Royal Sian Limited v Cove Investments Limited & 5 others (Civil Application E064 of 2025) [2025] KECA 2051 (KLR) (27 November 2025) (Ruling)

Neutral citation: [2025] KECA 2051 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPLICATION E064 OF 2025

JM MATIVO, JA

NOVEMBER 27, 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 ..... 4TH RESPONDENT

JOSHUA CHELEGO 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. Royal Sian Limited (the applicant) in its application dated 25th June 2025 prays for the following orders: (a) leave to the to file a fresh notice of appeal 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, Cove Investments Limited versus Johana Kiprotich Rono & Others; (b) stay of execution of the above ruling. 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 us is referred to as an omnibus, essentially seeking a variety of orders that cannot under this Court's rules, be heard and determined together by a single judge. Therefore, the prayer seeking orders staying the execution of the ruling and orders issued on 15th October 2024 is not properly before me. I will only confine myself to the prayer seeking leave to file a fresh notice of appeal and a record of appeal.

3. The background to the application is that vide application dated 7th January 2025, the 1st respondent sought orders that the applicant's substantive appeal against the ruling and orders issued on 15th October 2024 be struck out for reasons that the notice of appeal dated 28th October 2024 was served out of time. Vide ruling delivered by the Court on 20th June 2025, this Court (Mativo, Gachoka & Odunga JJ.A.) held that there was no basis to hold that the notice of appeal by the applicant should be treated as a notice of address; and in any event, the notice of appeal by the 2nd respondent was also not served as it was sent to the wrong address. Consequently, the record and memorandum of appeal were struck out.

4. The applicant's plea for leave to file a fresh notice of appeal and record of appeal is premised on the grounds that the intend appeal has high chances of success because:

    a. Prior to executing the sale agreement, the applicant conducted all due diligence, visited the suit property and satisfied itself that the 2nd respondent had legitimate interest in the property capable of being passed. A caution which was placed on the property was subsequently removed, and a letter of consent from the Land Control Board was obtained vide meeting held on 14th September 2019 and the suit property was registered in the applicant's name on 31st October 2017 and a certificate of title dated 31st October 2017 issued thereafter and the applicant took possession of the suit property.

    b. The applicant enjoyed quiet possession until the 19th October 2020 when one Kenneth Kiplagat accused him 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.

    c. The applicant is an innocent purchaser for value of the suit property having conducted reasonable due diligence and established that the suit property was not encumbered. Nevertheless, 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*.

    d. 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.

    e. 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*.

    f. The applicant is apprehensive that unless this Court intervenes and allows the applicant to file a fresh notice and record of appeal and grants a stay of execution order dated 15th October 2024,

the applicant's right to fair hearing will be grossly violated and the applicant will be summarily disposed of its property thus rendering its appeal nugatory.

g. 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 & record of appeal.

5. In opposing the application, the 1st respondent filed a notice of preliminary objection dated 18th September 2025 citing the following grounds:

SUBPARA 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.

SUBPARA 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.

SUBPARA c.

The instant application seeks to reverse the settled doctrine of lis pendens by reopening a closed case.

SUBPARA 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.

6. In addition, the 1st respondent swore 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 be 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. 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.

e. 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.

f. 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.

g. 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.

h. 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.

i. 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.

j. 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.

k. 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.

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 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.

o. 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.

7. In support of the application, the applicant's counsel Prof. Ojienda Senior Counsel in his submissions dated 11th July 2025 reiterated the contents of the affidavits in support of the application and maintained that the application was filed without undue delay on 25th June 2025 barely five days after

delivery of the ruling. Prof. Ojienda Senior Counsel cited the case of Jedida Alumasa & 3 Others vs. S.S. Kositanyi [1997] eKLR in submitting that since the applicant's appeal was struck out, he is allowed to come to Court promptly for an order extending time, at least to lodge a fresh notice of appeal.

8. Prof. Ojienda maintained that the applicant's intended appeal has high chances of success and cited the case of Machakos District Co-operative Union Limited vs. Philip Nzuki Kiilu [997] eKLR in submitting that the mere fact that the subject matter of an appeal has exchanged hands does not take away the right of appeal.

9. Counsel maintained that no prejudice will be suffered by the respondent if the orders sought are granted, but should the orders be declined, the applicant will be prejudiced if the appeal is not heard of merit.

10. In opposition to the application, the 1st respondent's counsel Mr. Kairaria vide submission dated 22nd July 2025 reiterated the contents of the 1st respondent replying affidavit and preliminary objection and contended that absent of a formal challenge of the Judgment of 18th May 2023, the said Judgment cannot be challenged in execution proceedings or at all. 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.

11. Mr. Kairaria also maintained that the intended 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.

12. 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.

13. I have considered the application, the affidavits on record and submissions by counsel and the law. There is no doubt that the discretion that I am being called upon to exercise in this application is provided under Rule 4 of the Court of Appeal Rules, 2022. However, the discretion is not absolute. It must be exercised in conformity with the letter and spirit of the law and in a manner that does not defeat justice. It must not be exercised arbitrarily or capriciously. (See Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR).

14. As authorities suggest, the applicant is required to demonstrate the existence of an arguable appeal. The following excerpt from this Court's decision in Athuman Nusura Juma vs. Afwa Mohamed Ramadhan [2016] eKLR is useful. It reads:

> " 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."

15. However, as I stated in Civil Application No. E065 of 2025, filed alongside with this application by the 2nd and 3rd respondents seeking similar orders and premised on substantially similar grounds, the existence of an arguable appeal is not the sole determinant. An applicant must also provide a satisfactory explanation for the delay. There is no question that this application was filed without delay. But again, that alone will not suffice. Grant or refusal to grant the order remains a matter of judicial

discretion to be exercised judicially and not capriciously. The Court will also consider the bona fides of the application and the overall conduct of the parties.

16. This litigation has a long and dramatic history lasting several decades culminating in this Court's ruling dated 20th June 2025 in Civil Appeal (Application) E051 of 2025 in which this 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.

17. The applicants were parties and they participated in the said proceedings. At the centre of this dispute is a huge parcel of land which was transferred to the applicant during the pendency of active court proceedings and contrary to a court injunction. In the above decision this Court explained in detail the effect of the doctrine of lis pendens. But more important, the applicant was a party before the Court of Appeal.

18. The rationale of judicial discretion is to allow courts to arrive at a fair, individualized decision tailored to the unique facts and circumstances of this case. A proper exercise of judicial discretion fosters fairness and equity by preventing mechanical application of rigid rules, allowing the Court to consider specific facts and nuances of a situation so as to arrive at a fair and equitable decision, principally securing the ends of justice. Talking about the need for the Court to consider the conduct of the parties, as I have stated in E065 of 2025, a sister file involving the same parties, I am highly persuaded that the applicant's conduct was not beyond reproach. The circumstances under which the disputed property was transferred to the applicant in total violation of a court injunction and during the pendency of active cases and participating in the proceedings without disclosing to the court the changed circumstances suggests bad faith on the part of the applicant which disentitles them exercise of judicial discretion in their favour. In the result, I'm not inclined to exercise this Court's discretion in favour of the applicant. 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.