



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. This Court is asked by the 1st Petitioner herein to give effect to the Notice of withdrawal of the Petition filed herein on 5th May 2016.

2. The quest to withdraw is opposed by the Respondents and the 2nd petitioner on three main grounds. The Applicant lacks locus standi to withdraw the Petition. Secondly an Order of Court granted herein on

22nd March 2016 has taken effect and the Notice of withdrawal has been overtaken by events. Another reason is that the Petitioners have subsequently amended the Petition and therefore the original Petition that the Petitioner seeks to withdraw does not exist.

3. As a general proposition, the right of a party to discontinue a suit or withdraw a claim cannot be questioned (see the decision of the Supreme Court in **Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others SC Appeal No.16 of 2014**). However a Court may decline such withdrawal if the withdrawal or discontinuance is intended to achieve an illegitimate outcome or is one driven by malafides (see the Court of Appeal Decision in **Civil Appeal No.1 of 2015 Beijing Industrial Designing & Researching Institute Vs. Lagoon Development Limited** [2015]eKLR).

Is there any reason why this Court should not allow the withdrawal sought?

4. The locus of Titus Thuo Macharia to withdraw the Petition is questioned. It is said that the 1st Petitioner is dead and no Personal Representatives to his Estate have been appointed. It is true that in the Petition as originally presented the 1st Petitioner was Gichuki Macharia and it is common ground that he has since passed on.

5. Although Mr. Kirundi told Court that the 1st Petitioner had been substituted by the Administrator to his Estate, the Court has gone through the Proceedings and Record and has neither seen an Application for substitution nor an Order allowing it.

6. It would seem therefore that Titus Thuo Macharia may for now be lacking locus to seek the withdrawal of the Petition on behalf of the Estate of Gichuhi Macharia.

7. The Notice of Withdrawal of 5th May, 2016 is hereby struck out.

8. Costs of the Proceedings in respect to the withdrawal to the 2nd Petitioner and the Respondents.

Dated, Signed and Delivered in Court at Nairobi this 20th Day of December, 2016.

F. TUIYOTT

JUDGE

PRESENT;

Ndirangu holding for Kirundi for 1st Petitioner

Wangalwa for 2nd Petitioner

Wangalwa for Gachomo for Terrace Hotels

Alex - Court Clerk