



**Braken Agricultural Limited t/a Gamba Rice Company Limited alias Gamba Company Limited v Tana and Athi Rivers Development Authority (Environment & Land Case E99 of 2024) [2025] KEELC 562 (KLR) (12 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 562 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE E99 OF 2024  
FM NJOROGE, J  
FEBRUARY 12, 2025**

**BETWEEN**

**BRAKEN AGRICULTURAL LIMITED T/A GAMBA RICE COMPANY LIMITED ALIAS GAMBA COMPANY LIMITED ..... PLAINTIFF**

**AND**

**TANA AND ATHI RIVERS DEVELOPMENT AUTHORITY ..... DEFENDANT**

**RULING**

**Application**

1. The Notice of Motion dated 13<sup>th</sup> September, 2024 has been brought under Section 1, 1A, 1B, 3, 3A and 63 (e) of the *Civil Procedure Act*, Order 40 Rules 1, 2, 4, 5 and 8, Order 51 Rules 1 and 3 of the Civil Procedure Rules and all other enabling provisions of the law. It seeks prays for the following orders;
  1. That this application be certified as extremely urgent to be heard ex –parte and service thereof be dispensed with in the first instance.
  2. That pending the hearing and determination of this application an injunction order do issue restraining the respondent, their agents, servants and or employees or anyone duly authorized by them or claiming under them from unilaterally terminating the applicant’s special use licence dated 22/12/2021, alienating, granting permission, authority, licencing, leasing, subletting or interfering in any manner with the plaintiff’s quiet and peaceful enjoyment of the licenced area pursuant to special use licence dated 22/12/2021 being 3,122 acres, part of L.R. No. 28026 East of Kibisu Area, Tana River (Hereinafter “Licenced area”).
  3. That pending the hearing and determination of this suit an injunction order to issue restraining the respondent, their agents, servants and or employees or anyone duly authorized by them or claiming under them from unilaterally terminating the applicant’s special use licence



dated 22/12/2021, alienating, granting permission, authority, licencing, leasing, subletting or interfering in any manner with the Plaintiff's quiet and peaceful enjoyment of the licenced area pursuant to special use licence dated 22/12/2021 being 3,122 acres, part of L.R No. 28026 East of Kibisu Area, Tana River (hereinafter "Licenced area").

4. That pursuant to issuance of prayers 2 and or 3 and or 4 above the Honourable Court be pleased to direct that the parties be subjected to court annexed mediation as provided for in clause 15 of the special use licence dated 21/12/2021.
  5. That pending the hearing and determination of this suit an injunction do issue compelling the respondent, their agents, servants and or employees or anyone duly authorized by them to continue meeting their obligations under the special use license dated 22/12/2021.
  6. That the Officer Commanding the Station (OCS) Gamba Police Station or any other police officer of equal or superior ranking from any other Police Station do oversee compliance of the orders.
  7. That the cost of the application be provided for.
2. The application is premised on the grounds on its face and in the attached sworn affidavit of Peter Paul Nkonge Kirigua. The grounds are that the respondent has unfairly and unprocedurally terminated a special use licence agreement dated 22/12/21 pertaining to 3122 acres of land being part of LR Number 28026 East of Kibisu area Tana River; that the applicant stands to lose funding for that reason being Kshs 197,000,000/- for investment in the licenced area and will therefore suffer a loss in the sum of Kshs 201452462.68/-; that they have invested towards large scale farming activities at the licenced area; that the applicant is not in breach of the licence and is up to date on payment of the rent and that the respondent's breach risks occasioning the applicants a loss of Kshs 692,495,609.00 by reason of missing out on the planting windows and loss of crops. By reason of the breach also, many persons who rely on the applicants' project may lose their sources of livelihood.

### **The Response**

3. The application is opposed through the sworn affidavit of Irene Ndavi, the respondent's Director, Resource Planning & Development. She stated that the respondent is a statutory state corporation under Cap 443 which coordinates all development projects within the Tana And Athi River basins for the purpose of utilization of water and soils within the basin areas; that the droughts of the 1970s and 1980s galvanized the government of Kenya into recognizing the importance of and prioritizing the development of the Tana and Athi river areas. She narrated how the area has grown from the flood irrigation community based schemes of the mid-1970s to the allocation to TARDA of land within the area to be developed for agriculture and the government's investment of billions of shillings in the irrigation project by construction of intake works, irrigation canals dams, a rice mill and its related infrastructure and subsequent rehabilitation of the infrastructure. The irrigation project is one of the so called Vision 2030 Flagship Projects and TARDA was tasked with coordinating sustainable production of rice in the irrigation project to enable the country meet the food security agenda and reduce reliance on imports, besides creating employment and actualize foreign exchange savings.
4. On the above premises TARDA sought to procure the best possible competitive investor to undertake the project through a laid down procedure in an open tender for utilization of 10,000 ha of land. So, it advertised in the local dailies on 8/7/2014 for expression of interest for lease of LR No 28026 for rice production. Certain conditions were to be met by the bidders for them to be considered responsive.



5. The plaintiff submitted his expression of interest setting out its objectives and targeting 10,000 hectares on 21/7/14. It that its shareholders were Pewin Investment Ltd and Paul Ndungu, and that it had competence and technical ability to execute the project of highly mechanized rice growing. It then submitted its form of tender executed on 3/10/14. It indicated it had entered into an agreement with some two foreign firms to undertake the project, whereby its said partners had committed to perform certain stated duties. It committed to undertake the project in two phases: planning stage and implementation stage. Upon evaluation it was awarded the tender vide a letter of notification dated 14/10/2014. TARDA executed a contract with the plaintiff on 31/10/2014 for lease of land for rice production on 10,000 ha for the sum of Kshs 3000 per hectare. Later the parties executed a lease dated 10/9/2015 for a term of 15 years for 10,000 ha totalling to Kshs 30,000,000/= per annum. The lease was registered for part of the land LR 28026 in favour of the plaintiff for 10,000 ha and a site plan delineated the leased portion with precision. The 15-year lease commenced on 31/10/2014. By December 2015 there was no activity on the ground. And on request the plaintiff failed to provide any work plan or milestones so TARDA asked its advocates to discharge the lease from the title deed. On 2/2/16 the advocates sent a notice of termination to the plaintiff for failure to pay arrears due of Kshs 21,000,000/= within the stipulated period. The response TARDA received was through Albert Kamunde Advocates committing to fulfil obligations in full. In March 2016 confirmation of payment of Kshs 21,000,000/= rent was dispatched to the plaintiff.
5. In March 2016 rent for 2016 and 2017 was demanded in writing. On 19/4/2017 TARDA issued a termination notice to the plaintiff for breach and failure to pay Kshs 60,000,000/=. The response was that farming machinery had been imported and a manager engaged. In 2017 October a demand was made again for payment of 60,000,000/= rent arrears. The response to it was that TARDA had failed inter alia to provide access roads and point out beacons and the plaintiff offered to do the works and deduct the expense from its rent obligations to TARDA. The roads were, in the opinion of the defendant, the plaintiff's obligation. The defendant relied on Section 23 (1)(b) of the Land Act for the proposition that quiet possession can only be granted upon full compliance with terms of a lease, including payment of rent, but avers that once the lease was signed, vacant possession was as good as granted. The deponent also dismissed the other excuses given by the plaintiff in its letter of 30/11/17 for non-performance of its part of the contract. The defendant avers that under paragraph 6 of the lease agreement the lease has now been terminated and is now void. That the moratorium under the licence ended in the year 2023 without any payment having been made by the plaintiff, or any activity having been performed by the plaintiff, as stipulated under the licence and the licence was terminated on 9/4/2024. That the payment of Kshs 3,902,500/= through Pewin Dry Cleaners was done on 15/4/2024 after the termination and in any event the same was refunded to Pewin for lack of privity of contract with them; that though the plaintiff later paid the said sum in its name, it still owes Kshs 27,317,500/=. Despite non-performance and non-payment, the plaintiff has also refused to execute a surrender of lease. By reason of that non-performance, TARDA has failed to meet its targets and institutional mandates and it has suffered considerable losses. That it is in the public interest that the land covered by the lease be allowed to revert back to the defendant for utilization for the national agenda on food security.
6. The defendant avers that the special licence is void as it was issued to a third party while the plaintiff was the lessee, and in any event the same ought to have not involved any execution by the defendant, is in respect of crops other than the ones in the lease, and is void for being in breach of the lease. It is stated that the plaintiff has not pleaded any ongoing activity on the suit land in this suit and that it would suffer no prejudice if the defendant was given a chance to utilize its land, and that public interests outweighs any potential prejudice to the plaintiff.



7. The plaintiff filed a supplementary affidavit of Peter Paul Nkonge Kirigua dated 26/10/2024. The deponent stated that the dispute in this matter is not about the lease of 2014 but the special licence between the plaintiff and the respondent dated 22/12/2021 and whose existence has been acknowledged by the defendant in paragraph 63 of their affidavit; that the said licence is not ancillary to the lease as per Clause 3 thereof, which fact the respondent has acknowledged. It has distinct terms from those in the lease. By the time of its execution, the lease had allegedly been terminated by the defendant. There has been part performance of the licence, including payment of rent, and the defendant can not thus deny its existence since in any event no direct connection between the lease and the licence has been drawn. The focus by the defendant on the lease is therefore improper; that the proper process was followed in the granting of the special use licence, including board ratification; that there was acceptance of dues by the defendant after the purported termination of the licence; that the moratorium period was top run from 29/9/2022 till 29/9/2024, and the applicant never had possession of the licenced site until handover. The plaintiff has now started a nursery, hired employees and put up electric fencing; that however the defendant has despite the court order destroyed the electric fence; that on the contrary it is the defendant who has breached the lease; that the licence terms never envisaged rice production, but other economic activities eg livestock, aquaculture, beekeeping, etc, hence no loss or damage for non - production of rice can be claimed. It was stated that the defendant has violated Article 47 of [the constitution](#) regarding fair action to the plaintiff.

#### **Submissions.**

8. The application was disposed of by way of written submissions which both parties filed. (confirm on CTS for the respondent). I have taken consideration of those submissions in the preparation of this ruling.
9. In its submissions, the plaintiff avers that the defendant has purported to terminate the licence unilaterally, illegally and with immediate effect, without issuing the plaintiff notice of the requisite 30 days for the rectification of any breach complained of. It is alleged that the defendant handed the site late, 9 months after execution of the agreement; that it failed to provide vacant possession of the site, point out beacons, avail storage facilities and water, or maintain water supply infrastructure which was crucial for the plaintiff's planned operations under the licence. It also stated that it paid Kshs 3,902,500/= to the defendant even after the purported termination notice being rent for the first quarter but that the defendant never acknowledged receipt. It avers that its entitlement to a loan of Kshs 197,000,000/= from the World Bank through Kenya development Corporation was put on hold due to the defendant's interference with its project.

#### **Determination.**

10. It is clear from the motion that the orders sought relate only to the area covered by the special licence, being 3,122 acres, part of L.R. No. 28026 East of Kibisu Area, Tana River. That notwithstanding, the respondent has in the reply luridly described the entire genesis and progression of the TDIP, and this court notes the understanding by the respondent's counsel of the fine details, and is appreciative of her ability to convey them in a crystal clear manner, which sets out the context of the current battle between the parties.
11. The issue arising for determination is whether the orders of interim injunction granted by this court on 16<sup>th</sup> September 2024 and extended from time to time, ought to be confirmed pending the hearing and determination of the suit.



12. Order 40 Rule 1, of the Civil Procedure Rules 2010 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) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, 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.
2. 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.”

13. It behoves the court to examine whether the principles warranting the grant of an injunction have been satisfied. These are that the applicant must establish a prima facie case, that there must be risk of irreparable loss if the orders sought are not granted. If the court is in doubt then it is permitted to strike a balance of convenience. See the case of *Giella Versus Cassman Brown* (1973) EA 358. In the case of *Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others* [2003] KLR 125, a prima facie case was defined as follows:

In civil cases, a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

14. The court must be careful not to make firm pronouncements at the interlocutory stage of issues meant for determination after the hearing. In *Mrao* (supra) the court stated as follows:

All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The



applicant need not establish title, it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges.”

15. In the present case the applicant has established, and the respondent has acknowledged that the special licence over the 3,122 acres, part of L.R. No. 28026 East of Kibisu Area, Tana River was entered into by the parties. The distinction must therefore be made between the lease entered into in 2014 and the special licence executed in 2021. The plaintiff’s claim is for inter alia a permanent injunction restraining the defendant from interfering with its quiet possession of the premises and a declaration that the defendant has breached the terms of that licence. The plaintiff also seeks special and general damages.
16. The particulars of the defendant’s alleged breach and those of the plaintiff’s alleged loss are all elaborately set out in the plaint. The special licence envisaged several types of farming activities on the suit premises. A number of the particulars of expenditure set out by the plaintiff to support its claim for loss are not unrelated to agrarian activities or preparation therefor. The plaintiff avers that the special use licence for the suit premises is not ancillary to the lease agreement. The defendant avers that it is directly linked to the lease agreement. I have noted that the plaintiff has corrected itself on this position with the last averment in paragraph 4 of the supplementary affidavit of Peter Paul Nkonge Kirigwa and in paragraph 4 of the defence to counterclaim being that the licence is nit ancillary to the lease.
17. In the amended defence the defendant points out to the repeated reference to the lease and alleged expenses associated with the lease in the plaint and asserts that this fact shows the interconnection between the two documents. The defendant states that the special use licence being ancillary to the lease ought not to have deviated in purpose with the lease and that such a deviation of purpose rendered the special licence void.
18. While not conclusively determining that issue, considering the contents of annexures in the case including the defendant’s Legal Officer’s letter of 20/9/23 to Kenya Development Corporation asserting in part that the 2014 lease was broken into three licenses issued to distinct persons and that the performance or lack thereof was not tied to any other licence, it can not be said at as present with clear cut certainty that the deviation of purpose rendered the special licence void. The letter states that upon default by any licensee, it is him who would lose his particular portion covered by that licence. It is that letter which confirms that the activities envisaged under the licence were to differ from the monochromatic rice growing requirement in the 2014 lease, but that the special licence terms with regard to term, renewal and acreage remained the same as those in the 2014 lease. Was there then some kind of reinstatement of the 2014 lease terms with some amendments as to the agrarian activities allowed? Whether or not that is the case requires an interpretation by this court after the hearing of the evidence of the parties. However, my conclusion is that in view of the inclusion in the admitted licence of activities other than rice farming and the drastic reduction of the acreage covered by the plaintiff’s activities as well as the initial payment and acceptance of the rental sum, this court is persuaded that the plaintiff has established a prima facie case.
19. The foundation of the relief of orders of injunction rests in the probability of irreparable injury being suffered by the applicant. As to the risk of irreparable loss, this court has noted the particularization of some of the expenses that the plaintiff has incurred which if provable, are in respect of preparatory activities aimed at execution of the terms of the special licence. Can these be recovered in the event if the orders are not granted?
20. It is highly probable that, regardless of the existence of the 2014 lease and all the controversy surrounding it, had the special licence not existed the plaintiff, having failed to implement the rice project on the leased 10,000 ha as earlier intended, may not have invested any capital expenditure on those activities that it carried out on the lesser acreage under the special licence.



21. In *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR the court held 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.”

22. I am of the view that TARDA is a Government agency which may be able to compensate the plaintiff for any pecuniary loss and damage that it may suffer by reason of the defendant’s breach, and an assessment of the claim may give the impression that only a set sum of the capital outlay is at stake, which can be met by the defendant if in breach. While this court is careful not to conclusively pronounce itself on the issue, the length of the licence period remains subject to interpretation of the documents before court and so the full range of opportunities for earnings from activities covered by the licence, if the plaintiff’s project is fully implemented, is unknown as at present. I do not think that it is possible to categorically hold that there would or would not be any irreparable loss perchance the orders sought are not granted.

23. For reason of that uncertainty mentioned above, this court shifts its focus on the issue of balance of convenience. In *Amir Suleiman v Amboseli Resort Limited* [2004] eKLR of it was observed as follows:

Counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago, in *Giella v. 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 on 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 Hoffmann in the English case of *Films Rover International*, made this point regarding the grant of injunctive relief ([1986] 3 ALL E.R.772, at pp.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’ ....”

24. In *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] eKLR the court held as follows:

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 injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. The burden of proof that the inconvenience which the applicant will suffer if the injunction is refused is greater than that which the respondent will suffer if it is granted lies on the applicant.”

25. A notice of dispute, intended to kick off alternative dispute resolution mechanisms was issued by the plaintiff to the defendant but the defendant appeared uninterested in that course of events. There is a risk then that the defendant may remove the plaintiff from the premises and bring to an end its activities on the suit land before the determination of the dispute and the need for prevention of that eventuality is the sole premise on which the application has been brought.



26. This court has viewed photographs of the nurseries said to be propagation grounds for different crop species before they are planted in the rest of the land. The most obvious feature of the business that the plaintiff is meant to conduct on the suit land is that of patient wait for maturity of crops which can not be hurried as it is a natural thing. The work of transplanting the propagated material is also bound to take time, according to the plaintiff's documents. The question is whether the propagated material go if the defendant evicted the plaintiff. Would it, as well as the resources engaged for its generation, go to waste? These are matters this court does not wish to delve deeply into in order not to prejudice the hearing of the main suit. Besides, there are apprehensions by the plaintiff that the suit land may be alienated to other parties. In this court's view, the circumstances analyzed hereinabove warrant the grant of an injunction as per Prayer No 3 of the motion.
27. Lastly, mandatory injunctions are sought in the application. In *Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited* [2006] KEHC 2855 (KLR) the court held as follows:

In the words of the Court of Appeal in *Kenya Airports Authority – Vs – Paul Njogu Mungai & Others*, Civil Application No. NAI 29 of 1997:

We would point out that the principles governing the grant of mandatory as well as prohibitory (restrictive) orders pending hearing and determination of a suit in the High Court are the self-same ones enunciated in the celebrated case of *Giella – Vs – Cassman Brown & Co. Ltd* [1973] EA 358 save that a temporary mandatory injunction can only be granted in exceptional and in the clearest of the cases.”

28. A mandatory injunction, as opposed to a prohibitory or restrictive injunction which requires abstention from acting, requires the taking of positive steps that may in some cases require the dismantling or destruction of something already effected or constructed. As this may result in waste of time, money and or materials if it is ultimately established that the plaintiff was after all not entitled to such an order, the court should not grant a mandatory injunction at an interlocutory stage which may not be granted at the final hearing. In 4 *Halsbury's Laws of England* Vol. 24 at page 948 it is stated that in the absence of special circumstances, an interlocutory mandatory injunction “will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can easily be remedied, or if the defendant attempts to steal a match on the plaintiff, ... a mandatory injunction will be granted.”
29. It is therefore the case that mandatory injunctions can be granted but only in very special, limited circumstances. The mandatory injunction orders sought in Prayers Nos 6 and 7 seek to compel the defendant to comply with certain aspects of its obligations under the special licence. The mandatory injunctions sought herein are, if granted, for the purpose of compelling the defendant to undertake certain actions that will serve the interests of the plaintiff in utilizing the suit land under the special licence. The injunctive order having been found merited as above, the seductive argument arises as to why the mandatory orders sought can not be issued. However, the involvement of this court in matters of implementation of each party's duties under a contract should be limited to issuing broad injunctive safeguards protecting the subject matter from dissipation and forestalling irreparable loss. However, as it is clear that parties are supposed to be aware of their rights and obligation under a contract, as well as the risks and consequences of non-performance thereof and the remedies available for breach, a court would be amiss if it delved into controlling the nitty gritty of the manner in which a party said to be threatening breach should run their part of the show, otherwise there may be no end to the tasks the court would be indefinitely burdened with. If the court intervenes in one breach, there would be no reason why by that precedent the plaintiff will not foist on the court's shoulders the burthens of constantly acting to compel the defendant to do what it knows or ought to know it ought to do, and



I hardly think enough time may be left to attend to any other litigant's business in this station. In any event, the present pleading by the plaintiff has included some of those breaches and that ought to be a sufficient signal to the defendant and safeguard for the plaintiff. For those reasons, this court considers that prayers nos 6 and 7 of the application are unmerited.

30. Consequently, the application dated 13/9/2024 is found by this court to have partial merit and it is hereby granted in terms of prayer 3 thereof. This court also directs that the present matter shall be subjected to court annexed mediation as an alternative dispute resolution. It shall be placed before the Deputy Registrar for processing for Court Annexed Mediation after which parties shall report to court on 12<sup>th</sup> May 2025 to report on the outcome of the mediation process.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 12<sup>TH</sup> DAY OF FEBRUARY 2025.**

**MWANGI NJOROGE**

**JUDGE, ELC MALINDI.**

