



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL SUIT NO. 13 OF 2016**

**HEZEKIAH WAN'GOMBE GICHOHI.....1<sup>ST</sup> PLAINTIFF**  
**HEZY JOHN LIMITED.....2<sup>ND</sup> PLAINTIFF**  
**ALLIMEX LIMITED.....3<sup>RD</sup> PLAINTIFF**  
**HII INVESTORS.....4<sup>TH</sup> PLAINTIFF**  
**CAROLINE W KAMARU.....5<sup>TH</sup> PLAINTIFF**

**VERSUS**

**DAVID N MUTHOGA.....1<sup>ST</sup> DEFENDANT**  
**ANTONY WAGURA IKIKI.....2<sup>ND</sup> DEFENDANT**  
**PETER GICHOHI GITAU.....3<sup>RD</sup> DEFENDANT**  
**UMOJA SERVICE STATIONS LIMITED.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. This matter was referred to Mediation and the parties concluded the matter and through a Mediation Settlement Agreement which was adopted as an order of the court; part of the terms of the settlement reached is summarized hereunder;

- (i) The 4<sup>th</sup> Defendant Company be dissolved in accordance with its Articles of Association and the Companies Act;
- (ii) An independent auditor be appointed by the court to handle the audit;
- (iii) An audit be conducted on the company's shares to establish what each of the members own and the parties request the court to elect a date when the audit ought to be conducted;

2. To give effect to Order (ii) and (iii) above the parties were directed to file their respective affidavits proposing their auditors of choice after which the court would appoint an independent auditor and give further directions; the parties duly filed their affidavits together with the proposed auditor's profiles and certificates; the proposals are as follows;

**PLAINTIFFS PROPOSAL**

3. The 1<sup>st</sup> plaintiff filed an affidavit dated 28/11/2019 on his own behalf and on behalf of the other plaintiffs and proposed the firm of M/s Kinyori & Associates;

4. He deposed that the firm had the requisite experience in audit service and had performed similar tasks arising from court cases; that they had lost faith with the former auditors M/s Mwangi Ruita & Company and when it was confirmed that this firm was not competent to provide audit services it was removed at a Special General Meeting held on 27/11/2015; a complaint was even filed with the ICPAK by the 2<sup>nd</sup> plaintiff requesting that disciplinary action be taken against the partners of the firm due to the manner in which it carried out their

professional duties;

5. This firm of auditors which has been proposed by the defendants who have been running the company is also likely to be compromised.

### **DEFENDANTS PROPOSAL**

6. In his affidavit the 3<sup>rd</sup> defendant had proposed the audit firm of Githitu & Company Certified Public Accountants; he later withdrew his proposal;

7. The 1<sup>st</sup> defendant filed his affidavit dated 6/12/2019 and proposed the firm of M/s Mwangi Ruita & Company; therein he deposed that this firm had been the 4<sup>th</sup> defendants' auditor for a period of over 15 years and had served the 4<sup>th</sup> defendant diligently; that the allegations that the firm had pending disciplinary matters has no basis; the plaintiffs are uncomfortable with the current auditors as the firm had been listed as the defendants' witnesses when the main case was ongoing;

8. It was his contention that the firm of M/s Mwangi Ruita & Company is best suited to carry out the audit of the shares;

### **ANALYSIS**

9. This court has perused the supporting affidavits at length and the only issue framed for determination is the appointment of an auditor;

10. From perusal of the respective affidavits on record this court has noted that the firm proposed by the 1<sup>st</sup> defendant namely M/s Mwangi Ruita & Company from the averments which are not disputed that the firm has been an auditor for the 4<sup>th</sup> defendant for a period of 15 years; it is also not in dispute that the firm was listed as a witness for the defendants during the course of the main suit;

11. Having interacted with the 4<sup>th</sup> defendant for a lengthy period of time and also having being listed as a witness herein It is this court's considered view that it would not be prudent for the firm of M/s Mwangi Ruita & Company to conduct the audit; it is apparent from the material placed before this court that the firm may have been embroiled in the dispute that was before this court and for these reasons may not be impartial nor independent;

12. This court is satisfied that this firm is not suited to conduct an impartial or an independent audit;

13. The 3<sup>rd</sup> defendant withdrew its proposed firm which then means that the firm proposed by the 1<sup>st</sup> Plaintiff is the only firm that remains for consideration;

14. Having perused the annexed testimonials of the firm of Kinyori & Associates this court is satisfied that the firm has the requisite experience and expertise and is best placed to be considered for appointment as the auditors to carry out the audit services.

### **FINDINGS AND DETERMINATION**

15. In the light of the foregoing this court makes the following findings and determinations;

(i) The firm of M/s Kinyori & Associates is found to be best suited to conduct the audit;

(ii) The firm is hereby appointed as the firm of auditors to conduct the audit;

(iii) Parties are at liberty to apply for further directions;

Orders Accordingly.

**Dated, Signed and Delivered at Nyeri this 28<sup>th</sup> day of May, 2020.**

**HON. A. MSHILA**

**JUDGE**