



REPUBLIC OF KENYA



**KENYA LAW**  
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**Thuo v Thuo & another (Civil Suit E37 of 2024)  
[2025] KEHC 5181 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5181 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL SUIT E37 OF 2024  
HI ONG'UDI, J  
APRIL 30, 2025**

**BETWEEN**

**SUSAN WANJIRU THUO ..... PLAINTIFF**

**AND**

**GEOFFREY NGETA THUO ..... 1<sup>ST</sup> DEFENDANT**

**ABBEY RESORTS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of two applications. The first one is dated 22<sup>nd</sup> October, 2024 while the second one is dated 6<sup>th</sup> February, 2025.
2. In the application dated 22<sup>nd</sup> October 2024 the plaintiff/ applicant prays for the following orders;
  - i. -
  - ii. Spent.
  - iii. That pending the hearing and determination of suit this honourable court be pleased to issue orders of temporary injunction as against the defendants /respondents, their agents, employees, servants and/or any other person acting under their authority or instructions from holding board meeting for the 2<sup>nd</sup> defendant/respondent scheduled on 23<sup>rd</sup> October, 2024 at Nairobi West Home and the said illegal and irregular board meeting be suspended and/or stayed.
  - iv. That costs of this application provided.
3. The application is premised on the grounds on its face as well as the affidavit of the plaintiff/applicant herein. She deponed that she is a shareholder of the 2<sup>nd</sup> defendant/respondent with a total of 1400 ordinary shares while the 1<sup>st</sup> defendant/respondent is the director/shareholder of the 2<sup>nd</sup> defendant/



respondent. Further, that the main shareholder of the 2<sup>nd</sup> defendant/respondent was her late husband Joseck Thuo Ngeta with a total of 5100 ordinary shares. That upon his demise the said shares were transferred to his estate.

4. She further deponed that the various beneficiaries of the late Joseck Thuo Ngeta had since petitioned for letters of administration vide a succession cause serialized as Nakuru HC Succession Cause No. E076 of 2022. The said succession cause was yet to be finalized and there are no administrators in place. Further, that the 1<sup>st</sup> defendant/respondent in total disregard of the shareholders of the company and the company's articles of association had irregularly and illegally mismanaged the revenues, accounts and assets of the 2<sup>nd</sup> defendant/respondent.
5. She deponed that the 2<sup>nd</sup> defendant/respondent secured a loan of Kshs. 35,000,000/= from NCBA Bank in the year 2015 and as per the terms of the loan agreement it was to pay Kshs. 574,000/= in monthly instalments. That after the death of the main shareholder, the 1<sup>st</sup> defendant/ respondent had been mismanaging the 2<sup>nd</sup> defendant/ respondent by defaulting in making the mandatory monthly instalments to the bank. Further, that at the time of filing her application, the 2<sup>nd</sup> defendant/ respondent had loan arrears totaling up to Kshs. 1,553,346/36 owing to NCBA Bank.
6. She deponed that unless this court intervenes urgently the operations of the 2<sup>nd</sup> defendant/respondent shall be brought to a halt and even worse, be exposed to legal proceedings for debt recovery and auctioning of its assets. Further, that the triplicate conditions for grant of temporary injunction are espoused in the case of *Giella v Casstnan Brown & Company Ltd* (1973) EA 358. She added that this application was not prejudicial to the interests and rights of the defendants/ respondents and hence ought to be allowed.
7. In the application dated 6<sup>th</sup> February 2025 the plaintiff /applicant prays for the following orders; -
  - i. & iv- Spent.
  - ii. That the applicant be granted permission to commence and institute a derivative Claim seeking relief on behalf of the Abbey Resorts Limited in respect of the acts and omissions by the 1<sup>st</sup> defendant/ respondent, involving negligence, default, breach of duty and breach of trust in his capacity as the managing director of Abbey Resorts Limited on such terms as the honourable court considers fit.
  - iii. That the applicant be granted permission to continue the derivative claim seeking relief on behalf of the Abbey Resorts Limited in respect of the acts and omissions by the 1<sup>st</sup> defendant / respondent, involving negligence, default, breach of duty and breach of trust in his capacity as the managing director of Abbey Resorts Limited on such terms as the honourable court considers fit.
  - iii. That pending the hearing and determination of the derivative suit, a temporary injunction do issue restraining the 1<sup>st</sup> defendant/respondent, his servants, agents and/or employees from selling, alienating, transferring, charging, disposing, removing or in any manner whatsoever dealing, with the assets of the 2<sup>nd</sup> defendant company.
  - iv. That pending the hearing and determination of the derivative claim, the 1<sup>st</sup> defendant/ respondent be compelled to produce the books of records, banking slips, audited financial accounts, bank statements of the 2<sup>nd</sup> defendant company in their custody from 2022 up to date.
  - v. That costs be in the cause.



8. The application is premised on the grounds on its face as well as the affidavit of the plaintiff/applicant herein. She reiterated the contents of the affidavit in support of her application dated 22<sup>nd</sup> October 2024.
9. The defendant/respondents in response filed a replying affidavit sworn on 7<sup>th</sup> March, 2025 by 1<sup>st</sup> defendant/ respondent who averred that the plaintiff/applicant's application was misconceived and a non-starter as it seeks to institute a purported derivative claim that has already been instituted albeit without leave making the entire suit incompetent. That he is a shareholder and the sole director of Abbey Resorts Limited while the plaintiff/applicant is a minority shareholder. Further, that she was not an administrator of the estate of the late Joseck Thuo Ngeta thus lacked the locus standi to address court on its behalf. In addition, he averred that the power to manage company accounts typically resides with the directors, acting in accordance with the company's Memorandum of Association and applicable law.
10. He further averred that despite the plaintiff/applicant not being a director of Abbey Resorts limited, she had been making endless effort to solely run the 2<sup>nd</sup> defendant/respondent. That she had recently filed a suit being Nakuru CM Miscellaneous Application number E106 of 2024, in which she sought orders to be given the sole mandate to run the bank accounts of the company despite her not being a director of the company. The said suit was however dismissed on 14<sup>th</sup> August, 2024 for lack of merit.
11. He further deponed that the 2<sup>nd</sup> defendant/respondent would suffer irreparable damage if the application is granted. It is his contention that being the sole director of the company barring him by way of injunction from conducting the affairs of the company including making loan repayments, would leave the company on a free fall.
12. In further support of her application and in response to the defendant/respondent's replying affidavit the plaintiff/ applicant filed a supplementary affidavit dated 12<sup>th</sup> February 2025.
13. The applications were canvassed by written submissions.

**Plaintiff/applicant's submissions to the application dated 6<sup>th</sup> February, 2025.**

14. These were filed by Mburu Ndung'u Advocates and are dated 19<sup>th</sup> March, 2025. Counsel gave a background of the application and identified two issues for determination.
15. The first issue is whether the plaintiff/applicant has met the conditions requisite for the grant of leave by court to institute a derivative suit. Counsel submitted in the affirmative and cited sections 238 and 239 of the *Companies Act* 2015 and the decision in the case of Arnold Kipkirui Langat v Atticon Limited & 6 others; Linkit Limited (Affected Company) [2021] eKLR, Justice Mabeya J stated as follows;

“...a derivative action is a mechanism by which the law allows a member of a company to institute an action on behalf of the company. This arises where the company is unwilling’, through the majority shareholder(s) or management to institute a suit for the benefit of the company. A derivative suit can therefore only be brought by a member of the company and for the benefit of the company or its members. It is an action to be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company. All that one has to establish is that, he is a member of the company and then establish a bona fide cause of action in favour of the company which the management has failed, refused or neglected to pursue for and on behalf of the company...”



See also;

- i. Mohammed Mohamed & Another v Ibrahim Ismail Isaak & Another [2021] eKLR.

16. Counsel further submitted that the plaintiff/applicant had met the threshold set since she was a shareholder of the company and had established a bonafide cause of action in favour of the company in which the management had failed and/or neglected to pursue. In addition, that the allegation against the 1<sup>st</sup> defendant/respondent had been brought in good faith and for the sake of the company's best interest.
17. On the second issue, whether the plaintiff/applicant is entitled to the orders sought in the application, counsel submitted in the affirmative and cited *Giella v Cassman Brown (Supra)* where the court set out the conditions to be met in the grant of injunctive relief to include; is there a prima facie case, does the applicant stand to suffer irreparable harm and on which side the balance of convenience lies. He also placed reliance on the case of *Jan Bolden Nielsen v Herman Phillipus Steya* [2012] eKLR where the court held as follows:

‘I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the *Giella Vs Cassman Brown* case. The court may look at the circumstances of the case generally and the overriding objective of the law.’

“...Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice...”

See also;

- i. Said Almed v Manasseh Benga & Another [2019] eKLR

18. He urged the court to rule in favour of the plaintiff/applicant.

#### **Defendant/respondent's submissions on the application dated 22<sup>nd</sup> October 2024**

19. These were filed by Okiro and Associates Advocates and are dated 19<sup>th</sup> March, 2025. Counsel submitted on brief facts of the case and identified two issues for determination.
20. On the first issue, whether the plaintiff/applicant has met the conditions for the grant of the orders of interim injunction, he placed reliance on the decision in *MM v DCI & Another* [1995] eKLR where the court cited with approval the case of *Giella v Cassman Brown (supra)* where the court set out the conditions to be met in the grant of injunctive relief to include; whether there a prima facie case, whether the applicant stands to suffer irreparable harm which would not be adequately compensated by an award of damages and finally if the court is in doubt, it will determine an application on a balance of convenience.
21. Counsel submitted further that the plaintiff/applicant had no prima facie case as from the onset the instant suit was incompetent as the plaintiff shareholder was seeking not to enforce any of her rights but complaining of purported breach of the rights of the company and fellow shareholders. He placed reliance on the decision in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR where the court cited with approval the decision in *Mrao Ltd v First American Bank of Kenya & 2 others* [2003] KLR 125.



22. Counsel submitted that the plaintiff/applicant had not pleaded any of her rights that stood to be violated should the meeting take place in Nairobi. Further that she was a minority shareholder and had not claimed that damages would not be adequate to remedy any loss that might occur. On balance of convenience, counsel submitted that the same undoubtedly lay on the defendant/respondent's favour. Further, that if the injunction sought is granted, the defendants/respondent's hotel would grind to a halt.
23. Regarding the second issue, counsel submitted that the plaintiff/applicant had not demonstrated sufficient grounds for the grant of an injunction. Further, that she had not met the test for the grant of an injunction as was settled by the case of *Giella Vs Cassman Brown & Co. Ltd (Supra)*. Thus, it was just and equitable in light of their submissions that the orders sought are not granted.
24. Counsel placed reliance on the decision in *Leboo & 2 others v Director Kenya Forest Services & Another [2013] eKLR*, where Sila Munyao J referred to the case of *Giella vs. Cassman Brown (Supra)* in which the court stated the conditions to be demonstrated before interlocutory injunctions are granted. The Court of Appeal stated as follows:
 

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be 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”
25. In conclusion, he urged the court to dismiss the plaintiff/applicant's application with costs to the defendants/ respondents.

**Defendants/respondent's submissions on the application dated 6<sup>th</sup> February 2025**

26. These were filed by Okiro and Associates Advocates and are dated 19<sup>th</sup> March, 2025. Counsel identified two issues for determination.
27. On the first issue, whether the plaintiff/applicant has met the conditions requisite for the grant of leave to institute a derivative claim, counsel placed reliance on the decision in *Nextgen Office Suites Ltd & another v Netcom Investments Ltd & another; Shah Minakshi Navinchandra (Interested Party) [2021] eKLR* where it was held as follows:

“The test for leave to commence a derivative action is generally accepted as requiring the applicant to establish, at a minimum, good faith and that its proposed derivative action is in the company's best interests. The onus to prove good faith in applying for leave to commence a derivative action is borne by the applicant. A plaintiff whose conduct is tainted is barred from pursuing a derivative action. The Courts should be alert in dealing with speculative suits and shoot down such litigations at an early stage.....

because an applicant is premising its action on an alleged failure by the directors to remedy the situation, he must demonstrate that he served an appropriate notice to the directors or shareholders to remedy the situation and a notice of intention to lodge the application detailing the reasons for the application. An applicant cannot wake up one morning and decide to file an application for leave without demonstrating that despite notice, the persons accused of the failure have refused to act or persisted in their breach.”



28. Counsel submitted that in applying the tests provided in the above cited decision to the facts and circumstances of this case, the current application did not meet the threshold so as to trigger the discretion of this court in allowing the leave.
29. On whether the plaintiff/applicant has met the conditions requisite for the grant of the orders of interim injunction, counsel reiterated the contents of his submissions for the application dated 22<sup>nd</sup> October 2024 on a similar issue.
30. Lastly, on whether the plaintiff/applicant is entitled to the prayers sought herein, he equally reiterated the contents of his submissions for the application dated 22<sup>nd</sup> October 2024 on a similar issue.

### **Analysis and determination**

31. I have considered the application dated 22<sup>nd</sup> October, 2024, the affidavits and the submissions by the defendants/respondents. I opine that the main issue for determination is whether the same has been overtaken by events.
32. The said application seeks for orders of temporary injunction against the defendants /respondents, their agents, employees, servants and/or any other person acting under their authority or instructions from holding board meeting for the 2<sup>nd</sup> defendant/ respondent scheduled on 23<sup>rd</sup> October, 2024.
33. This court notes that the plaintiff/applicant did not file any submissions on the said application. Further, there is no doubt that the date when the board meeting was scheduled to take place has since lapsed. It is the said meeting that the plaintiff/applicant sought injunctive orders against. She sought to have the said meeting suspended and/or stayed. The applicant has however not disclosed to this court through evidence that the said meeting actually took place. Thus, it is my humble view that the said prayer is speculative and for this court to grant any such orders would be an exercise in futility.
34. The upshot is that the application dated 22<sup>nd</sup> October 2024 lacks merit and is hereby dismissed with no orders as to costs.
35. I now move to the application dated 6<sup>th</sup> February 2025 which seeks among other orders that the plaintiff/applicant be granted leave to commence and institute a derivative claim seeking relief on behalf of the 2<sup>nd</sup> defendant /respondent in respect of the acts and omissions by the 1<sup>st</sup> defendant/ respondent.
36. Regarding derivative suits, Section 238(3) of the *Companies Act*, 2015 provides as follows:
  - (3) A derivative claim under this part may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.”
37. Further, section 239(1) of the *Companies Act*, 2015 provides as follows:
  - “(1) In order to continue a derivative claim brought under this part by a member, the member has to apply to the Court for permission to continue it.”
38. Moreover, *Dadani v. Manji & 3 Others* [2004] KLR 95, Justice Mwera (as he then was) stated as follows:

“It is a cardinal principle in Company Law that it is for the company and not an individual shareholder to enforce right of actions vested in the company and to sue for wrongs done to it. It is also cardinal that in the absence of illegality, a shareholder cannot bring proceedings in respect of irregularities in the conduct of the company’s internal affairs in circumstances



where majority are entitled to present the bringing of an action in relation to such matter (see *Foss –vs- Harbottle* (1843) 2 Hake 461). All this is in deference to the self-regulation the law allows corporations and thus limits the interference by the Courts in the running of such bodies on their own. However, if due to an illegality a shareholder perceives that the company is put to loss and damage but cannot bring an action for relief in its own name, such a shareholder can bring an action by way of a derivative suit.”

39. In view of the above, it is clear that a derivative action connotes an action to save a company from fraudulent or deliberate actions by a director calculated to fleece the company for personal gain or serious acts of negligence or breach of duty or breach of trust by a director resulting into damage or losses to the company. It is an action, not for the benefit of the applicant but for the benefit of the company in general. It is also not meant to act as an avenue for curing irregularities in the conduct of the company’s internal affairs.
40. In the case of *Jacob Juma –vs- Evans Kidero* [2016] eKLR, the court while citing the decision in *Shirawuse Limited and Another –vs- Pianesi Gino* [2012] eKLR stated the following:
- “It is a cardinal principle in company law that it is for the company and not the individual shareholder to enforce rights of action vested in the company and sue for wrongs done to it .... that in the absence of illegality, a shareholder cannot bring proceedings in respect of irregularities in the conduct of the company’s internal affairs in circumstances where the majority are entitled to present the bringing of an action in relation to such matters. However, if due to an illegality a shareholder perceives that the company is put to loss and damage but cannot bring an action for relief in its own name, such a shareholder can bring an action by way of a derivative suit.... (but) mere irregularity in the internal management of a company cannot be a basis for one to bring derivative suit for such can be rectified by a vote/resolution at the company’s meeting...”
41. Applying the above principles to the facts of this case, the plaintiff/applicant averred that the 1<sup>st</sup> defendant/respondent in total disregard of the shareholders of the company and the company’s articles of association had irregularly and illegally mismanaged the revenues, accounts and assets of the 2<sup>nd</sup> defendant/respondent. On his part the 1<sup>st</sup> defendant/ respondent argued that the plaintiff/applicant’s application was misconceived and a non-starter as it seeks to institute a purported derivative claim that has already been instituted albeit without leave making the entire suit incompetent.
42. The allegations made against the 1<sup>st</sup> defendant/ respondent for financial and deliberate actions to frustrate the company from paying of its loans, have been vehemently denied by the 2<sup>nd</sup> defendant/ respondent. However, it is my humble view that it is not the duty of this court to make substantive findings on this at this stage. Further, in view of such serious allegations made against the 1<sup>st</sup> defendant/ respondent and documents annexed to the application, I am satisfied that the plaintiff/applicant’s case discloses a prima facie case meriting to be more closely interrogated in a derivative suit.
43. The plaintiff/applicant has also sought for temporary injunction to be issued restraining the 1<sup>st</sup> defendant/ respondent, his servants, agents and/or employees from selling, alienating, transferring, charging, disposing, removing or in any manner whatsoever dealing, with the assets of the 2<sup>nd</sup> defendant company.
44. The principles upon which a temporary injunction may be granted were set out in the celebrated case of *Giella v Cassman Brown & Co* (Supra) as follows: -
- i. The applicant must establish a prima facie case with a probability of success.



- ii. The applicant must show that he is likely to suffer irreparable loss or damage if the relief being sought is not granted.
  - iii. In case of any doubt the balance of convenience should tilt in favour of the applicant.
45. Similarly, in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* (Supra) the court stated as follows: -
- “The conditions for the grant of an interlocutory injunction are well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be 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.”
46. This court already made a finding that the plaintiff/applicants have established a prima facie case justifying grant of leave to commence a derivative suit against the 1<sup>st</sup> defendant/respondent.
47. On whether the plaintiff/applicant is likely to suffer irreparable loss or damage if the relief being sought is not granted, the plaintiff/applicant argued that unless this court intervenes urgently the operations of the 2<sup>nd</sup> defendant/ respondent would be brought to halt and even worse, be exposed to legal proceedings for debt recovery and auctioning of its assets. On his part, the 1<sup>st</sup> defendant/ respondent argued that plaintiff/applicant had not demonstrated sufficient grounds for the grant of an injunction.
48. It is not disputed that the plaintiff/applicant is a shareholder of the 2<sup>nd</sup> defendant/respondent and without doubt anything that negatively affects the company would also affect her interest/shares and those of other shareholders. In other words, there is a likelihood that she would suffer irreparable harm. Additionally, in the circumstances of this case and equality of parties this court is required to fashion a remedy which carries the lowest risk of injustice should the court later on find that it should not have issued the injunction in the first place. Thus, this court in order to balance the interest of the parties shall proceed to grant a temporary injunction restraining the 1<sup>st</sup> respondent his servants, agents and/ or employees from selling, alienating, transferring, charging, disposing, removing or in any manner whatsoever dealing, with the assets of the 2<sup>nd</sup> defendant/respondent company pending filing of the derivative suit.
49. Finally, regarding the prayer that the 1<sup>st</sup> defendant/respondent be compelled to produce the books of records, banking slips, audited financial accounts, bank statements of the 2<sup>nd</sup> defendant company in their custody from 2022 up to date. It is my humble view that the said prayer is premature since the derivative suit is yet to be heard. Moreover, the said issue can always be raised and determined at any time during the pendency of the said suit.
50. The upshot is that the application dated 6<sup>th</sup> February 2025 is merited and is allowed in terms of prayers 3, 5 & 7. The following orders shall therefore issue:
- i. Application dated 22<sup>nd</sup> October, 2024 is dismissed with no order as to costs.
  - ii. Application dated 6<sup>th</sup> February, 2025 is allowed in terms of prayers 3, 5 & 7.
  - iii. The derivative claim MUST be filed within 45 days from today’s date.



- iv. The temporary injunction shall only be operational for 45 days. Once the derivative claim is filed the plaintiff/ applicant may seek for further orders from the court that will be dealing, with it.
- v. Costs to be in the cause.

51. Orders accordingly.

**DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 30<sup>TH</sup> DAY OF APRIL, 2025 IN OPEN COURT AT NAKURU.**

**H. I. ONG'UDI**

**JUDGE**

