



Gachoni Enterprises Limited v Nyaga & 5 others (Environment and Land Case Civil Suit 561 of 2015) [2025] KEELC 6408 (KLR) (25 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6408 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 561 OF 2015
AA OMOLLO, J
SEPTEMBER 25, 2025**

BETWEEN

GACHONI ENTERPRISES LIMITED PLAINTIFF

AND

DAVID NJERU NYAGA 1ST DEFENDANT

**MARTIN NJERU NYAGA (BOTH OF THEM T/A NJERU NYAGA & COMPANY
ADVOCATES) 2ND DEFENDANT**

ARTHI HIGHWAY DEVELOPMENT LIMITED 3RD DEFENDANT

ONESMUS KIMANI NGUNJIRI 4TH DEFENDANT

JUSTUS WAINAINA NJUGUNA 5TH DEFENDANT

FRANKLIN KAMAU KAMATHI 6TH DEFENDANT

RULING

1. Two applications are coming up for determination. The 2nd Defendant filed the first notice of motion on 21st August 2024. The 1st Defendant filed a notice of motion on 18th June 2025, supported by an affidavit sworn by David Nyaga on the same date. In both applications, the Defendants are seeking the orders to strike out the Plaintiffs' suit against them for failure to disclose any reasonable cause of action, and costs of the suit and application be provided.
2. The 1st Defendant's application is premised on the grounds inter alia,
 - a. He was just an advocate acting for a client in the transaction and therefore not liable to any fraud alleged by the Plaintiff.
 - b. He has no professional duty to the Plaintiff in respect to the transaction on the suit property.



- c. That he was not a party to the negotiations nor the Sale Agreement entered into between the Plaintiff and the 3rd Defendant, and has no proprietary interests in the land subject to the suit.
3. The 2nd Defendant's motion is based on the grounds that there is no reasonable cause of action disclosed against him in this suit. That the subject matter and parties in this suit are similar to Nairobi ELC No.391 of 2010, Gachoni Enterprises Limited vs David Njeru Nyaga & 5 Others, save for the addition of the 2nd Defendant.
4. In opposition to the two notices of motion, the Plaintiff filed two sets of replying affidavits sworn by Peter Mbogua on 20th June 2025 and 9th April 2025. Mr Mbogua deposed that the 1st Defendant's application is fatally defective for failure to comply with the express provisions of Order 2 Rule 15(2) of the Civil Procedure Rules. That indeed the 1st and 2nd Defendants have been sued in their capacity as partners trading as Njeru, Nyaga and Company Advocates, which prepared the sale agreement subject of the suit and received the deposit of the impugned transaction deposited in its Bank Account.
5. The Plaintiff contends that the cause of action against the 1st and 2nd Defendants arose because they had a clear obligation to hold the said deposit and only release it pursuant to the terms of the Agreement. Furthermore, the 1st & 2nd Defendants received clear instructions from the Plaintiff not to release the said deposit to the other defendants. Still, they did so, causing loss to the Plaintiff that it was their breach of duties under the Sale Agreement, as particularised by the Plaintiff in the Plaintiff, that forms the basis of this suit.

Submissions:

6. Directions were given for prosecuting the application by way of written submissions. Hence, the 2nd Defendant filed submissions dated 21st May 2025 in support of his motion. Citing Lord Pearson in Drummond -Jackson V.B.M.A (1970)1 W.L.R 688 AT P.696, the statement that a cause of action is an act on the part of the defendant which gives the Plaintiff his cause of complaint. The 2nd Defendant submitted that he is a limited liability partner at Njeru, Nyaga & Co. Advocates LLP, thus improperly joined in the suit.
7. He argued that he had no contractual relationship with the Plaintiff as he is simply a partner in the Limited Liability partnership with a legal personality of its own. Additionally, Section 10(4) of the Limited Partnership Act 2012 provides that a partner is not personally liable for the wrongful act or omission of another partner of the limited liability partnership.
8. The 2nd Defendant further submits that this implies each partner will be answerable for what they do in a partnership. That the dealings in the suit being between the Plaintiff and the 1st Defendant, the 2nd Defendant is not liable as held in Mwenda v Afri Business LLP & another (Cause E409 of 2020).
9. The 1st Defendant vide the submissions dated 10th September, 2025, avers that this court lacks jurisdiction to entertain a claim of an alleged breach of fiduciary duty/professional misconduct. He submits that it is an issue to be dealt with exclusively by the Advocates' Disciplinary Tribunal. Alternatively, the 1st Defendant argues that since the amount in contention is Kshs 5,500,000, the claim falls under the jurisdiction of the Magistrate's Court, as envisaged in Section 7 of the Magistrate's Court Act.
10. The 1st Defendant cites the provisions of sections 57 and 60 of the *Advocates Act*, which he states provide mechanisms for addressing complaints against advocates. Additionally, the 1st Defendant submitted that he acted on behalf of the 3rd Defendant in the transaction; hence, the Plaintiff is imagining that the 1st Defendant owed him any fiduciary duty.



11. He submits that since the 3rd Defendant has been sued, there is no cause against him since he was only acting for the party already sued. Since the Law Society of Kenya's conditions of sale were incorporated into the agreement for sale, the rights of the 1st Defendant, as an advocate acting for the 3rd Defendant, are protected, and any issue of misconduct can only be addressed through the mechanisms stated under sections 57 and 60 of the *Advocates Act*. He urged the court to allow his application.
12. The Plaintiff filed written submissions dated 20th June, 2025, urging this court not to grant orders sought in the two applications. It submits that the Plaintiff outlines specific allegations against the 2nd Defendant in: Para. 6–7: The 2nd Defendant's firm prepared the sale agreement and received the deposit. Para. 8: The firm had a contractual duty to hold the deposit until conditions were met. Para. 18: The 2nd Defendant allegedly released funds despite explicit instructions not to do so, causing financial loss. Para. 22: Particulars of breach include failure to safeguard funds and collusion with other defendants.
13. The Plaintiff argues that the 2nd Defendant is a necessary party because the 2nd Defendant's firm held the deposit in trust, making his participation critical to determining liability for its release. Further, vide his defence filed the 2nd admits his partnership in the firm but denies personal involvement, creating a triable issue requiring examination.
14. A triable issue is said to exist if there is a dispute in the facts, which dispute can only be resolved after ventilation in a full hearing. This position was stated by the Court of Appeal in the case of *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* [2015] KECA 846 (KLR), and the question of the 2nd Defendant's liability is dependent on evidence that has not yet been examined in court.
15. Lastly, the Plaintiff reiterated the position in the case of *Stephen Oddiaga v Eliud Mwamunga* [2017] KEELC 1302 (KLR), where the court stated:

“In the precedent set by *D. T. DOBIE & CO (KENYA) LTD VS MUCHAIA* (1982) KLR and subsequent rulings, the Court of Appeal emphasised that courts must exercise great caution when using their power to strike out cases. Such power should only be applied in situations where the case is clearly hopeless, to the extent that even allowing amendments would not save the suit.”

Analysis and Determination:

16. The 1st and 2nd Defendants are seeking to have the suit against them struck out on the basis that there is no cause of action against them. Premised on the arguments presented, this court is called to answer the question whether the plaint as filed raises any triable issues against the 1st and 2nd Defendants.
17. The 1st Defendant stated that he was merely the Advocate representing the 3rd Defendant in the transaction which forms the basis of the suit, thus improperly joined. The 2nd Defendant, on the other hand, argues that the 1st Defendant handled the dealings of the transaction in question and that he is only a partner in the firm of Njeru, Nyaga and Company Advocates, along with the 1st Defendant.
18. Order 2 Rule 15 of the Civil Procedure Rules provides grounds for striking out of suits. It has been established by case law that the court's power to strike out pleadings is to be exercised sparingly and



cautiously. For instance, in *DT Dobie & Company (Kenya) Ltd vs Muchina (1982)* KLR 1, the court stated that;

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of a case before it.”

19. The Plaintiff has argued that their case against the 1st and 2nd Defendants raises triable issues. The 1st Defendant pleaded that he represented the 3rd Defendant in the impugned sale transaction, and the 3rd Defendant, having been sued, the Plaintiff has no cause of action against him. The averment that the 1st Defendant acted on behalf of the 3rd Defendant is not contested, based on the contents of the replying affidavit.
20. The 1st Defendant also argues that if the Plaintiff is accusing him of professional misconduct, the same should be handled in the manner provided in sections 57 and 60 of the *Advocates Act*. Section 57 refers to the composition of the Tribunal, and so the applicable section in this case is 60, which states thus;

“60(1) A complaint against an advocate of professional misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate, may be made to the Tribunal by any person.”
21. From a reading of paragraphs of the plaint cited by the Plaintiff, the 1st and 2nd Defendants’ law firm is accused of breach of professional duties. I am persuaded by the argument of the 1st Defendant that the proper fora to address such a complaint/claim is the Advocates Disciplinary Tribunal and not through a civil case where a principal is sued.
22. The Plaintiff pleaded at paragraph 5 of the plaint that he entered into a sale agreement on 19th February 2010 with the 3rd Defendant. The chain of events relating to this claim flows from the said sale agreement. It is this court’s considered opinion that, having sued the 3rd Defendant as the principal, any orders to be made are against that principal, not the 1st and 2nd Defendants, who acted on behalf of the 3rd Defendant.
23. As regards the application by the 2nd Defendant, I do not buy the arguments put forward that his liability was limited as he did not play any role in the transaction. The reason behind my position is that the 2nd Defendant did not present any evidence/documents stating the extent of liabilities of the partners.
24. However, as a consequence of my finding hereinabove that the issues raised against the firm fail because the Advocates Disciplinary Tribunal can address them and second that the principal has been sued, hence no case against the agent. I also strike out the 2nd Defendant’s name from these proceedings.
25. Consequently, I allow the motion dated 18th June 2025 by making an order striking out the name of the 2nd Defendant from the proceedings. Each party to meet their costs of the application and the struck-out suit.

DATED, SIGNED AND DELIVERED AT NAIROBI, THIS 25TH DAY OF SEPTEMBER, 2025

A. OMOLLO

JUDGE

