



REPUBLIC OF KENYA



KENYA LAW
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**AUM Smarttech Limited v Holiday Resorts Limited (Civil Case
E003 of 2025) [2026] KEHC 4537 (KLR) (27 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 4537 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KWALE
CIVIL CASE E003 OF 2025
F ANDAYI, J
MARCH 27, 2026**

BETWEEN

AUM SMARTTECH LIMITED PLAINTIFF

AND

HOLIDAY RESORTS LIMITED DEFENDANT

RULING

1. The plaintiff herein filed suit against the defendant in a plaint dated 16th April 2025 seeking orders of permanent injunction to issue against the defendant either by itself, officers, agents, employees, assigns or any person acting for it from enforcing its notice to the plaintiff dated 4th April 2025 to stop renovation works on the defendant's premises situated at Neptune Paradise Holiday Resort and Neptune Village Holiday Resort and from restoring any tenant including Tourist le Paradise Boutique Limited, the Interested Party herein, back to the said premises and further that the plaintiff to continue with renovation works on the said premises. The plaintiff also prays for general damages.
2. At the same time, the plaintiff filed a notice of motion dated 16th April 2025 seeking a temporary injunction in the same terms as for the permanent injunction sought in the main suit.
3. When the application came up in the first instance, ex parte the court granted the order of temporary injunction sought pending hearing and determination of the application.
4. Subsequently, the Interested Party sought leave to be enjoined to the proceedings and the same was granted on 8th October 2025 after a full hearing of its application.
5. For a fuller appreciation of the issues in the matter, the case has to be considered with all the depositions by the parties in mind. The applicant supported its application with an affidavit sworn on 16th April 2025 by Bharat Kerai a director of the applicant. The respondent responded to the application through an affidavit sworn on 5th November 2025 by Alphaeus Dok, the Group Financial Controller of the



defendant/respondent while the IP responded to the application through a replying affidavit sworn on 31st October 2025 by Murtaza Abidhusein Haiderali, a director of the IP.

6. By way of background to the suit herein as gathered from the depositions by the parties, the IP is a tenant of the defendant. They are engaged in a dispute before the Environment and Land Court in Mombasa ELC Appeal No. E040 of 2024, Tourist Le Paradise Boutique Limited v. Holiday Resorts Limited. That appeal arose out of a case filed by the IP against the defendant in Business Premises Rent Tribunal Case No. BPRT/E120/2024 Tourist Le Paradise Boutique Limited v. Holiday Resorts Limited where the Tribunal issued an order dated 31st October 2024 that the tenant (the IP herein) to immediately give vacant possession to the landlord (the defendant herein) with respect to Neptune Village Resort and Neptune Paradise Beach Resort failure to which the landlord shall be at liberty to break in and take back vacant possession of the suit property with the assistance of the OCS Ukunda police station.
7. In the meantime, the defendant herein had on 15th January 2024 entered into a contract with the plaintiff for the plaintiff to undertake renovation works on the defendant's hotel premises Neptune Paradise Holiday Resort and Neptune Village Holiday resort where the IP was a tenant in two shops as stated above.
8. According to the plaintiff the defendant undertook to secure vacant possession of the shops occupied by the tenant/IP to enable the plaintiff to undertake renovation works thereon as per the contract. Therefore, the plaintiff commenced works on the portions of the hotel premises that were not occupied by any tenant.
9. According to the defendant, following the BPRT's order, the IP vacated its rented shops on 8th November 2024 and handed the shops to the defendant. The defendant therefore handed vacant possession of the two shops to the plaintiff who continued with the renovation works including the space previously occupied by the IP.
10. The IP appealed against the order of the BPRT and on 20th December 2024 obtained an order of stay of the BPRT's orders. The defendant's attempts to have that order reviewed were not successful as its application was dismissed on 3rd April 2025.
11. On 4th April 2025 the defendant wrote to the plaintiff to stop the renovation works on account of the court order obtained by the IP against it. The plaintiff thus filed the present suit and application dated 16th April 2025 to challenge that directive by the defendant on account of breach of contract.
12. The plaintiff deposes in its supporting affidavit that on 8th November 2024 the defendant informed it that it had secured vacant possession of the two shops occupied by the IP. This was shortly after the IP's reference at the BPRT had been dismissed on 31st October 2024. The plaintiff deposes further that it immediately moved into the premises, demolished some portions thereof and commenced renovation works as appropriate. It was while the renovation works were ongoing that the IP secured a stay order from the ELC on appeal against the BPRT order and the defendant wrote to it to stop further works.
13. To support its application, the plaintiff has annexed to its supporting affidavit various documents namely asset purchase orders, invoices and payment remittances as well as photographs of the demolitions done at the premises.
14. The plaintiff's position is that the defendant's action of stopping the renovation works is in breach of the contract and is likely to subject the plaintiff to immense loss and damages arising from contracts it has entered into with third parties such as suppliers of materials and workers. Further that it is impossible to restore the premises to their former state due to extensive works that have been



- undertaken thereon. For that reason, the defendant's instructions for the plaintiff to stop the works in that regard are impossible to execute, a fact that the defendant is well aware of. The plaintiff deposes that it will request the court to undertake a site visit to verify these facts.
15. In its response to the application through the affidavit of Alpheus Odok sworn on 5th November 2025, the defendant/respondent largely agrees with the plaintiff on the contractual obligations of the plaintiff to the defendant and the likely effect of the stoppage of the renovation works. The defendant deposes that after the BPRT decision, the IP vacated the shops it was in occupation of on 8th November 2024 whereupon the defendant handed them over to the plaintiff to carry out the renovation works. That the plaintiff demolished part of the premises and commenced the renovation works. The defendant was however forced to issue the plaintiff with the notice of stoppage of the works after the plaintiff obtained the order of stay from the ELC and the defendant's subsequent efforts to have the orders set aside were unsuccessful. The defendant had no other option but to issue the notice even as it was aware that it was impossible for the shops to be restored to their former state and the plaintiff's obligations to third parties pursuant to the contract it had with the defendant.
 16. The IP responded to the application through the affidavit of Murtaza Abidhusein Haiderali sworn on 31st October 2025. He deposes that the IP is being prejudiced by the orders of this court issued on 17th April 2025 in the present application as the orders obstruct it from enforcing the orders issued by the ELC.
 17. The IP deposes further that since it is not party to the dispute between the plaintiff and the defendant, any orders issued by this court should not extend to the IP and should not obstruct it from enforcing or interfere with the implementation and execution of the orders issued by the ELC.
 18. In its application to be enjoined to the proceedings dated 30th April 2025, the IP had sought orders that this court sets aside or varies the orders issued on the 17th of April 2025 to the extent that the same should not include or affect Tourist Le paradise Boutique Limited, the IP, and that the same should not interfere with the execution, compliance and enforcement of orders issued on the 20th of December 2024 in Mombasa ELC Appeal No. E040 OF 2024 Tourist Le Paradise Boutique Limited v. Holiday Resorts Limited. While considering that application, this court found that the only relevant prayer to consider at that stage would be the one for enjoining the IP to the suit and left out the prayer above. That prayer has to be considered as a response to the plaintiff's application herein.
 19. I am inclined to believe that if it was the defendant's wish, it would not be opposed to the application by the respondent herein. It is apparent that it is the IP that has caused this application to be made by the plaintiff. Otherwise the plaintiff and the defendant would have had no dispute at all for the renovations works to be carried out to completion. It is therefore important to determine the place of the IP in an application such as the present one.
 20. The parameters of participation of an IP in the proceedings to which it is joined were explained by the Supreme Court in the case of *Methodist Church in Kenya v Fugicha & 3 others* [2019] KESC 59 (KLR) thus:

“We did remark, in *Francis Karioko Muruatetu & another v Republic & 5 others*, Sup Ct Pet 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):

“Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected,



but the primary impact is on the parties that first moved the court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the court will always remain the issues as presented by the principal parties, or as framed by the court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the court. That stake cannot take the form of an altogether a new issue to be introduced before the court” [emphasis supplied].

In like terms we thus observed in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*, Civil Appeal No 290 of 2012 (paragraph 24):

“A suit in court is a ‘solemn’ process, ‘owned’ solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.”

21. From the principles laid down by the Supreme Court in the cited case, it is apparent that the interested party’s role is that, its participation in the suit and therefore the application herein should assist the court in effectively and efficiently determining the issues raised in the application. Its joining the proceedings herein does not mean that it will take over and run away with the application. The issues before court will remain only as framed from the controversy between the principal parties, the plaintiff and the defendant. Therefore, the IP’s prayer in the application dated 30th April 2025 cannot be granted in the present suit.
22. The application was disposed of on the written submissions of the parties. The plaintiff/applicant filed their submissions dated 2nd December 2025, the defendant/respondent’s submissions are dated 15th December 2025 while those of the IP are dated 8th December 2025. The submissions are considered in the analysis that follows.
23. I have carefully considered the applicants’ application as well as the responses thereto by the respondent and the IP. The issue for determination is whether or not the applicant has satisfied the conditions for the grant of an order of temporary injunction.
24. The conditions to be satisfied by an applicant before the court can grant a temporary injunction under Order 40 Rules 1 and 2 of the Civil Procedure Rules provides for injunction to restrain breach of contract or other injury as follows:
 1. In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.



2. The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.
25. These provisions are expounded in the words of Spry V.P in the celebrated case of *Giella v Cassman Brown Ltd* (1973) EA 358 which is cited by learned counsels for the parties are as follows: - “The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, 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. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”
26. Further exposition on the test for granting of an interlocutory injunction is as espoused in the English case of *American Cyanamid Co. v Ethicon Limited* (1975) 1 All ER 504 where the House of Lords set out the following guidelines namely:
 - a. Whether there was a sufficiently serious (substantial) matter to be tried.
 - b. Whether damages were an adequate remedy for the claimant if an injunction was not granted.
 - c. If damages would not be an adequate remedy, whether the claimant would be able to give an undertaking in damages to the defendant.
 - d. If it was considered that there was any difficulty regarding the availability of damages on either side, the court should consider the balance of convenience between the parties.
 - e. If these factors were evenly balanced, the court should consider maintaining the status quo.
27. Citing the case of *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86, the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] KECA 606 (KLR) said that these three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.
28. The first condition is whether the applicant has made out a prima facie case with a probability of success. In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KECA 175 (KLR) a prima facie case was described as follows:

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is 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.”
29. Learned counsel for the applicant submits that the applicant has made out a case to warrant the issue of a temporary injunction pending the hearing and determination of the main suit for the reason that certain facts are not disputed. These are that the plaintiff and the defendant are in a contractual relationship for the renovations works of the defendant’s hotel premises, that the plaintiff commenced the works as agreed and that the defendant attempted to terminate the contract by serving the plaintiff with notice to stop the renovation works and to restore the premises to their former state. It is therefore the plaintiff’s contention that stoppage of the works as per the notice issued by the defendant to the plaintiff will be in breach of the contract.



30. The plaintiff submits further that the orders granted by the ELC did not provide that the defendant do restore the Interested Party to the suit premises and to grant the Interested Party access thereto. The plaintiff submits further that the ELC order, as exhibited in this court by the Interested Party, does not conflict with the order of this court as it only dealt with deposit of six months' rent in court which in any event the Interested Party has not adduced evidence to demonstrate that indeed the rent was deposited.
31. However, I think that is a selective reading of the order because the ELC order starts with indicating that, "the Notice of Motion application dated 8th November 2024 be and is hereby allowed subject to the fulfilment of the below pre-conditions." What is not included in this order are the prayers made by the IP in its notice of motion dated 8th November 2024 which the ELC granted subject to the conditions now being cited by the plaintiff in its submissions.
32. The plaintiff submits further that the Interested Party having deposed in its replying affidavit that the dispute in this case does not concern or involve it, then it has no business participating in this case or even opposing the plaintiff's application.
33. The defendant on its part concedes in its submissions that the plaintiff has made out a prima facie case.
34. It is not disputed the plaintiff and the defendant are in a contract for the renovation of the defendant's hotels by the plaintiff. It is the defendant's case that it is compelled by a court order in favour of the IP to stop the performance of the contract by the plaintiff. The defendant and the plaintiff agree that the court order came after the plaintiff had embarked on the renovation works and demolished part of the IP's shops following the BPRT's order. They both concede that it is impossible to restore the premises to the state in which they were before the ELC order.
35. The IP has not denied this fact. Its position is simple, that it is not a party to the contract between the plaintiff and the defendant. For it there is a court order and the defendant has to obey it. Part of the order requires the defendant and therefore the plaintiff to restore the shops in which the IP is a tenant to the state in which they were before vacant possession was handed to the plaintiff for renovation. The plaintiff says this is impossible because demolition has been done. The IP has not contested this fact. It means that the substratum of the order of the ELC had changed by the time the IP obtained the order of stay. Unfortunately, none of the parties made available to this court the full ruling of the ELC in the application for stay pending appeal for this court's appreciation of its full tenure and purport.
36. I am aware that at this stage, the court is not required to make any definitive findings of fact or law on the assertions made by the parties. In the case of *Nguruman Limited v Jan Bonde Nielsen* (supra) it is further expounded that in determining whether a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely, except to see that the applicant has a right which has been or is threatened with violation.
37. On the facts established above, this court finds and holds that the applicant has established a prima facie case with probability of success and therefore has satisfied the first condition for grant of an interlocutory injunction.
38. The second condition to be satisfied for grant of a temporary injunction is whether the plaintiff/applicant has demonstrated that it stands to suffer irreparable injury which would not be adequately compensated by an award of damages.



39. Irreparable injury has been defined in equity as, “the type of harm which no monetary compensation can cure or put conditions back the way they were”. In *Alternative Media Limited V Safaricom Limited* [2004] KEHC 338 (KLR), the High Court held as follows:

“The second principle established by the *Giella* case for the grant of an interlocutory injunction is that the Plaintiff will suffer irreparable harm which would not be compensated in damages.

Considering this very point in the case of *Mureithi vs City Council of Nairobi* (1979) LLR 12 Madan JA (as he then was) cited with approval the speech of Lord Diplock in the case of *American Cynamid Co. vs Ethicon* (1975) 1 ALL E.R. 504 at page 506 where he said:-

the object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial... if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the Plaintiff's claim appeared to be at that stage.”

40. The subject matter of the suit herein is the contract for renovation works between the plaintiff and the defendant. It is the plaintiff's case that by stopping the execution of the works, the defendant is acting in violation of the contract.
41. The plaintiff deposes that it stands to lose irreparably as it has already invested substantial sums of money in the renovation works and it has engaged third parties for supply of materials and execution of the works. Further, it is unable to restore the shops to the IP as indicated in the letter of stoppage by the defendant because it has demolished parts of those spaces.
42. The defendant on its part agrees that it is aware that what the plaintiff is stating is the position. However, that the plaintiff has not demonstrated what irreparable injury it is likely to suffer that cannot be compensated by an award of damages. I find that position taken by the defendant to be contradictory to its stance in the matter that it agrees with the plaintiff that it is impossible to restore the IP to the shops as demolition has already taken place. Further, even as it submits so, it has not indicated who, between it and the plaintiff or even the IP should be responsible for the cost of restoration of the shops to their former state.
43. From the foregoing, it appears apparent that it would be impossible for the plaintiff on its part to restore the shops to their previous state without incurring extra costs and inconvenience. The question to ask is, who at this point bears the cost of restoring the shops? It is apparent, therefore, that asking the plaintiff to restore the shops to the state in which they were before the renovations on them started is not something that damages can adequately compensate. It is equivalent to asking the plaintiff to do the impossible. I therefore find that the irreparable injury done to the plaintiff if the temporary injunction is not granted will not be adequately compensated by damages, as none of the parties is ready to bear any such damages.
44. The final condition to determine is in whose favour the balance of convenience tilts. A temporary injunction serves the purpose of preserving and protecting the subject property in dispute as was held



in the case of Exclusive Estates Ltd v Kenya Posts and Telecommunications Corporation and another, Civil Application No. Nairobi 62 of 2004 [2004]LLR 5917 (CAK), where the court held that:

“ A temporary injunction is issued in a suit to preserve the property in dispute in the suit of the rights of parties under determination in a suit pending the disposal of the suit, to preserve the subject matter”

45. In the present case, weighing all the factors, I find that the balance of convenience tilts in favour of the plaintiff/applicant, who is an innocent party caught in the dispute between the IP and the defendant/respondent as tenant and landlord, respectively, yet it has to be loaded with extra expenses that it is not party to at all. I find that the plaintiff should be left to fulfill its contractual obligations to the defendant to the extent that it does not cause the defendant to be in disobedience of the ELC order.
46. Consequently, I find that the applicant has made out a case for the grant of an interlocutory injunction. The same being a discretionary remedy, it will be granted in the following terms:
- a. An order of temporary injunction is issued against the defendant either by itself, its officers, agents, employees, assigns or any person acting for it from enforcing its notice to the plaintiff dated 4th April 2025 to stop renovation works on the defendant’s premises situated at Neptune Paradise Holiday Resort and Neptune Village Holiday Resort pending the hearing and determination of the suit herein subject to order (b) below.
 - b. The status quo obtaining as of todate with respect to the tenant known as Tourist le Paradise Boutique Limited, the Interested Party herein, shall be maintained pending the hearing and determination of the suit herein or determination of Mombasa ELC Appeal No. E040 of 2024, Tourist Le Paradise Boutique Limited v. Holiday Resorts Limited, whichever is the earlier.
 - c. The parties are encouraged to engage in alternative dispute resolution mechanisms out of court to resolve the pending cases, seeing that these disputes involve loss of business to all the parties, the cost of which they may not be able to recover in the long run.
 - d. Costs shall be in the cause.
47. Orders accordingly.
48. Mention 29th April 2026 for compliance on the main suit.

WRITTEN, DATED, SIGNED AND DELIVERED ON THE VIRTUAL PLATFORM, MICROSOFT TEAMS, THIS 27TH DAY OF MARCH 2026.

ANDAYI W. F.

JUDGE

In the presence of:

... for the Plaintiff/Applicant.

... for the Defendant/Respondent.

... for the Interested Party Ummu: Court assistant.

SIGNED BY/FOR: HON. JUSTICE ANDAYI W.F.

HON. JUSTICE ANDAYI W.F.

