



REPUBLIC OF KENYA



**KENYA LAW**

THE NATIONAL COUNCIL FOR LAW REPORTING

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**Thome Farmers Company (No 1) Limited v Nanjero & 2 others (Civil Case E235 of 2024) [2025] KEHC 11488 (KLR) (Civ) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11488 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL CASE E235 OF 2024**

**JN MULWA, J**

**JULY 24, 2025**

**BETWEEN**

**THOME FARMERS COMPANY (NO 1) LIMITED ..... PLAINTIFF**

**AND**

**DORCAS AYOMA MBALANYA NANJERO ..... 1<sup>ST</sup> DEFENDANT**

**KAKAI KISSINGER AND PETER MUGALO PRACTICING IN  
THE NAME AND STYLE OF KAKAI MUGALO & COMPANY**

**ADVOCATES ..... 2<sup>ND</sup> DEFENDANT**

**OMUGA JOHN OTIENO MAURICE AND M OUMA PRACTISING  
IN THE NAME AND STYLE OF OTIENO-OMUGA & OUMA**

**ADVOCATES ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of two Applications filed one filed by the Plaintiff dated 4<sup>th</sup> November, 2024 and one by the 2nd Defendant dated 18<sup>th</sup> November, 2024.
2. The Plaintiff's application dated 4<sup>th</sup> November, 2024 has been filed under Sections 1A, 1B, 3, 3A, 63 (e) the *Civil Procedure Act*, Cap 21 of the Laws of Kenya and Order 40, rules 1 and 2 of the Civil Procedure Rules, 2010 and Sections 55 and 56 of the *Advocates Act*, Cap 16 of the Laws of Kenya seeking the following Orders;
  - a. Spent.
  - b. Spent.
  - c. Spent.



- d. Pending the hearing and determination of this suit, an order of restraining injunction be and is hereby issued restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by themselves, partners, consultants, associates, employees, clerks, servants and agents or otherwise howsoever from holding themselves out and acting as Advocates for the Plaintiff.
  - e. Pending the hearing and determination of this suit, an order of restraining injunction be and is hereby issued restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by themselves, partners, consultants, associates, employees, clerks, servants and agents or otherwise howsoever from any notices, writing any letters, drawing any documents, presenting any documents, certifying any documents and appearing as witnesses of the Plaintiff before any forum in matters pertaining to the affairs of the Plaintiff and in respect to property Land Reference Number Nairobi/Block 110.
  - f. The costs of this application be provided for.
3. The grounds of the application are on the face of it and are reiterated by the 32 paragraphed affidavit of Esther Wangeci Kariuki sworn on 4<sup>th</sup> November, 2024.
  4. The application is opposed by the 2<sup>nd</sup> Defendant/Respondent who filed the application dated 18<sup>th</sup> November, 2024 in opposition of the application dated 4<sup>th</sup> November, 2024 under Article 159 of *the Constitution* of Kenya, Sections 1A, 1b and 3A of the *Civil Procedure Act* (Cap 21) Order 1 Rule 10(2), 14 and 25 of the Civil Procedure rules and all enabling provisions of the Law. The 2<sup>nd</sup> Defendant in the said application seeks the following Orders:
    1. Spent.
    2. That this Honourable Court be pleased to strike out the 2<sup>nd</sup> Defendant from the proceedings herein.
    3. That the costs of this application and of the suit be provided for.
  5. The grounds of the application are on the face of the application and supporting affidavit dated 18<sup>th</sup> November, 2024 sworn by Mr. Peter Mugalo a partner in the firm of Kakai Mugalo Advocates Limited Liability Partnership.
  6. The Application dated 18<sup>th</sup> November, 2025 is opposed by the Plaintiff/Applicant vide Replying Affidavit dated 5<sup>th</sup> December, 2024.
  7. In Response to the Plaintiff's application dated 4<sup>th</sup> November, 2024. The 1<sup>st</sup> and 3<sup>rd</sup> defendants' filed a joint Replying Affidavit dated 6<sup>th</sup> December, 2024.
  8. The Court gave directions on disposal of the two applications on 6<sup>th</sup> March, 2025 after the parties agreed to canvass motion dated 4<sup>th</sup> November, 2024 by way of written submissions. The parties filed their submissions.

#### **Plaintiff/Applicants Submissions.**

9. The Plaintiff/Applicant stated that the 1<sup>st</sup> Defendant was retained by the Plaintiff pursuant to her request for retention made on 5<sup>th</sup> December, 1989. The retention was through pursuant to a letter dated 5<sup>th</sup> April, 2021 from the Plaintiff to the 1<sup>st</sup> Defendant.
10. It is the Plaintiff/Applicant's submission that notwithstanding the termination of retention, the 1<sup>st</sup> Defendant by herself or acting through the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants continue to hold themselves out and act as Advocates for the Plaintiff.



11. It is submitted by the Plaintiff/Applicant that the relationship between an Advocate and a Client is contractual. The Applicant relied on an extract from Bowstead & Reynolds on Agency, 9th Edition:

Where there is an express agreement, whether contractual or not, between principal and agent, this will constitute the relationship of principal and agent and the assent of both parties will be contained in it.

... [T]he simplest way in which agency arises, both between principal and agent and as regards third parties, is by an express appointment whether written or oral, by the principal, and acquiescence by the agent, or person similarly empowered to act for him. [Emphasis added]

12. The Plaintiff/Applicant argued that it is only lawful and just that the Defendants be restrained. The Plaintiff/Applicant cited the case of *Narok & another v Cabinet Secretary, Ministry of Industry, Trade & Co-operatives & another; Kenya Farmers Association Ltd* (Interested Party) where an injunction was issued, the Court held as follows:

48. An advocate is an agent of the client they represent and can therefore only represent a party with the correct authority. It is trite that the donor of such authority to act must first have the authority, to properly donate the same to their agent. According to Halsbury's Laws of England, (supra) at page 14 para 764, where an oral retainer exists or where a retainer relationship is implied the relationship thus created is a fiduciary one with the advocate being the agent and the client his principal. As a result, the parties' rights and obligations fall within the realm of the Law of agency. [Emphasis added]

### **1<sup>st</sup> and 3<sup>rd</sup> Defendants Submissions.**

13. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants stated that the threshold for grant of equitable relief of injunction is long settled. In the case of *Giella v. Cassman Brown & Co. Ltd* (1973) E.A 358 the following three cardinal principles were set:
- a. Applicant must show a prima facie case with a probability of success.
  - b. Injunction will not normally be granted unless the applicant will suffer irreparable injury.
  - c. When the court is in doubt, it will decide the application on the balance of convenience.
14. The 1<sup>st</sup> and 3<sup>rd</sup> defendant went on to analyze the evidence adduced by the Plaintiff/Applicant against threshold set above.

### **2<sup>nd</sup> Defendant's Submissions.**

15. The 2<sup>nd</sup> Defendant argues that it is a law firm and lawyers do not operate in a vacuum, they receive instructions from their respective clients and that the 2<sup>nd</sup> Defendant had been instructed by the 1<sup>st</sup> Defendant to act for her and pursuant to those instructions, the 2<sup>nd</sup> Defendant executed the 1<sup>st</sup> Defendant's instructions.
16. It is the 2<sup>nd</sup> Defendant's submission that the principle of common law is that an agent should not be sued where there is a disclosed principal. There is therefore no cause of action against the 2<sup>nd</sup> Defendant as it would be contrary to the common law principle.



17. The 2<sup>nd</sup> Defendant submitted that the twin test for determining the question of who is a necessary party in a suit was established in the case of *Werrot and Company Limited & Others -vs- Andrew Douglas Gregory & Others* [1998] eKLR;
- “For determining the question of who is a necessary party there are two tests;
- (i) There must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and;
  - (ii) It should not be possible to pass an effective decree in the absence of such party.”
18. In *Munene Wambugu & Kiplagat Advocates -vs- Amolo & Another* (Civil Case No. 15 of 2022) [2024] KEHC 1048(KLR) (CIV), the court held as follows;
- To that extent therefore, having made a finding that the Applicant's law firm was made a party to the suit for no pleasurable reasons. It would be proper to order for its removal from the suit and the suit to continue against the rest of the Defendants as clearly spelt out under the legal provisions cited and the decisions of the court.
19. The 2<sup>nd</sup> Defendant urged that on the second limb, it is evident that the 1<sup>st</sup> Defendant can effectively defend the Plaintiff's suit without having the 2<sup>nd</sup> Defendant in these proceedings.

#### **Analysis and Determination.**

20. The threshold for grant of equitable relief of injunction is long settled. In the case of *Giella v. Cassman Brown & Co. Ltd* (1973) E.A 358 the following three cardinal principles were set:
- a. Applicant must show a prima facie case with a probability of success.
  - b. Injunction will not normally be granted unless the applicant will suffer irreparable injury.
  - c. When the court is in doubt, it will decide the application on the balance of convenience.
21. These three conditions of the *Giella* test, have for long been the “litmus test” or legal threshold applied by Kenyan courts in applications for interlocutory injunctions.
22. In the instant case, the Plaintiff/Applicant in its pleadings and Affidavit presented an arguable case. The same has however, been extensively replied to by the Defendants. It is the Court's view that the parties have raised weighty issues that have to be determined. As to whether there are high chances of success, that is not obvious at this preliminary stage on the basis of pleadings only. It is actually the Plaintiff/Applicant's word against the Defendants.
23. As to whether there will be damage not compensable in damages should the sought injunctive reliefs not be issued, the Plaintiff/Applicant extensively argued that notwithstanding the termination of retention the 1<sup>st</sup> Defendant by herself or acting through the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants continue to hold themselves out and act as Advocates for the Plaintiff. The Court finds that the Plaintiff/Applicant did not convince it on this condition.
24. The Court has noted that the Application (dated 4/11/2024) and pleadings point to the issue of instruction between an Advocate and Client. If the Court were to set out and address itself on this issue it would result into a final determination of the suit itself and has preserved that for later when it finally determines the suit itself on its merits, and on the evidence exhibited in the filed pleadings and Affidavits of the parties.



25. Following the Plaintiff/Applicant's argument, the balance of convenience is logically in favour of injunctive orders sought. This is because of the delicate nature of issues raised in the pleadings and affidavits filed by the Plaintiff/Applicant and the Defendants.
26. For the foregoing Court allows the prayers in Notice of Motion dated 4<sup>th</sup> November, 2024. Costs shall be in course.
27. The Court has considered the 2<sup>nd</sup> Defendant/Applicants motion seeking to be struck out of this proceedings.
28. The Plaintiff/Respondent argued that the 2<sup>nd</sup> Defendant/Applicant ought to have moved Court by way of Notice of Motion in place of the Chamber Summons before Court.
29. As a Court, Article 159 of the Kenyan Constitution directs that we prioritize the actual merits and core issues of a case, rather than getting bogged down by procedural technicalities or minor errors in the way a case is presented.
30. The relationship between the 2<sup>nd</sup> Defendant/Applicant and the 1<sup>st</sup> Defendant is purely that of an Advocate/Client in line of their surviving engagement.
31. The 1<sup>st</sup> Defendant clarified the role of the 2<sup>nd</sup> Defendant/Applicant in her defence and the finding confirms existence of an Advocate and Client relationship. The 2<sup>nd</sup> defendant/Applicant acted on instructions of its principal.
32. In Antony Francis Wareham T/A A.F Wareham-vs- Kenya Post Office Savings Bank and 2 others [2004] eKLR: the court reiterated the common law principal of suits against the principal and agent.
33. The twin test for determining the question of who is a necessary party in a suit was established in the case of Werrot and Company Limited & Others -vs- Andrew Douglas Gregory & Others [1998] eKLR:

“For determining the question of who is a necessary party there are two tests;

  - i. There must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and;
  - ii. It should not be possible to pass an effective decree in the absence of such party.”
34. In answering the question of whether the Plaintiff stands to secure some relief against the 2<sup>nd</sup> Defendant/Applicant, the answer is the negative.
35. On whether it's not possible to pass an effective decree in the absence of such party, the finding of the Court is that it can pass an effective decree in the absence of 2<sup>nd</sup> Defendant/Applicant.
36. In the end, allow the 2<sup>nd</sup> Defendant/Applicant's application. Considering the circumstances of this case, there shall be no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> JULY 2025.**

**JANET MULWA**

**JUDGE**

