



REPUBLIC OF KENYA



**KENYA LAW**  
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**Fairways Hospitality Kisumu Ltd v Lake Basin Development Authority & 2 others  
(Civil Case E028 of 2025) [2026] KEHC 1326 (KLR) (12 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 1326 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL CASE E028 OF 2025  
A MABEYA, J  
FEBRUARY 12, 2026**

**BETWEEN**

**FAIRWAYS HOSPITALITY KISUMU LTD ..... APPLICANT**

**AND**

**LAKE BASIN DEVELOPMENT AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**CHARCON PROPERTIES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**DEMIGEN AUCTIONEERS ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling is on the Motion dated 27/10/2025. The same was brought under Articles 40 & 41 of *the Constitution*, Order 40 Rules 1,2 & 4 and Order 51 Rules 1 & 3 of the Civil Procedure Rules.
2. The applicant sought to restrain the respondents from proclaiming, attaching or selling by public auction its properties as a result of the proclamation notice date 21/10/2025.
3. The application was based on the grounds set out on the face of the Motion as well as the supporting affidavit of Eunice Wambura Njoki sworn on the 27/10/2025. She deposed that despite the existence of a consent agreement dated 3/6/2025 between the applicant and the 1<sup>st</sup> respondent, the 3<sup>rd</sup> respondent acting under instructions of the 2<sup>nd</sup> respondent proceeded to attach its properties in recovery of rent arrears allegedly owed to the 1<sup>st</sup> respondent.
4. That the proclamation notice issued by the 3<sup>rd</sup> respondent was thus erroneously issued. That it was an action which is prejudicial to it and thus if the respondents are not restrained, they will proceed with the intended auction thereby expose it to irreparable damage.
5. That it commenced its tenancy on 1/8/2019 and soon thereafter the COVID 19 pandemic broke out thereby affecting its business. That it pleaded with the 1<sup>st</sup> respondent to vary the terms of the Lease but the 1<sup>st</sup> respondent refused to heed.



6. The application was opposed by a replying affidavit of Michael Okuk sworn on 15/12/2025. He deposed that the application was an attempt to sanitize an admitted breach, disguise contractual indiscipline, and weaponize interim reliefs to shield the applicant from the very obligations it voluntarily assumed.
7. That the applicant seeks to restrain lawful recovery of rent arrears amounting to Kshs. 25,303,909/= as at 21/10/2025 a debt that the applicant acknowledged in the Consent Agreement executed on the 3/6/2025. In that agreement, it unequivocally acknowledged indebtedness to the 1<sup>st</sup> respondent in the sum of Kshs. 27,431,473/-.
8. That the consent agreement provided for a clear, structured repayment mechanism with fixed instalments and timelines, which the applicant had serially breached. That Clause 4 of the Consent Agreement categorically provided that “Upon default of any instalment, the entire balance becomes immediately due and payable and the Authority may pursue any remedies available under the Lease and applicable law.”
9. That in its letters dated 29/9/2025, 23/10/2025 and 4/12/2025, respectively the applicant expressly admitted default and breach which letters are a complete contradiction of the applicant’s false narrative before Court.
10. That apart from the default in complying with the payment obligations under the Consent Agreement, the applicant has also defaulted in settling monthly rent from May, 2025 to date totaling to a sum of Kshs. 15,361,770.96, a fact it has materially failed to disclose
11. That in strict line with the Default Clause, the 1<sup>st</sup> respondent lawfully accelerated the balance and issued a Rent Demand Notice dated 16/10/2025 through its agent, the 2<sup>nd</sup> respondent and therefore the ensuing Proclamation Notice dated 21/10/2025 was a legitimate contractual remedy and not a rogue unilateral action.
12. That the applicant’s attempt to invent a supposed set-off to muddy the waters is both desperate and contractually barred as Clause 5 of the Consent Agreement expressly prohibits any “conditions, set-offs, or counterclaims” against the agreed sum.
13. That the applicant purported to settle the 3<sup>rd</sup> instalment of Kshs. 5,486,294.60 via six (6) post-dated cheques which were dishonoured by the drawee bank and returned unpaid with the endorsement “Insufficient Funds — Refer to Drawer” which actions by the applicant constitute a criminal offense under section 316A of the Penal Code.
14. The 3<sup>rd</sup> respondent filed a replying affidavit sworn on the 6/11/2025 by one George Adie Omiti. He deposed that the application was devoid of any merit and was made in bad faith as the applicant was well aware that it was in rent arrears. That therefore, the distress for rent was never erroneous. That he carried out the instructions to distress levy for rent on instructions of his principal and proclaimed vide the notice dated 24/10/2025.
15. I have considered the application, the responses and submissions filed in respect thereof.
16. The principles for grant of temporary injunctions were settled in the case of Giella –versus- Cassman Brown and Company Limited (1973) E.A 385. These are that first; an applicant must show a prima facie case with a probability of success. Secondly, that an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. And thirdly, if the court is in doubt, it will decide the application on a balance of convenience.



17. A prima facie case was defined in *Mrao Limited –versus- First American Bank of Kenya and 2 Others* (2003) KLR 125, to be a case 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 as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case
18. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Court of Appeal held: -

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion ... The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”
19. In the present case, the applicant based its case on the alleged fact that the respondents proclaimed its properties despite existence of a consent agreement dated 3/6/2025 between itself and the 1<sup>st</sup> respondent on the modalities of paying the rental arrears.
20. However, the 1<sup>st</sup> respondent produced a Consent Agreement executed on the 3/6/2025 wherein the applicant acknowledged indebtedness to the 1<sup>st</sup> respondent in the sum of Kshs. 27,431,473/-. The 1<sup>st</sup> respondent further adduced evidence how the applicant had breached the Consent Agreement.
21. The applicant did not counter, deny or challenge the averments of being in breach of the Consent Agreement. That being the case, the evidentiary burden shifted back to the applicant to discharge which it failed to. Accordingly, its averments of wrongdoing by the 1<sup>st</sup> respondent remain unproven.
22. It is not disputed that the applicant is in rental arrears to the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent is in the process of levying distress for rent. It is trite that parties are bound by their contracts. It is not part of the Court’s business to interfere in such circumstances unless one of the parties want to steal a march against the other. The Court will only interfere where one party is in breach of the terms of the contract.
23. The applicant having willingly entered into the Consent Agreement executed on the 3/6/2025, it has a duty to settle the rental arrears as agreed therein and in breach, the 1<sup>st</sup> respondent has the right to exercise its right to levy distress for rent as provided for under Clause 4 of the Consent Agreement.
24. Consequently, the applicant has failed to prove a prima facie case in its favour.
25. On the second principle of irreparable harm, in *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others* [2016] eKLR, the Court considered the Halsbury’s laws of England on what irreparable loss is and stated that: -

“First, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages.”



26. The applicant needed to demonstrate that it was likely to suffer harm that cannot be compensated on monetary sums. In *Nguruman Limited V. Jan Bonde Nielsen & 2 others* [2014] eKLR, it was stated as follows on irreparable injury or damage: -

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

27. In this case, the applicant willingly entered into the Consent Agreement on the mode of repayment of the rental arrears. It was agreed by the parties that in the event of default, ‘the entire balance becomes immediately due and payable and the Authority may pursue any remedies available under the Lease and applicable law’. There has now been default. The 1<sup>st</sup> respondent is a stable institution with sufficient capacity to compensate the applicant in the event that it suffers loss. The applicant fails also on the second limb of irreparable harm.

28. As to the balance of convenience, the same tilts in favour of allowing the 1<sup>st</sup> respondent to recoup its rental arrears before the debt becomes too much and impossible to recover.

29. Accordingly, the Court finds the application dated 27/10/2025 to be without merit and dismisses the same with costs.

It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 12<sup>TH</sup> DAY OF FEBRUARY, 2026.**

**A. MABEYA, FCI Arb**

**JUDGE**

