

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC CASE NO. E365 OF 2025**

**EXECUTIVE SUPER RIDES LIMITED .....**  
**PLAINTIFF**

**VERSUS**

**KHUSHI MOTORS LIMITED .....**  
**DEFENDANT**

**RULING**

1. This ruling is with respect to five separate applications filed in this matter at different times.

**The Plaintiff's Application dated 24<sup>th</sup> July 2025**

2. By the first application dated 24<sup>th</sup> July 2025, the Plaintiff sought the following interlocutory reliefs:

- i) That pending the hearing and determination of the suit an order of temporary injunction do issue, restraining the Defendant, his heirs, family members, assigns his title, agents, employees, contractors or any other person acting at his behest or directions, from forever interfering with the Plaintiff's ownership, use, occupation and development of Parcel No.s LR No. 1/445 (Orig No. 1/432/11 Ngong Kilimani Nairobi County.*

***In the alternative***

- ii) Spent- In the alternative, the Honourable court be pleased to grant an order for status quo ante 24/7/2025 to the effect that no eviction and or construction of any building or structure upon LR No. 1/445 (Orig No. 1/ 432/11 Ngong Kilimani, Nairobi County pending the hearing and determination of this application.***
  - iii) That the orders herein be served upon the OCS Kilimani Police Station for strict compliance and enforcement.***
  - iv) That the costs of the application be provided for.***
- 3.** The grounds of the application are set out in the Supporting Affidavit sworn by Eric Kimathi, the Plaintiff's Managing Director. He deponed that the Plaintiff is the registered proprietor of Land Reference Number 1/445 (Original Number 1/432/11), Ngong, Kilimani, Nairobi County, having acquired the same in 2017. He averred that the Plaintiff has since that time been in occupation, possession, and active use of the property, upon which it has carried out substantial developments before the alleged unlawful demolitions complained of.
- 4.** It was his deposition that while the Plaintiff remained in possession of the suit land, officers from the National Police

Service advised the company to seek appropriate protective orders from this Court.

5. He further deponed that the Defendant, who operates a business similar to that of the Plaintiff in Mombasa, has threatened to unlawfully take possession of the suit property and to capitalize on the Plaintiff's business goodwill and reputation.
6. According to Mr. Kimathi, the Defendant, acting out of malice, unlawfully entered the suit property and demolished the Plaintiff's buildings and structures housing its automobile business. He alleged that in the process, the Defendant's agents stole and vandalized the Plaintiff's equipment and fittings, thereby depriving the Plaintiff of the peaceful and quiet enjoyment of its premises in violation of its proprietary rights.
7. It was his further deposition that the Defendant has no legal or equitable interest in the suit land and is therefore infringing upon the Plaintiff's rights protected under **Sections 25 and 26 of the Land Registration Act, 2012.**
8. The deponent stated that the matter was reported at Kilimani Police Station under OB No. 41/22/2025 and that investigations are ongoing. He added that since 2<sup>nd</sup> July 2025, the Plaintiff's employees have been unable to access the premises or carry out repairs owing to continued

harassment and intimidation by persons allegedly hired by the Defendant.

9. It was also averred that notwithstanding the lack of any legal entitlement to the property, the Defendant has trespassed onto the land, with an intention to evict the Plaintiff, and commenced depositing construction materials thereon with the intention of erecting permanent structures, in blatant disregard of the Plaintiff's proprietary rights.
10. Mr. Kimathi further deponed that the Defendant has purported to justify its actions by claiming ownership of the property following a public auction allegedly conducted by NCBA Bank of Kenya PLC. He stated that the Plaintiff has challenged the legality of that auction in **HCCOM No. E434 of 2024, Executive Super Rides Limited & Erick Kimathi Kirima vs NCBA Bank of Kenya PLC & Another**, a matter which contests the bank's exercise of its statutory power of sale and is still pending determination.
11. He deponed that although an order was issued in **HCCOM No. E434 of 2024** on 17<sup>th</sup> October 2024 that allowed NCBA Bank of Kenya PLC to exercise its statutory power of sale, the Court of Appeal subsequently issued injunction orders on 21<sup>st</sup> January 2025 and 20<sup>th</sup> June 2025 restraining any interference with the suit property. He maintained that the Defendant's actions on 22<sup>nd</sup> July 2025 were in open defiance of those subsisting appellate orders.

- 12.** The Plaintiff contended that the dispute before this Court concerns ownership, possession, and use of land, and therefore properly falls within the jurisdiction of the Environment and Land Court pursuant to **Article 162(2)(b)** of the **Constitution** and the **Environment and Land Court Act**.
- 13.** It was his further deposition that on 23<sup>rd</sup> July 2025, the Defendant attempted to deposit building materials on the property in a bid to seize control of the business premises, but this was thwarted through timely police intervention.
- 14.** The deponent urged that unless the Court grants the orders sought, the Plaintiff will suffer irreparable loss including the grounding of its business operations and redundancy of employees who depend on the company for their livelihood.
- 15.** Pursuant to the Court's directions issued on 28<sup>th</sup> July 2025, an interim order was made maintaining the prevailing status quo pending further directions on 17<sup>th</sup> September 2025. The said order restrained any interference with the suit property by the Defendant, including demolition, excavation, construction, or eviction of the Plaintiff.
- 16.** In opposition, the Defendant filed a Replying Affidavit sworn on 8<sup>th</sup> August 2025 by Waqas Ahmad, a Director of Khushi Motors Limited. He deponed that the Plaintiff's allegation of continued possession and occupation of the suit property is false, asserting that the Plaintiff was lawfully evicted on 17<sup>th</sup>

July 2025 pursuant to orders issued by the Business Premises Rent Tribunal (BPRT) on 16<sup>th</sup> July 2025. He stated that the Plaintiff's Counsel, Kariuki Law & Co. Admitted that the Plaintiff is no longer in possession of the land before the BPRT.

- 17.** Mr. Ahmad further deponed that the Plaintiff is not the registered owner of the property as alleged, and that the Defendant is the lawful proprietor, having purchased the same through a public auction conducted by NCBA Bank of Kenya PLC on 7<sup>th</sup> August 2024 pursuant to **Section 90** of the **Land Act**. He averred that a transfer was duly registered in favour of the Defendant on 29<sup>th</sup> November 2024, thereby extinguishing the Plaintiff's title.
- 18.** He averred that the Plaintiff's challenge to the auction in **HCCOM No. E434 of 2024** was dismissed on 17<sup>th</sup> October 2024, affirming the bank's exercise of its statutory power of sale, and that the Defendant, not being a party to that suit, holds an indefeasible title under **Section 26(1)** of the **Land Registration Act**.
- 19.** Mr. Ahmad admitted that the Plaintiff had previously operated an automobile business on the premises but stated that such operations ceased upon the lawful eviction of 17<sup>th</sup> July 2025. He contended that the Defendant, being the registered proprietor, is in lawful possession and is now operating its business thereon.

20. He denied that the Defendant harbours any intention to misappropriate the Plaintiff's goodwill, asserting that the Plaintiff's business closure was occasioned by its own default leading to the lawful sale and eviction.
21. The deponent denied the allegations of demolition, theft, or vandalism. He stated that the Defendant merely secured its property following eviction and safeguarded the Plaintiff's movable items in a storage facility, to which access was granted as confirmed in the BPRT proceedings. He contended that no evidence, such as inventories or photographs, had been produced to substantiate the Plaintiff's claims.
22. Mr. Ahmad further deponed that the Plaintiff's reliance on the Court of Appeal's orders in **Civil Appeal No. E900 of 2024** is misplaced, as those orders relate to the Plaintiff's dispute with NCBA Bank and not the Defendant, who had already obtained title prior to the issuance of the said orders.
23. He conceded that this Court has jurisdiction to hear the dispute but maintained that the Defendant's title remains infeasible and the Plaintiff's eviction was lawful.
24. Mr. Ahmad denied that the Plaintiff prevented any development on 23<sup>rd</sup> July 2025, maintaining that as the lawful proprietor, the Defendant was merely exercising its right to develop the property, and that police intervention was triggered by the Plaintiff's misleading complaint.

- 25.** He contended that the Plaintiff's claims of goodwill loss and redundancy are speculative and unsupported by evidence, and that such commercial losses, even if proven, cannot override the Defendant's constitutional right to property under **Article 40** of the **Constitution** and **Sections 24, 25** and **26** of the **Land Registration Act**.
- 26.** The deponent averred that the Plaintiff's assertions of continued possession and ownership amount to perjury contrary to **Section 108** of the **Penal Code**, and that its advocates knowingly abetted the same within the meaning of **Section 110** thereof.
- 27.** He argued that the Plaintiff's failure to disclose its eviction and the BPRT orders of 16<sup>th</sup> July 2025 constitutes material non-disclosure that misled this Court into granting ex parte orders on 28<sup>th</sup> July 2025.
- 28.** He further averred that the Plaintiff's multiple proceedings before various fora, including the BPRT and the High Court, amount to abuse of court process contrary to Sections **1A** and **1B** of the **Civil Procedure Act**, Mr. Ahmad contended that the balance of convenience tilts in favour of the Defendant, who holds a valid title and is in lawful possession, while the Plaintiff's alleged losses worth Kshs. 290 million are unsubstantiated.

**29.** He urged the Court to vacate the ex parte orders, dismiss the Plaintiff's application, and refer the matter of alleged perjury to the Director of Public Prosecutions for appropriate action under the Penal Code.

**The Plaintiff's Second Application dated 29<sup>th</sup> July 2025**

**30.** The Plaintiff subsequently filed a second application dated 29<sup>th</sup> July 2025 seeking orders directing the Officer Commanding Station (OCS), Kilimani Police Station, to enforce the orders of this Court issued on 28<sup>th</sup> July 2025.

**31.** In the Supporting Affidavit sworn by Eric Kimathi, the Plaintiff's Director, it was deponed that following the issuance of the said orders restraining the Defendant from evicting the Plaintiff and from further acts of vandalism against its business, the OCS Kilimani had expressed inability to enforce the orders, as the explicit order for police enforcement was not expressly included in the order.

**32.** It was further averred that the Defendant had remained uncooperative and hostile, and that the failure to expressly empower the OCS to implement the orders had rendered them incapable of execution. The Plaintiff therefore urged the Court to clarify and reinforce its earlier directive by authorizing police assistance.

**33.** In response, the Defendant, through a Replying Affidavit sworn by Waqas Ahmad on 8<sup>th</sup> August 2025, opposed the application, asserting that the ex parte orders of 28<sup>th</sup> July

2025 were obtained through a perjurious affidavit sworn by Eric Kimathi on 24<sup>th</sup> July 2025. He deponed that the Plaintiff had falsely claimed to be in occupation of the suit property, whereas in fact it had been lawfully evicted on 17<sup>th</sup> July 2025 pursuant to the Business Premises Rent Tribunal (BPRT) orders issued in **Tribunal Case No. E1387 of 2024** for non-payment of rent from 29<sup>th</sup> November 2024 to 16<sup>th</sup> July 2025.

- 34.** Mr. Ahmad further deponed that the Plaintiff's eviction was acknowledged by its own Counsel before the BPRT and evidenced by certified proceedings, thereby rendering the Plaintiff's claims before this Court false and amounting to perjury contrary to **Section 108** of the **Penal Code**. He maintained that the Defendant's compliance with the Tribunal's eviction orders, which predated the ex parte orders of this Court, negates any suggestion of disobedience or contempt.
- 35.** It was further deponed that the Plaintiff's possession, if any, was extinguished upon eviction on 17<sup>th</sup> July 2025, and that the BPRT had on 12<sup>th</sup> February 2025 affirmed the Defendant as the lawful landlord of the premises. Mr. Ahmad contended that the Plaintiff's concealment of these facts in its affidavit of 24<sup>th</sup> July 2025 amounted to material non-disclosure intended to mislead this Court.
- 36.** He reiterated that the Defendant lawfully acquired the suit property through a public auction conducted by NCBA Bank

of Kenya PLC on 7<sup>th</sup> August 2024, in exercise of the bank's statutory power of sale under **Sections 90** and **96** of the **Land Act, 2012**, and that enforcement of orders obtained through deceit would contravene **Article 50(1)** of the **Constitution**.

**37.** The Defendant further contended that the application to enforce the ex parte orders is part of the Plaintiff's persistent forum shopping, noting that the Plaintiff has litigated the same subject matter before multiple fora including HCCOM No. E434 of 2024 which was dismissed on 17<sup>th</sup> October 2024; BPRT Case No. E1387 of 2024, which was determined against the Plaintiff on 16<sup>th</sup> July 2025; a subsequent BPRT review application filed on 23<sup>rd</sup> July 2025, the present ELC matter, and two pending judicial review proceedings before this Court.

**38.** Mr. Ahmad therefore urged that the orders of 28<sup>th</sup> July 2025, having been obtained without disclosure of material facts and without affording the Defendant an opportunity to be heard, offend the principles of natural justice and fair hearing under **Article 50(1)** of the **Constitution**, and should not be enforced. He prayed that the application dated 29<sup>th</sup> July 2025 be dismissed with costs.

### **The Defendant's Application dated 30<sup>th</sup> July 2025**

**39.** The third application, dated 30<sup>th</sup> July 2025 was filed by the Defendant, in which it sought the following orders:

- i) That the orders issued by this Honourable Court on 28<sup>th</sup> July 2025 in the Plaintiff's Notice of Motion dated 24<sup>th</sup> July 2025 be vacated and/or set aside in their entirety.***
- ii) Spent- That an order be issued staying the proceedings and the Plaintiff's application pending the hearing and determination of this application.***
- iii) That pending hearing and determination of the Plaintiff's application and suit, the Plaintiff be ordered to deposit security of Kshs 198 million being the purchase value of the suit property as at August 2024.***
- iv) That pending the hearing and determination of the Plaintiff's application and suit dated 24<sup>th</sup> July 2025, the Plaintiff to deposit a sum of KShs. 50 million for the continued loss of business occasion by the ex parte order dated 28<sup>th</sup> July 2025.***
- v) That pending hearing and determination of this suit and the Plaintiff's application, preservative order be issued to preserve the actual status quo.***
- vi) That a mandatory injunction be issued directing the Plaintiff, its agents, servants, or***

*assigns to cease any interference with the Defendant's exclusive possession, use and enjoyment of the suit property being the parcel of land originally known as LR No. 1/445 (Orig No. 1/432/11) and currently as Nairobi/ Block 19/355 situated along Ngong Road Nairobi, pending the hearing and determination of this suit.*

*vii) That a prohibitory injunction be issued restraining the Plaintiff its agents, servants or assigns from entering, trespassing, or in any way interfering with the Defendant's possession, use and enjoyment of the suit property, pending the hearing and determination of this suit.*

*viii) That the costs of this application and this suit be borne by the Plaintiff.*

**40.** The Defendant's application is supported by an Affidavit sworn by Waqas Ahmad, the Defendant's Managing Director. Mr. Ahmad reiterated that the Defendant is the registered proprietor of Land Reference Number 1/445 (Original No. 1/432/11) and annexed copies of the Memorandum of Sale and duly registered transfer documents in proof thereof.

**41.** He maintained that the Defendant's ownership is indefeasible under Section **26(1)** of the **Land Registration**

**Act**, and that the Plaintiff cannot claim rights inconsistent with those of a registered proprietor. Consequently, he deposed, upon completion of the sale and registration of the transfer, the Plaintiff's proprietary interest in the land was extinguished.

- 42.** It was deposed that by a letter dated 16<sup>th</sup> December 2024, NCBA Bank notified the Plaintiff of the sale of the suit property and requested it to hand over vacant possession to the Defendant. The Plaintiff, however, failed to comply.
- 43.** Mr. Ahmad deposed that thereafter, the Plaintiff, together with its sister company ESR Motors, moved to the Business Premises Rent Tribunal vide an application dated 17<sup>th</sup> December 2024, seeking protection as tenants under an alleged lease agreement.
- 44.** He stated that on 20<sup>th</sup> February 2025, the Tribunal issued a ruling restraining the Defendant as landlord from evicting the Plaintiff and directing the parties to enter into a fresh lease agreement within 30 days reflecting market rates. The Plaintiff however declined to execute the lease agreement which was served upon it on 26<sup>th</sup> February 2025 and upon its advocates on 27<sup>th</sup> February 2025, and continued occupying the premises without a valid lease while defaulting on rent payments.
- 45.** Mr. Ahmad further deposed that on 6<sup>th</sup> March 2025, the Defendant issued a Notice of Termination of Tenancy under

**Section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301**, requiring the Plaintiff to vacate the premises by 6<sup>th</sup> May 2025 on the ground that the Defendant intended to occupy the premises for its own use.

**46.** It was deposed that the Plaintiff did not notify the Defendant of its unwillingness to comply, nor did it file a reference at the Tribunal within the statutory period as required under **Section 6(1) of Cap 301**.

**47.** It was therefore contended that the tenancy stood terminated upon expiry of the notice period and that the Plaintiff's continued occupation thereafter was unlawful, amounting to trespass which prevented the Defendant from utilizing its property and occasioned financial loss.

**48.** Mr. Ahmad stated that on 10<sup>th</sup> July 2025, the Defendant moved the Tribunal for orders of distress for rent, eviction, and possession. The Tribunal, on 16<sup>th</sup> July 2025, granted orders authorizing distress and permitting the Defendant to take possession. This was based on the finding that the Plaintiff and its corresponding company, a former tenant, had failed to pay rent from the date of transfer of title from 29<sup>th</sup> November 2024 to 16<sup>th</sup> July 2025. The eviction, he deponed, was lawfully executed by licensed auctioneers under the supervision of the OCS Kilimani Police Station.

49. The Defendant's Director added that on 23<sup>rd</sup> July 2025, the Plaintiff and its sister company filed an application before the Tribunal seeking review of the distress and possession orders and that during that hearing, the Plaintiff's Counsel confirmed that the Defendant had taken possession on 17<sup>th</sup> July 2025 and only sought release of items removed and stored during the eviction exercise.
50. Mr. Ahmad therefore termed as false and misleading the Plaintiff's subsequent averment before this Court that it remained in possession as of 28<sup>th</sup> July 2025, the date on which the ex parte orders were obtained. The Defendant contended that the Plaintiff is a serial litigant engaging in forum shopping with the aim of re-entering the premises through deceptive pleadings and interim orders.
51. It was further argued that the orders of 28<sup>th</sup> July 2025 are incapable of enforcement, having been issued in vain, since the Defendant is already in lawful possession as the registered proprietor. It was contended that an injunction cannot issue to restrain a lawful owner in possession from dealing with his property.
52. The Defendant also challenged the Plaintiff's reliance on conservatory orders issued in **Court of Appeal Application No. E900 of 2024**, arguing that the said orders were issued in a dispute between the Plaintiff and NCBA Bank concerning the auction process, to which the Defendant was not a party.

The said orders, it was contended, merely preserved the status quo pending appeal and did not confer possessory rights upon the Plaintiff.

53. Mr. Ahmad dismissed as speculative the Plaintiff's claim that movable assets worth Kshs. 290 million were detained. He averred that no inventory, valuation report, or photographic evidence had been provided, rendering the claim exaggerated and unsubstantiated. He further deponed that the Plaintiff has since been granted access to the public storage facility where the items were kept during the eviction process, and is therefore in custody of all its movable assets.
54. The Defendant urged the Court to disregard what it termed as the Plaintiff's theatrics and to uphold the sanctity of the Court's process. It was asserted that the Defendant's proprietary rights are constitutionally protected under **Article 40** of the **Constitution**, and that the Plaintiff's actions amount to continued trespass upon those rights.
55. It was deponed that the Defendant continues to suffer irreparable harm owing to the interim orders of 28<sup>th</sup> July 2025, which restrict its ability to operate its automobile business and have resulted in loss of revenue, clientele, and goodwill, losses which cannot be adequately compensated by damages.

56. Mr. Ahmad contended that the balance of convenience favours the Defendant, being the party in lawful possession and operation of a legitimate business, while the Plaintiff's claims remain speculative and unsupported by evidence.
57. The Plaintiff opposed the Defendant's application by way of Grounds of Opposition dated 31<sup>st</sup> July 2025, contending that this Court lacks jurisdiction to entertain issues arising from the exercise of the bank's statutory power of sale, which is the subject of pending proceedings in **HCCOM No. E434 of 2024, Executive Super Rides Limited vs NCBA Bank of Kenya PLC**, and **Civil Appeal No. E900 of 2024** between the same parties.
58. It was argued that the Defendant's application effectively seeks this Court to stay or review orders issued by the Court of Appeal, a jurisdiction it does not possess. The Plaintiff submitted that entertaining issues already determined or pending before the Court of Appeal would amount to contravening the constitutional hierarchy of courts and the principle of finality in litigation.
59. It was further contended that any findings or declarations by the Tribunal purporting to determine ownership or title are a nullity ab initio, the Tribunal lacking jurisdiction to determine questions of proprietorship of land.
60. The Plaintiff reiterated that ownership of the suit property remains a live issue pending determination before the Court

of Appeal and that the Defendant lacks any lawful evidence of title. It was argued that to reopen the issue in this Court would undermine the appellate process and amount to forum shopping.

- 61.** In response, the Defendant, through a Replying Affidavit sworn on 19<sup>th</sup> July 2025, opposed the Plaintiff's Grounds of Opposition, terming them speculative and misleading. It was contended that under **Article 162(2)(b)** of the **Constitution** and **Section 13(7)** of the **Environment and Land Court Act**, this Court has jurisdiction to adjudicate disputes relating to ownership, occupation, and use of land.
- 62.** The Defendant maintained that the pending appeal between the Plaintiff and NCBA Bank does not affect its title or possession, noting that the BPRT had, in **Case No. E1387 of 2024**, confirmed the Defendant as landlord on 12<sup>th</sup> February 2025 and issued eviction orders on 16<sup>th</sup> July 2025, which were executed on 17<sup>th</sup> July 2025, as admitted by the Plaintiff's Counsel before the Tribunal.

**The Defendant's Application dated 1<sup>st</sup> August 2025**

- 63.** Through the fourth application dated 1<sup>st</sup> August 2025, the Defendant sought the following orders:
  - i) Spent- That this Honourable Court be pleased to vary, discharge, vacate and/or set aside the interim orders of injunction issued ex parte on***

**28<sup>th</sup> July 2025, pending the hearing and determination of this application.**

- ii) That the Plaintiff's application dated 24<sup>th</sup> July 2025 be struck out for being incompetent, frivolous, fatally defective and an abuse of court process.**
- iii) That this Honourable Court declare that the Plaintiff, Executive Super Rides Limited and its advocates, Kariuki Law & Co. Advocates, committed perjury under Section 108 of the Penal Code Cap 63, by willfully falsifying facts in the Notice of Motion dated 24<sup>th</sup> July 2025 to obtain ex-parte orders issued on 28<sup>th</sup> July 2025.**
- iv) That a prohibitory injunction be issued restraining the Plaintiff, its advocates, Kariuki Law & Co., their agents, servants, or assigns from relying on or enforcing the ex-parte orders of 28<sup>th</sup> July 2025 or presenting any further false statements in this suit.**
- v) That this Honourable Court refer the matter of perjury by the Plaintiff and Kariuki Law & Co. Advocates to the Director of Public Prosecutions for investigation and prosecution under Section 108 of the Penal Code, Cap 63.**

***vi) That the costs of this application be borne by the Plaintiff and Kariuki Law & Co. Advocates, jointly and severally.***

- 64.** In a Supporting Affidavit sworn by Waqas Ahmad, the Defendant's Managing Director, he deponed that the Defendant has been in peaceful possession of the suit premises since the eviction and has neither carried out demolitions nor erected permanent structures thereon. He maintained that the Defendant has not interfered with any rights of the Plaintiff, who no longer has any legal or beneficial interest in the property.
- 65.** He added that the Plaintiff's movable items were safely secured in a storage facility, as acknowledged before the BPRT, and that this contradicts the Plaintiff's subsequent claim of continued possession.
- 66.** It was reiterated that the Plaintiff's statements in its Supporting Affidavit dated 24<sup>th</sup> July 2025, claiming possession and a valid certificate of title, constitute perjury under **Section 108** of the **Penal Code**, having been made willfully and with knowledge of their falsity.
- 67.** It was contended that Kariuki Law & Co. Advocates facilitated this misrepresentation by preparing and filing the said application despite their prior acknowledgment of the Plaintiff's eviction during the BPRT proceedings, thereby making them complicit in the alleged perjury.

- 68.** Mr. Ahmad deponed that the ex parte orders of 28<sup>th</sup> July 2025 have occasioned irreparable harm to the Defendant's automobile business, including loss of revenue, clientele, and goodwill, by unlawfully restricting the Defendant's proprietary rights guaranteed under **Article 40** of the **Constitution of Kenya, 2010**, and **Sections 24, 25 and 26** of the **Land Registration Act, 2012**.
- 69.** In response to the Defendant's applications dated 30<sup>th</sup> July 2025 and 1<sup>st</sup> August 2025, the Plaintiff, through a Replying Affidavit sworn by Eric Kimathi, averred that the citation of its advocates for perjury is unfounded, unnecessary, and unprofessional. He described the Defendant's application as a compilation of falsehoods, speculative assertions, and baseless allegations, urging that it be dismissed with costs.
- 70.** The Plaintiff contended that submissions made by counsel cannot constitute evidence, and that the Defendant's reliance on alleged remarks by one Advocate Ragot before the BPRT to demonstrate possession is both inaccurate and inadmissible. It was further asserted that the said advocate does not practise with Kariuki Law & Co. Advocates as alleged, and that the Defendant had failed to produce the relevant Tribunal proceedings to substantiate its claims.
- 71.** It was further submitted that the Plaintiff's advocates are not parties to this suit and should not be subjected to personal attacks that undermine their professional independence. The

Plaintiff argued that the Defendant had not shown how the firm facilitated any perjury, given that the advocates merely acted upon instructions. The Plaintiff invoked the principle of independent legal representation as a safeguard to the right to a fair hearing and the integrity of the justice system.

72. With respect to the Defendant's application dated 30<sup>th</sup> July 2025, the Plaintiff averred that it is an abuse of court process, the Defendant having neither appealed nor sought review of the injunction orders issued by the Court of Appeal in **Civil Appeal No. E900 of 2024**, which expressly prohibited any interference with the Plaintiff's possession or transfer of the suit property.
73. The Plaintiff argued that by seeking to set aside this Court's orders of 28<sup>th</sup> July 2025, the Defendant is effectively inviting this Court to sit on appeal or to review a decision of the Court of Appeal, a jurisdiction it does not possess. It was further submitted that the Defendant's application fails to satisfy the statutory threshold for review under **Order 45 Rules 1, 2 and 3** of the **Civil Procedure Rules, 2010**, there being no discovery of new evidence or error apparent on the face of the record.
74. It was deponed that the Defendant admitted that they entered on the suit land, demolished all buildings, or structures erected within the suit land which housed the Plaintiff's automobile business, stole and vandalized its

properties vide the strength of the orders of the Business Premises Rent Tribunal in BPRT Case No. E1387 of 2024.

75. The Plaintiff further deponed that the Defendant failed to disclose to this Court that on 29<sup>th</sup> August 2025, Hon. Lady Justice T. Murigi in **Judicial Review No. 249 of 2025, Executive Super Rides Limited vs Khushi Motors Limited**, stayed all orders and proceedings in **BPRT Case No. E1387 of 2024**.
76. It was alleged that notwithstanding the said stay, the Defendant refused to release the goods, vehicles, and other assets that had been proclaimed and seized during the distress for rent, which the Plaintiff maintains was illegally conducted for Kshs. 280 million instead of the corrected figure of Kshs. 2,800,800/=.
77. The Plaintiff reiterated that any declaration by the Tribunal purporting to determine ownership or to review the Court of Appeal's orders is nullity ab initio, as the Tribunal lacks jurisdiction on matters of proprietorship. It was expressed that the judicial review proceedings would result in the quashing of those proceedings by way of certiorari.
78. The Plaintiff further deponed that following the stay orders issued by Justice Murigi on 4<sup>th</sup> September 2025, the Tribunal's earlier orders were effectively suspended and the attached assets ordered released. The Plaintiff stated that although some of the items were returned, others had been

damaged, stolen, or vandalized, and that it continues to face interference and intimidation from persons allegedly hired by the Defendant.

- 79.** It was averred that the Defendant has not denied that the Court of Appeal, by rulings of 21<sup>st</sup> January 2025 and 20<sup>th</sup> June 2025, issued injunctive orders preserving the Plaintiff's possession and restraining any dealings in the suit property pending determination of Civil Appeal No. E900 of 2024.
- 80.** The Plaintiff maintained that the Defendant has no lawful order granting it access or possession of the suit property, given that all Tribunal orders have been stayed. It was argued that the Defendant's applications seek to undermine the Plaintiff's constitutional right to a fair hearing and to prematurely curtail the suit through procedural subterfuge.
- 81.** It was further deponed that the Plaintiff is a wholly Kenyan-owned company and that its directors are domiciled within the jurisdiction of the Court, rendering any apprehension about flight risk or inability to satisfy costs baseless. The Plaintiff argued that financial ability to pay costs is not a prerequisite to the enforcement of property rights under **Article 40** of the **Constitution** and the **Land Act, 2012**.
- 82.** On the Defendant's request for security for costs, the Plaintiff urged the Court to be guided by the Supreme Court's decision in **Westmont Holdings SDN BHD v Central Bank of Kenya [2021] KESC 3 (KLR)**, which sets

out the guiding test for such applications. It was argued that the discretion to order security for costs must be exercised judiciously and only where the applicant has established compelling reasons, conditions that have not been met in this case.

- 83.** Regarding perjury allegations, the Plaintiff denied having made any false statements to this Court and described the Defendant's application as a calculated attempt to delay the expeditious hearing of the suit. It was argued that the Defendant has failed to establish a prima facie case for perjury.
- 84.** The Plaintiff reiterated that it remains in possession of the suit property and that the police had merely advised it to obtain a court order for protection. It was further alleged that the Defendant, who operates a similar automobile business in Mombasa, seeks to dislodge the Plaintiff and unlawfully appropriate its goodwill.
- 85.** It was contended that granting the orders sought would result in the Plaintiff's unlawful removal from its business premises by a competitor, occasioning irreparable harm not compensable by damages. The Plaintiff submitted that the Defendant is effectively seeking to appeal against the Court of Appeal's ruling through the backdoor.
- 86.** It was contended that if the Defendant believes any advocate in the Plaintiff's firm was involved in wrongdoing, the

appropriate procedure would be to seek cross-examination of the concerned individual rather than to malign the entire firm.

**87.** Mr. Kimathi further argued that the Defendant has neither identified the specific documents allegedly containing perjurious statements nor sought to cross-examine the deponent. He maintained that the photographs annexed on the Plaintiff's affidavit sufficiently demonstrate possession, and that the Defendant has produced no contrary evidence.

**88.** The Plaintiff further contended that the prayer to refer the matter to the Director of Public Prosecutions is misconceived, as the Court cannot usurp the DPP's constitutional mandate under **Article 157** to independently investigate and prosecute offences. It was noted that perjury, is a criminal offence punishable by up to seven years' imprisonment under **Section 110** of the **Penal Code**.

**The Plaintiff's Application dated 11<sup>th</sup> August 2025**

**89.** The fifth application dated 11<sup>th</sup> August 2025 was filed by the Plaintiff, in which it sought the following reliefs:

- i) That this Honourable Court be pleased to find Awaiz Jalal Wahla, Victor Arara Were, Waqas Ahmad, Muhammad Wahla Temor Arshad, Khadija Arshad Wahla, Summan Arshad Wahla, Aysha Arshad Wahla and Akhtar Nasreen, the Directors of Khushi Motors Limited, the***

***Defendant/ Respondent herein, in contempt of the orders of the court as issued on 28<sup>th</sup> July 2025 and 31<sup>st</sup> July 2025.***

***ii) That this Honourable Court does find Awaiz Jalal Wahla, Victor Arara Were, Waqas Ahmad, Muhammad Wahla Temor Arshad, Khadija Arshad Wahla, Summan Arshad Wahla, Aysha Arshad Wahla and Akhtar Nasreen, the Directors of Khushi Motors Limited, the Defendant/ Respondent herein action of locking the entrance to the Parcel No. LR No. 1/445 (ORIG NO. 1/432/11 Ngong Kilimani Nairobi County by themselves and hiring goons stationed at the entrance of the premises with the intention of blocking the Applicant/Plaintiff's access to the premises and to carry out its automobile business goes contrary to the court orders issues on 28<sup>th</sup> July 2025 and 31<sup>st</sup> July 2025 by the Hon. Justice O. A. Angote.***

***iii) That as a result of Awaiz Jalal Wahla, Victor Arara Were, Waqas Ahmad, Muhammad Wahla Temor Arshad, Khadija Arshad Wahla, Summan Arshad Wahla, Aysha Arshad Wahla and Akhtar Nasreen, the Directors of Khushi Motors Limited, the Defendant/ Respondent herein***

***actions above, this Honourable Court be pleased to cite them for willful disobedience of the orders issued by the Honourable Court on 28<sup>th</sup> July 2025 and 31<sup>st</sup> July 2025.***

***iv) That this Honourable Court be pleased to issue a warrant of arrest against Awaiz Jalal Wahla, Victor Arara Were, Waqas Ahmad, Muhammad Wahla Temor Arshad, Khadija Arshad Wahla, Summan Arshad Wahla, Aysha Arshad Wahla and Akhtar Nasreen, the Directors of Khushi Motors Limited, the Defendant/ Respondent herein to be brought before this Honourable Court to show cause why they should not be punished for contempt of the orders issued by this Honourable Court on 28<sup>th</sup> July 2025 and 31<sup>st</sup> July 2025.***

***v) That this Honourable Court be pleased to commit Awaiz Jalal Wahla, Victor Arara Were, Waqas Ahmad, Muhammad Wahla Temor Arshad, Khadija Arshad Wahla, Summan Arshad Wahla, Aysha Arshad Wahla and Akhtar Nasreen, the Directors of Khushi Motors Limited, the Defendant/ Respondent herein, to civil jail for 6 months or such other period as the court may deem fit for contempt of the***

***orders issued by this Honourable Court on 28<sup>th</sup> July 2025 and 31<sup>st</sup> July 2025.***

- vi) That Awaiz Jalal Wahla, Victor Arara Were, Waqas Ahmad, Muhammad Wahla Temor Arshad, Khadija Arshad Wahla, Summan Arshad Wahla, Aysha Arshad Wahla and Akhtar Nasreen, the Directors of Khushi Motors Limited, the Defendant/ Respondent herein, be condemned to purge the contempt by an order directing them to remove from the premises the hired goons and allow access of the premises for automobile business by the Plaintiff with immediate effect.***
- vii) That in the alternative prayer to (vi) above, this Honourable Court be pleased to impose a penalty of a fine of a figure to be ascertained by the court against the said Awaiz Jalal Wahla, Victor Arara Were, Waqas Ahmad, Muhammad Wahla Temor Arshad, Khadija Arshad Wahla, Summan Arshad Wahla, Aysha Arshad Wahla and Akhtar Nasreen, the Directors of Khushi Motors Limited, the Defendant/ Respondent herein.***
- viii) That this Honourable Court be pleased to make any such order for purposes of enforcing the***

***orders issued by this court on 28<sup>th</sup> July 2025 and 31<sup>st</sup> July 2025.***

***ix) That this honorable court be pleased to issue all necessary and consequential directions in respect of the contempt as may be necessary for the ends of justice to be met.***

***x) That costs of this application be in the cause.***

**90.** In a Supporting Affidavit sworn by Eric Kimathi, it was deponed that Awaiz Jalal Wahla, Victor Arara Were, Waqas Ahmad, Muhammad Wahla Temor Arshad, Khadija Arshad Wahla, Summan Arshad Wahla, Aysha Arshad Wahla and Akhtar Nasreen, are the Directors of Khushi Motors Limited, the Defendant/ Respondent herein.

**91.** He averred that the Plaintiff, as the registered owner of the suit property, obtained a loan facility from NCBA Bank of Kenya PLC and charged the property as security. Upon the Bank alleging default, it auctioned the suit property to the Defendant; that the Plaintiff challenged the bank's exercise of statutory power of sale, and pending appeal, the Court of Appeal on 21<sup>st</sup> January 2025 and 20<sup>th</sup> June 2025 issued injunctions restraining interference with the Plaintiff's possession of the suit property.

**92.** It was further averred that on 28<sup>th</sup> July 2025, this court directed, inter alia, that the prevailing status quo be maintained until 17<sup>th</sup> September 2025, meaning that there

was to be no interference with the suit property by the Respondent, including by way of demolition, excavation, construction, depositing of construction materials, or eviction of the Plaintiff, until 17<sup>th</sup> September 2025.

- 93.** It was deponed that the said Directors of Khushi Motors Limited were personally served with, and informed of, the orders of this Court issued on 28<sup>th</sup> and 31<sup>st</sup> July 2025; that they acknowledged receipt, and affixed the company stamp on the copies served and that the Defendant's advocates wrote to the Plaintiff's advocates complaining about personal service of the said orders upon their clients.
- 94.** The deponent asserted that the Defendant was equally aware of the Court of Appeal order of 20<sup>th</sup> June 2025 but chose to ignore it, including to resorting to proceedings before the BPRT which the Plaintiff has moved to have set aside/quashed.
- 95.** It was stated that, notwithstanding reports to the police, the Defendant's Directors continued to disregard the Court's orders; that on 4<sup>th</sup> and 5<sup>th</sup> August 2025, the Plaintiff's employees were chased from the suit land by the Respondent and its agents allegedly armed with pangas and other crude weapons.
- 96.** It was further contended that on 5<sup>th</sup> August 2025, the Defendant placed and offered for sale several motor vehicles

outside the suit property, most of them bearing the logo “Khushi Motors Ltd”.

97. The Plaintiff averred that it, through its advocates, wrote to the Defendant both personally and through its advocates seeking restitution or reparations, which has not been forthcoming, hence the present application. The Plaintiff asserted that by reason of the Defendant’s failure and/or neglect to comply with the orders of this Court and those of the Court of Appeal, the authority of the Court is brought into disrepute, and that it is in the interests of justice that the prayers sought be granted.
98. In a Replying Affidavit dated 21<sup>st</sup> August 2025, Waqas Ahmad denied any contempt, maintaining that the Defendant is in lawful possession pursuant to valid and executable BPRT orders. He contended that it is the Plaintiff who is forum shopping and seeking to use this Court to overturn the final orders of the Tribunal.
99. While it was conceding that the Plaintiff challenged the auction in **HCCOM No. E434 of 2024**, Mr. Ahmad stated that the suit was dismissed. He added that the BPRT, in a ruling dated 12<sup>th</sup> February 2025, declared the Defendant the lawful landlord in relation to the Plaintiff’s associated company, ESR Executive Automobiles Limited, and later issued a final order on 16<sup>th</sup> July 2025 confirming rent arrears of Kshs. 2,800,000/=.

- 100.** He reiterated that the Plaintiff procured the status quo order ex parte on 28<sup>th</sup> July 2025 through material non-disclosure, notwithstanding that as at 28<sup>th</sup> July 2025 the Defendant had already taken vacant possession on 17<sup>th</sup> July 2025 and was in lawful occupation.
- 101.** Mr. Ahmad confirmed service of this Court's orders upon the Defendant's Directors but stated that the Defendant promptly moved the Court by the application dated 30<sup>th</sup> July 2025 to set aside the ex parte orders on account of non-disclosure. He argued that the alleged disobedience of orders in **Civil Appeal No. E900 of 2024** is misconceived, those orders relating to different parties in a different dispute and not overriding the BPRT's specific orders.
- 102.** He further deponed that the persons on the suit property are the Defendant's employees and legitimate security personnel safeguarding the premises; that allegations of "goons" armed with crude weapons are false; and that the Defendant is lawfully operating its car dealership business on the property.
- 103.** It was contended that it is the Plaintiff who is bringing the judiciary to disrepute by attempting to play two courts against each other; that ex parte orders obtained through non-disclosure cannot be used punitively against a party acting in accordance with another valid court order and that

the contempt application is incompetent and that the high standard for contempt has not been unmet.

**104.** Counsel for both parties filed lengthy submissions and authorities which I have considered.

**Analysis and Determination**

**105.** Upon consideration of the applications, responses and submissions, the issues for this court's determination are as follows:

- a) *Whether the interim orders issued by this court on 28<sup>th</sup> July 2025 were lawfully obtained and ought to be sustained or set aside;*
- b) *Whether the conduct of the Plaintiff and its advocates, M/s Kariuki Law & Co. Advocates, warrants referral to the Director of Public Prosecutions;*
- c) *Whether the Defendant's Directors are in contempt of the orders of 28<sup>th</sup> and 31<sup>st</sup> July 2025*
- d) *Whether either party has satisfied the conditions for the grant of injunctive relief; and*
- e) *Whether the Plaintiff should be ordered to furnish security for costs.*

**106.** The Plaintiff commenced this suit by way of a Plaint dated 24<sup>th</sup> July 2025. The Plaintiff contends that it is the registered proprietor of the suit property known as L.R. No. 1/445 (Original No. 1/432/11), Ngong, Kilimani, Nairobi County,

and that on or about 17<sup>th</sup> July 2025, the Defendant unlawfully entered upon the said property, despite repeated demands to desist from such interference.

- 107.** It is the Plaintiff's case that the Defendant, who has no lawful or equitable interest in the property, has unlawfully denied it quiet possession and enjoyment of its proprietary rights.
- 108.** The Plaintiff further avers that the Defendant maliciously demolished all buildings and structures erected on the suit property, vandalized, looted, and destroyed its business premises and equipment, resulting in loss and damage estimated at Kshs. 290,815,300/=, and seeks additional compensation of Kshs. 100,000,000/= for malicious damage and reconstruction costs.
- 109.** It was stated that the only matter previously or presently concerning the suit property is **HCCOMM No. E434 of 2024** between the Plaintiff and NCBA Bank of Kenya PLC.
- 110.** Consequently, the Plaintiff seeks, inter alia, a permanent injunction restraining the Defendant, its servants, agents, or any other person acting on its behalf, from entering upon, alienating, developing, or in any other manner interfering with its ownership, occupation, and use of the suit property.

**Whether the interim orders issued by this court on 28<sup>th</sup> July 2025 were lawfully obtained and ought to be sustained or set aside**

**111.** The Plaintiff, through an application dated 24<sup>th</sup> July 2025, asserted that it is the registered proprietor of the suit property and that it remained in possession thereof. It denied that the Defendant had any legal or equitable interest in the land.

**112.** While conceding that the Defendant claimed ownership through a public auction conducted by NCBA Bank of Kenya PLC, the Plaintiff contended that it had challenged the legality of that auction in **HCCOM No. E434 of 2024 - Executive Super Rides Limited & Erick Kimathi Kirima vs NCBA Bank of Kenya PLC & Another**, which matter was pending determination.

**113.** On the basis of these depositions, the Court, on 28<sup>th</sup> July 2025, issued interim ex parte orders in the following terms:

*“That the current (as at now) prevailing status quo be maintained until 17<sup>th</sup> September 2025 meaning that there should be no interference of the suit property by the Respondent including demolition, excavation, construction, depositing of construction materials or eviction of the Applicant until 17<sup>th</sup> September 2025”*

**114.** The Defendant has, however, opposed the Plaintiff’s claim of possession, asserting that the Plaintiff had been lawfully

evicted from the suit property on 17<sup>th</sup> July 2025 pursuant to orders issued by the **Business Premises Rent Tribunal** in **Tribunal Case No. E1387 of 2024**.

**115.** It was further contended that the Plaintiff was guilty of material non-disclosure, having failed to disclose that the High Court in HCCOM No. E434 of 2024 had declined to grant it injunctive relief and that the Business Premises and Rent Tribunal had subsequently issued eviction orders against it.

**116.** The principle governing disclosure in *ex parte* applications was well articulated in **Republic vs Kensington Income Tax Commissioners ex parte Princess Edmond de Polignac [1917] 1 KB 486**, where Warrington LJ held that a party who approaches the court without notice is under an obligation to make the fullest possible disclosure of all material facts, failing which the court will deprive him of any advantage obtained:

***“It is perfectly well settled that a person who makes an ex parte application to the Court - that is to say, in the absence of the person who will be affected by that which the Court is asked to do is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot***

***obtain any advantage from the proceedings and he will be deprived of any advantage may have already obtained by him. That is perfectly plain and requires no authority to justify it.”***

**117.**In ***The owners of the Motor Vessel “Lilian S” vs Caltex Oil (Kenya) Limited (1989) eKLR***, Kwach JA cited ***Brink’s MAT Ltd vs. Elcombe [1988] 3 ALL ER CA 188*** in which Slade LJ emphasized the penal nature of the principle in this way:

***“Nevertheless, the nature of the principle, as I see it, is essentially penal and in its application the practical realities of any case before the court cannot be overlooked. By their very nature, ex parte applications usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste. Particularly in heavy commercial cases, the borderline between material facts and non-material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making ex parte applications, I do not think the application of the principle should be carried to extreme lengths. In one or two other recent cases coming before this court, I have suspected signs of a growing***

*tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the R v Kensington Income Tax Commissioner principle as a tabula in naufrage, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience.”*

**118.**In **Brink’s MAT** (supra),Ralph Gibson LJ dwelt comprehensively on the issue of non-disclosure and its consequences which deserve to be fully set out as follows:

*“In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following:*

- i. The duty of the applicant is to make a ‘full and fair disclosure of all the material facts’: see R v Kensington Income Tax Comrs, ex parte Princess Edmond de Polignac [1917] 1 KB 486 at 514 per Scrutton LJ.*

- ii. The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see the Kensington Income Tax Comrs case [1917] 1 KB 486 at 504 per lord Cozens-hardly MR, citing Dalglish v Jarvie [1850] 2 Mac & G 231 at 238, 42 ER 89 at 92, and Thermax Ltd v Schott Industrial Glass Ltd [1981] FSR 289 at 295 per Browne-Wilkinson J.**
- iii. The applicant must make proper inquiries before making the application: see Bank Mellat v Nikpour [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.**
- iv. The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant: see, for example,**

*the examination by Scott J of the possible effect of an Anton Piller Order in Columbia Picture Industries Inc v Robinson [1986] 3 All ER 338, [1987] Ch 38, and (c) the degree of legitimate urgency and the time available for the making of inquiries: see Bank Mellat v Nikpour [1985] FSR 87 at 92-93 per Slade LJ.*

- v. *If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains ...an ex parte injunction without full disclosure is deprived of an advantage he may have derived by that breach of duty .....'* see *Bank Mellat Nikpour (at 91) per Donaldson LJ, citing Warrington LJ in the Kensington Income Tax Comrs case.*
- vi. *Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the*

*applicant to make all proper inquiries and to give careful consideration to the case being presented.*

*vii. Finally, 'it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded'; see Bank Mellat v Nikpour [1985] FSR 87 at 90 per lord denning MR. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:*

*'... When the whole of the facts, including that of the original non-disclosure, are before it, [the court] may well grant such second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosure.'*

**119.** Upon review of the pleadings and the evidence on record, this Court finds as a matter of fact that in **HCCOM No. E434 of 2024 - Executive Super Rides Limited & Another vs NCBA Bank of Kenya PLC; Regent Auctioneers (Interested Party) [2024] KEHC 12490 (KLR)**, Hon. Justice P. Mulwa, on 17<sup>th</sup> October 2024, declined

to issue injunctive orders restraining the bank from exercising its statutory power of sale. The Plaintiff thereafter lodged an appeal before the Court of Appeal vide **Civil Appeal (Application) No. E900 of 2024.**

**120.** The Court of Appeal, by orders dated 21<sup>st</sup> January 2025, issued an interim injunction restraining interference with the Plaintiff's possession or transfer of the suit property until 9<sup>th</sup> May 2025 or further orders of the court. On 20<sup>th</sup> June 2025, the appellate court extended the orders and directed that, pending determination of the appeal, there shall be no interference with the Plaintiff's possession of, or transfer of, the suit property.

**121.** The Defendant has, however, produced evidence showing that title to the suit property had been transferred to it on 29<sup>th</sup> November 2024, prior to the Court of Appeal's interim orders of 21<sup>st</sup> January 2025. A copy of the registered transfer and title deed was exhibited. This material fact was not disclosed either to this Court when the ex parte orders of 28<sup>th</sup> July 2025 were sought or to the Court of Appeal before issuance of its orders.

**122.** The Plaintiff's knowledge of the Defendant's proprietorship is evident from the record of Tribunal Case No. E1387 of 2024, filed before the Business Premises Rent Tribunal by ESR Executive Automobiles Limited, which described itself as a tenant of Executive Super Rides Limited. The Plaintiff

was joined as the 2<sup>nd</sup> Respondent, while Khushi Motors Limited (the Defendant herein) was the landlord by virtue of the registered transfer.

**123.** On 7<sup>th</sup> May 2025, the Defendant filed an application before the Tribunal seeking authority to evict the tenants and to recover rent arrears then standing at Kshs. 2,400,000. The Plaintiff's associated company, ESR Executive Automobiles Limited, in turn filed an application on 3<sup>rd</sup> July 2025 seeking variation of the Tribunal's earlier ruling and a stay of proceedings pending the determination of the Court of Appeal case.

**124.** It was contended that in light of the Court of Appeal's ruling, the proceedings at the BPRT amounted to sub-judice. It was argued that the outcome of the Court of Appeal's proceedings is likely to render the Tribunal's proceedings nugatory as the issues canvassed in the proceedings are directly affected by the Court of Appeal's proceedings.

**125.** The Tribunal heard the parties on 16<sup>th</sup> July 2025 and, in a ruling delivered by Hon. Makori, directed that the tenant clear all arrears forthwith, failing which the landlord would be at liberty to distress for rent and to take possession. The Tribunal erroneously recorded the rent arrears as Kshs. 280 million, which error was subsequently corrected to Kshs. 2,000,800/= by an order of 29<sup>th</sup> July 2025.

**126.** The Plaintiff further alleged that on 29<sup>th</sup> August 2025, Hon. Lady Justice T. Murigi, in **Judicial Review Miscellaneous Application No. 249 of 2025 - Executive Super Rides Limited vs Khushi Motors Limited**, stayed all orders and proceedings in **BPRT Case No. E1387 of 2024**.

**127.** However, no such order was presented before this Court. The Court record similarly reveals that no stay order was issued on that date. What the record shows is that on 4<sup>th</sup> September 2025, Justice Murigi issued, by consent, an order directing that the motor vehicles attached pursuant to the Tribunal's orders be released to the ex parte Applicant. It is not in dispute that these vehicles were indeed released, as conceded by the Plaintiff.

**128.** The consequence of the foregoing is that the orders of the Business Premises Rent Tribunal made on 16<sup>th</sup> July 2025, having not been stayed, reviewed, or set aside by any competent court, remain valid and enforceable. On the strength of those orders, and by virtue of being the registered proprietor of the suit property, the Defendant was lawfully entitled to take possession thereof.

**129.** While the evidence placed before this Court does not conclusively establish the exact date or circumstances under which the eviction occurred, the record sufficiently demonstrates that the Defendant's right to possession of the

suit property is supported both by the Tribunal's orders and by its registered ownership.

- 130.** It is therefore evident that the Plaintiff failed to make full and frank disclosure of material facts, including the Defendant's proprietorship of the suit property and the existence and effect of the Tribunal's proceedings and orders. Had these matters been disclosed, this Court would not have granted the ex parte status quo orders of 28<sup>th</sup> July 2025. Those orders were plainly obtained through material non-disclosure and are hereby set aside.
- 131.** Consequently, the Plaintiff's application dated 29<sup>th</sup> July 2025 seeking the enforcement of the orders of 28<sup>th</sup> July 2025 has been overtaken by events and rendered nugatory by the vacation of those orders. Nothing remains for enforcement.
- 132.** As to whether the Court of Appeal orders are binding upon the Defendant, it is not refuted that the Defendant was not a party to Civil Appeal No. E900 of 2024. It is a fundamental principle of law, anchored in the doctrine of privity of proceedings, that a judgment or order of a court binds only the parties to the suit in which it was made, their privies, and those claiming under them. This principle is rooted in both fairness and due process: no person should be condemned, bound, or affected by an order of a court without having been heard or afforded the opportunity to be heard.

**133.** While this Court is bound by the ratio decidendi and legal reasoning emanating from the Court of Appeal's judgment, the specific orders issued in that appellate matter do not bind the Defendant, who was not a party to those proceedings, unless the order expressly indicates that it applies to all persons or is of a public law nature such as constitutional declarations or prohibitory orders directed to the world at large.

**134.** Even if this court was for a moment to agree with the Plaintiff's argument that the Defendant breached the orders of injunction issued by the Court of Appeal, the question that arises is this: why did the Plaintiff file the present suit? The Plaintiff should have filed in the Court of Appeal an application for contempt or enforcement, and not this suit.

**135.** Having been aware that on 21<sup>st</sup> January 2025 and 20<sup>th</sup> June 2025 the Court of Appeal issued injunctions restraining interference with his possession of the suit property, the Plaintiff cannot be heard to say that refusal by this court to grant injunctive orders is tantamount to setting aside the orders of the Court of Appeal.

**136.** The narration by the Plaintiff, in my view, is an admission that this court should not have entertained the application and the suit in the first, if indeed the same issues are pending before the Court of Appeal. The filing of the suit, if

the argument as stated by the Plaintiff is to be believed, amounts to abuse of court process.

**Whether the conduct of the Plaintiff and its advocates, M/s Kariuki Law & Co. Advocates, warrants referral to the Director of Public Prosecutions;**

**137.** The Defendant has invited this court to find that the Plaintiff's assertions of continued possession and ownership of the suit property amount to perjury, contrary to **Section 108** of the **Penal Code**, and that its advocates knowingly abetted such conduct within the meaning of **Section 110** thereof.

**138.** The offence of perjury is defined under **Section 108** of the **Penal Code** 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.*

*(b) It is immaterial whether the testimony is given on oath or under any other sanction authorized by law.*

*(c) The forms and ceremonies used in administering the oath or in otherwise binding the person giving the testimony to speak the truth*

*are immaterial, if he assent to the forms and ceremonies actually used.*

*(d) It is immaterial whether the false testimony is given orally or in writing.*

*(e) It is immaterial whether the court or tribunal is properly constituted, or is held in the proper place or not, if it actually acts as a court or tribunal in the proceeding in which the testimony is given.*

*(f) It is immaterial whether the person who gives the testimony is a competent witness or not, or whether the testimony is admissible in the proceeding or not.*

*(2) Any person who aids, abets, counsels, procures or suborns another person to commit perjury is guilty of the misdemeanour termed subornation of perjury.”*

**139. Section 110** of the **Penal Code** prescribes that any person who commits perjury or suborns perjury is liable to imprisonment for seven years.

**140.** It is trite that perjury is a criminal offence, and as such, this court, sitting as the Environment and Land Court established under **Article 162(2)(b)** of the **Constitution**, and **Section 13** of the **Environment and Land Court Act** lacks jurisdiction to make a finding of guilt or to impose criminal sanctions for perjury.

**141.** That mandate rests exclusively with the Director of Public Prosecutions under **Article 157** of the **Constitution**, and the jurisdiction to try such offences vests in the Magistrates' Courts or the High Court Criminal Division pursuant to the **Criminal Procedure Code**.

**142.** Indeed, **Article 157(10)** of the **Constitution** expressly provides that 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 that mandate, shall not be subject to the direction or control of any person or authority. This constitutional insulation reinforces the independence of the DPP and underscores why this court must refrain from assuming a prosecutorial role or purporting to make determinations that fall within the province of the criminal justice process.

**143.** In any event, although this court has made a definitive finding as to the prevailing ownership of the suit property, the evidence adduced by the Defendant was insufficient for this court to conclude that, as at 17<sup>th</sup> July 2025, the Defendant had taken actual possession of the suit property.

**144.** The only evidence presented was the BPRT orders dated 16<sup>th</sup> July 2025 and correspondence between the Office of the Regional Police Commander and the Executive Officer of the BPRT, verifying the validity of the tribunal orders.

145. Accordingly, while the court takes cognizance of the seriousness of the allegations made, it finds no jurisdiction to inquire into or determine the commission of perjury within these proceedings. The appropriate course, should the Defendant so wish, is to lodge a complaint with the Director of Public Prosecutions or other relevant investigative agencies for consideration in accordance with the law.

**Whether the Defendant's Directors are in contempt of the orders of 28<sup>th</sup> and 31<sup>st</sup> July 2025**

146. The Plaintiff sought to find the Defendants' directors in contempt of the orders of this court dated 28<sup>th</sup> July 2025 and 31<sup>st</sup> July 2025, alleging that despite service and knowledge of the same, they willfully disobeyed them by remaining on the suit property, evicting the Plaintiff's employees, and continuing business operations thereon.

147. The law on civil contempt is settled. In *Cecil Miller vs Jackson Njeru & Another [2017] eKLR*, the Court adopted the elements of contempt as stated in the text *Contempt in Modern New Zealand*, namely that to establish civil contempt, an applicant must prove:

***"a) The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant.***

***b) The defendant had knowledge of or proper notice of the terms of the order.***

***c) The defendant has acted in breach of the terms of the order and.***

***d) The defendant conduct was deliberate.”***

**148.**In the present case, this Court has already found that the orders issued on 28<sup>th</sup> July 2025 were obtained through material non-disclosure and have accordingly been set aside. The subsequent orders of 31<sup>st</sup> July 2025 merely required compliance with the earlier orders of 28<sup>th</sup> July 2025 pending inter partes hearing. The effect of setting aside the initial orders is that the foundation upon which the contempt application stands has been extinguished.

**149.**It follows, therefore, that there can be no contempt of an order that has been vacated or rendered a nullity.

**150.**Consequently, the Plaintiff's application seeking to have the Defendant's Directors cited for contempt of the orders of 28<sup>th</sup> July 2025 and 31<sup>st</sup> July 2025 cannot stand. The said orders having been vacated, no enforceable directive subsists upon which contempt proceedings can be anchored.

**151.**In any event, no evidence was placed before this court to show that as at the time the impugned ex parte order was given, it is the Plaintiff which was in possession of the suit premises. The fact that the BPRT had on 16<sup>th</sup> July 2025, granted orders authorizing distress and permitting the Defendant to take possession is prima facie evidence that the

Plaintiff was not on the suit premise on the date this court gave the orders of status quo.

**152.** Indeed, on 23<sup>rd</sup> July 2025, the Plaintiff and its sister company filed an application before the Tribunal seeking review of the distress and possession orders and during that hearing, the Plaintiff's Counsel confirmed that the Defendant had taken possession on 17<sup>th</sup> July 2025 and only sought release of items removed and stored during the eviction exercise.

**153.** That being the case, the court is in agreement with the Defendant's submissions that it is misleading for the Plaintiff's subsequent averment before this Court that it remained in possession as of 28<sup>th</sup> July 2025, the date on which the ex parte orders were obtained. For those reasons, it is the finding of the court that the application for contempt is not merited.

**Whether either party has satisfied the conditions for the grant of injunctive relief;**

**154.** Both the Plaintiff and the Defendant have sought injunctive orders in their respective applications. The Plaintiff, through its application dated 24<sup>th</sup> July 2025, seeks orders restraining the Defendant from entering, demolishing, excavating, constructing upon, or otherwise interfering with its alleged possession and ownership of the suit property. Conversely, the Defendant through its applications dated 30<sup>th</sup> July 2025

and 1<sup>st</sup> August 2025, seeks to restrain the Plaintiff from interfering with its occupation and use of the same property.

**155.** The principles governing the grant of interlocutory injunctions are well settled. In **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**, the court established a threefold test, namely that:

- i. The applicant must establish a prima facie case with a probability of success;***
- ii. The applicant must demonstrate that he stands to suffer irreparable harm that cannot be adequately compensated by damages; and***
- iii. If in doubt, the court will determine the matter on a balance of convenience.***

**156.** These principles have been reaffirmed in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, where the Court of Appeal emphasized that these conditions are sequential rather than conjunctive.

**157.** On the first limb, this court has already found that as at the material time, the Defendant was the registered proprietor of the suit property, the title having been transferred to it on 29<sup>th</sup> November 2024 following a public auction by NCBA Bank of Kenya PLC.

**158.** The Plaintiff's challenge to that sale is the subject of **HCCOM No. E434 of 2024, Executive Super Rides**

**Limited & Erick Kimathi Kirima vs NCBA Bank of Kenya PLC & Another**, in which the High Court declined to issue injunctive orders on 17<sup>th</sup> October 2024. That ruling is currently on appeal in **Civil Appeal No. E900 of 2024**, which remains pending. The existence of that suit and appeal does not, however, invalidate the Defendant's title, which under **Section 26(1)** of the **Land Registration Act, 2012**, remains infeasible until lawfully revoked or nullified.

**159.** It follows, therefore, that the Plaintiff has not demonstrated a prima facie right capable of protection at this interlocutory stage. On the contrary, the Defendant has exhibited a registered title and valid Tribunal orders affirming its right to possession. The Plaintiff's allegation of continued occupation and ownership was found to have been based on untruths, and as such, the basis for its injunctive relief is fatally undermined.

**160.** On the second limb of irreparable harm, it is apparent that the Defendant, being the registered proprietor, would face interference with its proprietary rights guaranteed under **Article 40** of the **Constitution** were the Plaintiff to continue occupying or dealing with the property.

**161.** The Plaintiff contended that unless restrained, the Defendant, being its direct competitor in the automobile business, would unlawfully remove it from the suit property, thereby destroying its long-standing goodwill and business

operations. It was argued that such loss of clientele and reputation would amount to irreparable harm incapable of monetary compensation.

**162.** The Plaintiff was therefore required to demonstrate that it had acquired substantial goodwill and reputation in the trade name Executive Super Rides Limited, and that the Defendant's conduct amounted to an infringement of that goodwill by engaging in activities that were confusingly similar or calculated to mislead customers into believing that the Defendant's business or products were associated with, or originated from, the Plaintiff. (see **Softcare Kenya Company Limited vs Kot Group Limited & Another [2025] KEHC 12475 (KLR)**).

**163.** The Plaintiff did not place before this court sufficient evidence to support such a claim. In any event, the nature of the allegation would require the court to interrogate contested facts and subject witnesses to cross-examination, a process that cannot be undertaken at the interlocutory stage. This court can only grant injunctive relief on the basis of a prima facie showing, not on speculative assertions requiring evidentiary proof. In the result, the Plaintiff has not established irreparable harm warranting the grant of an injunction.

**164.** In view of the foregoing, this court finds that the Plaintiff has not satisfied the threshold for the grant of injunctive relief. Conversely, the Defendant has demonstrated proprietorship

and possession capable of protection pending final determination of the dispute.

**165.** That said, this court takes cognizance of the highly contentious nature of the dispute between the parties, and the fact that the question of ownership remains pending before the High Court in **HCCOM No. E434 of 2024** and before the **Court of Appeal in Civil Appeal No. E900 of 2024**.

**166.** In the circumstances, and having been informed that the Court of Appeal did issue interim orders pertaining the suit property, the court will not delve into the propriety or otherwise of the Defendant's possession, save to say that the Defendant took possession of the property by an order of the BPRT. That position should prevail until this suit is heard and determined, or the Court of Appeal states otherwise.

**Whether the Plaintiff should be ordered to furnish security for costs.**

**167.** The Defendant has urged this Court to direct the Plaintiff to deposit a sum of Kshs. 198,000,000, being the alleged purchase value of the suit property as at August 2024, together with a further sum of KShs. 50,000,000 as compensation for alleged loss of business said to have been occasioned by the ex parte order of injunction issued on 28<sup>th</sup> July 2025.

**168.** It is contended that such sums ought to be deposited as security pending the hearing and determination of the Plaintiff's application and the main suit. The power to award costs and to determine the conditions for such award is conferred upon this Court by **Section 27** of the **Civil Procedure Act**, which provides that:

*“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”*

**169.** Further, **Order 26 Rule 1** of the **Civil Procedure Rules** empowers the Court to order that security for the whole or any part of the costs of any Defendant or third or subsequent party be given by any other party to the proceedings.

**170.** The question of whether or not to grant security for costs is therefore one of judicial discretion, to be exercised reasonably and judiciously, and in light of the constitutional guarantee of access to justice enshrined under **Article 48** of the Constitution.

**171.** The Court must, in the exercise of its discretion, strike a delicate balance between a Defendant's legitimate expectation that its costs, if successful, will not be rendered illusory, and a Plaintiff's fundamental right to be heard without undue hindrance. Security for costs should not, therefore, be used as an instrument to stifle genuine claims.

**172.** The Supreme Court in **Westmont Holdings SDN BHD vs Central Bank of Kenya & 2 others (Petition 16 (E023) of 2021) [2023] KESC 11 (KLR)** provided the comprehensive framework to guide courts in determining applications for security for costs. The Court set out, inter alia, the following non-exhaustive factors to be considered:

- a. the prospects of success or merits of the proceedings;**
- b. the genuineness of the proceedings;**
- c. the impecuniosity of the plaintiff;**
- d. whether the plaintiff's impecuniosity was attributable to the defendant's conduct;**
- e. whether the plaintiff was effectively in the position of a defendant;**

- f. whether an order for security for costs would stifle the proceedings and/or impede access to justice;***
- g. whether the proceedings involved a matter of public importance;***
- h. whether there had been an admission or payment in court;***
- i. whether the delay by the plaintiff in commencing the proceedings had prejudiced the defendant;***
- j. the costs of the proceedings;***
- k. Whether the security sought was proportionate to the importance and complexity of the subject matter in dispute;***
- l. the timing of the application for security for costs;***
- m. whether an order for costs made against the plaintiff would be enforceable within the Republic of Kenya;***
- n. the ease and convenience, or otherwise, of enforcing a Kenyan court judgment or order in the country of a non-resident plaintiff or appellant;***
- o. if the plaintiff was a natural person, an order for security for costs could not be made merely on account of his or her impecuniosity.***

- p. security for costs was to be given in such manner, at such time and on such terms (if any) as the court may by order direct;**
- q. if the plaintiff failed to comply with an order under the instant rule, the court could order that the proceeding on the plaintiff's claim for relief in the proceedings be dismissed;**
- r. the provisions of any Act under which the court could require security for costs to be given, such as the Elections Act;**
- s. a second motion for security for costs would not succeed unless there was an unforeseen and material change in circumstances since the first order for security. An example of an unforeseen and material change in circumstances might be where a plaintiff had come into a sum of money sufficiently large that they could no longer make an impecuniosity argument.**
- t. The defendant seeking increased security bears the onus of demonstrating a significant gap between the security ordered and the actual expenses which were not foreseeable, and that, in hindsight, the original request for security for costs was based on an assessment of the complexity of the case which hindsight has established was not realistic.**

***u. The jurisdiction to increase or decrease the amount of security already ordered should not be exercised lightly or be used to second-guess the court that made the original order, whether on consent or otherwise, unless the gap between what was ordered and what later appears to be necessary is significant.***

**173.** In the present case, the Defendant argues that access to justice is not a licence for vexatious litigation, and that the Plaintiff's conduct, including what it terms demonstrable falsehoods and a high probability of failure, renders it just and equitable that security be provided to prevent the Defendant from being left with a hollow judgment. The Defendant contends that the magnitude of the claim, coupled with the ex parte injunction that has allegedly paralyzed its business operations, justifies the sums sought as security.

**174.** It is further contended that the Plaintiff's conduct throughout these proceedings warrants the imposition of punitive costs on a full indemnity basis, and that to discourage such conduct in future, this Court should consider awarding costs on an advocate-client scale. The Defendant urges that failure to do so would embolden litigants to institute proceedings recklessly, without regard to the financial prejudice suffered by those against whom they proceed.

**175.** However, as observed in *In re Estate of Alice Mumbua Mutua (Deceased) [2017] KEHC 8289 (KLR)*, the purpose of ordering security for costs is not to punish the Plaintiff, but to secure the Defendant in the event that it successfully defends the suit and finds itself unable to recover its costs.

**176.** The rule developed primarily to safeguard defendants from impecunious Plaintiffs or those resident outside the jurisdiction. The Court must therefore be cautious not to transform the principle into a barrier against bona fide litigants, lest it offends the constitutional dictate of access to justice.

**177.** In the present matter, the Defendant has not placed before the Court any evidence to suggest that the Plaintiff is impecunious, is a foreign entity without attachable assets within the jurisdiction, or that there exists any other factor that would render recovery of costs illusory. The Court notes that the Plaintiff is a registered company carrying on business within the Republic, and there is no material to show that it is incapable of satisfying an order for costs should its claim fail.

**178.** The Court further observes that the Defendant's prayer is not limited to security for costs properly so called. It includes a demand that the Plaintiff deposit the alleged purchase value

of Kshs. 198 million and an additional Kshs. 50 million for alleged loss of business.

**179.** These sums do not constitute costs within the meaning of **Order 26** of the **Civil Procedure Rules**. They amount to an attempt to obtain, through an interlocutory motion, what would effectively be a pre-judgment on the merits of the dispute. Such an order, if granted, would not only be oppressive, but would also offend the Plaintiff's constitutional right to access justice under **Article 48** of the **Constitution**.

**180.** In the premises, and applying the principles set out above, this Court finds no sufficient basis upon which to order the Plaintiff to deposit security for costs. The Defendant's application to that extent is therefore declined.

**181.** In conclusion, and upon consideration of all the applications before this Court, the following orders commend themselves as just and appropriate:

**a) The applications dated 24<sup>th</sup> July 2025, 29<sup>th</sup> July 2025, 1<sup>st</sup> August 2025, and 11<sup>th</sup> August 2025 are found to be without merit and are hereby dismissed.**

**b) The Defendant's application dated 30<sup>th</sup> July 2025 succeeds partially and is allowed in the following terms:**

- i. The orders issued by this Court on 28<sup>th</sup> July 2025 pursuant to the Plaintiff's Notice of Motion dated 24<sup>th</sup> July 2025 are hereby vacated and set aside in their entirety;**
- ii. The status quo prevailing as at the date of this ruling shall be maintained. Accordingly, the Defendant, being the registered proprietor of the suit property, and in possession, shall continue to hold, use and preserve the suit property, but shall not undertake any demolition, construction, alienation, or other activity that may alter its character or prejudice the rights of either party, pending the hearing and final determination of this suit, or the orders of the Court of Appeal.**
- iii. Each party to bear its own costs.**

**Dated, signed and delivered virtually in Nairobi tis 30<sup>th</sup> day of October, 2025.**

**O. A. Angote  
Judge**

**In the presence of;**

**Mr. Karanja for Plaintiff**

Ms Sega for Defendant  
Court Assistant: Tracy

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