



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
WINDING UP CAUSE NO 1 OF 2000
IN THE MATTER OF COMPANIES ACT (CAP 486 OF THE LAWS OF KENYA)

GICHUHI MACHARIA.....1ST PETITIONER
DUNCAN MWAURA KAMAU.....2ND PETITIONER

VERSUS

KIAI MBAKI.....1ST RESPONDENT
WAWERU MUGO.....2ND RESPONDENT
THIONGO KIUNGA.....3RD RESPONDENT

AND

IN THE HIGH COURT OF KENYA AT MILIMANI
MISC CIVIL APPLICATION NO 555 OF 2014
WAWERU MUGO & 19 OTHERS.....APPLICANTS

VERSUS

TITUS THUO MACHARIA & ANTHONY MACHARIA GICHUHI
(Sued as the Managers/Administrators of the Estate of
GICHUHI MACHARIA (Unsound Mind).....RESPONDENTS

RULING

1. For the determination of the Court is the application by the Respondents dated 20th January 2016. The application was brought pursuant to the provisions of Sections 1A, 1B, 3A, 6 and 63 of the Civil Procedure Act as well as Order 51 Rule 1 of the Civil Procedure Rules. The Respondents seek for orders for the stay of proceedings in this matter, pending the hearing and determination of **HCCC No. 96 of 1999 Kiai Mbaki v Gichuhi Macharia & 4 Others**. The grounds upon which the application was set out were as follows; that the matter in **HCCC No. 96 of 1999** was with regards to the filing of the claim with

regards to the conversion of the partnership into a limited liability company, and which if the instant matter proceeded and was determined, then the outcome would affect the final outcome of **HCCC No 96 of 1999**. In support of the application, the Respondent swore an affidavit, which was deposed to by KiaiMbaki on 20th January 2016. Therein, the deponent reiterated the grounds as adduced in support of the application. Further, it was averred that there was an arbitral award that had been adopted as a determination of the Court with regards to the shareholding of the company, and which adoption made on 4th December 2015, was alluded to be oblivious of the proceedings in **HCCC No. 96 of 1999**. These dispositions were further supported in the Supplementary affidavit dated 10th February 2016.

2. The application was opposed. It was contended that the main issue in dispute was with regards to the shareholding in the company, and which issue, had by consent, been referred to arbitration, and in which an arbitral award was issued dated 6th October 2014 was adopted as a ruling of the Court on 4th December 2014. It was contended that the award was a final determination on the issue of shareholding, and that therefore, the issue is res judicata as the Respondents had earlier attempted and failed in setting aside the award. Further, it was averred that the Petitioners intend to withdraw the instant suit filed, and that therefore, there would be no suit capable of being stayed.

3. I have considered the application, the affidavits filed by the respective parties both in support of and in objection to the application, the oral arguments made by the respective counsels and the submissions filed thereto. The main issue for determination is for stay of proceedings in the instant suit pending the hearing and determination of **HCCC No. 96 of 1999**, in which the Respondents in this matter are the Plaintiffs. It was their contention that if this Winding-Up Cause was determined, then the resultant determination may prejudice their rights and interests that they claim in **HCCC No. 96 of 1999**.

4. In establishing that they would stand to suffer substantial loss, the Respondent relied upon the provisions of Sections 6 and 63(e) of the Civil Procedure Act, which empowers the Court to halt proceedings where it has been established that the issues in contention are directly and substantially in issue in a previously instituted suit between the same parties. They also relied on the cases of **HCCA No 326 of 2013 Kenya Power & Lighting Co. Ltd v Esther Wanjiru Wokabi** and **HCCC No 74 of 2011 Christopher Ndolo Mutuku & Another v CFC Stanbic Bank Ltd (2015) eKLR** on the principles that the Court may consider in such instant application. Further, they relied on the case of **Nairobi HC Winding-Up Cause No 43 of 2000 Global Tours & Travel Ltd**, for the disposition that the determination of the winding-up cause pending the determination in **HCCC. No. 96 of 1999** would be rendered nugatory unless the parties are afforded an opportunity to prosecute the pending suit.

5. On their part, the Petitioners reposed and stated that the Respondents had submitted to the jurisdiction of the arbitrator, that they had attended the arbitral proceedings and were therefore bound by the outcome of arbitrator. Further, it was reiterated that the Respondents sought to both approbate and reprobate on the issues at hand, and as such, the attempts made in the instant application should not be allowed by the Court to be determined. It was contended that the Respondents have further failed to take steps to prosecute **HCCC No 96 of 1999**, and further, that it was curious that they intended to stay a suit which the Petitioners had intended to withdraw.

6. In reading the dictum in the case of **Global Tours & Travel Ltd** (supra), Ringera, J (as he then was) had held *inter alia*;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order for stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And, in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

7. As was reiterated in the decision of Ringera, J in Global Tours & Travel Ltd (supra) the Court has to consider a number of issues before it may order for stay of proceedings; the Court should weigh the pros and cons of issuing such order and the ramifications that may arise subsequent to that orders. Further, it was for the Court to consider whether the issuing of such orders would be in the interest of justice, or for the expeditious disposition of matters as alluded to under the provisions of Section 1A of the Civil Procedure Act.

8. In the instant, the prayers sought by the Respondents in **HCCC. No. 96 of 1999** are not dissimilar to those sought by the Petitioners in the instant suit, to wit, winding up of Terrace Hotels Ltd. Further, it was the Petitioner intention, although which intention has not been expressly stated through an application filed before the Court, to withdraw the instant suit. As contended once the same is withdrawn, there would be no suit to be stayed, although some of the residual orders would still be in place, such as the determination adopting the arbitral ruling by the Court on 4th December 2014. The Respondents are yet to execute the application dated 25th February 2016 in which they seek for stay orders pending an intended appeal. But that is neither the issue at hand nor one to be considered at this particular juncture.

9. By issuing stay orders, the Court would effectively be denying the Petitioner an opportunity to further proceed in executing their suit, which in any event, they have stated in their affidavits that they intend to withdraw. In the interests of justice, and in achieving the overriding objective, the Court is persuaded to disallow the Respondent's application, albeit for a limited period of fourteen (14) days to allow the Petitioners time in which to withdraw the instant suit. However, failure by the parties to withdraw the suit within this time stipulated, the Court will direct that the application by the Respondent allowed, and stay of proceedings be allowed pending the hearing and determination of **HCCC No 96 of 1999**.

Dated, signed and delivered in court at Nairobi this 22nd day of April, 2016.

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C. KARIUKI

JUDGE