



**REPUBLIC OF KENYA**  
**IN THE SUPREME COURT OF KENYA**

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

**APPLICATION NO. E027 OF 2025**

**-BETWEEN-**

**COVE INVESTMENT LIMITED .....APPLICANT**

**—VERSUS—**

**JOHANA KIPROTICH RONO &  
JOSEPH RONO LANGAT**

**(Suing as the Legal Representatives of the Estate of**

**MATHIAS KIMNYOLE LANGAT) ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR, NAKURU COUNTY ..... 3<sup>RD</sup> RESPONDENT**

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*(Being an application to strike out petition of appeal No. E034 of 2025, arising from the Ruling of the Court of Appeal in Nakuru Civil Appeal No. E051 of 2022 (Mativo, Gachoka & Odunga, JJ. A dated 20<sup>th</sup> June, 2025)*

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**Representation:**

Mr. Kairaria for the Applicant  
*(Gitonga Kamiti Kairaria & Co. Advocates)*

Ms. Misiati holding brief for Prof. Tom Ojienda, SC for the 1<sup>st</sup> Respondent  
*(Prof. Tom Ojienda & Associates)*

No appearance for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

**RULING OF THE COURT**

**[1] UPON PERUSING** the Notice of Motion dated 15<sup>th</sup> August, 2025 and filed on 21<sup>st</sup> August, 2025 pursuant to Articles 163(3)(b), 163(4)(a) and (b) of the Constitution, Section 21(1) and (2), 23(2)(i) of the Supreme Court Act, and Rule 31(1), (2) and (3) of the Supreme Court Rules 2020, seeking the striking out of ***Petition No. E034 of 2025, Johana Kiprotich Rono & Joseph Rono***

***Lang'at (suing as the legal representatives of the Estate of Mathias Kimnyole Langat) Vs Cove Investment Limited & 2 Others***, for want of jurisdiction, and an order for costs of this application and of ***Petition No. E034 of 2025***; and

**[2] UPON PERUSING** the applicant's grounds on the face of the application, and the supporting affidavit of **Kenneth Kiplagat**, the applicant's Asset Manager, sworn on 15<sup>th</sup> August, 2025 where it is contended that: this Court does not have jurisdiction to admit ***Petition No. E034 of 2025*** as the Ruling of the Court of Appeal was not based on, nor did the court invoke in any manner the interpretation or application of the Constitution; the Court of Appeal Ruling was on an interlocutory application filed by the applicant under Sections 3A(1), 3B(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; the application before the Court of Appeal was prompted by the 1<sup>st</sup> respondent's fraud which was only discovered after the judgment of the Environment and Land Court (ELC) had been rendered; and that the Court of Appeal's dispositive determinations were solely based on the exercise of the court's inherent power. The applicant avers that the petition does not qualify under Article 163(4)(a) or (b) of the Constitution and therefore it is fatally defective for want of jurisdiction; and

**[3] UPON CONSIDERING** the applicant's rendition of the genesis of the dispute as an Agreement for Sale entered into in 1999 by the applicant as the purchaser, with Mathias Kimnyole Langat (deceased) as the vendor for the sale and purchase of a 120-acre farm in Kabarak, Nakuru for valuable consideration. It is the applicant's case that it paid the agreed deposit and was immediately handed possession, and that for over a period of six months, the vendor collected money from the applicant but eventually the vendor refused to release the completion documents. Upon the applicant demanding the completion documents, the vendor turned around and claimed that the agreement for sale had become a nullity for want of Land Control Board Consent even though the applicant had signed the Land Control Board consent application forms and placed them with the vendor to present the application before the next Nakuru Land Control Board meeting. Further, that pursuant to the provisions of the Agreement for Sale, the onus of obtaining the Land Control Board Consent was on the Vendor. A dispute having arisen, the applicant filed a suit at the ELC in Nakuru for

orders that the suit property was now held in trust in favour of the applicant, and sought for an extension of time to lodge an application to the Land Control Board for the necessary consent. The trial court (*Ohungo J.*) held that a constructive trust had arisen and directed that the suit property be transferred to the applicant; and

**[4] FURTHER CONSIDERING** the applicant's contention that: the 1<sup>st</sup> respondent lodged an appeal to the Court of Appeal against the decision of the ELC and obtained stay of execution; that once the stay of execution expired, the applicant sought to execute the judgment of the ELC, only to discover that the Caution that had been placed against the suit property had been illegally removed; the Green Card showed that during the pendency of the suit before the ELC, and despite the subsisting court orders, the suit property was transferred to a third party known as Royal Sian Limited, which fact was not disclosed to the trial court; and that the 1<sup>st</sup> respondent swore and filed affidavits, made applications and obtained orders before the ELC on the basis that they were still the registered proprietors of the suit property; and

**[5] TAKING INTO ACCOUNT** the applicant's averments that: upon discovery of the misconduct, the applicant immediately applied to have the appeal filed by the 1<sup>st</sup> respondent before the Court of Appeal be struck out; the Court of Appeal determined that the 1<sup>st</sup> and 2<sup>nd</sup> respondents transferred the suit property in total violation of the doctrine of *lis pendens* and contrary to a court order thus constituting an abuse of court process; the petition has been lodged for and on behalf of a third party – Royal Sian Limited which is not a party to the proceedings herein; and that the petition has been solely presented to protect the fraudulent activities of the third party in collusion with the 1<sup>st</sup> respondent; and

**[6] IN VIEW OF** the applicant's submissions dated 20<sup>th</sup> August, 2025 and filed on 21<sup>st</sup> August, 2025 where it buttresses the averments in the application and cites the Court's decisions in ***Lawrence Nduttu & 6000 others Vs Kenya Breweries Limited & Another*** (Pet. No. 3 of 2012) [2012] KESC 9 (KLR); ***Peter Oduor Ngoge Vs Francis Ole Kaparo & 5 others*** (Pet. No. 2 of 2012) [2012] KESC 7 (KLR); ***Espie Njuguna & 46 Others Vs Spire Properties K Limited & 12 others Njuguna & 46 others Vs Spire Properties (K) Limited & 12 others*** (Pet. No. 28 (E030) of 2022) [2023] KESC 37 (KLR); ***Abidha Nicholus Vs***

**Attorney General & 7 Others** Pet. No. E007 of 2023 [2023] KESC 113(KLR) and **Hermanus Philipus Steyn Vs Giovanni Gneccchi Ruscone** (Appl. No. 4 of 2012) [2013] KESC 11 (KLR) to urge that the appeal is for striking out; and

[7] **MINDFUL OF** the applicant's submissions that: the 1<sup>st</sup> respondent, asserts other matters not framed or identified by the Court of Appeal; an appeal can only lie against the *ratio decidendi* of a decision; the arguments made by the 1<sup>st</sup> respondent are not justiciable as they no longer present an existing or live controversy, and do not relate to the real issue between the parties; and the doctrine of *lis pendens* is not related to a constitutional precept but a purely private law remedy available in land law. The applicant cites **United Bank of Africa PLC Vs Engineer Olabisi Mabogunje**, Lagos Court of Appeal No. 611 of 2014; **National Assembly & Anor Vs Okiya Omtatah Okoiti & 55 Others** Civil Appeal No. E003 of 2023 [2024] KECA 876 (KLR); Supreme Court of Zambia decision in **C&H Fuel Services Limited & Anor Vs Bank of Zambia**, Appeal No. 59 of 2013; and this Court's decision in the **Albert Chaurembo Mumba & 7 others Vs Munyao & 148 others** [2019] KESC 83 (KLR) (**Albert Chaurembo case**) to urge that a litigant must choose a jurisdictional path and pursue it; and

[8] **TAKING INTO CONSIDERATION** the 1<sup>st</sup> respondent's Replying Affidavit sworn on 4<sup>th</sup> September, 2025 and filed on 10<sup>th</sup> September, 2025 by **Johana Kiprotich Rono** (a co-administrator of the Estate of the late Mathias Kimnyole Langat), in opposition to the application, where it is averred that: this Court has jurisdiction to determine whether the Court of Appeal applied the doctrine of *lis pendens* erroneously; whether it exercised its jurisdiction under Article 164 of the Constitution properly and whether in such exercise, it inadvertently denied the 1<sup>st</sup> respondent the right to a fair hearing under Articles 50 and the right to property under Article 40 of the Constitution. The 1<sup>st</sup> respondent adds that: from the onset, and before the trial court, in their replying affidavit in response to *Petition No. 360 of 2017*, they challenged the trial court's consideration of the matter as a constitutional dispute as opposed to a purely contractual claim seeking enforcement of the terms of the sale agreement; the Court of Appeal ought to have addressed itself to the substantive appeal to determine whether the proceedings were before a competent court; and that

by summarily dismissing the substantive appeal, it automatically affirmed the trial court's erroneous arrogation of jurisdiction to determine the petition; and

**[9] COGNIZANT OF** the 1<sup>st</sup> respondent's averments that: the Court of Appeal's determination was anchored on a narration of facts and not questions of law in the substantive appeal; its petition seeks a determination on whether the Court of Appeal was proper in its exercise of jurisdiction as a first appellate court under Article 164 of the Constitution; this Court reserves the mandate to question the exercise of jurisdiction by the Court of Appeal as the first appellate court; that the petition of appeal categorically asserts violation of their right to fair hearing under Article 50(1) by the Court of Appeal; that the right to be heard by a competent court goes to the heart of the right to fair hearing under Article 50 of the Constitution; it is in the interest of justice that the substantive appeal be heard; and

**[10] CONSIDERING** the 1<sup>st</sup> respondent's further averments that: the applicant, as the driver of the suit had the onus to join any party to the suit; the allegation of fraud is being made for the first time before this Court; the applicant neither challenged the Grant as creditors of the Estate nor as alleged owners of the suit property; its appeal to the Court of Appeal was a direct result of the judgment issued against the Estate; the transfer of the suit property to Royal Sian Limited was done after due process was followed by the 1<sup>st</sup> respondent as the vendors of the property; the transaction was concluded prior to the applicant filing its petition dated 22<sup>nd</sup> September, 2017; that the applicant cannot claim to have been unaware of the same as the Ministry of Lands, Housing and Urban Planning, in a letter dated 2<sup>nd</sup> June, 2017 informed them that the caution registered over the suit property shall be removed absent of any objection from it within thirty days; that the applicant failed to register any objection to the removal of the caution within the timelines rendering the suit property unencumbered and rightfully belonging to the Estate; the 1<sup>st</sup> respondent's stake in the dispute increased upon judgment being entered against the 1<sup>st</sup> respondent directing that the suit property be transferred to the applicant; the Estate faces a liability refund of a total sum of Kshs. 200,000,000/- being the purchase price paid by Royal Sian Limited, which amount the Estate does not currently have; and

**[11] CONSIDERING** the 1<sup>st</sup> respondent's submissions dated 4<sup>th</sup> September, 2025 and filed on 10<sup>th</sup> September, 2025 where it is submitted that: the theme of the applicant's pleadings from the trial court to the Court of Appeal has been and remains a violation of its right to property under Article 40 of the Constitution; that the doctrine of *lis pendens* is an important question of law if not properly applied shall result in the arbitrary infringement under Article 40 of the Constitution; the Court of Appeal, in finding a violation of the doctrine of *lis pendens*, outlined the conditions that ought to be fulfilled for the doctrine to apply; that this Court has held that where the question relates to the Court of Appeal's application of the doctrine of *lis pendens* the Court shall exercise its jurisdiction as the same is at the heart of the right to property, citing the decision in ***Ashmi Investment Limited Vs Riakina Limited & Another***, Petition (Application) E014 of 2023 [2023] KESC 66 (KLR); and

**[12] AWARE THAT** the 1<sup>st</sup> respondent's further submissions add that that the Court of Appeal in its reasoning applied and interpreted the Constitution or at the very least its reasoning took the trajectory of a constitutional interpretation or application citing this Court's decision in ***Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 others*** (Appl No.5 of 2014) [2014] KESC 30 (KLR); ***Albert Chaurembo case*** (*supra*); ***Damaris Kondoro Vs Gachanja Gitere & Another*** [2005] KEHC 3105 (KLR); Supreme Court of India decision in ***Santosh Hazari Vs Purushottam Tiwari*** L.Rs (2001) 3 SCC 179 and ***Kimweli Vs Kimweli*** (Civil Appeal No. 660 of 2019) [2019] KECA 1394 (KLR) on the mandate of a first appellate court; and

**[13] UPON PERUSING** the applicant's submissions in reply dated 11<sup>th</sup> September, 2025 and filed on 12<sup>th</sup> September, 2025 where it is submitted that: the 1<sup>st</sup> respondent does not deny that it misled the trial court, swore affidavits, tendered pleadings and testimony asserting that they were the registered proprietors of the suit property when in actual fact they had purportedly sold the property during the pendency of the trial court proceedings and in defiance of subsisting court orders; the appellate court concluded that this misconduct could not be tolerated by any court and it was a clear abuse of process; once a court establishes that its process has been abused, it matters not what other meritorious claims a party may have; that the offending party must have its case summarily dismissed so as to protect the general administration of

justice and dignity of courts; and that if the 1<sup>st</sup> respondent's misconduct were to be allowed, there would be litigation *ad infinitum*; and

**[14] NOTING** the applicant's further submissions that: in *Ashmi Investment Limited Vs Riakina Limited & another* (Petition E014 of 2023) [2024] KESC 30 (KLR) this Court frowned upon the practice of parties lodging appeals against an interlocutory order and crossing over to urge their appeals against substantive appeals which were never before the Court of Appeal at the time; the application of the doctrine of *lis pendens* cannot constitute an issue involving the interpretation or application of the Constitution; the parameters of striking out an appeal for abuse of process and for offending the doctrine of *lis pendens* by the Court of Appeal are well settled; there is no connection between the decision of the Court of Appeal and the alleged lack of jurisdiction of the ELC; and there is no doubt that the ELC was the proper court competent to decide the matter before it; the Appellate Jurisdiction Act governs the law and procedure for interlocutory applications before the Court of Appeal and they succeed or fail on the basis of the stipulated rules and procedures and not on the merits of the appeal or the proposed appeal; and

**[15] FURTHER NOTING** that the applicant, who is the 1<sup>st</sup> respondent in Petition No. E034 of 2025 filed a Preliminary Objection dated 8<sup>th</sup> August, 2025 challenging this Court's jurisdiction to hear and determine the petition on the same grounds as the Notice of Motion before us; and

**[16] COGNISANT THAT** the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, despite service of the application, neither filed any response, submissions nor participated in these proceedings or those in respect of the petition of appeal, the petition of appeal having been held in abeyance awaiting the outcome of this application as per the parties representations and directions before the Deputy Registrar; and

**[17] BEARING IN MIND** the provisions of Article 163(4)(a) of the Constitution and Section 15A of the Supreme Court Act Cap 9B, including numerous of this Court's decisions where we have delineated this Court's jurisdiction;

**[18] WE HAVE CONSIDERED** the application, the affidavit in support, the responses and submissions filed, and **NOW OPINE** as follows:

- i. In ***Paul Mungai Kimani & 20 others (On behalf of themselves and all members of Korogocho Owners Welfare Association) Vs Attorney General & 2 others*** (Petition 45 of 2018) [2020] KESC 9 (KLR) (***Paul Mungai Case***) we set the parameters for the exercise of this Court's jurisdiction under Article 163(4)(a) of the Constitution. Similarly, in ***Ali Hassan Joho & another Vs Shahbal & 2 others*** (Petition 10 of 2013) [2014] KESC 34 (KLR) we held that the test is to evaluate whether the appeal raises a question of constitutional interpretation or application. Further, that we must interrogate whether the same has been canvassed in the superior courts below and has progressed through the normal appellate mechanism so as to reach this Court by way of an appeal, as contemplated under Article 163(4)(a) of the Constitution.
- ii. From a perusal of the record in Petition E034 of 2025, we note that the applicant instituted *ELC Petition No. 360 of 2017* seeking *inter alia* orders that: leave be granted to apply for the Land Control Board consent under Section 8 of the Land Control Act; a declaration be issued that the 1<sup>st</sup> respondent holds the suit property in trust for the applicant, and the 1<sup>st</sup> respondent be directed to formally transfer the suit property and execute the transfer document; and compensation for loss and damages.
- iii. In the judgment dated 18<sup>th</sup> May, 2021 the court (*Ohungo J.*) determined, on the basis of issues framed, that: the ELC had jurisdiction to entertain the petition including bundled prayers; the petition was not *res judicata* as the earlier suit filed, *Nairobi High Court Civil Suit No.588 of 2006 (O.S)* was never determined on merits; the petition was properly filed and was not defective for want of company resolution; and the court was not persuaded that Section 6 of the Land Control Act is unconstitutional. The court found that the 1<sup>st</sup> respondent held the suit property in trust for the applicant. Further, that the 1<sup>st</sup> respondent having sold the suit property to the applicant, and having received almost the entire purchase price and having put the applicant in possession for about 21 years, the 1<sup>st</sup> respondent had a duty in equity to complete the transaction. Consequently, the court directed the 1<sup>st</sup> respondents to formally transfer the parcel of land known as LR. No. Nakuru/Ol'ongai Phase 11/34 to the applicant and to execute the transfer document within 30 (thirty) days from the date of delivery of the judgment. In

default, the Deputy Registrar of the court to execute the transfer document on behalf of the 1<sup>st</sup> respondent.

- iv. The 1<sup>st</sup> respondent instituted **Civil Appeal No. E051 of 2022** at the Court of Appeal challenging the court's decision. Subsequently, the applicant moved the court seeking to strike out the appeal for want of cause of action, the 1<sup>st</sup> respondent having secretly, fraudulently and in defiance of subsisting court orders disposed of the suit property to a third party, not named as a party to the appeal, and that the 1<sup>st</sup> respondent is not permitted to sustain an appeal on behalf of another party. In the Ruling dated 20<sup>th</sup> June, 2025 the Court of Appeal allowed the application holding as follows:

***“[55] ... 1<sup>st</sup> and 2<sup>nd</sup> respondents transferred the suit property pendente 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 1<sup>st</sup> and 2<sup>nd</sup> respondents constructively abandoned their appeal, (d) by transferring the suit property, the 1<sup>st</sup> and 2<sup>nd</sup> respondents basically abandoned the cause of action, a sine qua non for the ultimate success of the suit, (e) the 1<sup>st</sup> and 2<sup>nd</sup> 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.”***

- v. From a perusal of the petition of appeal dated 17<sup>th</sup> July, 2025 filed by the 1<sup>st</sup> respondent in **Petition No. E034 of 2025**, the three grounds of appeal against the Ruling of the Court of Appeal set out are as follows: That the learned judges of appeal erred in law by:

1. *finding that the 1<sup>st</sup> respondent had no cause of action that could sustain the appeal and require the court to exercise its jurisdiction in an appeal despite the petitioners anchoring their appeal on pertinent questions of law that go to the root of the jurisdiction exercised by the trial court and therefore the*

*determination as to the ownership of the suit property by the applicant thus summarily condemning the petitioners without according them an opportunity to ventilate the said questions of law in violation of their right to fair hearing under Article 50 of the Constitution;*

2. *summarily determining the fate of an appeal without considering the questions of law raised by the petitioners in the trial court and its pleadings in violation of its mandate under Article 164 of the Constitution as the first appellate court to rehear the parties on both questions of law and fact; and*
3. *summarily determining the fate of an appeal without considering the questions of law raised by the petitioners in the trial court and in its pleadings on appeal and allowing the petitioners to ventilate the same in a proper hearing of the substantive appeal in violation of the petitioner's right to be heard on both questions of law as well as on facts.*

- vi. In their appeal, the 1<sup>st</sup> respondent herein contends that the Court of Appeal is in violation of its right to fair hearing under Article 50 of the Constitution and also in violation of its mandate under Article 164 of the Constitution as the first appellate court. The appeal seeks to have the Court set aside the Ruling of the appellate court and for the Court of Appeal to be directed to hear *Civil Appeal No. E051 of 2022*.
- vii. It is common ground that the appeal filed by the 1<sup>st</sup> respondent arises from a Ruling on an interlocutory application filed at the Court of Appeal. In the ***Paul Mungai Case*** (*supra*) we held that this Court does not have jurisdiction to entertain appeals from interlocutory decisions save for where the interlocutory decision in question “is a substantive determination of a constitutional issue that has been canvassed through the superior courts below.” In the same breadth, in ***Kampala International University Vs Housing Finance Company Limited***; SC Petition No. 34 (E035) of 2022), [2024] KESC 11 (KLR) (***Kampala International University case***) we held that:

***“...Where the Court of Appeal had made an interlocutory decision which in essence amounted to a substantive determination of a constitutional question that had been canvassed right from the High Court, the Supreme Court could rightly assume jurisdiction in an appeal arising therefrom.***

**Indeed, such had been the case in the Hassan Ali Joho case.”**

[emphasis ours]

- viii. Whereas the suit was instituted as a constitutional petition at the ELC and the trial court interrogated the constitutionality of Section 6 of the Land Control Act, the course at the Court of Appeal took a detour owing to the intervening factors, which the appellate court concluded amounted to abuse of office on the part of the 1<sup>st</sup> appellant. It is in this context that the doctrine of *lis pendens* was adverted to, the same not having been a substantive ground of appeal. The Court of Appeal invoking inherent powers, established that the 1<sup>st</sup> respondent transferred the suit property during the pendency of active litigation before the trial court in contravention of the doctrine of *lis pendens* and court orders maintaining *status quo*. It found that such action was an abuse of the court process and a tactic to delay or obstruct the legitimate resolution of the case. Further, that by the 1<sup>st</sup> respondent parting with the suit property, they had constructively abandoned the appeal and the cause of action, and their interest in the subject matter of the appeal. Consequently, the court struck out the appeal.
- ix. The 1<sup>st</sup> respondent avers that their rights to a fair hearing were violated by the Court of Appeal for reason that the court failed to address itself to the substantive appeal, in effect failing to exercise jurisdiction as a first appellate court. This, at the very least amounted to the matter taking a constitutional trajectory within the permissible jurisdiction of this Court. We have consistently held that the mere claim by a party to the effect that its rights were violated by a superior court, for whatever reason, does not bring the intended appeal within the purview of Article 163(4)(a) of the Constitution. See ***Kampala International University case*** (*supra*) par.62) and ***David Mulwa Malamu Vs John Waweru Gakuru & another*** (Petition (Application) E002 of 2023) [2025] KESC 15 (KLR) where similar issues were raised.
- x. The fact that the status of the suit property, the basis upon which the appeal had been predicated, had changed and the 1<sup>st</sup> respondent was no longer the registered proprietor, it served no purpose for the court to belabour itself in vain on the merits of the appeal. The 1<sup>st</sup> respondent does not dispute that they transferred the property to Royal Sian Limited. If anything, the 1<sup>st</sup> respondent justifies the same

by arguing that the transfer was done procedurally and the applicant was informed of the removal of the caution, choosing not to object to the same within the timelines. Royal Sian Limited, not being a party to the present proceedings will not be able to articulate its position as relates to the suit property.

- xi. We have held in several of our decisions that an appellant before this Court must demonstrate and particularize the basis of dissatisfaction with the appellate court's interpretation or application of the Constitution. It is not the mere allegation or citing of Constitutional provisions that places a matter within Article 163(4)(a) of the Constitution. A party must demonstrate that those provisions were indeed subject of the court's findings and determination. Further, even if the original suit in the High Court or lower court invoked specific Constitutional provisions, that fact alone is not enough for one to invoke and sustain an appeal before this Court. See ***Richard Nyagaka Tong'i Vs Bichage & 2 others*** (Petition 17 of 2014) [2015] KESC 22 (KLR) and the ***Paul Mungai case***.
- xii. In the premises, we are persuaded that the Court of Appeal was correct in exercising the inherent powers to prevent the abuse of process. There was no reason for the court to interrogate the merits of the appeal, founded on an abuse of the court process, the live controversy between the parties having ceased. Unlike in ***Ashmi Investment Limited case*** (supra) where the court was prepared to interrogate the application of the doctrine of *lis pendens*, the same having transcended through the court hierarchy, the situation obtaining herein is different. The doctrine of *lis pendens* was the basis of the appellate court's inference of abuse of court by the 1<sup>st</sup> respondent. As this is a factual contestation, we would not exercise our jurisdiction on account of the doctrine as sought. In the end, the applicant succeeds.
- xiii. Our guiding principles on the issue of costs in ***Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 others***, (Petition 4 of 2012) [2014] KESC 31 (KLR) where we held that costs follow the event, and being that the award of costs is discretionary, are instructive. The applicant being successful in this application, it is entitled to its costs, for both the application and the petition.

**[19] CONSEQUENTLY**, for reasons aforesaid, we make the following orders:

- (i) The applicant’s Notice of Motion dated 15<sup>th</sup> August, 2025 and filed on 21<sup>st</sup> August, 2025 be and is hereby allowed;**
- (ii) The Preliminary Objection dated 8<sup>th</sup> August, 2025 and filed on even date in Petition No. E034 of 2025 be and is hereby allowed;**
- (iii) The petition of appeal dated 17<sup>th</sup> July, 2025 and filed on 21<sup>st</sup> July, 2025 in Supreme Court Petition No. E034 of 2025 is hereby struck out for want of jurisdiction;**
- (iv) The sum of Shs.6,000/- deposited as security in Supreme Court Petition No. E034 of 2025 be released to the petitioner.**
- (v) The 1<sup>st</sup> respondent shall bear the costs of this application and Supreme Court Petition No. E034 of 2025.**

Orders accordingly.

**DATED and DELIVERED at NAIROBI this 20<sup>th</sup> day of February, 2026.**

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

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

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

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

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

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

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

**REGISTRAR,  
SUPREME COURT OF KENYA**

