



REPUBLIC OF KENYA



KENYA LAW
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**Javisapa Enterprises Limited v Neema Trust Company Limited; Karara t/
a Westminster Merchants Auctioneers & another (Interested Parties)
(Civil Case 5 of 2018) [2025] KEHC 9124 (KLR) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9124 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL CASE 5 OF 2018
RC RUTTO, J
JUNE 19, 2025**

BETWEEN

JAVISAPA ENTERPRISES LIMITED DECREE HOLDER

AND

NEEMA TRUST COMPANY LIMITED JUDGMENT DEBTOR

AND

**HENRY KURIA KARARA T/A WESTMINSTER MERCHANTS
AUCTIONEERS INTERESTED PARTY**

K MBURU & ASSOCIATES INTERESTED PARTY

RULING

1. Before this Court for determination is a Notice of Motion dated 6th May 2024, seeking which seeks orders that;
 - a. Spent
 - b. Spent
 - c. Spent
 - d. Spent
 - e. Upon cross examination of the Decree Holder's Director Jacqueline Wambui Njeru, the Honourable court do find that the Decree Holder's Director Jacqueline Wambui Njeru is liable of the misdemeanor termed as perjury under Section 108 (1) (a) of the [Penal Code](#) Cap 63 of the Laws of Kenya



- f. Consequently, the Honourable court do order that the Director of Public Prosecutions at Machakos County to institute and undertake criminal proceedings against the Decree holder's Director Jacqueline Wambui Njeru under Section 108 of the Penal Code Cap 63 of the Laws of Kenya.
 - g. In the alternative and without prejudice to Prayers 5 and 6 above, the Decree Holder's Director Jacqueline Wambui Njeru be committed to civil jail for contempt of court for disobeying the orders of the court given on 11th December 2023 and 6th February 2024.
 - h. That the Honourable court do expunge/ strike out from the court records the Supplementary Affidavit dated 12th March 2024.
 - i. Any other or further orders of the court geared towards protecting the dignity and authority of the court.
 - j. The costs of the application be in the cause.
2. The grounds of the application, as deponed by Counsel Mwangi Mburu in the supporting affidavit sworn on 6th May 2024, are that the Plaintiff/Decree Holder filed an application dated 2nd January 2024 seeking the release of certain funds held by the 2nd Interested Party. The court subsequently issued orders on 11th December 2023 and 6th February 2024, recognizing that both the 1st and 2nd Interested Parties had an interest in the said funds, and directed them to file their opposition to the application. Upon service of the Interested Parties' responses, the Decree Holder filed a Supplementary Affidavit dated 12th March 2024, which, according to the Applicant, was replete with falsehoods and misrepresentations designed to steal a march against the Interested Parties who, notably, had no further right of response. It is further alleged that the Decree Holder's Director, Jacqueline Wambui, knowingly swore false averments amounting to perjury and contempt of court. Specifically, the impugned falsehoods are said to be contained in Paragraphs 2.9, 2.10, 3.13, 3.14, and 3.15 of the Supplementary Affidavit. In these paragraphs, the Director allegedly claimed that the 1st Interested Party was still on record for the Decree Holder despite having ceased acting; alleged that no application to cease acting had been served by the 1st Interested Party; claimed to have given a letter dated 22nd September 2023 to the 1st Interested Party, who allegedly delivered it to the firm of Omwanza Ombati & Company Advocates, and subsequently to the 2nd Interested Party.
 3. The Applicant further stated that the 1st Interested Party does not have conduct of any civil or criminal matters on behalf of the Decree Holder within the jurisdiction of the Republic of Kenya. It is contended that the 1st Interested Party had either successfully concluded and closed all matters previously handled on behalf of the Decree Holder or had otherwise ceased acting in any remaining matters. The Applicant avers that, as at 12th March 2024 the date on which the Decree Holder swore and filed the impugned Supplementary Affidavit, the 1st Interested Party had already filed Advocate-Client Bills of Costs in Machakos HCCOMMMisc E1006/2023 (K.M. Mburu v Javisapa Enterprises Limited) and Machakos HCCCMisc/242/2023 (K.M. Mburu v Javisapa Enterprises Limited). It is further contended that by that time, the Decree Holder had instructed its current counsel, M/s Kivuva Omuga & Co. Advocates, to file responses or objections to the said Bills.
 4. The Applicant states that the only remaining matter in which the 1st Interested Party had conduct was Machakos ELC/E060/2022, Danson Njoroge Kinyanjui & 2 Others v Jackson Wainaina Kamau & 2 Others, but that the 1st Interested Party was excused from further participation by an order made on 6th March 2024, upon the substitution of the said firm of M/s Kivuva Omuga & Co. Advocates. The Applicant further deposes that the Director, Jacqueline Wambui, has sworn under oath in this and



other related proceedings that the Interested Parties sold the suit property by public auction to one Nelly Mbogo, while the true and factual position is that the Director herself formally engaged with the said Nelly Mbogo. The Applicant alleges that this transaction gave rise to a criminal case at the Kibera Law Courts, in which the Director accused Nelly Mbogo of conspiring to defraud her of Kshs. 16,500,000/=. The Applicant maintains that it is reprehensible for the Director to allege without proof that the Interested Parties colluded to deny her the funds and engaged in clear fraud, particularly in light of the fact that she was fully aware of the proceedings and the orders issued by the court. Accordingly, the Applicant urges the court to expunge the allegedly perjurious, scandalous, and malicious falsehoods from the court record, and to reprimand the Director for perjury and contempt of court before the application dated 2nd January 2024 is heard and determined.

5. In support of the Application dated 6th May 2024, the 2nd Interested Party also filed an application dated 22nd August 2024, seeking, among other orders, a stay of further proceedings and a determination of the Decree Holder's Application dated 2nd January 2024. The 2nd Interested Party further sought leave to cross-examine the Decree Holder's Director, Jacqueline Wambui, on the contents of her Supplementary Affidavit sworn on 12th March 2024, and to have her found liable for the offence of perjury and punished accordingly. The said application was partly allowed by the court vide an order issued on 23rd October 2024, whereby the court granted leave to the Auctioneer to cross-examine the Decree Holder's Director, Jacqueline Wambui.
6. In response to the Application dated 6th May 2024, the Decree Holder's Director, Jacqueline Wambui, filed a Replying Affidavit sworn on 3rd July 2024, in which she opposed the application on various grounds. She averred that the 1st Interested Party's application was intended to delay the hearing and determination of her Application dated 2nd January 2024. She contended that the cross-examination sought particularly relating to herself and her former advocates in another suit involved instructions that were privileged in nature, and therefore protected from disclosure. She further asserted that the orders sought by the 1st Interested Party were unrelated to her current application and instead concerned matters extraneous to the present proceedings, including taxation disputes. The Director stated that when she swore the Supplementary Affidavit dated 12th March 2024, she limited her averments strictly to the issues arising in the present suit and not to matters relating to pending taxation. She added that the 1st Interested Party had not expressly denied authoring the letter that is central to the dispute, nor had he shown any privilege to withdraw the earlier instructions. She contended that he had also not addressed the issue of having misadvised her in the drafting of an erroneous consent, which she maintained is part of a separate potential claim for professional negligence that her company is considering pursuing.
7. The Director also pointed out that the 1st Interested Party had not annexed any application or notice to cease acting on record in relation to the present matter, which contextualized her averments in the Supplementary Affidavit. She further clarified that Nelly Mbogo was not mentioned in her Supplementary Affidavit and that any pending criminal proceedings involving her are before a criminal court and should not be litigated within these civil proceedings.
8. In conclusion, she asserted that the application by the 1st Interested Party was intended to delay the matter until all his other bills of costs are taxed, contrary to the principles of justice. She alleged that the application was filed with an ulterior motive and should be dismissed.
9. In response to the Application filed by the 2nd Interested Party dated 22nd August 2024, the Decree Holder's Director, Jacqueline Wambui, filed a Replying Affidavit sworn on 24th September 2024. She stated that she was unable to adequately prepare for cross-examination as the application had not specifically identified the offending paragraphs in the Supplementary Affidavit. She further averred



that the Auctioneer had been in custody of Kshs. 21,000,000/= since the auction held on 2nd August 2023, and that there remained an unrealized decretal balance exceeding Kshs. 45,000,000/=-, which was sufficient to satisfy any sums claimed by the Auctioneer and the Advocate in other matters already taxed outside the scope of this suit. She contended that the 2nd Interested Party's application was made in bad faith and ought to have been filed earlier, rather than at a late stage in the proceedings.

10. The 1st Interested Party, through Counsel Mwangi Mburu, filed a Further Affidavit sworn on 19th July 2024 in response to the Decree Holder's Replying Affidavit dated 3rd July 2024. In it, he asserted that the Replying Affidavit failed to adequately address the grave issues raised in his earlier application specifically concerning alleged fraud by an officer of the court and whether the Decree Holder's Director had knowingly given false testimony in judicial proceedings.
11. On the issue of advocate-client privilege, Counsel Mburu argued that such privilege is not absolute, particularly where the communication is alleged to have been made in furtherance of an illegal act. He further stated that the Decree Holder's former advocates, Omwanza Ombati & Company Advocates, had written to him expressly denying any knowledge of the alleged correspondence between themselves and the Decree Holder's Director. Counsel Mburu attached this correspondence as part of his evidence and maintained that the firm of Omwanza Ombati had effectively rebutted the claims made by Jacqueline Wambui in her Supplementary Affidavit. He argued that those averments were knowingly false and had been sworn for the purpose of misleading the court.
12. In response, the Decree Holder's Director, Jacqueline Wambui, filed a Further Supplementary Affidavit sworn on 7th November 2024, wherein she stated that she had given both oral and written instructions to the firm of Omwanza Ombati & Company Advocates to disregard the contents of her earlier letter dated 22nd September 2023. She averred that the correspondence attached by the firm of Omwanza & Co. Advocates does not explicitly deny that she had issued such oral instructions. To support her assertion, she annexed a letter dated 30th September 2023, addressed to the firm of Omwanza Ombati Advocates, expressly instructing them to ignore the contents of the earlier letter dated 22nd September 2023. The Director further clarified that the earlier letter had been hand-drafted by her former advocate, Mr. Mburu Mwangi, who allegedly requested her to type and deliver a copy of the same to him in order to facilitate payment of the auction proceeds.
13. Following this, Cross-examination of the Decree Holder's Director Jacqueline Wambui, proceeded on 6th November 2024. Notably, the court, vide its earlier ruling delivered on 2nd July 2024, declined the request to cross-examine Counsel Omwanza Ombati. The court further directed that the Application dated 6th May 2024 be heard and determined first, noting that its resolution would also conclusively determine the 2nd Interested Party's application.
14. The court directed the parties to file written submissions and scheduled oral highlights, which were heard on 26th March 2025. The 1st Interested Party filed submissions dated 18th November 2024, while the Decree Holder's application was dated 6th December 2024. The court notes that although the Auctioneer indicated that submissions had been filed in respect of its application dated 22nd August 2024, which sought orders similar to those pursued by the 1st Interested Party, no such submissions are on record.

Applicant's/1st Interested Party's Submissions

15. Mr. Mburu, counsel for the 1st Interested Party, commenced his submissions by providing a brief background to the matter. He submitted that the Decree Holder filed an application dated 2nd January 2024, seeking the release of funds held in escrow by the Auctioneer. These funds had been preserved



pursuant to a consent order recorded on 14th December 2023, involving the Decree Holder, the 1st Interested Party, and the 2nd Interested Party.

16. Pursuant to the said consent, a sum of Kshs.21,000,000/= was to be retained in the Auctioneer's account as security for costs in favour of the 1st and 2nd Interested Parties, pending resolution of the issue of fees. Mr. Mburu submitted that the application dated 2nd January 2024 was opposed by way of Grounds of Opposition and Replying Affidavits sworn on 14th and 15th February 2024, respectively. He noted that, in response to these affidavits, the Decree Holder filed a Supplementary Affidavit dated 12th March 2024, which, according to him, contained perjurious averments. It is on the basis of those averments that the 1st Interested Party filed the present application dated 6th May 2024, seeking appropriate sanctions against the Decree Holder.
17. Counsel submitted that the application was largely unopposed in substance, despite the Decree Holder having filed a Replying Affidavit. He argued that during the cross-examination of the Decree Holder's Director on the impugned paragraphs of the Supplementary Affidavit Paragraphs 2.9, 2.10, 2.11, 3.13, 3.15 and 3.19 it emerged that the 1st Interested Party no longer had conduct of any matter on behalf of the Decree Holder. Counsel pointed out that the matters Milimani HCCOMM Misc/E1006/2023 and Machakos HCC Misc/242/2023, both filed by K.M. Mburu v Javispa Enterprises Limited, had already been concluded, with the files marked as closed. He further submitted that while the 1st Interested Party had no active legal representation role, he retained a financial interest in the matter as he was pursuing recovery of legal fees.
18. Counsel contended that there was no proof such as a stamped or acknowledged copy showing that the letter dated 22nd September 2023 was received by the firm of Omwanza Ombati & Company Advocates, allegedly from the 1st Interested Party. He further asserted that the said letter, although said to have been copied to both the advocates and the Auctioneer, was not verifiably delivered. He added that the follow-up letter dated 30th September 2023, allegedly issued to retract the initial instructions, was non-existent in the records of Omwanza Ombati Advocates.
19. Counsel further submitted that in an effort to support her case, the Decree Holder filed a Further Affidavit sworn on 7th November 2024, wherein she made substantial reference to the letter dated 30th September 2023. Counsel maintained that the authenticity and effect of that letter had been expressly refuted by Omwanza Ombati Advocates, who were then acting for the Decree Holder. He submitted that the said firm's position confirmed that the allegations contained in the Supplementary Affidavit were spurious and unfounded, particularly as they sought to impugn the conduct of her former advocate without credible evidence.
20. Counsel for the 1st Interested Party submitted that perjury constitutes the offence of knowingly making a false statement under oath on a material matter, which bears upon the outcome of an official proceeding. Relying on the case of James Mulinge v Freight Wings Ltd & 3 Others, Cause No. 1359 of 2014, Counsel argued that the impugned averments made by the Decree Holder's Director in her Supplementary Affidavit and indeed across her other affidavits met all four elements of the offence of perjury, and that the Director should accordingly be reprimanded.
21. Counsel further submitted that the Director had attempted to invoke the doctrine of advocate-client privilege to shield her communications with Counsel Omwanza Ombati from scrutiny. However, he argued that such privilege is not absolute. Citing Section 134(1) of the *Evidence Act* and the case of Manani Lilan & Mwetich Co. Advocates v Veronica Sum [2022] eKLR, he submitted that there are exceptions to the rule, particularly where the communication is alleged to have been made in furtherance of an unlawful act or where disclosure is necessary to refute allegations made against the advocate. In reference to the letter dated 3rd June 2024 from Counsel Omwanza Ombati, written



“without prejudice,” Counsel Mburu submitted that the without prejudice rule is not absolute, and that the letter was properly admissible in the circumstances. Relying on the case of Unilever PLC v Procter & Gamble Co, Counsel highlighted recognised exceptions to the rule, including where the communication evidences misrepresentation or is necessary to explain disputed conduct. He submitted that the said letter was relevant and admissible, and ought to be considered in support of the 1st Interested Party’s application, as it rebutted the Decree Holder’s assertions regarding the issuance and delivery of the letter dated 22nd September 2023. In conclusion, Counsel urged the court to allow the 1st Interested Party’s application dated 6th May 2024 in its entirety, with costs.

Decree Holder’s Submissions

22. Counsel Kivuva, appearing for the Decree Holder, also commenced his submissions with an introduction and brief background to the matter. He submitted that on 2nd June 2021, judgment was entered in favour of the Decree Holder against the Judgment Debtor for the sum of Kshs.58,313,091/=, together with costs and interest. Following the Judgment Debtor’s failure to satisfy the decree, the Decree Holder initiated enforcement proceedings. He submitted that pursuant to execution, the court granted orders for attachment and sale of the Judgment Debtor’s property, being Mavoko/Block 3/2104, by way of public auction. Warrants of attachment were issued, and the 2nd Interested Party who had been nominated by the 1st Interested Party was appointed as the Auctioneer. Counsel submitted that the property was eventually sold to Usercare Limited for Kshs.100,000,000/=, from which the 2nd Interested Party retained Kshs.25,000,000/= as deposit, and the 1st Interested Party retained Kshs.75,000,000/=.
23. He further submitted that several suits arose following the public auction but were later withdrawn after the parties entered into a consent recorded on 11th December 2023, which provided that a sum of Kshs.21,000,000/= would be preserved in the 2nd Interested Party’s account as security for costs claimed by the 1st and 2nd Interested Parties, pending resolution of their respective fee claims. Counsel submitted that the Decree Holder subsequently filed an application dated 2nd January 2024, seeking recovery of part of the preserved funds, stating inter alia that the 2nd Interested Party was entitled to Kshs.2,000,000/= as auctioneer’s fees. In response, the 1st Interested Party filed Grounds of Opposition and a Replying Affidavit dated 14th and 15th February 2024, respectively, wherein he contended that the application was an abuse of the court process, and that he had filed and served his Bills of Costs in HCCOMMMisc E1006/2023 and HCCCMisc/242/2023, both arising from prior instructions by the Decree Holder.
24. Counsel submitted that it was thereafter that the Decree Holder filed a Supplementary Affidavit dated 12th March 2024, in which the averments made in Paragraphs 2.9, 2.10, 3.13, 3.14, and 3.15 became the subject of the 1st Interested Party’s current application dated 6th May 2024. Counsel further submitted that during the cross-examination of the Decree Holder’s Director, she testified that the matters referenced in HCCOMMMisc E1006/2023 and HCCCMisc/242/2023 had already been completed and that the 1st Interested Party had not filed any formal application to cease acting, as those matters had been concluded and the files closed.
25. With respect to Paragraphs 3.13 to 3.15, Counsel submitted that the Director admitted she had no proof such as a stamped or acknowledged copy that the letter dated 22nd September 2023 was received by Omwanza Ombati & Co. Advocates from the 1st Interested Party. However, she maintained that she had communicated with the said advocates and had issued instructions advising them to disregard the contents of the earlier letter.



26. Counsel submitted on three issues for determination that is, whether the supplementary affidavit dated 12th March 2024 should be struck out, whether the contents of Paragraphs 2.9, 2.10, 3.13, 3.14 and 3.15 amount to perjury and whether the decree holder in the matter disobeyed the court orders granted on 11th December 2023 and 6th February 2024.
27. On the first issue, Counsel for the Decree Holder submitted that the 1st Interested Party had failed to demonstrate that the Supplementary Affidavit dated 12th March 2024 meets the legal threshold for striking out. He contended that the reliefs sought in the application before the court and the scope of the cross-examination conducted are not aligned. Specifically, Counsel argued that during cross-examination, the 1st Interested Party's advocate limited his questions to only six paragraphs namely, select parts of Paragraph 2, which comprises 16 sub-paragraphs, and Paragraph 3, which contains 22 sub-paragraphs. He therefore questioned the basis upon which the 1st Interested Party sought to have the entire affidavit, comprising 52 paragraphs, struck out. Relying on the authority of *Raila Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others* [2017] eKLR, Counsel submitted that an advocate cannot seek to expunge or invalidate an entire affidavit based on a challenge to a limited number of averments especially where the deponent has offered clear and coherent explanations during cross-examination, thereby resolving any alleged discrepancies raised by the Applicant.
28. Counsel for the Decree Holder further submitted that with regard to Paragraph 2.9 of the Supplementary Affidavit, it was evident that the firm of K.M. Mburu & Associates remained on record in the matter and was actively pursuing payment from the Decree Holder. He noted that the Decree Holder's Director had clarified during cross-examination that her reference in that paragraph pertained to the status of the firm at the time of filing the Supplementary Affidavit, and that notices of change of advocates in other matters were filed subsequently. She further explained that any issues relating to taxation could only be addressed in those respective suits, and not in the present matter.
29. Regarding Paragraph 2.10, Counsel submitted that it emerged during cross-examination that the 1st Interested Party had not filed a notice to cease acting, but had instead filed a notice of change of advocates which simply removed the name of the advocate on record and did not formally withdraw from the matter in accordance with procedure. As for Paragraph 2.11, Counsel submitted that the Director had clarified that the 1st Interested Party, being counsel, is not a substantive party to the proceedings, and thus cannot seek or obtain substantive relief under the decree issued in the matter. Counsel argued that the 1st Interested Party was overreaching by attempting to hold the Decree Holder and other parties hostage in this matter, while failing to pursue the appropriate avenue for redress in relation to his taxation claims. He contended that the mere filing of an application by an advocate does not elevate the advocate to the status of a party capable of invalidating the Decree Holder's affidavit.
30. In relation to Paragraphs 3.13 and 3.15, Counsel submitted that the Director had clarified during cross-examination that the handwritten letter dated 22nd September 2023 had been drafted by the 1st Interested Party himself, and that she had typed and delivered the letter to him as requested. She maintained that he was responsible for delivering the same to the firm of Omwanza Ombati & Company Advocates.
31. Counsel further submitted that the court had already ruled that the background to the letter dated 22nd September 2023 could not be examined in this proceeding, as doing so would risk pre-empting the issues that are pending in other related matters. He also invoked Section 137 of the *Evidence Act*, which protects communications between advocate and client as privileged, and not subject to disclosure without the client's consent.



32. With respect to the instructions allegedly issued to Omwanza Ombati & Company Advocates, Counsel submitted that the court had already ruled that Counsel Ombati could not be called as a witness in this matter, particularly because he had not sworn any affidavit. He pointed out that the court granted leave to the Decree Holder's Director to file the letter dated 30th September 2023, which had been erroneously omitted from the Supplementary Affidavit. The said letter was subsequently filed under cover of her affidavit sworn on 7th November 2024. Counsel concluded that the 1st Interested Party had no legal basis to challenge the instructions issued by a client to her advocate, particularly where the advocate had not challenged the existence or effect of those instructions under oath.
33. On the second issue whether the contents of Paragraphs 2.9, 2.10, 3.13, 3.14, and 3.15 amount to perjury, Counsel for the Decree Holder made reference to Section 108(1)(a) of the *Penal Code* and the decision in *Getuba & Another v Kibagendi & 2 Others* (Election Petition E002 of 2022) [2022] KEHC 14994 (KLR), in submitting that the burden of proof for the offence of perjury had not been discharged by the 1st Interested Party. Counsel argued that the impugned paragraphs could not be characterised as scandalous or misleading, as the Decree Holder's Director had offered clear and reasonable explanations during cross-examination, which addressed and resolved the issues raised by the 1st Interested Party.
34. On the final issue, Counsel relied on the case of *Re Estate of Pius Temebte Kwayiya (Deceased)* (Succession Cause 400 of 2002) [2024] KEHC 13467 (KLR) (Ruling delivered on 29 October 2024), in submitting that the 1st Interested Party's application does not meet the threshold for contempt of court. He further relied on the case of *Mutitika v Baharini Farm Limited* [1985] KLR 227, in which the court emphasized that contempt proceedings require strict proof, a burden that he contended the 1st Interested Party had not discharged. Counsel also submitted that even if the court were to accept the allegations of perjury which he denied perjury does not, in itself, constitute contempt of court, and therefore cannot support the orders sought.
35. Counsel further submitted that the statements complained of by the 1st Interested Party do not raise any substantially material issues capable of sustaining the application before the court. He argued that the 1st Interested Party had not demonstrated any intentional falsehood in the Decree Holder's testimony during cross-examination. On that basis, Counsel submitted that the prayer for a finding of perjury, and the request to refer the matter to the ODPP for prosecution, must fail. He added that the court cannot purport to direct how independent constitutional bodies, such as the Office of the Director of Public Prosecutions, should conduct their affairs. To do so, he argued, would offend the principle of fair hearing and amount to condemning a party unheard.
36. In conclusion, counsel urged the court to dismiss the application dated 6th May 2024 with costs.

Analysis and Determination

37. I have considered the rival affidavits by parties, oral highlights and submissions on record made in respect of the motion dated 6th May 2024. It is my view that the following issues arise for determination;
 - a. Whether the supplementary affidavit sworn on 12th March 2024 contains perjurious statements under Section 108 (1) (a) of the *Penal Code* hence should be struck out from the record.
 - b. Whether the Director of the Decree Holder is in contempt of court for disobeying orders of 11th December 2023 and 6th February 2024.



- c. Whether the court should direct the Office of the Director of Public Prosecution (ODPP) to prosecute the Decree Holder's Director.

Whether the supplementary affidavit sworn on 12th March 2024 contains perjurious statements hence should be struck out from the record.

38. The Paragraphs alleged to constitute perjury in the Supplementary Affidavit are;
- i. 2.9 – Claiming the 1st Interested Party is still on record;
 - ii. 2.10 – Asserting no application had been served by the 1st Interested Party to cease acting;
 - iii. 2.11 – Alleging the 1st Interested Party is not to be allowed to address court since it is not a party to the proceedings.
 - iv. 3.13, 3.14, 3.15, 3.19 – Detailing the events around the 22nd and 30th September 2023 letters and the purported misrepresentation.
39. The Black's Law Dictionary, 9th Edition at page 1254 defines perjury as –
- “The act or an instance of a person's deliberate making material false or misleading statements while under oath.”
40. Section 108 (1) (a) of the *Penal Code* provides for the offence of perjury as follows-
- (1)(a) Any person who, in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then pending in that proceeding or intended to be raised in that proceeding, is guilty of the misdemeanour termed perjury.
41. In the case of *James Mulinge v Freight Wings Ltd, Vegpro (K) Ltd, Simba Colt Motors Ltd & High-Class Auctioneers* [2016] KEELRC 11 (KLR), the Court identified the elements of the offence of perjury as follows; that a person;
- a. being a lawfully sworn witness or interpreter;
 - b. in judicial proceedings;
 - c. deliberately makes a material statement which is false; and
 - d. knowing that it is false or not believing it to be true.
42. In light of the foregoing, it is important to evaluate each of the statements based on the averments during cross examination and the submissions by parties.
43. With respect to Paragraphs 2.9 and 2.10 of the Affidavit which refer to the allegation that the 1st Interested Party, despite being involved in other suits concerning tax matters, continues to act for the Decree Holder in this case, the Director clarified during cross examination that she did not receive any formal notice from the 1st Interested Party's advocate indicating that he had ceased acting but that he filed a notice of change. It is my view that her averments in this regard were made based on her own knowledge and no conclusive evidence was adduced to establish that Jacqueline had received the application to cease acting. Accordingly, I find that Paragraphs 2.9 and 2.10 cannot be considered to be perjurious.



44. Regarding Paragraph 2.11 of the Supplementary Affidavit which avers that the 1st Interested Party is not entitled to address the court or seek substantive orders as it is not a party to the proceedings, I note that this is an opinion and not a factual claim. The court had in fact allowed the 1st Interested Party to participate as an Interested Party and therefore disagreements over legal interpretation cannot amount to perjury.
45. Regarding Paragraph 3.13 3.14, and 3.15 of the affidavit, where it is alleged that the Decree Holder's Director signed one original letter which was then handed to Mr. Mburu who in turn provided a copy of same letter to the firm of Omwanza Ombati & Co Advocates. The court notes that the letter dated 22nd September 2023 exists and was admitted by Jacqueline as having been authored by her. However, the firm of Omwanza Ombati Advocates denied receiving this letter in a "without prejudice" letter dated 3rd June 2024. This denial, however was not made under oath. During cross-examination Jacqueline clarified that she handed the letter to Mr. Mburu and believed that he delivered the letter to the said firm of Omwanza Ombati, though she concedes that she does not have evidence of service by Mr. Mburu to the firm of Omwanza Ombati Advocates. Further, by the court's direction issued on 6th November 2024 the context in which the letters were written was excluded from the record, thereby limiting and restricting any additional examination on the matter. In light of these circumstances, the issue raised in these paragraphs concerns a dispute over delivery of the letter rather than a deliberate intent to mislead. Therefore, it cannot be construed as a deliberate falsehood.
46. Regarding Paragraph 3.19 the Director asserts that upon discovering the mischief by Mr. Mburu, through the letter dated 30th September 2023, she instructed the firm of Omwanza Ombati Advocate to ignore the instructions given through her letter dated 22nd September 2023, the court notes that the Director during cross examination and questioning on the letter dated 30th September 2023, said the letter was not on record however, the same was filed pursuant to leave granted by court. Further, this court takes note that Counsel Omwanza in his letter dated 3rd June 2024 on a without prejudice basis denies receiving the letter of cancellation. Noting that Counsel Omwanza Ombati was excluded from cross examination, and given that the nature of the letter he wrote in response to Mr. Mburu which is on a prejudice basis it cannot be said that it carries more evidentiary weight than the sworn evidence.
47. This court further notes that the Decree Holder's Director remained consistent in her statement and supported her position with documentary evidence. Moreover, since the court had given express orders prohibiting probing the context of the letters' authorship and delivery, it is my view that although it was proper noting the reasons advanced by the court, it limited the definitive ruling on veracity of the letters. In that regard, I note that the contents of Paragraph 3.19 were not made deliberately with an intent to mislead.
48. In light of the above, and taking into account the evidentiary gaps alongside the standard of proof required, I find that the application has not established that the Decree Holder's Director knowingly gave false testimony on a material issue. Consequently, the impugned paragraphs do not support a finding of perjury. No finding of perjury can be sustained on the basis of the impugned paragraphs.
49. Should the supplementary affidavit therefore be expunged? the court notes that the impugned affidavit was filed to respond to substantive claims regarding release of amounts held by the 2nd Interested Party in an escrow account. Although some of the affidavit's averments are contested, it is the court's view that the affidavit contains relevant and probative material necessary for resolving the issues raised in the Decree Holder's application. Accordingly, the prayer to expunge the supplementary affidavit is therefore declined.



Whether the Director of the Decree Holder is in contempt of court for disobeying orders of 11th December 2023 and 6th February 2024.

50. Having perused the present Application dated 6th May 2024 for determination, the court finds no specific act demonstrating violating the orders of 11th December 2023 or 6th February 2024. The funds in question continue to be held as ordered. Furthermore, the Decree Holder action of filing an application seeking release of the said funds remains subject to this court determination as the application dated 2ND January 2024 is still pending before court for determination. By filing the aforementioned application is not a contemptuous conduct.

Whether the court should direct the Office of the Director of Public Prosecution (ODPP) to prosecute the Decree Holder’s Director.

51. Article 157 (10) of *the Constitution* of Kenya provides as follows;

“The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers of functions, shall not be under the direction or control of any person or authority.”

52. Article 157 (10) of *the Constitution* bars courts from directing the ODPP on whether or whom to prosecute. Therefore Prayer 6 of the Application is declined.

53. From the above findings, the Application dated 6th May 2024 is dismissed specifically for Prayers 5 to 11. Each party to bear their own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 19TH DAY OF JUNE 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Judgment Debtor

.....Decree Holder

Sam Court Assistant

