REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELCLC NO. E073 OF 2025

ISL KENYA LIMITED::APPLICANT

VERSUS

EXPORT PROCESSING ZONE::::::::::::::::::::::::::::::::::::::RESPONDENT

RULING

The application is dated 11th June 2025 and is brought under Order 40 Rule 1(a) 2(1), (2) (3), Order 51 Rule 1 of the Civil Procedure Rules 2010, Sections 1(A), (B) and 3(A) of the Civil Procedure Act Cap, 21 seeking the following orders;

1. That the court be pleased to certify this application as urgent and the same be heard exparte in the first instance.
2. That pending the hearing and determination of this application that an injunction do issue restricting the Respondent by itself, its servants, agents and or employees or whoever is acting on its behalf and or instructions from trespassing onto, alienating, advertising for lease, taking possession of, leasing, transferring, disposing of or in any manner whatsoever interfering with Plot No. 18474/224 C1 and C2 as leased out to the Applicant.
3. That pending the hearing and determination of this suit that an injunction do issue restricting the Respondent by itself, its servants, agents and or

employees or whoever is acting on its behalf and or instructions from trespassing onto, alienating, advertising for lease, offering for lease, taking possession of, leasing, transferring, disposing of or in any manner whatsoever interfering with plot No. 18474/224 C1 and C2 as leased out to the Applicant.

4. Any other or further order that this Honourable Court may deem fit and just to grant in the interest of justice and fairness.
5. That costs of this Application be provided for.

It is based on the grounds that following discussions between the parties herein regarding the lease of the subject land, a letter of offer dated 19th August 2019 was issued by the Respondent to the Applicant in respect of the lease of the property known as L.R. No. 18474/218, portions C1 and C2. The said letter was duly acknowledged, signed by the Applicant and subsequently returned on 2nd September 2019. Subsequently, profoma invoices for the payment of the standard premium being USD 23,698 (United States Dollars Twenty-Three Thousand, Six Thousand Ninety-Eight Only; Security Deposit being USD 6,129(United States Dollars Six Thousand One Hundred Twenty-Nine Only, totaling to USD 29,827(United States Dollars Twenty-Nine Thousand Eight Hundred Twenty-Seven Only); and Business Service Permit being Ksh. 20,000 (Kenya Shillings Twenty Thousand Only) were issued.

The Applicant was however not able to make payment at the said time due to challenges brought about by COVID 19, thereby necessitating it to write to the Respondent requesting for a three-month extension via their letter dated 15th April 2020, which request was declined via a repossession notice dated 7th May 2020. That the Applicant later issued a subsequent request for an extension dated 14th June 2021 which was accepted and a new letter of offer dated 30th June 2021 was issued, which letter was accepted on 29th July 2021. The parties herein entered into a lease agreement with respect to the subject property referred to as Plot No. 18474/224 C1 and C2-vide a letter of offer which was issued on 30th June 2021 and subsequently, accepted on 29th July 2021.

The Applicant through its representative made several requests to view the subject property but the requests were not heeded to by the Respondent. That following the Respondent's oral representations that the subject property was flood prone and as such was not viable for the intended project, the Applicant wrote to the Respondent requesting that the plots be swapped with Plot No. 18474/224 A and B but the Respondent declined the request on the grounds that there was no interest to be transferred, as the lease entered into had been terminated and/or revoked on 25th December 2023 due to failure to develop the subject properties within the two-year period. That this was not withstanding the fact that the Respondent had orally represented that the subject property was flood prone and as such unsuitable for the

intended project. That Applicant has since through its own investigations realized that the representations that the plots were flood prone were actually false and misleading and that the Respondent is actually in the process of re-allocating the subject property. That the Applicant has spent a considerable amount of time, money and resources to secure the lease by paying the requisite fees as per the agreement and further taken actual steps to decommission its plant in preparation for relocation to EPZ from its current location at Athi River Mombasa Road. That the Applicant has made total payment of USD. 29,827.80 being the sum of the Standard Premium and Security Deposits; and Kshs. 20,000/= being the Business Service Permit Fees.

The Applicant stands to suffer loss of business opportunity as it incurred costs and expended significant time and resources in preparing the business proposal, with the expectation of commencing operations thus the abrupt termination/disruption caused by the Respondent has resulted in a loss of anticipated income and business prospects. That the Applicant stands to suffer loss legitimate expectations as the Respondent's representations created a reasonable and lawful expectation that the Applicant would be able to engage in the business activity as planned. The failure to fulfill this has led to financial harm and reputational damage to the Applicant. That the Applicant stands to suffer a loss of resources as it has spent a considerable amount of time, money and resources to take actual steps to decommission its plant

in preparation for relocation to EPZ from its current location at Athi River Mombasa Road. That unless the application is heard and the Orders sought are granted, the Applicant will suffer irreparable harm, damage and loss of resources, loss of business opportunity and loss of legitimate expectations-as it notes that the Respondent will not only successfully re-allocate the subject property but also not refund the amounts paid thereby unjustly enriching itself at the expense of the Applicant who has greatly invested.

The Respondent submitted that they issued the Applicant with a letter of offer dated 19th August 2019 for a term of 30 years from 1st November 2019. However, he failed to make initial payment within the offer validity period and the letter of offer lapsed on 2nd September 2019. After various appeals by the Applicant the Respondent issued a new letter of offer dated 30th June 2021 for a period of 50 years commencing 1st August 2021. This letter of offer was duly accepted and signed by the Applicant through its Managing Director on the 29th July 2021. Despite notices the Applicant failed to comply with the letter of offer (lease) and subsequently it was terminated.

This court has considered the application and the submissions therein. The principles of temporary injunctions are well settled and are set out in the judicial decision of Giella vs Cassman Brown (1973) EA 358. This position has been

reiterated in numerous decisions from Kenyan courts and more particularly in the case of Nguruman Limited vs Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

> *"in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.*
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> *These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially".*

Consequently, the Plaintiff ought to, first, establish a prima facie case. In Mrao Ltd vs First American Bank of Kenya Ltd (2003) EKLR the Court of Appeal gave a determination on a prima facie case. The court stated that;

> *"... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*

In support of the application, the Applicants stated that the parties herein entered into a lease agreement with respect to the subject property referred to as Plot No. 18474/224 C1 and C2-vide a letter of offer which was issued on 30th June 2021 and subsequently, accepted on 29th July 2021.

Secondly, the Plaintiff has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;

> *"Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.*

The Applicant states that they have made total payment of USD. 29,827.80 being the sum of the Standard Premium and Security Deposits; and Kshs. 20,000/= being the Business Service Permit Fees. That they stand to suffer loss of business opportunity as it incurred costs and expended significant time and resources in preparing the business proposal, with the expectation of commencing operations

thus the abrupt termination/disruption caused by the Respondent has resulted in a loss of anticipated income and business prospects.

Thirdly, the Plaintiff has to demonstrate that the balance of convenience tilts in their favour. In the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) EKLR which defined the concept of balance of convenience as:

> *'The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.*
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> *In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".*

The decision of Amir Suleiman vs Amboseli Resort Limited (2004) eKLR where the learned judge offered further elaboration on what is meant by "*balance of convenience*" and stated;

> "*The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.*"

The Applicants state that despite making the payment and following the Respondent's oral representations that the subject property was flood prone and as such was not viable for the intended project, the Applicant requested that the plots be swapped with Plot No. 18474/224 A and B but the Respondent declined the request on the grounds that there was no interest to be transferred, as the lease entered into had been terminated and/or revoked on 25th December 2023 due to failure to develop the subject properties within the two-year period.

Bearing this in mind, I am convinced that there is a risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the current situation on the ground. I have also not had the opportunity to interrogate the annexures therein.

In Robert Mugo wa Karanja vs Ecobank (Kenya) Limited & Another (2019) eKLR where the court in deciding on an injunction application stated;

> *"circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts..."*

In view of the foregoing, I find that the application is not merited and I dismiss it. Costs to be in the cause. Parties are advised to comply with order 11 and set the matter down for hearing.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF MARCH 2026.

N.A. MATHEKA

JUDGE