

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC LAND CASE NO.E003 OF 2025

THE REGISTERED TRUSTEES OF THE

AGRICULTURAL SOCIETY OF KENYAPLAINTIFF/ APPLICANT

VERSUS

COUNTY GOVERNMENT OF KISUMU.....DEFENDANT/ RESPONDENT

R U L I N G

This ruling is in respect of the application by the plaintiff dated 8th January, 2025 expressed to be brought pursuant to the provisions of order 40 Rules 1, 2, 3 and 9 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The application seeks for orders that: -

- (a) Pending hearing and determination of the suit, the court be pleased to issue a temporary injunction restraining the Defendant/Respondent, its agents, servants or any third parties claiming on, conducting any activities/events, leasing, charging, advertising for lease and/sale, constructing or in any other manner interfering with the Applicant's peaceful possession of the parcel of land known

as L.R. 18042 (Mamboleo Showground) or any portion thereof.

(b) The Officer Commanding Station (OCS) Mamboleo Police Station do ensure compliance with these orders.

(c) The costs of the application be provided for.

The application was supported by the averments in the Supporting Affidavit sworn by the Applicant on 9th January, 2025 and the annexures thereto.

The application was opposed. Firstly, the Respondent filed an application under certificate of urgency dated 31st January, 2025 seeking that the proceedings herein be stayed and the matter be referred to arbitration in terms of the parties' Memorandum of Understanding dated 16th September, 2020 (herein also referred to as MOU). The application was heard and determined vide the ruling dated 21st February, 2025.

Thereafter the Respondent filed a Replying Affidavit sworn on 8h March, 2025 by Abala M. Wanga.

The substantive prayer in the application is for an order of interlocutory injunction. The grounds for grant of interlocutory injunctions were set out in the case of *Giella vs Cassman Brown Co. Ltd (1973) 358*, that the Applicant must establish a *prima facie* case

with a probability of success, an interlocutory injunction will not normally be granted unless the Applicant would suffer irreparable injury which would not adequately be compensated in damages and that when the court is in doubt, it will decide the application on a balance of convenience.

In the present case, the grounds upon which the order is being sought are that the Applicant is the registered owner of all that portion of land known as L.R. NO.18042 (Mamboleo Showground), the suit property. That on 24th August, 2024 at 4.00p.m. the Governor of Kisumu accompanied with County officials without any lawful justification and with wanton abandon, forcibly entered the Applicant's premises situate at Mamboleo Showground (the suit premises) and removed/vandalised and wasted various items and property belonging to the Applicant.

That on 25th August, 2024, a County inspectorate team lead by the City Manager Mr. Abala Wanga entered the same premises and tore down partition load-bearing walls and made away with 4 doors leaving the office unusable for the intended purpose. That agents from the County government again visited the suit property and removed the Applicant's logo/trademarks from the main entrance of the show ground.

That a Memorandum of Understanding entered into between the parties terminated on 28th November, 2024. That inspite of the termination of the Memorandum of Understanding, the Respondent had forcefully continued to use the suit property for its purposes.

That on 19th December, 2024, the Respondent's agents welded the Applicant's gate shut and hence restricted entry of the Applicant's staff to the premises. That the Applicant cannot access its property. That the Applicant has been denied its constitutionally guaranteed right to property and will continue to suffer irreparably should the orders sought not be granted.

The application was opposed on the grounds that the Applicant cannot state that the land is private land and that if the land was granted to the Applicant, the same was done for public good as both the National and County governments are done hefty investment for a sporting facility - the building of Jomo Kenyatta Sports Stadium for Kshs.415,880,565.

That the County Government built a wall to protect such assets for the benefit of all Kenyans. That the parcel is government land to be used for public good.

That the Respondent and the Applicant entered into a Memorandum of Understanding dated 16th September, 2020 vide which the

County government would invest in and source the funding for projects in the suit land.

That the County Government has not gone against the Memorandum of Understanding. That there is no obligation under the Memorandum of Understanding on the part of the Respondent to seek approval or authority from the Respondent when using the facilities constructed by itself and using public funds. That this would defeat the whole essence of the Memorandum of Understanding.

That the Memorandum of Understanding obligates the Applicant to provide the Respondent space to implement any of its desired projects as envisaged in the purported master plan.

That the Respondent cannot be faulted for carrying out its activities for the benefit of the public in the specified areas provided by the Applicant as had been agreed under the Memorandum of Understanding.

The Respondent denied forcible entry and destruction of property.

That the Applicant's premises are outside the stadium facility in two distinct and identifiable buildings.

That the Memorandum of understanding between the parties was still active.

That the Plaintiff/Applicant has not met the conditions of proving a *prima facie* case to warrant the reliefs sought for reasons of;

- a) failure to produce a search to ascertain ownership.
- b) failure to produce a complete grant as the one produced to this court is incomplete and could therefore not be verified by the Chief Registrar of Lands.
- c) the court has already made a finding that the MOU is still operative.
- d) there's no proof of destruction of property.

That the Plaintiff/Applicant have not met the condition of showing what irreparable harm they will suffer if an injunction is not issued. That it is undeniable that the Applicant/Plaintiff do actually have its offices and all the exhibition stands are in a distinct portion from the stadium facility with a separate access gate and the Trade Fair can therefore proceed.

That the balance of convenience tilts in favour of the respondent for the reason that the public and the residents of Kisumu whose taxes were used to construct the sporting facilities and the ongoing convention center would be denied the right to use and enjoy such facilities. The County Government of Kisumu does not have an

alternative for its surging population as the other facilities are still uncompleted and are also not designed for multi-purpose use.

Submissions

Written submissions dated 3rd June, 2025 were filed by Counsel for the applicant who relied on the cases of Giella v Cassman Brown and Co Ltd [1973] EA 358 and Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125 and submitted that the Applicant has a clear legal right over the suit property which has been infringed by the Respondent and is at risk of even further and more grievous violation if this court does not intervene.

That the Applicant possesses good title over the land as evidenced by the copy of the title that was annexed to the Affidavit of Thadeus Fita in support of the Application. The applicant relied on section 26(1) of the Land Registration Act on indefeasibility of title.

Counsel submitted further that the Respondent's position that the suit property is now public land is baseless and completely unfounded.

That the MoU did not contemplate or provide for any transfer of property rights from the Applicant to the Respondent. That article 3 of the MoU explicitly states that the objective of the MoU is for the parties to collaborate without attracting liability to either party.

Counsel submitted further that the Applicant will suffer irreparable injury if the temporary injunction sought is not granted. That this includes significant financial harm and grave reputational damage that cannot be adequately compensated by an award of damages.

That the Applicant has hosted its annual International Trade Fair (Kisumu Show) on the suit property since 1987. From 2010, it was upgraded to its current regional status attracting exhibitors and visitors from Rwanda, Burundi, Tanzania and Uganda. Only the Nairobi International Trade fair is bigger than the Kisumu Show.

That planning for this show typically begins in December and all the delays occasioned by the Respondent's belligerent conduct indescribably affects the once-in-a-year event which is the Applicant's main event in that region and contributes significantly to their annual revenue.

Relying on the case of *Chebii Kipkoech vs. Barnabas Tuitoek Bargoria & Another [2019] eKLR*, Counsel submitted that the balance of convenience tilts in favour of the Applicant. That the effect of granting the temporary injunction as sought by the Applicant would simply maintain the respect for their property rights during the pendency of the suit. That it would not fully deny the Respondent access and use of the facilities in the suit property.

It would simply require their cooperation and consultation with the Applicant as the rightful owner of the property.

Counsel urged the court to allow the application.

On behalf of the Defendant Counsel submitted vide the written filed that the application falls short of the threshold and does not meet the conditions for grant of the orders sought. Counsel relied on the Court of Appeal case of *Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125* where “prima facie case” in civil cases was defined as

“In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case”.

It was submitted further that the Applicant has not established a *prima facie* case. That it adduced an incomplete Grant which could

not be verified by the Chief Land Registrar when the Defendant requested for the same as their only proof for entitlement and ownership of the land.

Further, it was submitted that there is lack of proof of irreparable harm. Relying on the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai (2018)eKLR*, Counsel submitted that there is no evidence of any irreparable damage which the Applicant stands to suffer if the prayers are not granted.

On balance of convenience, reliance was placed on the decision in *Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR* where it was held inter alia that

“Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion.”

Counsel submitted that the balance of convenience tilts in favour of the Defendant/Respondent. That this is so because the public, whose resources (to a tune of more than Kshs 1 Billion) were pumped into developing the stadium, the basketball courts, the perimeter walls as well as the conference facilities, will be denied the opportunity of using them. That the same facility plays host to annual sporting events such as the Kenya Rugby 7s Series famously

dubbed as 'Dala 7s' and the Safaricom Chapa Dimba football. That these events provide a golden opportunity for scouting talents from the youth and also promote local tourism. That if the Plaintiff is granted the reliefs sought, the County of Kisumu will lose the hosting rights to other counties and for unforeseen future as planning for these events among others have already started owing to their previous success at the same venue.

That moreover, the schools and the community use the stadium as preparation ground for their sporting events on a daily basis - this application would in any event deny them access to these facilities as the applicant has no mandate for sporting activities. That the Applicant is a privately-owned society with agriculture as the area of trade.

Counsel urged the court to disallow the application.

Of the two parties before court, the party who exhibited documents of ownership of the suit land is the plaintiff. It exhibited photographs showing the damage done to property on the suit land which damage prompted the filing of the suit. Although the Respondent denies destroying the property, it justifies its activities on the suit land on the basis of the Memorandum of Understanding

and the claim that the suit land is public land. No evidence was availed that the suit land is public land.

As the registered owner, the plaintiff has, on a prima facie basis, demonstrated that it has proprietary rights over the subject land. The duty of the court is to accord, to whom it is due, the protection guaranteed by the Constitution and statute. Under section 24 of the Land Registration Act the registration of a person as the proprietor of land or of a lease vests in that person absolute ownership of the land or the leasehold interest described in the lease and rights and privileges thereunder. Article 40 of the Constitution guarantees the right to property and provides in sub article 3 that the state shall not deprive a person of property of any description or any interest in or right over property of any description, unless the deprivation is done through a lawful process of compulsory land acquisition.

For purposes of the application before court, this court finds that the plaintiff is entitled to protection of its right to property pending hearing of the case.

The Defendant has demonstrated its need for the space comprised in the suit land and particularly the stadium, for use for various public functions as described in the Replying Affidavit. This need has hitherto been accommodated by the arrangements made

through the Memorandum of Understanding existing between the parties. And it appears the Memorandum of Understanding had worked well for the parties until the actions and/or omissions complained of in the application and in the plaint occurred. The actions of the Respondent complained of by the Applicant include defacing and totally removing the Applicant's logo/trademark from the suit property; damaging property, causing to be published in a publication of regional circulation that the respondent owns the property; and restricting access to the property for the Applicant's employees.

The Applicant submitted that the effect of granting the temporary injunction as sought by the Applicant would simply maintain the respect for its property rights during the pendency of the hearing and determination of the suit. That it would not fully deny the Respondent access and use of the facilities in the suit property That it would simply require their cooperation and consultation with the Applicant as the rightful owner of the property. That if the temporary injunction is not granted and the suit is ultimately determined in favour of the Plaintiff/Applicant, the Applicant would have endured considerable damage in the interim.

The purpose of a temporary injunction as stated in Order 40 Rule 1 is to protect the suit property from destruction or wastage or being alienated and there preserve the substratum of the suit.

Nothing stops the parties from continuing in accordance with the terms of the MOU or an appropriate MOU or other lawful arrangement acceptable to the plaintiff as the registered owner on how to share the space comprised in the suit land for mutual benefit.

The conclusion is that the court finds that the application has merit and hereby allows it in the following terms;

- (a) unless acting in accordance with a valid Memorandum of Understanding between the parties or with the express permission of the Plaintiff, the Defendant/Respondent, its agents, servants or employees are hereby restrained by an order of temporary injunction granted hereby from claiming, conducting any activities/events on, leasing, charging, advertising for lease and/or sale, constructing on or in any other manner interfering with the Applicant's peaceful possession of the parcel of land known as L.R. 18042 (Mamboleo Showground) or any portion thereof pending hearing and determination of the suit.

(b) Costs of the application to the applicant.

Orders accordingly.

**Ruling, dated and signed at Kisumu, read virtually this 30th
day of October, 2025.**

**E. ASATI
JUDGE.**

In the presence of:

Maureen: Court Assistant.

Ligami for the Plaintiff/Applicant

Qeu for the Defendant/Respondent