Bia Tosha Distributors v Kenya Breweries Limited & 4 others (Petition 249 of 2016) [2026] KEHC 4798 (KLR) (Constitutional and Human Rights) (9 April 2026) (Ruling)

Neutral citation: [2026] KEHC 4798 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 249 OF 2016

B MWAMUYE, J

APRIL 9, 2026

BETWEEN

BIA TOSHA DISTRIBUTORS ..... PETITIONER

AND

KENYA BREWERIES LIMITED ..... 1ST RESPONDENT

UDV (K) LIMITED ..... 2ND RESPONDENT

EAST AFRICAN BREWERIES LIMITED ..... 3RD RESPONDENT

DIAGEO PLC ..... 4TH RESPONDENT

AND

COGNO VENTURES LIMITED ..... INTERESTED PARTY

RULING

(On the Petitioner/Applicant's Notice of Motion Application dated 05/01/2026)

Introduction

1. Before the Court is a Notice of Motion Application dated 5th January 2026 filed by the Petitioner. The Application is brought under Article 23(3)(b) and (c) of *the Constitution* of Kenya, 2010, seeking conservatory orders to restrain the 4th Respondent, Diageo PLC, from selling its shareholding in East African Breweries Limited (EABL) and its Kenyan subsidiaries pending the hearing and final determination of the main Petition.

2. The Petitioner therefore specifically seeks the following orders:

> " a. Spent
>
> b. That, pending the hearing and final determination of the Petition herein, this court be pleased to grant a conservatory injunction order restraining the 4th Respondent, whether by itself, its agents, nominees, subsidiaries or affiliates, from selling, transferring, encumbering, pledging, or in any manner disposing of its shareholding in East African Breweries Limited (including but not limited to Kenya Breweries Limited and UDV (Kenya) Limited) or any part thereof.
>
> c. That pending the hearing and final determination of the Petition herein, this Honourable Court be pleased to grant a conservatory order preserving the status quo in respect of the ownership, control and legal incidents of the 4th respondent's shareholding in East African Breweries Limited and its Kenyan subsidiaries.
>
> d. That the conservatory orders sought herein do issue for the purpose of preserving the substratum of the Petition herein, safeguarding the adjudicatory authority of this Honourable Court, and ensuring that the Petition is not rendered nugatory.
>
> e. That pending the hearing and final determination of the Petition herein, this Honourable Court be pleased to restrain the 4th Respondent from taking any steps that would have the effect of wholly divesting itself of assets within the Republic of Kenya, in a manner that would defeat or frustrate the enforcement of any relief that may be granted under Article 23 of *the Constitution*.
>
> f. That for the avoidance of doubt, the orders herein are issued in rem and shall bind the subject shares and assets irrespective of any intended or purported contractual arrangements entered into after the filing of this application.
>
> g. That in compliance with the express directions of the Supreme Court, the Petition herein be heard immediately together, and contemporaneously with all pending applications, and a composite ruling and judgment be rendered.
>
> h. That the costs of this application be provided for. "

3. The dispute between the parties has a protracted history spanning nearly a decade. The underlying Petition was filed on 14th June 2016, and it has been subsequently amended and further amended. The basis of the dispute concerns a commercial relationship between the Petitioner and the 1st and 2nd Respondents relating to the distribution of beer and spirits in designated territories within Nairobi and its environs. The Petitioner claims to have paid substantial goodwill sums totaling Kshs.38,298,000 to the 1st and 2nd Respondents for exclusive distribution rights over specified routes.

4. The litigation has traversed the entire judicial hierarchy. On 29th June 2016, the High Court (Onguto, J) issued conservatory orders preserving the Petitioner's distribution territory, which were later set aside by the Court of Appeal in 2020. The Supreme Court, in its landmark judgment delivered on 17th February 2023 in Petition No. 15 of 2020 (Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others [2023] KESC 14 (KLR)), reinstated the High Court orders of 29th June 2016 and remitted the matter for hearing by the High Court. The Supreme Court further directed the High Court to

consider the consequences of any disobedience of those orders and to determine the pending contempt Application on a priority basis.

5. Following the Supreme Court judgment, further proceedings have been marked by multiple applications for clarification and disputes over the sequencing of matters. On 9th December 2025, the Court of Appeal, by consent of the parties, issued orders remitting the matter back to the High Court for hearing of the clarification applications before any other Judge other than Hon. Mr. Justice L.N. Mugambi.

6. On 18th December 2025, the 4th Respondent publicly announced an agreement to sell its 65% shareholding in the 3rd Respondent (EABL) and its shareholding in the 2nd Respondent (UDV) to Asahi Group Holdings, Ltd, a Japanese multinational corporation, in a transaction valued at US$2.3 billion. This announcement precipitated the filing of the instant application on 5th January 2026, in which the Petitioner seeks to restrain the share sale.

The Petitioner's Case

7. The Petitioner/Applicant's Notice of Motion Application dated 5th January 2026 is supported by the Petitioner's Supporting Affidavit of Anne-Marie Burugu sworn on 5th January 2026, and a Further Affidavit dated 3rd February 2026, together with its written submissions dated 3rd February, 2026 and 23rd February, 2026.

8. The Petitioner contends that the 4th Respondent intends to dispose of its only known asset and security within Kenya through the private share sale and exit the jurisdiction with the intention of rendering the Petition nugatory. The Petitioner asserts that the substratum of the Petition will be irreversibly eroded unless the share sale is stopped by this Court.

9. The Petitioner relies heavily on the alleged 'persistent and arrogant disobedience' of court orders by the Respondents. It is submitted by the Petitioner that the Respondents have been in contempt of court for ten years, having continuously disobeyed the conservatory orders of 29th June 2016, the Court of Appeal status quo order of 11th August 2016, and the Supreme Court judgment of 17th February 2023.

10. The Petitioner urges that, flowing from the Supreme Court's pronouncements in its 2023 judgment, this Court is under a judicial estoppel to down its tools and first deal with the issue of contempt before hearing any other application. The Petitioner argues that the Respondents, being contemnors, have no audience before the Court and that the present application is therefore unopposed.

11. Regarding the substantive prayer for conservatory orders, the Petitioner submits that the impending divestiture by the 4th Respondent will irreversibly alter the factual and legal substratum of the Petition. Relying on the constitutional principles governing conservatory orders as articulated by the Supreme Court in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR, and the reasoning in Invesco Assurance Co. Ltd v MW (Minor suing through next friend and mother HW) [2016] eKLR and Martin Nyaga Wambora v Speaker of the County Assembly of Embu & 3 Others [2014] eKLR, the Petitioner contends that the primary purpose of a conservatory order is to preserve the adjudicatory authority of the Court and ensure that the final decree is not rendered nugatory.

12. The Petitioner further argues that the 4th Respondent's foreign character, combined with the fact that the share sale constitutes a divestiture of its only Kenyan assets, presents a real risk of non-enforceability. The Petitioner characterizes the 4th Respondent as a "financially stressed entity" disposing of assets to shore up a collapsing enterprise and asserts that the sale is timed to coincide with the Christmas holidays to evade scrutiny. The Petitioner also made submissions on the proposed shares-purchaser, Asahi, that are not germane to the issues pending before this Court.

13. In response to the procedural objections raised by the Respondents, the Petitioner submits that the Respondents cannot dictate to the Court how it should manage its docket. It is argued that the Court is the master of its own process and that the earlier directions by Justice Ong'udi concerning the hearing of the clarification Applications do not preclude the Court from hearing the present Application, which the Petitioner maintains is urgent and distinct.

The Respondents' Case

The 1st and 3rd Respondents' Case

14. In response, the 1st and 3rd Respondents oppose the Application through a Replying Affidavit sworn by Nadida Rowlands, the Group Legal Director, sworn on 8th January, 2026, and written submissions dated 10th February, 2026.

15. Their primary contention is that the Application is fundamentally misconceived and rests on a false premise that the Respondents are in contempt of court. They trace the procedural history to demonstrate that no valid finding of contempt exists against any Respondent. They highlight the Supreme Court's Clarification Ruling of 26th May 2023, which clarified that the issue of contempt was remitted to the High Court for determination on evidence; and the subsequent consent orders before the Court of Appeal on 3rd February 2025 and 9th December 2025, where the Petitioner conceded that the High Court Judges had erred in finding the Respondents in contempt and denying them audience.

16. The 1st and 3rd Respondents argue that the issue of contempt has been conclusively settled by those consent orders and that the Petitioner is estopped from re-litigating it.

17. On the merits of the conservatory application, while relying on the decisions in Munya v Kithinji & 2 others (Application 5 of 2014) [2014] KESC 30 (KLR) and Gachagua & 40 others v Speaker, National Assembly & 15 others and Law Society of Kenya & 7 others (Interested Parties) (Constitutional Petition E565 of 2024 & Petition E013 (Kerugoya), E014 (Kerugoya), E015 (Kerugoya), E550 (Nairobi), E570 (Nairobi) & E572 (Nairobi) of 2024 (Consolidated)) [2024] KEHC 13473 (KLR), the 1st and 3rd Respondents argue that the orders sought are legally untenable as they seek to restrain a shareholder-level transaction that has no nexus whatsoever to the subject matter of the Amended Petition, which they maintain is a commercial distributorship dispute concerning distribution routes and alleged goodwill payments. They emphasize that the substratum of the Petition has already been preserved by the existing conservatory orders of 29th June 2016. They further argue that the 1st and 3rd Respondents are Kenyan-incorporated companies with substantial assets within the jurisdiction and that any judgment of the Court can be enforced against them without recourse to the 4th Respondent's shares.

18. The 1st and 3rd Respondents also submit that the Applicant has not offered an undertaking as to damages and that the Application is an abuse of process designed to create collateral pressure rather than advance the determination of the Petition.

The 2nd Respondent's Case

19. The 2nd Respondent, through its Grounds of Opposition dated 20th January 2026 and written submissions dated 11th February 2026, submitted along the same lines as the 1st and 3rd Respondents. The 2nd Respondent places particular emphasis on the legal principle that conservatory relief must be firmly anchored in the substantive pleadings. The 2nd Respondent argues that the prayers in the

Petitioner's Application have no relation to the reliefs sought in the Amended Petition, which is solely concerned with the distribution routes.

20. Flowing from this, the 2nd Respondent further argues that the Application in essence seeks an order of attachment before judgment under the guise of a conservatory order, without meeting the stringent statutory requirements for an order of attachment before judgment.

21. The 2nd Respondent also contends that the Application is speculative, premature, and an abuse of process.

22. Reliance was placed in several authorities inter alia Samuel Okwama Odera v Agricultural Finance Corporation & 2 Others [2022] KEHC 2822 (KLR), Gatirau Peter Munya v Dickson Mwenda Kithinji & Others (supra) and Okoth v Attorney General & 4 others; Kenya Sugar Millers Association (Interested Party) [2025] eKLR in support of the above arguments.

The 4th Respondent's Case

23. The 4th Respondent, Diageo PLC, the Respondent most directly impacted by the Application, opposes the Application through a detailed Replying Affidavit sworn by Anthony David William Smith, its General Counsel, dated 8th January 2026, and written submissions dated 10th February 2026.

24. The 4th Respondent refutes the allegation that the share sale is imminent, stating that completion is subject to regulatory approvals in Kenya, Uganda, and Tanzania; with an expected transaction closure date sometime in the second half of 2026. It vehemently denies that it is in contempt of any court orders, noting that no court has ever made a finding of contempt against it.

25. The 4th Respondent further submits that the Application is fatally untethered from the pleadings. It argues that the dispute as pleaded concerns distribution routes and goodwill payments, to which it is not a party, and that the reliefs sought do not seek to regulate upstream shareholding. Echoing the positions taken by the other Respondents, the 4th Respondent relies on the principle that a party is bound by its pleadings and that interlocutory relief must flow from the substantive prayers.

26. The 4th Respondent also argues that the orders sought amount to de facto attachment before judgment, circumventing the strict statutory safeguards for the same. It provides evidence of its substantial market capitalization as a publicly listed UK company and its intention to establish a new Kenyan presence, including employing staff and maintaining bank accounts, to demonstrate that there is no risk of non-enforceability in the event, which it describes as extremely unlikely, that judgment was to be entered against it.

27. In such an eventuality, the 4th Respondent emphasizes that reciprocal cross-border enforcement pathways exist and that the Kenyan-incorporated Respondents remain within the jurisdiction with substantial assets so satisfy any adverse decree.

28. The 4th Respondent highlights the adverse public interest implications of the orders sought, arguing that they would destabilize an established supply chain supporting thousands of jobs, disrupt capital markets, and discourage foreign investment in Kenya.

29. The 4th Respondent also points out that the Applicant has not provided an undertaking as to damages, which it sees as a fatal omission given the potential for massive loss the 4th Respondent would suffer if the orders sought by the Applicant were to be granted, estimated at US$2.3 billion being the transaction value, should the transaction be restrained.

30. It relied on the decisions in Michael Osundwa Sakwa v. Chief Justice and President of the Supreme Court of Kenya & Another [2016] eKLR and Kenya Hotel Properties Limited v. Willisden Investments Limited & 4 Others [2012] eKLR to buttress its arguments.

31. The Court was thus urged to dismiss the application with costs as the same is alleged to be an abuse of court process, is frivolous, has been brought by a vexatious litigant, and it does not meet the mandatory statutory requirements for granting conservatory orders being sought.

The Interested Party's Case

32. The Interested Party, Cogno Ventures Limited, filed Grounds of Opposition dated 20th January 2026 and written submissions dated 11th February 2026, opposing the Application. It echoes the arguments of the Respondents that there is no nexus between the share sale transaction and the substratum of the Amended Petition, which is the ownership of distribution routes. It submits that the Petitioner has not demonstrated any proprietary or equitable right over the sale shares and that the conservatory orders sought are unnecessary and disproportionate.

33. The Interested Party also addresses the contempt narrative, detailing the procedural history and noting that the Petitioner has twice conceded before the Court of Appeal that the High Court Judges erred in finding the Respondents in contempt. It argues that the Petitioner's attempt to resurrect the contempt issue is an abuse of process. The Interested Party further submits that the Supreme Court did not direct that all pending Applications be heard contemporaneously and that the Ruling of Lady Justice Ong'udi of 28th April 2023, which directed that the clarification applications be heard first, remains in force and has not been appealed or set aside.

34. The Court was therefore urged to dismiss the instant Application with costs as the Petitioner has failed to meet the conditions for granting the conservatory orders being sought; which are not anchored to the Amended Petition and that the Application is an abuse of court process, frivolous and lacks merit.

Analysis and Determination

35. Having carefully considered the pleadings, affidavits, written submissions, and the extensive record of the proceedings, the Court discerns the following three core issues for determination:

    i. Whether the Respondents are in contempt of court and, consequently, disentitled to audience, thereby rendering the application unopposed.

    ii. Whether the Applicant has established a prima facie case and satisfied the other aspects of the criteria legal threshold for the grant of the conservatory orders sought.

    iii. Whether the Application is an abuse of the court process.

Whether the Respondents are in contempt of court and, consequently, disentitled to audience, thereby rendering the application unopposed.

36. The Applicant's entire foundation for its argument that the Respondents have no audience rests on an assertion of a final finding of contempt by the Supreme Court. This assertion, which is advanced with considerable force and repeated throughout the Applicant's pleadings, is demonstrably incorrect when examined against the actual judicial record. The Court must first address this fundamental mischaracterization, as it goes to the very legitimacy of the procedural posture the Applicant seeks to create.

37. The Supreme Court's judgment of 17th February 2023, while finding that there was a possible breach of the status quo orders and that contempt may have occurred, did not conclude with a final, punitive order against the Respondents. Instead, the Supreme Court made a critical distinction that lies at the heart of this dispute. The Supreme Court in its decision invoked its powers under Section 22 of the *Supreme Court Act* to remit the matter of possible contempt, mitigation, and sentencing back to the High Court.

38. Any perceived ambiguity in the Supreme Court's judgment was dispelled by the Supreme Court itself in its Clarification Ruling of 26th May 2023. In that Ruling, the Supreme Court explicitly clarified its earlier judgment. It stated that it had left it to the High Court to "establish the nature and extent of the contempt, if any, of the status quo order."

39. The Apex Court could not have been clearer: the final determination of the contempt, including the extent of the contempt, was a matter for the High Court to determine on evidence. The subsequent proceedings in the High Court and the Court of Appeal further underscore the absence of any subsisting finding of contempt that would deny the Respondents audience.

40. Two High Court Judges, Chacha Mwita,J (as he then was) and L. Mugambi, J have been found by the Courts above to have erroneously interpreted the Supreme Court judgment as having made a final finding of contempt and proceeded to deny the Respondents audience. In both instances, the Applicant, when faced with the appeals before the Court of Appeal, conceded that the Learned Judges were in error. This is a critical admission by the Applicant itself. In Civil Application No. E704 of 2024, the parties recorded a consent on 3rd February 2025 setting aside the Ruling of Justice Chacha Mwita and remitting the matter to the High Court. Again, on 9th December 2025, the parties recorded a consent in Civil Appeals Nos. E360 and E383 of 2025, setting aside the ruling of Justice Lawrence Mugambi and remitting the matter back to the High Court. In both consents, the Applicant was a party to each consent.

41. The law on the effect of a consent order is well settled. A consent order is binding on the parties and operates as an estoppel. The Court of Appeal in Hirani V Kassam (1952) 19 EACA 131 affirmed that a consent judgment cannot be varied unless it is proved that it was obtained by fraud, collusion, or mistake. In arriving in the decision, the Appellate Court had the following to say: -

> " Prima Facie, any order made in the presence and with the consent of the counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud of collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement"

42. Furthermore, consent order also operates as an estoppel against any party who seeks to assert a different position from that stipulated in the agreement of the parties. This position was affirmed Lindley L.J in Huddersfield Banking Co. Ltd. vs Henry Lister and Son Ltd (1895) 2 Ch.D where it was underscored that a Consent Order was an order of the recording and adopting court, and as long as it stood, it must be acknowledged as such and was a good estoppel as any attempt to reverse track.

43. In Flora N. Wasike vs Destino Wamboko (1988) eKLR, the court spelt out the principles necessary to debunk a Consent Order as fraud, mistake or misrepresentation. The court was opined as follows: -

> " It is now settled law that a Consent Judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside or if certain conditions remain to be fulfilled which are not carried out: see the decision of this court in J M Mwakio

> v Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983. In Purcell v F C Trigell Ltd [1970] 2 All ER 671, Winn LJ said at 676; 'It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract'."

44. By entering into these consents, the Applicant is estopped from now asserting that the Respondents are contemnors without audience. To allow the Applicant to now, in this Application, resurrect the same argument that it conceded was wrong before the Court of Appeal, would be to permit a party to approbate and reprobate. Such conduct is an abuse of the court process, as it seeks to use the same issue to gain a tactical advantage depending on the forum.

45. The legal principle regarding denial of audience to a contemnor is not a blunt instrument to be wielded against any party against whom an allegation of contempt is made. As the Court of Appeal held in Fred Matiang'i, the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018] KECA 789 (KLR), the right to a fair hearing is a fundamental right. The denial of audience is an exceptional remedy, justified only where contempt is proved, persists, and demonstrably obstructs the course of justice. A Court must consider whether the disobedience is such that it impedes the ability of the court to ascertain the truth. In the present case, there has been no hearing on the contempt application, no evidence has been tested, and no finding of contempt that warrants the draconian step of denying the Respondents a hearing has been made. The Respondents have a constitutional right to be heard under Article 50(1), which this Court must protect.

46. Therefore, this Court finds and holds that there is no extant or valid finding of contempt that disqualifies the Respondents from being heard in this Application. The Respondents have a right to be heard, and the Court will determine the Application on its merits. Consequently, the Petitioner's/Applicant's objection on this ground fails.

Whether the Applicant has established a prima facie case and satisfied the other aspects of the criteria legal threshold for the grant of the conservatory orders sought

47. The Court now turns to the substantive prayer for conservatory orders. The principles governing the grant of conservatory orders in constitutional litigation are well established. Unlike interlocutory injunctions in private law, which focus on the balance of convenience and irreparable harm, conservatory orders are public law remedies aimed at preserving the adjudicatory authority of the Court and the subject matter of the dispute.

48. The conservatory orders are sought when there is a risk to the effect that the subject of the Petition or the Petition itself might be rendered meaningless or nugatory by the actions taken in the interim period, and if such conservatory orders are not issued. See the case of David Ndii & others vs Attorney General & others [2021] eKLR, where the court held that: -

> " ..... Such orders (conservatory) are granted to preserve the substratum of the Petition and therefore, where it is contended that there is a threat of violation of *the constitution*, any stage in the chain of a constitutional process under challenge may properly be the subject of a conservatory order as long as that action is consequential to the process under challenge..."

49. In Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 Others (2011) eKLR, the Court stated as follows: -

> " The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side."

50. In Njagi Zacharia Mwaniki vs Ndiga & 3 others [2023] KEHC 9562, the court while quoting the case of Board of Management of Uhuru Secondary School vs City County Director of Education and 2 others [2015] eKLR summarized the principles of grant of conservatory orders as follows: -

> " i. The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
>
> ii. The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
>
> iii. Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory
>
> iv. Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order."

51. These principles were also emphasized by the Supreme Court in Munya v Kithinji & 2 others [2014] KESC 30 (KLR) held that conservatory orders should be granted on the inherent merit of a case, bearing in mind the public interest, constitutional values, and proportionate magnitudes. To be successful, an Applicant meet this four-pronged test and must therefore demonstrate an arguable prima facie case, that the orders sought would enhance the constitutional values and objects if granted, show that if the order is not granted the petition or its substratum will be rendered nugatory, and the public interest favours the grant of those orders.

52. The Applicant's prima facie case must be assessed against the pleadings in the Amended Petition. The Amended Petition dated 20th June 2016, which is the operative pleading for this Application, seeks declarations concerning distribution routes and goodwill. The substantive reliefs are centered on the territory referred to as the "Bia Tosha Territory." The Petition does not, in its original or amended form as at the date of this Application, seek any relief against the 4th Respondent concerning its shareholding or any relief that would be frustrated by a change in that shareholding. The 4th Respondent was joined as a party based on allegations that it is the controlling entity, but the substantive reliefs do not target its shareholding.

53. The Court of Appeal in Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] KECA 870 (KLR) reaffirmed the principle that a party is bound by its pleadings. The court thus stated: -

> " This Court in Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 others (supra) cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) Limited v Nigeria Breweries PLC SC 91/2002 where Pius Adereji, JSC expressed himself thus on the importance and place of pleadings: "... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded." The judges in that case also stated: "In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

54. The orders sought in this application, which seek to preserve the "ownership, control and legal incidents" of the 4th Respondent's shareholding and to restrain it from "divesting itself of assets," are not anchored in the substantive prayers of the Amended Petition but rather on a Further Amended Petition which is still in flux and not the basis upon which this Application must be considered. This lack of nexus is a fatal flaw.

55. This is not to say that the Amended Petition or the Further Amended Petition do not raise an arguable issue or arguable issues. This Court is limiting itself to only saying that the nexus between the Application on one hand and the foundational document does not meet the required threshold.

56. Furthermore, the substratum of the dispute has already been identified and preserved by this Court. In the Ruling of 29th June 2016, Justice Onguto specifically found that the substratum was the "Bia Tosha territory," which he described as the distribution routes for which the Petitioner had paid goodwill. He held that the purpose of the conservatory order was to preserve that territory, as "goodwill dissipates if interfered with." The Supreme Court, in its 2023 judgment, fully restored this order.

57. Additionally, the existing conservatory orders, which have been in place since 2016 and were reinstated by the Supreme Court, protect the very subject matter of the Petition. The Applicant has not demonstrated how a change in the ultimate shareholding of the 4th Respondent in the 3rd Respondent would interfere with the distribution routes on the ground in Nairobi. The 3rd Respondent (EABL) and the 1st and 2nd Respondents remain the Kenyan operating entities, and their legal existence, assets, and obligations remain unaffected by the sale of shares. The 3rd Respondent itself, in its public announcement of 17th December 2025, confirmed that it is not a party to the impugned transaction and that its operations would continue.

58. The Applicant's primary concern appears to be the enforceability of any eventual judgment. While this is a legitimate consideration, the evidence does not support the claim that the Petition will be rendered nugatory. The 1st and 3rd Respondents are Kenyan companies with substantial assets. As it was noted in Delina General Enterprises (K) Ltd v Kenol-Kobil Limited [2019] eKLR, a sale of shares does not affect a company's legal existence or its ability to meet its liabilities. The company remains the same legal entity. Furthermore, the 4th Respondent is a publicly listed company in the United Kingdom. It has submitted to the jurisdiction of this Court. In the event that a judgment is entered against it, the Applicant would have recourse to reciprocal enforcement mechanisms, such as the *Foreign Judgments (Reciprocal Enforcement) Act*, Cap 43, given that the United Kingdom is a reciprocating country, with

respect to the 4th Respondent. The 4th Respondent's undertaking to establish a local presence, while not a guarantee, further underscores its commitment to maintain a nexus with the jurisdiction.

59. The argument that the 4th Respondent is a "financially stressed entity" is not supported by any evidence. The 4th Respondent's Replying Affidavit annexes public announcements of the transaction, which describe a US$2.3 billion transaction and an "implied enterprise value" for EABL. The Applicant has not produced any evidence to contradict this or to show that the 4th Respondent is in any financial distress. The Court cannot act on speculation. The principle that a conservatory order should be granted where there is a real, imminent, and evident danger, as set out in Martin Nyaga Wambora v Speaker County Assembly of Embu & 5 others [2014] KEHC 6715 (KLR), requires the danger to be proven, not merely alleged. The danger of non-enforcement in this case is remote and unlikely, not imminent and actual.

60. The Applicant has also failed to provide an undertaking as to damages. While the requirement for an undertaking is not absolute in constitutional petitions, it is a relevant factor, especially where the orders sought have the potential to cause substantial financial loss to the Respondents and third parties. The Court of Appeal in Chatur Radio Service v Pronogram Limited [1994] eKLR held that the purpose of an undertaking is to protect a defendant from damage suffered by a wrongful injunction. The Applicant seeks to stop a US$2.3 billion transaction. The potential for loss is immense. The Applicant's failure to offer an undertaking is a further indication that the balance of convenience and proportionality does not favour the grant of the orders sought.

61. This Court is also satisfied that the grant of the orders sought by the Applicant would not advance constitutional values and objects. The orders sought as against the sale of its shares would in essence suspend the 4th Respondents right to dispose of its property on a basis unsupported by the Amended Petition itself and with other avenues for enforcement being readily available and with other Respondents being in a position to satisfy any adverse decree.

62. This Court is also not satisfied that the Amended Petition, or even the Further Amended Petition, would be rendered nugatory were the orders sought not granted. The 1st, 2nd, and 3rd Respondents should be in a position to satisfy any adverse decree obtained by the Petitioner/Applicant; and no evidence to the contrary has led by the Petitioner/Applicant.

63. This Court must also consider the public interest. The 3rd Respondent is a publicly listed company on the Nairobi Securities Exchange and the 4th Respondent wishes to dispose of its shares in the 3rd Respondent. Judicial interreference with such a sale transaction, particularly at an interlocutory stage, would likely send a negative signal to the markets as well as foreign investors; an argument made by the Respondents and the Interested Party which the Applicant has been unsuccessful in rebutting.

64. The public interest also lies in allowing legitimate commercial transactions to proceed, subject to regulatory oversight, while the underlying constitutional litigation dispute between the Petitioner and the 1st and 2nd Respondents, and by extension the 3rd Respondent, proceeds to trial and determination. To my mind, the existing conservatory orders adequately protect the Petitioner's asserted rights.

65. In light of the above, the Court finds that the Applicant has failed to establish a prima facie case with a direct nexus to the reliefs sought in the instant Application. The Applicant has also failed to demonstrate that the grant of the orders sought would enhance the constitutional values and objects, and/or that the substratum of the Petition is at risk of being rendered nugatory if the orders sought are not grated, and/or that the public interest favours their grant. On the other hand, the parties opposed have shown to the required standard that the grant of the orders sought would not

enhance constitutional values and objects, and/or the orders sought are not necessary to maintain the substratum and the adjudicative authority, and that their grant would not be in the public interest.

66. The Court also finds and hold that the existing conservatory orders issued on 29th June 2016already preserve the core of the dispute. The Application for further conservatory orders must therefore fail.

Whether the Application is an abuse of the court process

67. The Court is mindful of the principle that every litigant has the right to approach the court, but that right must be exercised in good faith and not for a collateral purpose. As it was observed in Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] KEHC 6100 (KLR), an abuse of process arises where the process of court is not resorted to fairly, properly, or honestly to the detriment of another party.

68. While the Application has not been successful, to my mind it is not one which rises to the level of abuse of court process. The Petitioner's case in either the Amended Petition or the Further Amended Petition, while not guaranteed to succeed or fail, certainly raises issues that warrant full hearing and determination. The Applicant was within its rights to move the Court, in good faith, in attempt to provide itself with as secure a post-judgment position as it could, were its case in court to succeed.

69. The Respondents' position that the Application was a flagrant abuse of the court process for being one designed not to advance the determination of the genuine dispute between the parties but to create pressure and disrupt a lawful commercial transaction unrelated to the substratum of the Petition before the Court was not proved. The litigation is, ultimately, the pursuit of all that one can possibly garner. Asking for too much, unless evidence is satisfactorily led to the contrary, cannot be said to be abuse of court process.

70. Consequently, I find and hold that while the Petitioner/Applicant's Notice of Motion Application dated 5th January 2026 was unsuccessful the same was not an abuse of the court process.

Conclusion

71. In conclusion, the Court finds and that the Petitioner's Notice of Motion Application dated 5th January 2026 lacks merit but was not an abuse of the court process. The Court further finds that the Respondents are not presently subject to a finding of contempt of court such as to be disentitled to audience. The Court also finds that the existing conservatory orders dated and issued on 29th June 2016adequately preserve the substratum of the dispute.

72. Consequently, the Court makes the following final orders:

    a. The Petitioner's Notice of Motion dated 5th January 2026 is hereby dismissed;

    b. The interim conservatory orders in force other than those issued in the Ruling dated and delivered on 29th June 2016, if any, granted earlier be and are hereby discharged;

    c. Mention on 15/04/2026 before the Presiding Judge – Milimani CHR Division for allocation to a Judge in that division and for directions towards the expedited hearing and determination of any other interlocutory applications and the Petition in compliance with the Supreme Court's directions; and

    d. No orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF APRIL 2026.

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BAHATI MWAMUYE MBS

JUDGE