Cove Investments Limited v Rono & 2 others (Civil Appeal (Application) E051 of 2025) [2025] KECA 1089 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KECA 1089 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL (APPLICATION) E051 OF 2025

JM MATIVO, PM GACHOKA & GV ODUNGA, JJA

JUNE 20, 2025

BETWEEN

COVE INVESTMENTS LIMITED ..... APPLICANT

AND

JOHANA KIPROTICH RONO ..... 1ST RESPONDENT

JOSEPH RONO LANGAT (AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF MATHIAS KIMNYOLE LANGAT) ..... 2ND RESPONDENT

THE ATTORNEY GENERAL ..... 3RD RESPONDENT

(Being an appeal against the judgment of the Environment and Land Court of Kenya at Nakuru (D. O. Ohungo, J.) delivered on 18th May, 2021 in Constitution Petition No. 360 of 2017)

RULING

1. A briefly account of the history of the litigation before the trial court, culminating in this appeal and the application dated 5th October 2023 filed by Cove Investments Limited (the applicant), the subject of this ruling is necessary in order to properly contextualize and effectually determine the diametrically opposed arguments pressed by the parties in support of their respective positions. The 1st and 2nd respondents in this application, namely, Johana Kiprotich Rono & Joseph Rono Langat, are the legal representatives of the estate of the late Mathias Kimnyole Langat (herein after referred to as the deceased). They are the appellants in the main appeal, but for the purposes of this ruling, they are the 1st and 2nd respondents. The Attorney General is the 2nd respondent in the main appeal, but for the purposes of this ruling, he is the 3rd respondent. The applicant is the 1st respondent in the appeal.

2. Briefly, this dispute concerns the ownership of a parcel of land known as L.R. No. Nakuru/Ol'ongai Phase 11/34, situated in Menengai/Ol'ongai, together with all the buildings and improvements erected thereon. It is common ground that the applicant through its company secretary entered into a sale

agreement dated 1st December 1999 with the deceased for the purchase of the said land at an agreed consideration of Kshs. 16,758,425.50/-. It was a term of the agreement that the agreed completion date was 31st December 1999. Pursuant to special condition no. 6 of the said agreement, the deceased was to grant vacant possession of the property to the applicant within 15 days of payment of the agreed deposit. Special condition no. 11 provided that the deceased was to provide the applicant with all the consents necessary for completion of the transfer 15 days before the completion date.

3. Pursuant to the said agreement, the applicant paid a total sum of Kshs.15,976,000/- to the deceased. However, the deceased never applied for the consent of the Land Control Board to transfer the said land. Instead, he filed Nakuru HCCC No. 158 of 2005 seeking vacant possession on the basis that the Land Control Board consent had not been obtained within the prescribed time under the *Land Control Act*. On its part, the applicant filed Nairobi High Court Civil Suit No. 588 of 2006 (O.S) seeking leave to apply for consent of Land Control Board out of time. Vide ruling delivered on 26th June 2006, Osiemo J. ordered that the issue of consent be dealt with in Nakuru HCCC No. 158 of 2005. Eventually, Nakuru HCCC No. 158 of 2005 was dismissed on 24th May 2013 for want of prosecution.

4. It is common ground that the applicant was in occupation of the suit property. However, the invasion of the suit property by the 1st and 2nd respondents prompted the applicant to institute Constitutional Petition No. 360 of 2017 at the Environment and Land Court (the ELC), Nakuru, dated 22nd September 2017 which was subsequently amended on 25th September 2019 seeking:

   (a) leave to apply for consent of the Land Control Board under section 8 of the *Land Control Act* on grounds inter alia that the parties had in their sale agreement agreed that the vendor would obtain the said consent;

   (b) the Deputy Registrar of the Court be mandated to execute any necessary forms and transfer instruments necessary for obtaining the said consent;

   (c) a declaration that the 1st and 2nd respondents held LR. No. Nakuru/Ol'ongai Phase 11/34 in trust for the applicant herein and the 1st and 2nd respondents be directed to formally transfer the suit property and execute the transfer documents within 14 days failing which the Deputy Registrar of this Court be authorized to execute the transfer documents in favour of the applicant and the Land Registrar, Nakuru to forthwith cancel the title issued in the name of the 1st and 2nd respondents and to re- issue a new title in the name of the applicant;

   (d) compensation for the loss and damage as set out at paragraph *4*. 5. 4.

5. Alternatively, the applicant prayed for:

   a. a declaration that Section 6 of the *Land Control Act* in as far as it invalidates controlled land transactions where Land Control Board consent has not been obtained not more than six months after agreement for sale has been executed is unconstitutional null and void and that such consent may be obtained at any time before the transfer is registered on the grounds that Section 8(1) of the *Land Control Act* in declaring that dealing in a controlled transaction is null and void unless consent is obtained within six months of the making of the agreement for the controlled transaction action:

      i. does not comport with any rationale legitimate purpose of the *Land Control Act*;

      ii. is unconscionable, harsh and unreasonable; amounts to an unjust enrichment in favour of one party against the other;

iii. unnecessarily interferes with the constitutional rights of citizens to own and deal in property as envisaged in Article 40 of *the Constitution*;

iv. is against the public policy of Kenya.

v. any other or further order that this Honourable court may deem fit to grant.

vi. costs.

6. The petition was opposed vide replying affidavit sworn on 19th April 2018 by Johana Kiprotich Rono (the 1st respondent). He was resolute that the transaction was void for want of Land Control Board consent and that the applicant's continued possession of the suit property was a criminal act since its recourse lay in claiming the purchase price paid.

7. The petition was heard by way of viva voce evidence and submissions. Vide Judgment delivered on 18th May 2021, Ohungo, J. held was satisfied that equitable doctrines of constructive trust and proprietary estoppel were applicable and that the applicant was entitled to a declaration that the appellants held the suit property in trust for the applicant, and that an order for extension of time to apply for the consent of the Land Control Board Consent should issue. The learned judge was emphatic that the deceased having sold the suit property to the applicant, having received almost the entire purchase price and having put the applicant in possession for about 21 years, the 1st and 2nd respondents had a duty in equity to complete the transaction. Consequently, the learned judge ordered: (a) the applicant herein to deposit KShs.782,425/- being balance of the purchase price due to the 1st and 2nd respondents 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 be extended by 6 months from the date of the delivery of the judgment; (c) the 1st and 2nd respondents to execute all necessary forms and transfer instruments necessary for obtaining the said consent within 30 days from the date of delivery of the judgment. In default, the Deputy Registrar of the court to execute the said documents on behalf of the 1st and 2nd respondents; (d) a declaration issued that the 1st and 2nd respondents held the said land in trust for the applicant; (e) the 1st and 2nd respondents were directed to formally transfer the land to the applicant 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 applicant and issuance of title in its name, the sum of KShs.782,425/- referred to under order number (a) above be released to the 1st and 2nd respondents; (g) costs of the petition awarded to the applicant herein to be borne by the 1st and 2nd respondents.

8. Aggrieved by the said verdict, the 1st and 2nd respondents filed a notice of appeal dated 24th May 2021 seeking to appeal against the entire judgment. They also filed the instant appeal, i.e. E051 of 2025, in which they seek to overturn the said decision.

9. In the instant application dated 5th October 2023, the subject of this ruling, the applicant's grievance is that the 1st and 2nd respondents secretly sold the land the subject of this dispute during the pendency of the proceedings before the trial court. The application is brought under sections 3A (1), 3 B (1) (a), (b), (c) and 4 (2) (d) of the *Appellate Jurisdiction Act* and Rules 1 (2) and 77 of the Court of Appeal Rules, 2022. Principally, the applicant seeks one substantive prayer couched in the following words:

> " This hounourable Court be pleased to dismiss or otherwise strike out the appeal herein for want of cause of action, the appellants having secretly, fraudulently and in defiance of subsisting court orders, disposed of the suit property to a third party, Royal Sian Limited, which has not been named as a respondent in this appeal and which has neither been served

with the notice of appeal in violation of and the law which does not permit the appellant to sustain an appeal on behalf of another party, not being a party to the appeal."

10. In a nutshell, the key grounds in support of the application are that the appellants lost the cause of action the moment they secretly transferred the title to the suit property to Royal Sian Limited during the currency of the High Court proceedings but pretended to both the trial court and this Court that they were still the registered owners of the property.

    The applicant maintained that the appellants cannot now obtain a remedy in respect of a property they no longer own, which renders this appeal otiose. The applicant contends that this appeal offends Rule 1 (2) of the Court of Appeal Rules, 2022 and it is an abuse of court process, and that the appellant, having lost interest in the property, the subject of this appeal, it cannot now mount a competent appeal, and further, the appellant prosecuted its case before the trial court on the premise that it owned the land.

11. It is the applicant's case that all along the 1st and 2nd respondents were aware of the status quo orders and have never disputed and/or appealed against the said orders which were issued by Sila, J. on 28th September 2017, and the orders issued by Ohungo, J. on 14th November 2017 and on 27th July 2018 which quashed the appellant's attempt to interfere with the applicant's rights in the suit property. Therefore, the purported removal of the caution and purported transfer of the suit property to third parties without lawful authority were nullities ab initio and could not be sanitized by an inferior tribunal (the Land Control Board) in a manner inconsistent with the Judgment of Ohungo, J.

12. The applicant averred that in executing the judgment dated 18th May 2021, it was represented by its company secretary, Mr. Kenneth Kiplagat who attended the Rongai Land Controls Board meeting on its behalf on 14th September 2022. That its aforesaid company official furnished the Land Control Board members with copies of the judgment and decree issued by Ohungo J., the Land Control Board consent forms and transfer forms duly signed by the applicant and the Deputy Registrar of the ELC in lieu of the 1st and 2nd respondents' signatures. However, upon being served with the said documents, the Rongai Land Control Board members ignored the court order in total disregard of the rule of law.

13. The applicant maintains that the purported acquisition of the suit property on 31st October 2017 by Royal Sian Limited was fraudulent and in breach of existing court orders and in violation of the doctrine of lis pendens and is therefore void and it is a fatal misrepresentation in failing to tell this Court that circumstances had changed, since a third party had acquired a right over the land.

14. It is the applicant's case that vide letter dated 20th April 2018 the 1st and 2nd respondents instructed the firm of M/s Karanja - Mbugua & Company Advocate to demand that the applicant vacates the suit property. Therefore, the letter is inconsistent with the allegations that the purported transfer was effected on 31st October 2017, since the 1st and 2nd respondents were aware that the applicant was in possession of the property and Royal Sian Limited did not attempt to take possession in assertion of its right as a bona fide purchaser for value as such action would have invited contempt proceedings given that its interests were created in flagrant defiance of court orders and in violation of the doctrine of lis pendens. In any event, the orders issued by Ohungo, J. addressed the issue by resetting the system to where it was on 28th September 2017 when the court ordered that the status quo be maintained.

15. The applicant asserts that it had no way of knowing the fraud perpetuated by the 1st and 2nd respondents earlier than when it conducted a search for the purpose of submitting its application for the Land Control Board consent, which was after the judgment of the trial court, because the 1st and 2nd respondents illegally colluded to corruptly have five entries made on the same day. Further, the 1st and 2nd respondents kept issuing notices and letters, lodging suits and applications, and swearing affidavit

on the basis that the suit property was registered in the name of the deceased on whose behalf they appeared in Court.

16. In the end, the applicant prays that this appeal be dismissed or otherwise struck out as it does not now disclose a cause of action because the success of the appeal cannot benefit the 1st and 2nd respondents because they ceased having any interest in the subject matter of the appeal and a positive outcome will not have the effect of restoring the suit property to them.

17. The 1st and 2nd respondents opposed the application through the replying affidavit of Joseph Karanja Mbugua, advocate sworn on 31st May 2024, who swore the affidavit on behalf of his clients. The salient averments are: (a) the applicant had filed an application dated 5th October 2023 before the High Court seeking inter alia a finding that Royal Sian Limited, Joshua Chelelgo Kulei and Kennedy Kipruto Kulei are necessary parties for the purpose of executing the court decree, therefore, the 1st respondent is gambling with the court processes, which application was pending determination, consequently, this application is premature; that the applicant is playing lottery with judicial processes; and that, the application offends Rule 86 (b) of the Court of Appeal Rules, 2022.

18. During the hearing of the application, learned counsel Mr. Kairaria, appeared for the applicant, while learned counsel Prof. Tom Ojienda SC, appeared for the 1st and 2nd respondents. The Attorney General despite being served did not participate in these proceedings.

19. In his submissions in support of the application, Mr. Kairaria invoked the inherent jurisdiction of this court and cited this Court's decision in Kenya Power & Lighting Company Limited vs. Benzene Holdings Limited [2016] eKLR to buttress his assertion that this appeal has been rendered otiose since the appellant cannot obtain a relief in relation to a property it no longer owns having lost the cause of action the moment it secretly transferred the suit property during the currency of the suit before the ELC but pretended to both the said court and this Court that they were still the registered owners of the suit property.

20. Mr. Kairaria maintained that the instant appeal is incompetent since the main party Royal Sian Limited has conveniently not been joined as a person likely to be affected by the decision and that the 1st and 2nd respondents continue to conceal a continuing fraud which has been perpetrated both before the trial court and before this Court.

21. Counsel also submitted that the 1st and 2nd respondents not only disobeyed court orders but also acted in breach of the doctrine of lis pendens by fraudulently and illegally altering documents pertaining to the suit property and pretending to transfer the same to Royal Sian Limited.

22. In opposition to the application, learned counsel for the 1st and 2nd respondents Prof. Ojienda, SC essentially reiterated the averments in the 1st respondent's replying affidavit highlighted earlier and submitted that by the time the applicant's petition dated 22nd September 2017, was filed, which was subsequently amended on 25th September 2019, the applicant was already aware that Royal Sian Limited was the registered proprietor of the suit property yet it did not deem it fit to join it in the suit to seek redress against it. Therefore, it cannot turn around and claim that a party it did not consider to be affected ought to have been served.

23. The other ground urged by Prof. Ojienda is that the instant application contravenes Rule 86 (b) of this Court's Rules having been brought outside the 30 days prescribed by the said rule. In addition, counsel cited this Court's decision in D.T. Dobie & Company (Kenya) Limited vs. Joseph Mbaria Muchina & Ano. [1980] eKLR in support of the proposition that courts ought to cautiously and carefully consider

all the facts of the case before dismissing a case for not disclosing a reasonable cause of action or for being otherwise an abuse of the process of the Court.

24. We have carefully considered the pleadings, the parties' submissions, the authorities cited and the law. The gravamen of the applicant's case is that the 1st and 2nd respondents secretly transferred the suit property during the pendency of active litigation in breach of the doctrine of lis pendens, and therefore, the cause of action has ceased to exist. For this reason, the applicant is urging this Court to strike out this appeal. It is their case that having transferred the land, the 1st and 2nd respondents no longer have interest in the subject matter of the appeal, and any orders issued in this appeal will be of no value to them. Further, Royal Sian Limited has not been enjoined in this appeal. On the other hand, the 1st and 2nd respondents' counter argument is that the instant application offends Rule 86 of the Court of Appeal Rules, 2022 which provides that an application to strike out an appeal shall not be brought after the expiry of 30 days after the date of service of the notice of appeal or record of appeal.

25. As is evident from the provisions of the law upon which the application is brought, and the applicant's submissions, clear that the applicant's case is premised on this Court's inherent jurisdiction under rule 1(2) of the Court of Appeal Rules, 2022, which expressly provides that the rules shall not limit or otherwise affect the inherent power of the Court to make any orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. The question we seek to answer at this point is whether this application offends the proviso to Rule 86 as urged by Prof. Ojienda, SC.

26. Undeniably, courts derive their power from *the Constitution* and the statutes that regulate them. In addition to the powers courts enjoy in terms of statute, a court always has additional powers to regulate its own process in the interests of justice. This power is described as an exercise of inherent jurisdiction. Freedman, CJ. in the Canadian court decision in Montreal Trust Co vs. Churchill Forrest Industries (Manitoba) Ltd 1972 21 DLR (3d) 75 at 81 quoting I H Jacob, Current Legal Problems (1970) p 51 defined 'inherent jurisdiction as:

> "... the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them..."

27. Jerold Taitz, in his book The Inherent Jurisdiction of the Supreme Court (1985) pp 8-9 pithily describes the Court's inherent jurisdiction as:

> "... those (unwritten) powers, ancillary to its common law and statutory powers, without which the court would be unable to act in accordance with justice and good reason. The inherent powers of the court are quite separate and distinct from its common law and its statutory powers, e.g. in the exercise of its inherent jurisdiction the Court may regulate its own procedure independently of the Rules of Court."

28. However, we must underscore that a court's inherent power is not unlimited because it does not extend to the assumption of jurisdiction which it does not otherwise have. (See National Union of Metal Workers of South Africa & Others vs. Fry's Metal (Pty) Ltd 2005 (5) SA 433 (SCA) para 40). The question before us is not whether this Court has inherent powers, but whether this is a proper case for this Court to exercise these powers, and whether, this application offends the proviso to Rule 86.

29. The applicant's grievance is that the 1st and 2nd respondents secretly transferred the suit property notwithstanding the pendency of this appeal. Consequently, the applicant is seeking a determination that since the subject matter of this appeal has been disposed of, this appeal has been rendered otiose,

and, the 1st and 2nd respondents have lost interest in the appeal. The assertion that the suit property was transferred pendete lite is a pure point of law which touches on the maintainability of the appeal. This is an issue which this Court in exercising its inherent jurisdiction can entertain. Both the *Appellate Jurisdiction Act* and the Court of Appeal Rules to not divest this Court of the power to invoke its inherent jurisdiction in deserving cases. To the contrary, rule 1 (2) of this Court's Rules recognizes that jurisdiction which is intrinsic in a Superior Court, its very lifeblood, its very essence, its immanent attribute. Without such power, the court would have form but would lack substance, since it is that which enables it to fulfill itself as a court of law. Therefore, this application is properly brought under Rule 1 (2). The foregoing being the position, we are clear in our minds that this application does not offend the proviso to Rule 86 as argued by counsel for the 1st and 2nd respondents.

30. Having found that this application is properly before this Court, we now proceed three pertinent questions that are begging for an answer. These are: (a) whether disposing a suit property pendete lite constitutes an abuse of court process, (b) whether by disposing the subject matter of the appeal, the 1st and 2nd respondents lost interest in the appeal. Simply put, have they technically abandoned the appeal? (c) whether the cause of action has ceased to exist as urged by the applicant.

31. Regarding the first question, earlier we stated the date the petition was filed before the ELC and the date the transfer was registered. We need not rehash them here. It will suffice to underscore that the land was transferred during the pendency of the suit. This brings into sharp focus the common law doctrine of lis pendens, a term defined in the Black's Law Dictionary, 10th Edition as "a pending law suit. The jurisdiction, power, or control acquired by a court over property while a legal action is pending."

32. The above doctrine denotes those principles and rules of law which define and limit the operation of the common law maxim pendente lite nihil innovetur, that is, pending the suit nothing should be changed. As was held in Ex parte Thornton [1867] 2 Ch.p.178, as soon as proceedings are commenced to recover or charge specific property, there is lis pendens, that is, a pending suit, the consequence of which is that until the litigation is at an end neither litigant can deal with the property to the prejudice of the other. This doctrine requires that nothing new can be introduced during the pendency of a suit and if at all anything new is introduced, the same would also be subject to the final outcome of the suit, which would decide the rights and obligations of the parties.

33. The Supreme Court of India in Jayaram Mudaliar vs. Ayyaswami AIR 1973 SC 569 explained that where any proceeding in respect of a property is pending, the doctrine of lis pendens vests the courts with the control or dominion over such subject-matter so that no party or person may remove the subject-matter outside of the power of the court to deal with it in accordance with law and thereby render the proceedings infructuous. The relevant observations read as under:

> "14. ... the doctrine of lis pendens has been defined as the jurisdiction, power, or control which a court acquires over property involved in a suit pending the continuance of the action, and until final judgment therein." It was observed there: "Expositions of the doctrine indicate that the need for it arises from the very nature of the jurisdiction of Courts and their control over the subject-matter of litigation so that parties litigating before it may not remove any part of the subject-matter outside the power of the Court to deal with it and thus make the proceedings infructuous."

34. The following conditions ought to be fulfilled for the doctrine of lis pendens to apply:

(i) There must be a pending suit or proceeding;

(ii) The suit or proceeding must be pending in a competent court;

(iii) The suit or proceeding must not be collusive;

(iv) The right to immovable property must be directly and specifically in question in the suit or proceeding;

(v) The property must be transferred by a party to the litigation; and,

(vi) The alienation must affect the rights of any other party to the dispute. In short, the doctrine of lis pendens bars the transfer of a suit property during the pendency of litigation.

The only exception to the principle is when it is transferred under the authority of the court and on terms imposed by it. Where one of the parties to the suit transfers the suit property (or a part of it) to a third-party, the latter is bound by the result of the proceedings even if he did not have notice of the suit or proceeding.

35. In the landmark decision of the English Court of Chancery in Bellamy vs Sabine reported in [157] 1 De G & J 566, Lord Turner underscored and explained the rationale of the principle underlying lis pendens and observed that if any alienation or material change to the subject matter during the pendency of a proceeding were permitted to prevail, it would defeat the very course of such proceedings before the courts.

36. The common law doctrine of lis pendens is fittingly recognized in Section 52 of the repealed Transfer of Property Act (TPA) which states that during the pendency in any court of any suit in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings. The explanation to the provision states that for the purposes of the section, the pendency of a suit or proceedings shall be deemed to commence from the date of the presentation of the plaint or institution of the proceeding in a court, and shall continue until the suit or proceeding is disposed by a "final decree or order" and complete satisfaction of the order is obtained, unless it has become unobtainable by reason of the expiry of any period of limitation. Madan, JA (as he then was) in Mawji vs. US International University & Ano. [1976] KLR 185, stated thus:

> "The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other..."

37. Unlike the repealed TPA which expressly provided for the doctrine of lis pendens at Section 52, neither the *Land Act* nor the *Land Registration Act* explicitly mentions "lis pendens". However, this common law doctrine of lis pendens is still applicable in Kenya, courtesy of the common law doctrines and the doctrines of equity preserved by Section 3 (2) (c) of the *Judicature Act* which provides that the common law and doctrines of equity are applicable in Kenya, provided that the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

38. At this point it is important to point out that Section 106 of the *Land Registration Act* preserves rights and liabilities arising from the repealed legislation, including those under the TPA, which included the doctrine of lis pendens. The foregoing has been asserted by many decisions rendered by our superior

courts. For example, this Court in Naftali Ruthi Kinyua vs Patrick Thuita Gachure & Ano. [2015] eKLR, affirmed that lis pendens remains applicable in Kenya. It stated:

> " Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle of lis pendens, Turner L. J, in Bellamy vs Sabine [1857] 1 De J 566 held as follows:
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> > "It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.""

39. From the material before us, it is clear that the applicant filed their petition before the trial Court on 22nd September 2017 and they served the court documents upon the appellants. The transfer of the suit premises is said to have been registered on 31st October 2017, evidently, during the pendency of the litigation before the trial court in utter contravention of the doctrine of lis pendens and court orders maintaining the status quo.

40. Court decisions have consistently held that transfers of property during the pendency of a suit (litigation) are not void, but rather are subject to the final outcome of the suit. This means the transferee (the person who receives the transfer) is bound by the decree or judgment, even if they were not a party to the original suit. However, the key question in this application is whether the transfer of the property affects the maintainability of this appeal.

41. The Supreme Court of India in a landmark judgment in Celir LLP vs. Mr. Sumati Prasad Bafna & Others (2024 INSC 978) held that selling property that's the subject of a lawsuit and then continuing with the appeal is an abuse of the court's process. This action is seen as undermining the judicial process and can lead to a miscarriage of justice. The court's reasoning was that such behavior is a tactic to delay or obstruct the legitimate resolution of the case, essentially using the court's process for an improper purpose.

42. Courts are not powerless when it comes to dealing with such misconduct. The court is vested with inherent authority to control its process and those persons who come before it. It is a power incidental and necessary to the exercise of substantive jurisdiction. That power, together with rules of the court and statutory provisions, enables the court to dismiss or strike out claims which are frivolous, vexatious or where a litigant is engaged in abuse of court process or is involved is grave misconduct which can bring the administration of justice into disrepute or where the conduct pollutes the pure stream of justice. Whereas the rules of pleadings allow parties to plead their cases in the alternative, inconsistent pleadings are unacceptable. That is our understanding of the holding of Akiwumi, JA in the case of Raghbir Singh Chatte vs. National Bank of Kenya Ltd. Civil Appeal No. 50 of 1996 that what the rules prohibit are not inconsistent pleadings but pleadings, which set up inconsistent and embarrassing defences.

43. The core concept is that the court's process is being used in a way that it is not intended. This includes actions that frustrate the judicial process, such as intentionally delaying a case or making it harder to reach a fair conclusion or taking the property the subject of the litigation away from the reach of the court. Selling property, the subject of litigation during the pendency of litigation without an express authority from the court is an affront to justice and must be abhorred. By continuing with court

proceedings after selling the subject property without express permission from the court, a party is effectively trying to manipulate the court into a situation where it cannot fully and fairly resolve the issues before it. It can potentially cause the court to arrive at an unjust and sometimes embarrassing decision.

44. The court has the power to take action against parties who abuse its process. (See the High Court decision in Satya Bhama Gandhi vs. Director of Public Prosecutions & 3 Others [2018] KEHC 6100 (KLR)). This can include dismissing claims, ordering costs, or even disciplining the litigants. In essence, in doing so, the court is protecting the integrity of its own process and ensuring that justice is served fairly, even when parties try to manipulate the system. Lord Diplock in Hunter vs. Chief Constable of the West Midlands Police [1982] AC 529 at p. 536C descried such conduct and asserted "the inherent power which any court must possess to prevent misuse of its procedure in a way which, whilst not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to the litigation before it or would bring the administration of justice into disrepute amongst right-thinking people.

45. This Court cannot condone flagrant conduct which displays total disregard of the rules of fair play in the administration of justice nor can this court tolerate brazen disobedience of court orders. A litigant who has transferred the suit property without the knowledge of his opponent and without the permission of the court and continues to participate in the proceedings for years, on the false premise that the property belongs to him, as has happened in this case, cannot be said to be acting in good faith. Litigation is neither a game of chess where parties outsmart each other by dexterity of purpose nor is it a forum where a party lulls his opponent into a false sense of security that he is still seriously litigating the matter when he knows that his case has transmuted as a result of his own actions. Conversely, litigation is a game where all the parties place their cards on the table openly and leave it to the court to determine the dispute in accordance with the evidence before it and the law. Having secretly transferred the subject land in breach of the doctrine of lis pendens, and contrary to a court order, the 1st and 2nd respondents are basically perpetuating abuse of court process, which is a valid ground for this Court to strike out this appeal. They know that whatever decision the Court arrives at, it will not adversely affect them, yet they still intend to keep the Court busy on what, according to them, is wild goose chase.

46. The other question we posed earlier is whether by disposing the subject matter of the appeal, the 1st and 2nd respondents lost interest in the appeal, or, did they technically abandon the appeal? This is because, to maintain a suit, a litigant must have an interest in the matter. Selling or alienating the subject property during the pendency of an appeal can be interpreted as constructive abandonment of the cause of action or the suit, potentially leading to dismissal or other adverse consequences. This is because it undermines the court's jurisdiction and purpose in resolving the dispute. It essentially disregards the court's pending jurisdiction and the potential outcome of the appeal. (See this Court's decision in Kivindu & Ano. vs. Musau *& 4 Others (Civil Appeal 233 of 2020* [2020] keca 1015 (KLR) 28 July 2023 (Judgment)).

47. The manner in which this Court deals with the appeals before it must of necessity be in tandem with the double-O principle (or the oxygen principle as referred to by this Court) as provided in sections 3A and 3B which introduced the overriding objective in the *Appellate Jurisdiction Act*. Those provisions provide that:

> " 3A.
>
> (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.

2. The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

3. An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.

3B.

(1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims –

a. the just determination of the proceedings;

b. the efficient use of the available judicial and administrative resources;

c. the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

d. the use of suitable technology."

48. While interpreting similar provisions, May LJ said in Purdy vs. Cambran (unreported) 17 December 1999: Court of Appeal (Civil Division) Transcript No 2290 of 1999 appreciated that:

> " The court has to seek to give effect to the overriding objective when it exercises any powers given to it by the rules. This applies to applications to strike out a claim. When the court is considering...whether or not it is just in accordance with the overriding objective to strike out a claim, it is not necessary to analyse that question by reference to the rigid and overloaded structure which a large body of decisions under the former rules had constructed."

49. Lord Woolf, in Swain vs. Hillman [2001] 1 All ER 91, gave this further guidance at pp 94 and 95:

> " It is important that a judge in appropriate cases should make use of the powers contained in Part
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> 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible.....it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

50. This Court had occasion to expound on the overriding objective in the case of Hunker Trading Company Limited vs. Elf Oil Kenya Limited [2010] eKLR where this Court pronounced itself as hereunder:

> " The advent of the "O2 principle" in our opinion, ushers in a new management culture of cases and appeals in a manner aimed at achieving the just determination of the proceedings; ensures the efficient use of the available judicial and administrative resources of the courts; and results in the timely disposal of the proceeding at a cost affordable by the respective parties. That culture must include where appropriate the use of suitable technology. It follows therefore that all provisions and rules in the relevant Acts must be "O2" compliant because they exist for no other purpose. The "O2 principle" poses a great challenge to the courts in both the exercise of the powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In our view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail our redesigning approaches to the management of the court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day."

51. The Court's power to determine cases which really have no substance was, even before the advent of the overriding objective, appreciated by Omolo, JA in J P Machira vs. Wangethi Mwangi & Ano. Civil Appeal No. 179 of 1997, where he held that there is no magic in holding a trial merely because it is normal and usual to do so since a trial must be based on issues; otherwise, it may become a farce.

52. A litigant's interest can cease in several circumstances, typically when the subject matter of the suit is no longer relevant or when the litigant is no longer affected by the outcome. Where a litigant has transferred his interest in the suit property, the question whether the cause of action still exists arises. The Black's Law Dictionary, 10th Edition defines a cause of action as "a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one to obtain a remedy in court from another person."

53. A cause of action basically means that bundle of facts which gives rise to a right or liability and which enables a party to file a civil suit. Cause of action is a sine qua non for the ultimate success of the suit. The burden of proving cause of action lies upon the party who asserts the cause of action. Therefore, the cause of action is the pivot of the suit and the entire suit revolves around it. It follows that if an appellant relinquishes the cause of action, as happened in this case, the court will be perfectly entitled to dismiss the suit. This is because the relief that may be obtained in the appeal, even if it is favourable to the said party, it may be of no utilitarian value to the appellant. In other, words the appeal will have been rendered moot by that party's conduct.

54. We have no doubt in our mind that an appeal can be dismissed if the cause of action has ceased to exist. This principle is rooted in the idea that an appeal is a remedy sought to address a grievance, and if that grievance no longer exists, the appeal loses its purpose. If the matter that was the subject of the dispute has been resolved or settled in a way that the appellant no longer has a legal basis to complain, the appeal can be dismissed. In essence, the courts are concerned with ensuring that appeals are not used to pursue matters that are no longer in dispute or where the relief sought has already been obtained. This helps to maintain the efficiency and effectiveness of the legal system. At the risk of repetition, it is worth mentioning that before us are appellants who were sued and served with court papers, they entered appearance and filed a defence and participated in the court proceedings without disclosing

to the court that they had transferred the suit property to a third party. If they had won, this would have satanized the fraudulent conduct. What other action would amount such an abuse of the court process? Upon loosing, the appellants filed this appeal for a property they had long transferred during the hearing of the suit. What is the interest of the appellants in such a scenario, other than using the court to dry clean the illegal transfer of the property. No Court can allow such an abuse of the process and we have no hesitation in holding that this a proper case to stop further abuse of the court process by a party who has absolutely no interest in the outcome as it no longer has any interest in the property it willingly, albeit illegally, transferred to a third party who is not a party to this appeal.

55. We have said enough to demonstrate that:

(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.

56. Arising from the issues discussed above and the conclusions arrived at, it is our finding that the applicant's application dated 5th October 2023 is merited. Accordingly, for the reasons herein above stated, we hereby strike out this appeal with costs to the applicant.

DATED AND DELIVERED AT NAKURU THIS 20TH DAY OF JUNE, 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA CIArb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR