harvesting and stealing crops from the suit property and it is upon being served the said letter dated 19th October 2020 that the applicant became aware of the litigation between the 1st and 2nd respondent.***

e) ***Vide ruling delivered on 15th October 2024 M. A. Odeny, J. issued orders directing the applicant to surrender its original certificate of Lease and cancellation of its proprietary interest in the suit property without according the applicant an opportunity to be heard in blatant disregard of its rights under article 50 of the Constitution.***

f) ***Court orders are binding only on the party against whom it is addressed, none of the pleadings in in Nakuru ELC Petition No. 360 of 2017. Therefore, the learned judge violated the applicant's right to a fair hearing by erroneously finding that the applicant is a "representative" of the 2nd respondent and is thus bound by the judgment and decree issued on 18th May 2021 by***

D.O. Ohungo, J in Nakuru ELC Petition No. 360 of 2017.

g) ***The applicant has a claim against both the 1st and 2nd respondents which claim must be accorded an opportunity to defend against both them as required under article 50 of the Constitution.***

h) ***If at all the 1st respondent found the applicant to have been trespassing, nothing would have prevented the former from enjoining the applicant in the proceedings in Nakuru ELC Petition No. 360 of 2017, and claim against both the applicant and the 2nd respondent.***

i) ***The Superior Court in its judgment dated 18th May 2023 proceeded to arrogate itself jurisdiction over the contractual issues raised by the 1st respondent, in the guise of upholding article 159 (2) of the Constitution.***

j) ***Unless leave to lodge the applicant's appeal out of time is granted, the applicant faces the risk of being summarily dispossessed of the suit property on the strength of an erroneous decision which is ripe for setting aside. At the very least, article 25 of the Constitution demands that the applicant be accorded opportunity to exhaust all legal avenues, before it is so dispossessed.***

7. In opposing the application, the 1st respondent has 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.***

8. The 1st respondent's Asset Manager swore a replying affidavit 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 instant application is a surrogate proceeding brought on behalf of the 2nd respondent to obtain that which the 2nd respondent failed to achieve in the appeal against the decision of the Environment and Land Court that was struck out.***

c) ***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 be premised on a declared illegality.***

d) ***The Court having declared the purported transfer of the suit property as an abuse of process, no cause of action can subsequently be maintained.***

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 prior to effectuation of the fraud, the applicant's advocate wrote to the 1st respondent vide letter dated 28th June 2017 seeking an out of Court settlement and cancellation of the sale agreement between the 1st and the 2nd respondent.***

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 applicant squandered its opportunity to be heard before the Superior Court by failing to join the proceedings in a bid to conceal the fraudulent transfer of the suit property. Therefore, the applicant is bound by the decision in the matter even if they did not have notice of the proceedings. Therefore, there is no requirement that such a party ought to be heard at all.***

j) ***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.***

k) ***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.

l) ***In the execution process, the firm of Prof. Tom Ojienda & Associates Advocates appears for both the applicant and the 2nd respondent and at every stage the applicant and the 2nd respondent have acted in concert, retained common advocates and jointly aligned the arguments.***

m) ***There is no explanation by the applicant why after having knowledge of the litigation on the suit property on 19th October 2020 they did not move the trial court to be joined in the proceedings.***

n) ***The purported removal of the caution has since been found to have been irregular, illegal and null and void and the transfer has been found to have breached existing court orders.***

o) ***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.***

9. The applicant's counsel Prof. Ojienda Seniro Counsel vide written submissions dated 17th July 2025 reiterated the contents of the affidavits in support of the application and maintained that what amounts to in ordinate delay depends on the circumstance of each case and in this case the applicant was never involved as a party in the proceedings in ELC Petition 360 of 2017 and only became aware of the dispute when it was served with a post judgment

application seeking to join them in the suit and through the

ruling

delivered on 15th October 2024 by *Odeny, J.* summarily cancelling its title to the suit property.

10. Counsel also submitted that despite instructing its previous counsel to lodge an appeal against the substantive judgment, the said counsel failed to do so, which fact the applicant became aware of recently. Consequently, mistakes of an advocate should not be visited on the client.

11. Prof. Ojienda Senior Counsel also submitted that the instant application raises important questions of law which outweigh the prejudice that can be suffered by a respondent especially in a land matter. He cited the case of ***K.H Osmond vs. Daima Bank Limited & Whitestone Auctioneers (k) limited [2001]*** where the court found in favour of the applicant in a similar application filed nearly four years since delivery of judgment.

12. Urging the ground that the appeal has high chances of success, Prof. Ojienda Senior Counsel submitted that the learned judge erroneously, sitting as a Constitutional Court, assumed jurisdiction over a purely contractual claim while ignoring that the petition was *sub-judice* as the issues raised in were pending determination in ELC Suit No. E158

of 2005.

The erroneous arrogation of jurisdiction cannot be wished away even after the suit property has exchanged hands.

13. In opposition to the application, the 1st respondent's counsel Mr. Kairaria vide submission filed on 22nd July 2025 reiterated the contents of the 1st respondent's replying affidavit and preliminary objection and contended that the applicant lacks a cause of action since the rights of the parties have been determined with finality vide Judgment of a full bench on 20th June 2025.

14. It is the 1st respondent's case that the applicant is inviting this Court to re-hear the same facts and considerations and arrive at an opposite decision to that arrived by the full bench on 20th June 2025. The applicant was ably represented.

15. Mr. Kairaria also maintained that the intend appeal has zero chance of success since the applicant needed not to have participated in the proceedings for the doctrine of *lis pendens* to apply. Therefore, the applicant cannot anchor its claim on an illegality and ask this Court to exercise its discretion in its favour.

16. Regarding the intended appeal having high chances of success because of the issue of a Constitutional Court assuming jurisdiction over a purely contractual matter, Mr. Kairaria urged and contended that the submission by counsel is precisely the reason why the intended appeal has zero chances of success since the applicant is admitting the existence of an alleged suit prior and subsisting suit over the suit property, perforce, meant that the suit property was never available for sale or transmission because of the doctrine of *lis pendens.* Therefore, the applicant is approbating and reprobating at the same time.

17. On the issue of inordinate delay, counsel maintained that there is no attempt at all to dispute the fact that at all times the applicant and its co-conspirator utilised the services of the very same lawyers during the entirety of trial court proceedings. Knowledge is imputed on the lawyers and their clients. Nevertheless, the applicant accepts and admits that it was served with a court order on 19th October 2020 emanating from the trial court proceedings, but the applicant chose not to be enjoined in

the proceedings.

18. On prejudice, counsel maintained that the 1st respondent continues to suffer serious prejudice on account of the applicant's confirmed fraud which has prejudiced the constitutional and property rights of the 1st respondent and the applicant cannot be allowed to continue benefiting from fraudulent conduct.

19. 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).***

20. An applicant in an application such as this 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."***

21. 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 in the applicant fails to provide a good reason for the delay. However, absence of delay or a satisfactory explanation for the delay is not the only requirement. Even if sufficient cause is shown, a 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.

22. It is important to bear in mind that this is a matter that has been in Court for several decades. The applicant's reason for the delay is that it was never made aware of the Judgment or the appeal instituted until the application dated 5th October 2023 was scheduled for hearing on 19th May 2025 when the same was canvassed before this Court. However, in the same affidavit sworn on 25th June 2025 by Trophimus Kiplimo who is the applicant's manager avers that Joshua Kulei, the Chairperson of Sovereign Group and a director of the applicant became aware of the litigation between the 1st and 2nd respondent when he received a letter dated 19th October 2020 from one Kenneth Kiplagat, who is the 1st respondent's Assets Manager accusing him of all manner of things under the sun, including but not limited to trespassing unto the suit property.

23. It is also noteworthy that the 1st respondent has averred that the applicant and the 2nd respondent have always utilized the same counsel during the entirety of the trial proceedings and therefore knowledge is imputed on the

lawyers and their client. To substantiate his allegations, 1st respondent stated that M/s

Olonyi & Co. Advocates wrote to the 1st respondent on behalf of the 2nd respondent vide letter dated 28th June 2017 seeking an out of Court settlement and cancellation of the sale agreement between the 1st respondent and the 2nd respondent. To show the nexus, the 1st respondent also referred the Court to the sale agreement dated 17th July 2017 and pointed out that M/s Olonyi & Co. Advocates acted for both the applicant and the 2nd respondent in the said sale agreement.

24. It is also noteworthy, the applicant's advocate one Kipkoech B. Ng'etich of Gordon Ogola Kipkoech & Co. Advocates conducted the hearing on behalf of the respondent and even cross- examined the 1st respondent witness. However, when the 1st respondent protested the trespass by the applicant onto the suit property it was the same Kipkoech B. Ng'etich of Gordon Ogola Kipkoech & Co. Advocates who replied to the formal written protest letter vide letter dated 23rd October 2020 on behalf of Joshua Kulei, the Chairperson of Sovereign Group and a director of the applicant.

25. It is noteworthy that the applicant has not responded to this

serious issue raised by the 1st respondent herein that border on collusion between the applicant and the 2nd respondent.

Consequently, having considered the evidence on record, I find that the applicant was all along aware of the proceedings between the 1st and 2nd respondents herein but opted not to join the said proceedings. Therefore, the applicant is approbating and reprobating by swearing on oath that it only became aware of the proceeding before the Environment and Land Court in May 2025 when the 1st respondent had applied for the 2nd respondent's appeal to be struck out, yet the same applicant admitted to being aware of the litigation over the suit property on 19th October 2020.

26. It is noteworthy that the applicant has in its submission blamed the failure to lodge an appeal against the decision by *Ohungo, J* on 18th May 2022 in Nakuru ELC Petition No. 360 of 2017 on its previous counsel. Prof. Ojienda SC. went on to contend that mistakes of an advocate should not be visited on the applicant herein. Having considered the arguments by Prof. Ojienda SC. in his submissions, I note that the issue of mistakes of an advocate was never raised in the applicant's motion. Therefore, introducing the issue during submissions in conducting trial by ambush at the

expense of the 1st

respondent herein. Be that as it may, it is trite that submissions cannot take the place of evidence.

27. The upshot of the foregoing is that the delay of almost five years in bringing the instant application is inordinate and the explanation proffered by the applicant is not plausible. Furthermore, it is noteworthy that the applicant is not deserving of the exercise of the discretion of this Court in its favour since the applicant has not approached this Court with clean hands.

28. For the above stated reasons, I accordingly dismiss the applicant's notice of motion application dated 25th June 2025 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.

REPUBLIC OF KENYA THE COURT OF APPEAL JUDICIARY