



REPUBLIC OF KENYA



KENYA LAW
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Boss Freight Terminal Limited v Kenya Railways Corporation & another (Environment and Land Case E060 of 2025) [2025] KEELC 5450 (KLR) (23 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5450 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE E060 OF 2025
SM KIBUNJA, J
JULY 23, 2025

BETWEEN

BOSS FREIGHT TERMINAL LIMITED PLAINTIFF

AND

KENYA RAILWAYS CORPORATION 1ST DEFENDANT

THE HON. ATTORNEY GENERAL 2ND DEFENDANT

RULING

1. The plaintiff moved the court through the notice of motion dated the 20th May 2025, seeking for the following orders:
 - “ a. Spent.
 - b. Pending the hearing and determination of this application, this honourable court be pleased to issue a temporary injunction restraining the 1st defendant/respondent, by itself, its agents, employees, police officers, or anyone acting under its instructions, from interfering with the plaintiff’s quiet possession, occupation, use, or access to the properties known as Mombasa/Block XLV111/173 and Mombasa/Block XLV111/174 situated in the Mbaraki area of Mombasa County.
 - c. Pending the hearing and determination of the main suit, this honourable court be pleased to issue a temporary injunction in terms of prayer 2 above.
 - d. This honourable court be pleased to issue a mandatory injunction compelling the 1st defendant/respondent to vacate the suit premises and remove all its personnel, agents, police officers, and security guards, and restore possession of the properties to the plaintiff/applicant forthwith.



- e. The OCS Port Police Station or the County Commander, Mombasa, do ensure compliance with any orders issued herein and provide such security as may be necessary for enforcement.
- f. The costs as this application be provided for.”

The application is premised on the eight [8] grounds on its face marked [a] to [h] respectively, and supported by the affidavit of Abdiwahid Haji Yarrow, sworn on the 20th May 2025, inter alia deposing that the plaintiff is the lawful registered proprietor of Mombasa/Block XLV111/173 and 174, the suit properties, situated in the Mbaraki area of Mombasa County; that the suit properties are sensitive, secured government regulated facilities handling transit cargo and are designated as Customs Bonded Freight Stations; that on the night of 16th May 2025 and early morning of 18th May 2025, the 1st defendant forcefully entered and seized the suit properties without any court order, notice or justification, damaged the infrastructure, deployed police officers and private security guards to man the premises; that the continued respondents’ occupation of the suit premises has paralysed the plaintiff’s business operations, disrupted customs services and exposed the plaintiff to immense commercial, contractual and reputational losses; that the respondents acts are unconstitutional, unlawful and a gross violation of the plaintiff’s right to property; that the court should intervene and grant the prayers sought to restore possession of the suit properties to the plaintiff, uphold its property rights and prevent further irreparable harm.

- 2. The application is opposed by the 1st defendant through the replying affidavit of Stanley Gitari, Acting General Manager, Legal Services, inter alia deposing that it is the lawful owner of the suit properties, which are in area earmarked for railway operations; that vide the transfer registered on 4th April 1997, the properties were transferred to Kobil Petroleum Limited; that the said purchaser did not pay the purchase price, and the plaintiff is therefore occupying properties that belong to the 1st defendant, whose title were irregularly obtained; that as there was no board or ministerial approvals for their sale that were obtained, the application should be dismissed.
- 3. The 2nd defendant also opposed the application through the five [5] grounds of opposition dated the 17th June 2025, summarized as follows:
 - a. That the balance of convenience lies with not granting the application, as the plaintiff will not suffer irreparable loss and if successful in the suit, it can be awarded compensation.
 - b. That the plaintiff is no longer in possession of the suit properties, and public interest favours the 1st defendant which is undertaking expansion of its infrastructure on the suit properties, that outweighs the plaintiff’s commercial interests over the same.
- 4. The application was on 23rd May 2025 set down for inter parties hearing on the 18th June 2025, when Ms Nzamsa, Mr. Obuya and Mr. Penda, the learned counsel for the plaintiff, 1st & 2nd defendants respectively made their oral submissions, which the court has considered.
- 5. The issues to be determined by the court in the notice of motion dated 20th May 2025, are as follows:
 - a. Whether the plaintiff has met the threshold for the injunctive orders sought to be issued at this interlocutory stage.
 - b. Who pays the costs?



6. The court has carefully considered the grounds on the notice of motion, affidavit evidence, grounds of opposition, oral submissions by the learned counsel for and against the application and come to the following determinations:

- a. The principles guiding the courts in the determinations of applications seeking for temporary injunctive orders are now settled and have been addressed in various superior courts decisions, including the case of *Giella v Cassman Brown* [1973] EA 358, which has been reiterated in numerous decisions in Kenya, such as *Nguruman Limited v 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.

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”.

The tests that an applicant has to surmount to be successful are that:

- i. The applicant should establish a *prima facie* case with a probability of success;
 - ii. Demonstrate the irreparable injury or loss to be suffered or exposed to if injunctive order is not issued;
 - iii. Show that the balance of convenience tilts towards issuing the order sought and
 - iv. Convince the court that the public interests tilts in issuing the injunctive order.
- b. On the first pillar of *prima facie* case, the Court of Appeal in the case of *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR had the following to say:

“... 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.”

The plaintiff has through copies of certificates of title, postal searches and green cards annexed to the application and list of documents of 20th May 2025 shown the suit properties were registered in its name and title issued on the 15th December 2014. The 1st defendant has contested the plaintiff's title alleging that the suit properties were sold and transferred to Kobil Petroleum Limited without following the due process, and that the purchaser did not pay the purchase price, and therefore the plaintiff is occupying the properties illegally. It is trite that at this interlocutory stage, the court is not expected to make final determinations on any questions of law or fact as that will have to await the tendering of the parties' evidence during the trial in the main suit. However, in view of the provision of section 26 of the *Land Registration Act*, No. 3 of 2012, that a certificate of title issued by the Registrar shall be taken by courts as *prima facie* evidence of proprietorship, until otherwise impugned on the grounds of fraud or misrepresentation to which the proprietor is proved to be a party, or where the title



has been acquired illegally, unprocedurally or through a corrupt scheme, the court is without more satisfied that the plaintiff has established the first test of *prima facie* case.

- c. Next, the plaintiff has to demonstrate that irreparable injury will be occasioned to it if an order of temporary injunction is not granted. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR the court provided an explanation for what is meant by irreparable injury as follows:

“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 plaintiff herein was prompted to file this suit and application after the 1st defendant reportedly interfered with their use of the properties by deploying police officers and private guards. The plaintiff has stated the actions of the 1st defendant has caused it severe financial losses, business disruption and reputational harm which will continue unless the orders sought are granted. The activities attributed to the 1st defendant in interfering with the plaintiff's use and occupation of the suit properties and the obvious negative impacts to its business and commercial operations has not been challenged by the defendants, and I find it suffices to show the plaintiff will likely suffer irreparable loss/injury unless the injunctive orders are issued.

- d. All the defendants seem to say is that it is in the public interest for the suit properties to be in the hands of the 1st defendant as the plaintiff may be compensated for the properties if it is successful in the main suit. I have weighed the contestations between the plaintiff and the defendants and though the quantum of the likely damages or losses the plaintiff will be exposed to as a result of it being forced to cease business and commercial operations on the suit properties for the period the suit will last in court before determination, may be ascertained it shall inevitably be huge. The defendants have not shown the value of the benefits the 1st defendant will probably get as a result of taking over the suit properties and retaining it for the period the suit will be in court before determination. Had the values the 1st defendant stand to gain and that which the plaintiff is likely to suffer have been ascertained, the court would have seen whether it will be in the best interest of the public for the said properties to be in the hands of the plaintiff or the 1st defendant for the duration the suit will take to be heard and determined. This is especially important because if the Plaintiff was to be successful and defendants lose the suit, the damages to be awarded will reflect negatively on the public coffers or revenue, from where it will be drawn. With that uncertainty in mind, and as the titles to the suit properties that the plaintiff relies on were apparently issued by the government, and are yet to be successfully impugned through cancellation or revocation, the balance of convenience tilts towards granting the application.

- e. In the case of *Pius Kipchirchir Kogo case* [*supra*] the court held that:

“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.

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”.

Similarly, in the case of *Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others* [2016] eKLR, the court in dealing with the issue of balance of convenience expressed itself and stated that:

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

Further, in the case of *Amir Suleiman v Amboseli Resort Limited* [2004] eKLR the court offered 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 lower risk of injustice or inconvenience in the instant situation would be to grant an injunction as sought by the plaintiff to prevent a scenario of subjecting it to unfathomable business reputational and commercial losses while it holds title to the suit properties that are yet to be successfully impugned.

- f. The 1st defendant, just like other Government and or public agencies, and all law abiding persons, should be in the forefront in acting in accordance with the *Constitution* and the law in pursuing their rights and going against those that infringe or are perceived to infringe them. To act as the 1st defendant appear to have done, by forcefully removing the plaintiff from the suit properties that it was registered with since 2014, without a court order, notice or their concurrence, flies on the face of the law, justice and fairness. The 1st defendant should not be allowed to benefit from it, without first letting the suit to be heard and determined, because to do so, would amount to the court granting its stamp of approval of the actions that were taken without following the due process.
 - g. The provision of law under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya is that costs always follow the event unless where there is good reason to order otherwise. The plaintiff having been successful in the application is awarded costs.
7. In view of the foregoing conclusions on the notice of motion under certificate of urgency dated the 20th May 2025, the court finds the said application has merit and orders as follows:



- a. That temporary order of injunction in terms of prayer [3] of the application is granted.
- b. That mandatory order of injunction in terms of prayer [4] of the application is also granted.
- c. The defendants to pay the plaintiff's costs in the application.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 23RD DAY OF JULY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiff : M/s Nzamsa

Defendants : Mr Penda for 2nd Defendant

Shitemi-court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

