



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELCLC CASE NO. E234 OF 2025**

**THAARA LIMITED**

.....**PLAINTIFF/APPLICANT**

**VERSUS**

**BREW HAUZ LOUNGE & GRILL  
LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. Before the Court is the Plaintiff's Notice of Motion dated 30<sup>th</sup> September 2025, brought **under Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 40 Rules 1 and 2 of the Civil Procedure Rules**, the inherent jurisdiction of this Court and all other enabling provisions of the law. It seeks the following orders:

a) Spent

b) The plaintiff, its servants and/or agents be granted break in orders into all those premises known as

a) Unit 302 on Level Three

b) Unit 312 on Level Three

c) Unit 320 on Level Three

d) The Terrace on Level Two and Three

all on Rosslyn Riviera Mall situate on all that piece of land situate in the County of Nairobi known as LR 21/1/179.

c) The costs of this application be borne by the defendant.

2. The application is supported by the supporting affidavit sworn on 30<sup>th</sup> September by Peter Nderitu. The supporting affidavit avers, that on 31<sup>st</sup> July

2025 the parties recorded a consent order compromising the entire suit in terms that the Defendant would pay Kshs. 20,000,000 on or before 30<sup>th</sup> August 2025 and the balance of arrears on or before 15<sup>th</sup> September 2025, and that in default the Plaintiff would be at liberty to evict and lease the premises to another tenant.

3. The affidavit further avers that the Defendant has failed to make any payments in breach of the consent, has locked and/or denied access to the premises and effectively abandoned the premises, thereby frustrating the Plaintiff's right to enforce the consent and re-let the units; the Plaintiff therefore requires break-in orders to give effect to the consent and protect its contractual and proprietary interests.
4. The application is opposed by a replying affidavit sworn on 7<sup>th</sup> October 2025 sworn by Kenneth Gitunda Kamau. The replying affidavit avers that the Defendant fell into a financial crisis caused by delayed financier disbursements and had sought a moratorium which the Plaintiff's representative (Peter Nderitu Gethi) agreed to on condition of penalty; that the Defendant did not willingly enter the consent but did so under pressure and without full opportunity to negotiate; that the sums claimed are exaggerated; that the Defendant has not abandoned the premises but has invested substantial and valuable fixtures and fittings (asserted in the affidavit to be of very high value) which require time to dismantle; and that the Defendant is willing to regularise payment and/or be given a reasonable period (the affidavit seeks 90 days) to remove fixtures so as to avoid substantial loss.
5. The Applicant filed a further affidavit sworn on 15<sup>th</sup> October by Peter Nderitu Gethi in reply to the Defendant's replying affidavit (filed in respect of the application). The further affidavit avers that the consent recorded on 31<sup>st</sup> July 2025 was negotiated between counsel, that the Defendant's advocates

proposed Kshs 20 million which the Plaintiff accepted, that the Defendant was represented when the consent was recorded and did not object at the time, that the Defendant thereafter failed to respond to the draft consent or to make any payment, and that the allegation of coercion is untrue; the further affidavit therefore invites the Court to hold the consent valid and to grant the enforcement relief sought by the Applicant.

## **Submissions**

### **a) Plaintiff's Submissions**

6. In its written submissions dated 15<sup>th</sup> October 2025, the Plaintiff reiterates that the Defendant is in admitted and total breach of the consent order recorded on 31<sup>st</sup> July 2025, having neither paid the agreed sum of Kshs. 20,000,000 by 30<sup>th</sup> August 2025 nor the balance by 15<sup>th</sup> September 2025.
7. The Plaintiff submits that the consent was mutually negotiated between counsel, voluntarily adopted before the Court, and that the Defendant has not demonstrated any of the limited grounds recognised in law for setting aside a consent judgment.
8. On this basis, the Plaintiff identifies the key issues for determination to be: whether the consent is binding; whether the Defendant has proved coercion or any vitiating factor; and whether, upon the Defendant's default and the premises being locked, the Court should grant the break-in and re-entry orders sought to enforce the consent.
9. The Plaintiff relies on the statutory framework **under Order 22 Rule 29(3) of the Civil Procedure Rules** and the Court's inherent jurisdiction, submitting that where a decree-holder is denied access to premises, the Court is empowered to authorise removal of locks or forced entry to enable execution. It cites **John Nthumbi Kamwithi v Asha Akumu Juma [2018]**

**KEHC 5161 (KLR)** to support the position that break-in orders are appropriate where the judgment-debtor has locked the premises.

10. To address the Defendant's claim of coercion, the Plaintiff refers **to Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd [1980] KLR, Board of Trustees NSSF v Michael Mwalo [2015] eKLR, and KCB & Another v Samuel Kamau Macharia [2008] KECA 334,** all affirming that a consent order is binding and can only be interfered with upon proof of fraud, duress, or circumstances analogous to vitiating a contract, none of which the Defendant has established.
11. The Plaintiff further submits that the Defendant's request for 90 days to remove fixtures amounts to an impermissible attempt to rewrite or vary the consent, contrary to the principles restated in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd [2001] eKLR** that courts do not rewrite contracts between parties. Citing also **Chase Bank (In Liquidation) v Khan & 19 Others [2023] KEHC 17559,** the Plaintiff argues that the Defendant initiated and agreed to the terms of the consent and cannot now turn around to challenge it.
12. In conclusion, the Plaintiff urges the Court to find that the Defendant has not proved coercion, has blatantly breached the consent, and has locked the premises, thereby rendering enforcement impossible without the Court's intervention. The Plaintiff therefore submits that the application is merited and prays that it be allowed as filed.

#### **b) Defendant's Submissions**

13. In opposition to the application, the Defendant submits that the consent recorded on 31<sup>st</sup> July 2025 was not voluntarily entered into, but was procured under coercion, undue influence, and circumstances that did not permit free negotiation.

14. The Defendant argues that its advocate had entered appearance within the statutory timelines on 14<sup>th</sup> July 2025, but due to malfunction of the CTS system, the Notice of Appointment did not appear on the Court portal. The Defendant contends that despite being mapped in the system and despite serving the Notice on the Plaintiff's advocates, the Court appeared inclined to enter interlocutory judgment, thereby exerting pressure on the Defendant to seek an out-of-court settlement.
15. According to the Defendant, counsel for the Plaintiff dictated the terms of the consent, rejected reasonable counter-offers such as a proposed monthly payment of Kshs 5,000,000, and refused an adjournment despite the Defendant's director being outside the country, leaving the Defendant with no meaningful opportunity to participate in crafting the consent.
16. The Defendant further submits that the sums claimed by the Plaintiff were disputed at the material time, were allegedly exaggerated, and that the Court declined to address or investigate the correct arrears before urging parties to record the consent. The Defendant states that it has invested substantial sums estimated at Kshs 75,000,000 in fixtures and fittings within the suit premises, and that no rational party would willingly consent to immediate eviction without provision for removal of such investment.
17. The Defendant contends that the consent is therefore contrary to justice, oppressive in nature, and amounts to being "boxed into a corner" under threat of imminent judgment despite available defences. It thus asserts that the consent lacks the hallmarks of a voluntary agreement and ought to be set aside to allow the matter to be heard on its merits, including reconciliation of accounts.
18. In support of these arguments, the Defendant relies on **Flora Wasike v Wamboko [1982-88] 1 KAR 625**, which sets out the limited grounds upon

which a consent order may be set aside, namely fraud, collusion, coercion, misapprehension, lack of material facts, or other factors that would vitiate a contract.

19. The Defendant submits that the circumstances under which the consent was recorded meet this threshold and therefore warrant the Court's intervention. The Defendant concludes by urging the Court to set aside the consent order, decline the break-in orders sought, and allow the dispute to proceed to a full hearing so that the true rent arrears may be ascertained and justice achieved.

### **Analysis and Determination**

#### **Issue No. 1: Whether the Consent of 31 July 2025 Is Valid, Binding and Enforceable**

20. The first issue concerns the legal status of the consent recorded on 31<sup>st</sup> July 2025 and whether the Defendant has demonstrated grounds sufficient to justify its setting aside or variation. The law on consent judgments is settled. A consent order is treated as a binding contract, and courts interfere with such agreements only in strictly limited circumstances.
21. In **Flora Wasike v Wamboko [1982-88] 1 KAR 625**, the Court of Appeal stated: "Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings... and cannot be varied or discharged unless obtained by fraud, collusion, or by an agreement contrary to the policy of the court, or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or for a reason that would enable the court to set aside an agreement."

22. This principle has been applied consistently, including in **Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd [1980] KLR**, where the Court held that a consent judgment has contractual effect and can only be set aside on grounds that would justify the setting aside of a contract.
23. Similarly, in **Board of Trustees, NSSF v Michael Mwalo [2015] eKLR**, the Court of Appeal affirmed that a court will not interfere with a consent judgment except in circumstances such as fraud, collusion, mistake or misrepresentation, or other reason that would vitiate an agreement.
24. These authorities set a high threshold, which the Defendant must discharge. The Defendant contends that the consent was procured through coercion and undue influence, alleging that the CTS filing system failed to upload its Notice of Appointment, that the Court appeared inclined to enter interlocutory judgment, and that the Plaintiff's counsel dictated the terms of the consent, leaving no room for negotiation.
25. However, the documentary evidence before Court does not support this assertion. The email correspondence of 31<sup>st</sup> July 2025 exhibited by the Plaintiff demonstrates that the parties engaged in negotiation: the Plaintiff proposed a payment of Kshs 25 million, to which the Defendant's advocate responded that his client was "comfortable with Kshs 20 million". The Plaintiff accepted that counterproposal. The parties subsequently appeared before the Court at 2.00 p.m. and recorded the consent without any protest from the Defendant's counsel.
26. The presence and participation of counsel is highly material. In **KCB & Another v Samuel Kamau Macharia & 2 Others [2008] KECA 334**, the Court of Appeal adopted the test in **Pao On v Lau Yiu Long [1980] AC 614**, where the Privy Council explained In determining whether there was

coercion of will such as to vitiate consent, the Court considers whether the person alleged to have been coerced protested at the time, whether he had an alternative course open to him such as an adequate legal remedy, whether he was independently advised, and whether after entering the agreement he took steps to repudiate it.

27. Applying this test to the facts, the Defendant did not raise any objection before the Court when the consent was read out; it had an alternative course of action namely, to request validation of the appearance or to seek more time; it was represented by counsel throughout; and it took no immediate step to challenge the consent until the Plaintiff sought to enforce it nearly two months later. This conduct is inconsistent with the presence of coercion or undue influence.
28. The Defendant's further argument that the arrears were exaggerated, or that the Court overlooked the dispute on figures, does not constitute a recognised basis for impeaching a consent. Parties often compromise disputes even in the face of contested amounts. As the Court of Appeal stated in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd [2001] eKLR**: A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.
29. In the present case, no evidence has been led that the Defendant was misled, that essential facts were withheld, or that the consent was the product of misapprehension.
30. The allegation that the Plaintiff's counsel "dictated" terms is contradicted by the Defendant's own written counterproposal of Kshs 20 million, which was incorporated word-for-word in the final consent. The claim that the Defendant's director was outside the country or that counsel desired more

time is not supported by any contemporaneous record. Importantly, the Defendant did not, after recording the consent, move the Court expeditiously to repudiate or vary it, which would have been expected if the agreement had been entered under protest.

31. Having considered the facts alongside the applicable law, and bearing in mind the high threshold for impeaching a consent judgment, I find that the Defendant has not established fraud, collusion, coercion, misrepresentation, ignorance of material facts, mistake, or any other vitiating factor known in law. The consent was negotiated by counsel, voluntarily adopted before the Court, and remained unchallenged for an extended period. In these circumstances, the Court is bound to treat it as valid and binding.
32. I therefore conclude that the consent order dated 31<sup>st</sup> July 2025 was properly entered into and remains legally enforceable.

**Issue No. 2: Whether the Plaintiff is entitled to the break-in and re-entry orders sought**

33. Having found that the consent of 31<sup>st</sup> July 2025 is valid and binding, the remaining question is whether the Plaintiff is entitled to the break-in and re-entry orders to give effect to that consent. The consent expressly provided that “in default of payment... the Plaintiff be at liberty to immediately evict the Defendant, and to lease the premises, as is, to any other tenant.”
34. It is undisputed that the Defendant made no payment whatsoever either by 30<sup>th</sup> August 2025 or 15<sup>th</sup> September 2025, thereby activating the Plaintiff’s contractual and court-sanctioned right of re-entry. The Plaintiff avers, and has exhibited photographic evidence, that the Defendant has locked the premises and denied access, frustrating execution of the consent. The

Defendant, on its part, does not deny that the doors are locked; indeed, it seeks time to dismantle and remove fixtures, which is itself an acknowledgment that the premises are not open or freely accessible.

35. The law governing enforcement of possession orders is clear. **Order 22 Rule 29(3) of the Civil Procedure Rules** provides that where possession of a building is to be delivered and the judgment-debtor does not afford free access, “the court... may... remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.”
36. The Plaintiff’s right to possession is founded not only on this procedural rule but also on the consent decree, which compromises the entire suit and grants explicit liberty to evict upon default. The jurisprudence supports the issuance of break-in orders where premises are locked in a manner that obstructs the lawful execution of a decree.
37. In the present case, the effect of denying access is to render the consent decree nugatory, to prevent the Plaintiff from re-letting the premises, and to perpetuate the very default the consent was intended to resolve. The Defendant’s argument that it should first be allowed 90 days to remove fixtures cannot override the consent order or the Plaintiff’s right to immediate possession.
38. As was stated in **National Bank of Kenya v Pipeplastic Samkolit [2001] eKLR**, the Court cannot rewrite a contract for parties; the Defendant cannot now import new terms such as a 90-day grace period that were neither negotiated nor included in the consent. Furthermore, the Defendant’s claim of significant investment in the premises, even if accepted, does not provide a legal basis to impede execution. Fixtures removable without injury to the landlord’s reversion may be dealt with

through reasonable supervised access, but they do not defeat the Plaintiff's right to possession.

39. In the circumstances, the Court is satisfied that the Plaintiff has demonstrated both a legal right and a practical necessity for break-in and re-entry orders. The Defendant is in default of the consent; the premises are locked; and access is obstructed. The law expressly empowers the Court to authorize forced entry where required to enforce possession. I therefore find that the Plaintiff is entitled to the break-in and re-entry orders sought, subject only to reasonable safeguards regarding the removal of any fixtures that may lawfully be taken by the Defendant.

### **Final Orders**

40. Having considered the Notice of Motion dated 30<sup>th</sup> September 2025, the affidavits and the written submissions, and upon finding that the consent order of 31<sup>st</sup> July 2025 is valid and binding and that the Defendant is in default, the Court makes the following orders:

- a) The Plaintiff is hereby granted break-in and re-entry orders into the premises known as Unit 302, Unit 312, Unit 320 (all on Level Three), and the Terrace on Levels Two and Three, Rosslyn Riviera Mall, LR No. 21/1/179.
- b) The Plaintiff shall be at liberty to take possession of the said premises forthwith, in accordance with the terms of the consent order recorded on 31<sup>st</sup> July 2025.
- c) The Defendant shall not obstruct or interfere with the Plaintiff's re-entry, repossession or re-letting of the premises.

d) Costs of the application shall be borne by the Defendant.

**It is so ordered.**

**DATED, SIGNED and DELIVERED** virtually at **NAIROBI** on this **4<sup>th</sup>** day of **December, 2025.**

**MOHAMMED N. KULLOW**  
**JUDGE**

**Ruling delivered in the presence of: -**

**No Appearance**..... for the Plaintiff/Applicant

**Mr. Namukoru**..... for the Defendant/Respondent

**Philomena W.**..... Court Assistant