

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT SIAYA
ELCLC E031 OF 2025

**BENARD OGEYA MUGELE (Suing as the Chairman
and member of Siaya, Kadenge, Seje & Yimbo
Yala Swamp Community -**

SIKASEYI YALA SWAMP COMMUNITY) 1ST

PLAINTIFF/APPLICANT

**GEORGE ONDIFF (Suing as the Treasurer
and member of Siaya, Kadenge,
Seje & Yimbo Yala Swamp Community -**

SIKASEYI YALA SWAMP COMMUNITY) 2ND

PLAINTIFF/APPLICANT CHRISTINE ADHIAMBO OLUOCH

(Suing as the

**Chairman and member of Siaya, Kadenge,
Seje & Yimbo Yala Swamp Community -**

SIKASEYI YALA SWAMP COMMUNITY)3RD

PLAINTIFF/APPLICANT

-VERSUS-

LAKE AGRO LIMITED

DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. The subject of this ruling is the Notice of Motion application dated 26th August 2025. It was instituted by Benard Ogeya Mugele, George Odiff and Christine Adhiambo Oluoch - the 1st - 3rd Plaintiffs/Applicants herein as office bearers and members of the Siaya, Kadenge,

Seje & Yimbo Yala Swamp Community -SIKASEYI YALA SWAMP COMMUNITY.

2. The Plaintiffs/Applicants seek the following orders: -
 - a) SPENT.
 - b) SPENT.
 - c) SPENT.
 - d) THAT the court be pleased to grant an injunction restraining the Defendant/Respondent whether by acting by itself, agents, servants and/or other nominees from trespassing on, entering, remaining upon, wasting, staying on, erecting or constructing any structure whether permanent or temporary upon, alienating or otherwise dealing or harvesting and transporting sugarcane from or interfering with the community land known as 'Yala Swamp' farm situate at Ratuoro area within Siaya County pending the hearing and determination of this Suit.
 - e) THAT the Officer Commanding Siaya Police Station do enforce compliance of the orders above.
 - f) THAT the costs of this application be provided for.
 - g) THAT the honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.
3. The application is premised on the grounds on its face and averments in the supporting affidavit dated 26th August 2025 and sworn by Benard Ogeya Mugele the 1st Plaintiff and the Chairperson of Siaya, Kadenge, Seje & Yimbo Yala Swamp Community (SIKASEYI Yala Swamp Community). It

avered the Yala community was the owner and custodian of the Yala Swamp, within which lies a vast sugarcane plantation farm that had previously been operated by Dominion Farms Limited with the approval and participation of the community.

4. The deponent contends that sometime in or about the year 2022, the Defendant/Respondent unlawfully entered upon the said farm and commenced harvesting sugarcane and transporting the same to other regions without the consent, authority, or involvement of the surrounding community. That the members of the community had never been consulted or engaged in respect of the Defendant/Respondent's activities on the said community land.
5. The deponent maintains that the Defendant/Respondent has continued to exploit and utilize the community's resources to the exclusion and detriment of the community members, actions which are stated were undertaken in disregard of the applicable legal framework governing community land.
6. The deponent further states on advise of counsel on record for the plaintiffs that the Defendant/Respondent's use and management of the community land offends the provisions of **Section 35 of the Community Land Act**, in that the Respondent has failed to manage and utilize the land: Sustainably and productively; For the benefit of the whole community including future generations; With

transparency and accountability; and on the basis of equitable sharing of accruing benefits.

7. The deponent further depones that despite attempts by the community to resolve the matter through mediation and dialogue, the Defendant/Respondent had failed and/or refused to address the community's concerns.
8. The deponent expressed apprehension that unless restrained by orders of this Honourable Court, the Defendant/Respondent will continue to interfere with and utilize the community land to the detriment of the community members, which situation was likely to occasion a breach of peace.
9. The Court is urged to grant the orders sought in the application in the interest of justice and for purposes of safeguarding the community's interests in the suit property.

The Defendant/Respondent Response

10. The Defendant/Respondent filed a Replying Affidavit dated 19th September 2025 sworn by Jaswant Singh Rai Jao, who introduced himself as a Director of the Respondent. Narrating the history of the property it is averred as follows.
11. That in 1970 and pursuant to Gazette Notice No. 2570, 3700 hectares of land, now titled Usonga/Usonga/Block 1/4 within the Yala Swamp, was set apart by the County Council of Siaya and the County Council of Bondo; and that in 2006, via Gazette Notices

Nos. 9819, 9820, 9821 and 9822 of 2006, a further 3200 hectares of land, now titled Usonga/Usonga Block 7 and Usonga/Usonga/Block 8, was similarly set apart, as evidenced by the documents annexed and marked “JSR-1”.

12. That on advice of counsel on record for the Respondent, the legal effect of setting apart land was the extinguishment of all community rights in such land under African customary law, whereupon the land vested in the County Councils for use for the benefit of the community; and that, as a result, the subject areas within Yala Swamp so set apart became public land held in trust by the County Councils of Siaya and Bondo and, following devolution, by the County Government of Siaya.

13. The deponent further states that on 25th May 2004, the County Council of Siaya and the County Council of Bondo leased Usonga/Usonga Block 1/4 to Dominion Farms Limited (“Dominion Farm”) for a term of 25 years commencing on 1st June 2003, as shown by the lease annexed and marked “JSR-2”.

14. The deponent maintains that in 2018, Dominion Farm sold its business as a going concern to the Defendant/Respondent for good and valuable consideration; that the Defendant/Respondent holds a valid title to the land it occupies; and that it is not a trespasser.

15. It is deponed that the Defendant/Respondent did not know and has never had any dealings with the

Plaintiffs/Applicants, and observed that none of the Applicants has furnished the Court with documents illustrating any ownership rights over any part of Yala Swamp.

16. Further that issues pertaining to community interests in Yala Swamp had previously been raised in ELC Petition No. 1 of 2021 filed in the Court by Kennedy Omondi Ochieng and Charles Odhiambo Oliech on behalf of the local community, which suit was withdrawn by consent to allow the National Land Commission (NLC) to conduct a public hearing and make a determination on, inter alia, community rights, wildlife corridors, ecological matters, and the grant of title to additional lands to the Defendant/Respondent for investment purposes. The NLC conducted public hearings from 13th to 16th June 2022 and issued its determination on 17th November 2022, as evidenced by the determination annexed and marked "JSR-3".
17. It is deponed that the issue of ownership of the land by the Defendant/Respondent had recently been the subject of agitation by local politicians and directors of Dominion Farms, who mistakenly believed that the Defendant/Respondent had somehow lost its title, and that the local community had been manipulated into a path of conflict with the Defendant/Respondent. That this agitation prompted the Defendant/Respondent to institute High Court Civil Suit No. E548 of 2025, Lake Agro Limited v. Calvin Brugees and Dominion Farms Limited, seeking

urgent injunctive relief in view of public threats to mobilize the local community to forcibly take back the land, as shown by the orders annexed and marked “JSR-4”.

18. That the issues were also the subject of an ongoing mediation exercise being conducted by the National Land Commission, which had brought together the County Government of Siaya, the community occupying land within Yala Swamp, and the Defendant/Respondent, as evidenced by the invitation letter dated 2/7/2025 to the Respondent annexed and marked “JSR-5”.

19. It is reiterated that the Defendant/Respondent holds a valid title to the land it occupies and is deserving of the Court’s protection in the exercise of this fundamental constitutional right and the application and the suit should be dismissed in their entirety.

Applicants Further Affidavit

20. The applicants filed a further affidavit sworn on 3/11/2025 annexing copy of authority of representation, registration certificate , Gazette Notice No. 2570 3,700 Ha of Yala Swamp, the Court of appeal judgement in Martin Magina Okoyo referred to later in their submissions. The depositions largely reiterate that Yala Swamp is community land.

SUBMISSIONS

21. The application was canvassed by way of written submissions but were also accorded opportunity to highlight orally on 5/12/2025. The submissions are summarised as follows;-

Plaintiffs/Applicants Submissions

22.The applicants submissions are dated 3/11/2025 and address two issues 1) whether Yala Swamp land is community land and 2)whether the applicants are entitled to an order of temporary injunction.

23.Rehashing the history of the matter as highlighted in the supporting affidavit it is submitted that Dominion Farms Limited encroached upon the additional 3,200 hectares belonging to the community, prompting members of the community to institute legal proceedings. That the community successfully obtained injunctive orders against Dominion Farms Limited in the case of **Martin Magina Okoyo & another (Suing on their own behalf and on behalf of Yimbo Yala Swamp Farmers Society) v Bondo County Council & 2 others [2016] eKLR.**

24.That the present Respondent had similarly trespassed onto the 3,200 hectares and commenced harvesting sugarcane thereon, and had further taken over the entire 3,700 hectares previously operated by Dominion Farms Limited without the approval or participation of the community members.

25.It is submitted that the community members have never been consulted or engaged regarding the Respondent's

activities on the land, and that the Respondent continued to exploit the land to the exclusion and detriment of the community contrary to Section 35 of the Community Land Act. The Applicants further maintain that Yala Swamp has always remained unregistered community land, and has never been gazetted as public land under Section 26 of the Community Land Act. According to the Applicants, the land therefore remained community land held in trust by the County Government of Siaya on behalf of the community.

26.To buttress the position that Yala Swamp is community land the court is referred to Article 63 of the Constitution , Part II and V of the Community Land Act and that the setting apart done under the gazette notices referred to by the respondent did not set apart the land for public use but for use by the community. Reliance is also placed on the case of **Gitson Energy Limited Vs. Francis Chachu Ganya & 6 Others (2017)eKLR.**

27.On whether the orders of temporary injunction should issue the applicants rely on the principles set out in the case of **Giella v Cassman Brown & Co. Ltd** (1973) EA 358 namely that the applicant must demonstrate a prima facie case with a probability of success, show that irreparable harm would be suffered if the injunction is not granted and where the court is in doubt determine the matter on a balance of convenience. Reliance is also placed on **Western Seed Company Ltd Vs Absolom Ngalo (2017)eKLR** which cited **Mrao Limited v First**

American Bank of Kenya Ltd & 2 others (2003) KLR 125 and the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others (2014)eKLR.**

28.It is submitted that a prima facie has been established the applicants having demonstrated Yala Swamp (comprising Usonga/Usonga/Block ¼, 7 and 8 is community land. That no sale agreement has been displayed by the respondent who has also not denied failure to involve the community.

29.The court is urged to consider the public interest in determining whether irreparable loss will occur should the orders sought not issue. That public interest override private interests. Reliance is placed on the case of **Kenya anti-Corruption Commission Vs. Willesden Investment Limited & 6 Others (2021)eKLR.**

30.It is further urged that the present suit is a template of the case of Martin Mogina Okoyo & Ano. (Suing on their own behalf and on behalf of Yimbo Yala Swamp Farmers Society) Vs. Bondo County Council & 2 Others (2016)eKLR where the applicants successfully obtained injunctive orders against Dominion Farms Ltd and the court should grant the orders sought in the present case.

Written Submissions by the

Defendant's/Respondent's.

31. The Defendant/Respondent submissions are dated 17/11/2025. It is submitted that the relief sought by the Applicants was equitable in nature and therefore

discretionary. Reliance was placed on the decision in **Nyutu & Others v Gatheru & Others** where the Court held that the discretion to grant injunctions must be exercised judicially.

32. That in determining an interlocutory application for injunction the Court was not required to make final findings on contested facts. In this regard reliance was placed on **Airland Tours & Travel Ltd v National Industrial Credit Bank** as cited in **Mohammed Mehdi Bank v Crossroads Limited & 2 others** (2024) KEHC 16690 (KLR) commercial and tax, where the court held that at the interlocutory stage the court ought not to make conclusive determinations of fact or law based on contested affidavit evidence.

33. Highlighting the applicable principles governing the grant of interlocutory injunctions as set out in **Giella v Cassman Brown & Co. Ltd**, and the sequential nature of the said principles as held in **Mwananchi Credit Limited v Onyango & another** it is further submitted as follows;-

34. On whether the Plaintiffs had established a prima facie case, Counsel relies on the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others** where the Court of Appeal held that a prima facie case entails demonstration of a clear right that has been infringed and which requires rebuttal from the opposite party. Further reliance is placed on **Mrao Limited v First American Bank of Kenya Ltd & 2 others** (2003) eKLR where the court defined a prima

facie case as one in which the material presented discloses the existence of a right that has apparently been infringed.

35. It is submitted that the Plaintiffs have failed to establish such a case. That the Plaintiffs' claim was founded on trespass yet they had not specifically identified the parcel of land allegedly trespassed upon. The Plaintiffs merely referred to the land as "Yala Swamp farm situate at Ratuoro area within Siaya County," which description is vague and incapable of enabling the court issue enforceable orders. In support of this proposition reliance is placed on **In re Estate of David Mutisya Makumbi (Deceased)** (2002) KEHC 15477 KLR where the court held that an injunction cannot be issued at large without proper identification of the property concerned.

36. It is further submitted that the National Land Commission had already undertaken investigations and hearings relating to Yala Swamp and rendered a determination on 17th November 2022. The Commission found that the portion of land measuring approximately 6,900 hectares under consideration constitutes public land held in trust by the County Government of Siaya under Article 62(2) of the Constitution and not community land as alleged by the Plaintiffs.

37. That the said determination had never been challenged or set aside by any court of competent jurisdiction and therefore remained binding. It was further argued that the land had previously been set apart through Gazette Notice

No. 2570 of 1970 and subsequent Gazette Notices issued in 2006 which converted the land into public land and extinguished prior community interests under the repealed Trust Land Act.

38. It is urged that following planning and surveying processes the land has been subdivided into parcels known as Usonga/Usonga Block 1/4, Usonga/Usonga Block 1/7 and Usonga/Usonga Block 1/8. The Defendant lawfully holds a lease over the said parcels and therefore its occupation and use of the land is lawful.

39. Additionally, the Plaintiffs have failed to demonstrate any legal interest in the said parcels of land. Reliance is placed on **James Maina Gachie v Republic**, where the court emphasized that proceedings for trespass can only be instituted by a person who is either the lawful owner or occupier of the land in question.

40. Further reliance is placed on **Athman Mbosio Mwakulu & another v National Land Commission & 4 others**, where the Court of Appeal recognized the legal effect of setting apart trust land and held that once land is lawfully set apart the previous community rights are extinguished.

41. On the second limb of the test for injunction, Counsel submitted that the Plaintiffs have not demonstrated they will suffer irreparable harm incapable of compensation by damages if the orders sought were not granted. Reliance was placed on **Nguruman Limited v Jan Bonde Nielsen & 2 others**, where the Court of Appeal explained that irreparable harm must be actual and demonstrable and

not speculative. That the Plaintiffs have merely alleged the likelihood of breach of peace without identifying any imminent threat or injury that could not be remedied by damages. The alleged harm is therefore speculative and incapable of satisfying the threshold for injunctive relief.

42. On the balance of convenience, Counsel relies on the decision in **Margaret Njambi Kamau v John Mwatha Kamau & another**, where the court held that the balance of convenience lies in favour of the party who would suffer greater inconvenience if the injunction were either granted or refused.

43. It is submitted the Defendant is in lawful possession and occupation of the land and had already invested in agricultural activities including sugarcane farming. Granting the injunction sought would therefore occasion greater prejudice to the Defendant than any inconvenience the Plaintiffs might suffer if the application was declined. That the Plaintiffs had not demonstrated any proprietary right over the land or any violation thereof and therefore had failed to satisfy the conditions for grant of an interlocutory injunction. Reliance was placed on **Stek Cosmetics Limited v Family Bank Limited & Another**, where the court held that the existence of a prima facie case must be demonstrated through evidence. The court is urged to dismiss the application

ANALYSIS & DETERMINATION

44. I have read the affidavits sworn in support of the application and those sworn in reply. I have also given due

consideration to the submissions of the learned counsels appearing. Having keenly considered the facts of the case the main issue for determination is whether the orders sought by the Plaintiffs should issue and if the answer is in the affirmative who bears the costs of this application.

45. The application has been brought under the provisions Articles 40, 60 and 63 of the Constitution of Kenya, 2010, Sections 1A, 1B, 3A and 63 (e) of the Civil Procedures Act, Cap. 21 of the Laws of Kenya, Section 4, 5, 12, 13, 17, 27, 30, 32, 34, 35 and 42 of the Community Land Act 2016 and Order 40 Rule 1 of the Civil Procedures, 2010.

46. However, I must point out that this is substantively an application for orders of interlocutory injunction and which correlates with the final prayers for permanent injunction sought in the plaint dated 26th August 2025. I will therefore largely confine myself to the provisions on the grant of such relief. I will also demonstrate later why the provisions of the Community Land Act will not be substantively visited in the present application.

47. Order 40 Rule 1 of the Civil Procedure Rules is the legal framework for the grant of orders of injunction. It provides as follows; -

1. Where in any suit it is proved by affidavit or otherwise—

- a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit,**

**or wrongfully sold in execution of a decree;
or**

b. the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

48. The courts power to grant an order of injunction is discretionary and I'm aware that discretion must be exercised judiciously. Guidance has been given in several court cases which have been cited by the parties starting with the case of **Giella Vs Cassman Brown (Supra)** which laid out three principles which are already set elsewhere in this ruling and I will not rehash them.

49. On whether the Plaintiffs have established a prima facie case I have noted the arguments that have been raised. The main issue addressed on behalf of the applicants in this regard is whether Yala Swamp land is community land. Indeed, the core of the Applicants' case is that the Yala Swamp constitutes unregistered community land belonging to the people of Siaya, Kadenge, Seje and Yimbo (SIKASEYI) community, and that the Respondent has trespassed upon and exploited that land without the community's consent, contrary to the Community Land

Act, 2016. The Respondent, for its part, asserts that the land was lawfully set apart as public land through Gazette Notices issued in 1970 and 2006, that it holds a valid lease over the parcels it occupies, and that the National Land Commission (NLC) has already determined that the land constitutes public land and not community land.

50. The Respondent's first objection is that the Applicants have not specifically identified any parcel of land allegedly trespassed upon, having merely referred to 'Yala Swamp farm situate at Ratuoro area within Siaya County. This court is alive to the holding in **In re Estate of David Mutisya Makumbi (Deceased) (2002)KEHC 15477 KLR** that an injunction cannot issue at large over land that is not properly identified. However, the court observes that the Yala Swamp is a geographically identifiable area and that the dispute over its character — whether as community or public land is precisely the matter to be litigated.

51. I have seen the robust history of the Yala Swamp that has been laid out by the applicants as well as the respondents.

52. Further, the alleged setting apart of part of the swamp for the benefit of the community, and that the land has never been gazetted as public land under Section 26 of the Community Land Act, 2016 is a matter that is highly contested. The Respondent places great weight on the NLC determination of 17th November 2022, which, it is said to have found that the Yala Swamp land constitutes public land held in trust by the County Government of Siaya

under Article 62(2) of the Constitution. The Respondent submits that this determination has never been challenged or set aside and is therefore binding. This court notes, however, that the weight and binding character of an NLC determination raises complex constitutional and statutory questions that cannot be resolved at the interlocutory stage.

53. Why have I outlined the foregoing? It is trite the court is not, at this stage, required to make any conclusive determinations on contested facts or law: see **Airland Tours & Travel Ltd v National Industrial Credit Bank** as cited in **Mohammed Mehdi Bank v Crossroads Limited & 2 Others (2024) KEHC 16690 (KLR) (Commercial Tax)** cited by the respondents.

54. Furthermore, the legal effect of the gazette notices issued in 1970 and 2006 on pre-existing community rights is itself a matter of genuine legal controversy. The Court of Appeal in **Athman Mbosio Mwakulu & Another v National Land Commission & 4 Others(2021) KECA1044 (KLR)** recognised that the lawful setting apart of trust land extinguishes prior community rights. However, whether the relevant gazette notices in this case were procedurally regular, whether they were issued with free, prior and informed consent of the community, and whether they are consonant with the constitutional framework now governing community land under Articles 40, 60 and 63 of the Constitution of Kenya, 2010 and the

Community Land Act, 2016 — all are weighty matters for determination at a full hearing.

55. The court further notes that there is an alleged ongoing mediation exercise being conducted by the NLC, involving the County Government of Siaya, the local community, and the Respondent. The existence of this process is consistent with the view that the community's interests in the land are not yet settled.

56. All the above issues must be placed on the scales of justice at a full hearing of the case.

57. Having stated the above what then should the court do in the circumstances? Indeed each case must be decided on its own facts and merits. The court will resort to the balance of convenience where in doubt.

58. The Respondent urges this court to find that the balance favours it, on the basis that it holds a valid lease over the land and has invested substantially in sugarcane farming operations thereon. If the injunction is granted, the Respondent argues, it will be unable to harvest mature sugarcane, causing significant commercial losses. I must however quickly observe that the validity of the lease can only be determined at the full hearing.

59. It is not in dispute that the Respondents are in occupation of the property in dispute thus the reason for the present application by the applicants. The applicants plead that the respondents entered the alleged suit land in dispute in the year 2022. I have also seen the lease annexed by the respondents. The court cannot at this juncture make a

determination on whether the respondents entry is illegal and that they are trespassers thereon which will mean going into the merits of the case.

60.I have no evidence that the community is the one that has planted the sugarcane and if it is the resource that is being depleted and which cannot be compensable by way of damages. The status quo at the moment is that operations are ongoing which are of a commercial nature in terms of sugar cane farming and can be quantified from the company's books of accounts.

61.The court has noted the proposition to consider the public interest. The respondent avers that their activities are just but concentrated in the areas reserved for commercial purposes and not the land reserved for community use which can only be ascertained upon full hearing. There are also allegations that the land was surveyed as seen in the Report by NLC that has been annexed by the Respondents into portions for commercial and investment purposes.

62.I will reiterate that every case is decided based on its facts and circumstances. The court must look at the course that will bear the lesser risk of injustice. In this regard I will be guided by the case of **Jan Bolden Nielsen vs. Herman Phillipus Steyn alias Hermannus Phillipus Steyn & 2 Others (2012) eKLR** where the learned judge stated thus: -

'I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set

out in the Giella vs Cassman Brown case. The court may look at the circumstances of the case generally and the overriding objective of the law. In Suleiman vs. Amboseli Resort Ltd (2004) eKLR 589 Ojwang Ag. J (as he then was) at page 607 delivered himself thus:- ‘ ...counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in Giella vs Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:- “ A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong”....”

63. I think the lesser risk of injustice is to allow for things to remain as they are on the specific portion of land occupied by the defendant. The plaintiff has sought for damages with interest should they be found to be right upon weighing the cases on the scales of justice.

64. I have also seen the depositions indicating there could be a breach of peace. The applicants have approached the court for a lasting solution to the matter and it is my view they must therefore exercise restraint.

65. For the foregoing reasons this court declines to grant the orders sought in the Notice of Motion application dated 26th August 2025. In view of the public interest nature of the case brought by the plaintiffs I will order that each party bears their own costs of this application.

Orders accordingly.

Dated at Siaya this 16th Day of March 2026

HON. JUSTICE A. E. DENA
JUDGE
16/03/2026

**Judgment delivered virtually through Microsoft Teams
Video Conferencing Platform in the Presence of:**

Mr. Munjalu appearing alongside Mr. Ochieng for the Applicants/Plaintiffs

Ms. Odaga appearing alongside Mr. Wachira for Defendant Respondent.

Court Assistant: Ishmael Orwa

ORIGINAL