

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
E&L CASE NO.046 OF 2025

MOSES M.O. ODIYO.....
PLAINTIFF

VERSUS

MAURICE WERE OWITI.....
DEFENDANT

RULING

APPLICANT'S CASE

1 The application giving rise to this ruling is dated 21st November 2025. The same was filed by the Plaintiff/Applicant under certificate of urgency. The Applicant sought for the following orders; -

1) SPENT

2) That pending the hearing and determination of this application, this honourable court be pleased to issue a temporary injunction restraining the defendant, his agents, servants, or any person acting through him from leasing the property LR SOUTH SAKWA/BARKOWINO/6097 to any party or interfering with the Applicant's possession during the pendency of the lease.

3) That pending the hearing and determination of this suit, this honourable court be pleased to issue a

temporary injunction restraining the defendant, his agents, servants, or any person acting through him from leasing the property LR SOUTH SAKWA/BARKOWINO/6097 to any party or interfering with the Applicant's possession during the pendency of the lease.

4) That the order be enforced by the OCS Bondo Police Station

5) That costs of this application be in the cause.

- 2 The application is supported by grounds listed on its face and the supporting affidavit sworn by the applicant Moses Odiyo who avers that he had been approached by a friend one Adan Abbey who informed him that jumbo Filing station a petrol station in Bondo town was being leased.
- 3 That he travelled to Bondo with the said Adan who introduced him to Mr Mohammed Sheikh Hussein who was leasing the petrol station. That he was given a tour of the premises which stands on the suit property herein.
- 4 That the property included several developments which Mr Hussein informed him that he had developed while establishing the petrol station. The same included three underground fuel tanks, an abolition block, an administrative block for the offices, a generator and two fuel pumps. That the owner informed him that he was keen on disposing off the establishment as business had gone down after the post-election violence since some of the pumps had been vandalised.

- 5 The deponent states that he was informed that the owner of the suit property upon which the petrol station stood was the defendant herein. That Mr Hussein arranged for a meeting between the owner of the property and the deponent herein. At that time the deponent stated that he had already secured a loan facility from Letshego Limited to the tune of Kshs 4,000,000/- [read four million only] and that he offered his matrimonial home as security for the same.
- 6 It is averred that the Applicant and Respondent herein met on 8th December 2017. Consequently, the lease between Mr Mohammed Hussein and the defendant was terminated and a new lease between the litigants herein was entered into. That they used one advocate for the transactions. The deponent states that he paid the respondent three months rent and one month's deposit.
- 7 The deponent states that it was agreed he would get all the requisite permits to run the business. That thereafter he paid a total of Kshs 1 million to Mr Hussein for all the developments made on the suit property. The agreed price for all the items and developments was Kshs 1,600,000/- [read one million six hundred thousand.
- 8 The deponent states that he purchased 20,000 litres of fuel for the establishment and awaited the registration of the lease. That during this period, the respondent continued to collect rent in the small business establishments within the suit property.

- 9 The Applicant states that it was agreed that the lease would be registered by the joint advocate. However, after several months, the respondent had not released the title deed to the suit property to the advocate to enable the registration of the lease. That several demand letters were done to the respondent eliciting no response.
- 10 According to the applicant, he made efforts to meet the respondent in Nakuru, that the respondent informed him that he was hesitant in registering the lease as the same would lead to him losing his property. That the previous lessee had not registered the lease and there had been no problem between them.
- 11 The applicant avers that he was informed by the respondent that he was expected to pay for the lease even if he was not operating the business.
- 12 The applicant states that to his utter shock and dismay, he saw renovation on the suit property and learnt that the station was about to be commissioned. That this was sometime on 17th November 2025 which necessitated the instant suit and application. That he is incurring losses of almost Kshs. 42 million, that before operation of the business he was losing Kshs 15,000/- daily, that the loan is also not being serviced and there is the danger of being auctioned. He states that the lease is set to lapse in the year 2033 and to date the same is yet to be registered.

RESPONDENT'S CASE

- 13 The application was opposed by a replying affidavit sworn by the Defendant MAURICE WERE OWITI who averred as follows;
- 14 THAT he is the registered owner of all that property known as LR. SOUTH SAKWA/BARKOWINO/6097 the suit property herein. Mr. Mohamed Sheikh Hussein was the previous tenant operating a petrol station on the suit property.
- 15 The Respondent states that he was called by his advocate Odongo Awino who informed him that Mr. Mohamed Sheikh Hussein was in his office and he intended to transfer the lease to a third party who was not known to the deponent at the time. That he called Mohamed Sheikh Hussein to confirm the allegations and he insisted that the deponent goes to the office to discuss further, he obliged to his request and went to advocate Odongo Awino office where he met Mr Moses M.O Odiyo the Plaintiff/Applicant herein for the very first time.
- 16 That they introduced to him the said idea of transferring lease to Mr. Moses M.O Odiyo the Plaintiff/Applicant herein as the lessee Mr. Mohamed Sheikh Hussein was relocating. On discussions the advocate advised that the earlier lease be terminated and a new lease with Mr Odiyo the plaintiff be procured. A lease agreement was drafted and signed, and the Plaintiff paid three (3) months' rent and a one (1) month deposit as per the agreement, totalling Kshs. 120,000/-. That there were no structures on the site and

Mr. Sheikh handed over everything to the Plaintiff as it was.

- 17 The Respondent states that the Plaintiff was given three months of unpaid rent to carry out renovations, that three months later the deponent visited the plot and was met with new structures (four in number) and on asking the new occupants he was informed that they were given by the Plaintiff's brother Mr Charles Omolo and he was receiving rent on behalf of the Plaintiff.
- 18 That the new occupants were strangers to the deponent at the time and introduced themselves as Nancy Otieno, Fredrick Odhiambo, Charles Omolo and Mildred Orure. That he went to meet the plaintiff's mother and explained the predicament that the plaintiff had failed to pay rent and had breached the lease agreement and on being called he was a no show.
- 19 It is deponed that the Plaintiff has approached this Honourable Court with unclean hands and has failed to disclose material facts which led to the termination of the said lease. That the Plaintiff was solely responsible for failing to operationalize the petrol station business and, more critically, failed to pay rent as agreed upon in the lease agreement, occasioning significant arrears and not any action or inaction on the respondent's part.
- 20 The Respondent states that on 2nd June 2019 the applicant had been informed of rent arrears amounting to Kshs. 300,000/= The Plaintiff failed to respond to this

communication. That on the 7th February, 2020 following the Plaintiff's continued failure to settle the arrears or respond to the initial demand a follow-up letter dated 7th February, 2020 was duly dispatched to Plaintiff, notifying him of the termination of the lease agreement, demanding vacant possession, and reiterating the demand for Kshs. 300,000/= in arrears. This letter also went unresponded to by the Plaintiff.

- 21 That on 25th November 2022 and 1st December 2022 follow up demand letters were done through M/S Ocheng Gai Advocates, attempting to resolve the matter and recover the premises. That the applicant responded to the same through an email asking that the lease be terminated as he was tired.
- 22 It is averred that the lease was lawfully and formally terminated on or about 25th November 2022. The respondent stated that he further filed a case in the Business Premises Rent Tribunal (BPRT) under BPRT Case No. 40 of 2023 Seeking Orders for Distress for Rent and Vacant Possession. The Plaintiff was properly and duly served with the process of the Tribunal. Subsequently, the Tribunal issued substantive orders granting the Respondent vacant possession of the suit premises and leave to levy distress for the outstanding arrears.
- 23 That pursuant to the BPRT orders allowing for distress, duly instructed auctioneers proceeded to attach and sell the Plaintiff's available property found on the premises to

recover the outstanding arrears. The Plaintiff had previously removed valuable assets, specifically a generator and a pump, leaving behind only defective equipment (a defective pump and underground petrol station tanks), two fire extinguishers, and old wooden furniture which were subsequently attached and sold.

- 24 That following the lawful termination of the tenancy and recovery of the premises through the BPRT process, a new lease was entered into between the respondent and a third party who is currently in possession and undertaking renovations. The court was informed that the Plaintiff was at all material times a party to the BPRT proceedings and was fully aware of the termination and subsequent re-letting.
- 25 That the alleged losses, anguish, and financial distress claimed by the Plaintiff are a result of his own failure to run the business and meet his contractual obligations, not any action on the Respondent's part. The court is urged to dismiss the application.

SUBMISSIONS

- 26 Directions were issued to have the application disposed off by way of written submissions. The court has considered the detailed submissions on record and will now embark on analysis and determination of the application.

ANALYSIS AND DETERMINATION

27 The court has considered the pleadings placed before it by the parties herein, the submissions on record and case law therein together with the relevant statutes. Two issues commend determination 1) Whether a case has been made for grant of the injunctive orders sought and 2) Who bears the costs of the application.

28 The principles of granting temporary injunction are very clear and well enunciated in the celebrated case of **Giella vs Cassman Brown & Company Limited (1973) E A 358** where the court stated the conditions for grant of interlocutory injunctions as follows;

“The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally 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.”

29 The test for granting of an interlocutory injunction was also considered in the **American Cyanamid Co. v Ethicom Limited (1975) A AER 504** where three elements were noted to be of great importance namely, There must be a serious/fair issue to be tried, Damages

are not an adequate remedy and the balance of convenience lies in favour of granting or refusing the application.

- 30 Have the Plaintiffs/Applicants made out a prima facie case with a probability of success? In the case of **Mrao versus First American Bank of Kenya Limited & 2 Others (2003) KLR 125**, 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.”

- 31 In the case of **Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR** the Court of Appeal stated that:

“With reference to the establishment of a prima facie case, Lord Diplock in the case of American Cyanamid vs Ethicon Limited [1975] AC 396 stated thus, “If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant’s proposed activities that is the end of any claim to interlocutory relief.”

- 32 The Plaintiff's case is that he entered into a lease agreement with the Respondent herein over the suit property which housed a fuel station that he had the intention of operating. Indeed, from the evidence attached in his affidavit in support of the application, the court has managed to peruse the agreement by the parties herein and which is not an issue of dispute from the Respondent's averments.
- 33 However, the Applicant states that despite paying for the lease and the developments made thereon, the Respondent has been hesitant in registering the lease and has in fact entered into another lease agreement with a third party, a clear breach of the agreement between them.
- 34 In his rejoinder, the Respondent did not dispute the lease, he however stated that it was the Applicant who breached the terms of the lease by failing to pay rent despite the many reminders given to him as evidenced by the demand letters availed to court. The Respondent informed the court of several new developments with regard to the suit property and which included a separate new lease having been entered into and further that the BPRT had already dealt with the issues surrounding the lease between the parties and its decision enforced.
- 35 I have carefully perused the lease agreement between the parties herein, from the same, it is noted that the issue of the developments on the suit property was not discussed

or provided for under the terms and conditions of the agreement. It is also noted that the lease was entered upon in the year 2017 and was terminated in 2025.

- 36 The court notes that it has not been clearly stated by both parties what was transpiring during this period, to wit who between the parties was in use of the property. On one hand the applicant states that it was the respondent who was collecting rent from the premises from the other tenants who had sub leased spaces on the property. The respondent on the other hand alleged that the applicant had in fact entered into a sub-lease with new people and was collecting rent from the property. None of the parties presented evidence confirming these assertions.
- 37 The respondent is the registered owner of the suit property, as has been stated in several authorities, a title deed is prima facie evidence of ownership of land. This is reinforced in statute under **Section 24 of the Land Registration Act No 3 of 2012** which states that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.
- 38 Section 25 of the said Act provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor,

together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—to encumbrances charges or leases shown on the register and the overriding interests as stated in section 28 of the Act.

- 39 Drawing guidance from the above provisions, I am convinced that a prima facie case has not been established by the Applicant. There has been no evidence tendered before court in support of contrary ownership of the suit property. Infact, it is confirmed that the lease has to date never been registered. Though I must admit that ownership was not contested by the parties. Discussions over this are with respect to why the court will be hesitant in granting orders against a registered owner without proper cause.
- 40 Secondly, the orders being sought have in my view been overtaken by events. The BPRT has already conclusively dealt with the rent arrears issue and the same led to the termination of the lease between the parties herein. As it is, there may be no valid lease between the parties herein. The Applicant has absolutely nothing to be protected by the court given the circumstances of the case vis a vis the orders sought.
- 41 Moreover, the instant suit is not an appeal against the decision of the BPRT. The court is convinced that the Plaintiffs were not candid in their disclosure of facts to the court and proof that they are entitled to any reliefs before

the court as was held in **Kenleb Cons Ltd Vs New Gatitu Service Station Ltd & another [{1990} K.L.R 557]** where Bosire J held that

“To succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction.”

42 I am further guided by the decision of **Ringera J. (as he then was)** in the case of **Showind Industries v Guardian Bank Limited & Another (2002) 1 EA 284** where the Learned Judge stated as follows: -

“.....an injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant’s case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant’s conduct does not meet the approval of Court of equity or his equity has been defeated by laches”

43 Having found that the Applicant has not established a prima facie case, it will not be necessary to consider if the two remaining conditions for the granting of orders of injunction have been met as it is a requirement that all the three conditions be fulfilled before an order of injunction is granted. I am guided by the decision in **Nguruman**

Limited V. Jan Bonde Nielsen & 2 Others, CA NO. 77 OF 2012, where the Court expressed itself on the importance of satisfying all the three requirements for an order of injunction as follows: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not

granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

44 The upshot of the foregoing is , I find that the application dated 21st November 2025 is not merited and must therefore be dismissed.

45 On the issue of costs, it is trite that the same follow an event. The event herein is that the applicant is unsuccessful in his case. The Respondent is therefore entitled to costs and the same are hereby awarded to the Respondent.

It is ordered accordingly.

Ruling dated signed and delivered this 4th day of May
2026

**A E DENA
JUDGE**

4/05/2026

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

No appearance for Plaintiff/Applicant

Ms. Juma for the Defendant/Respondent

Court assistant: Dorothy Awuor

ORIGINAL