



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**

**PETITION NO. E105 OF 2018**

GITAH GETHENJI.....1<sup>ST</sup> PETITIONER  
AMEE SHALSHAZAR .....2<sup>ND</sup> PETITIONER  
SHEETAL KHANNA .....3<sup>RD</sup> PETITIONER  
NARESH MEHTA.....4<sup>TH</sup> PETITIONER

VERSUS

JAMES NDUNGU GETHENJI.....1<sup>ST</sup> DEFENDANT  
ERIC GOVANI.....2<sup>ND</sup> DEFENDANT  
CHACHA MABANGA .....3<sup>RD</sup> DEFENDANT  
KIHINGO VILLAGE (WARIDI GARDENS)  
MANAGEMENT LIMITED.....NOMINAL RESPONDENT

**RULING**

**(IN RESPECT TO APPLICATION DATED 9<sup>TH</sup> AND 10<sup>TH</sup> JULY 2019)**

**BACKGROUND**

1. On 5<sup>th</sup> October 2018 the petitioners herein filed a petition against the respondents and nominal respondent seeking the following orders:-
  - a) *A declaration that the affairs of the Nominal respondent have been conducted in a manner that is oppressive and unfairly prejudicial to the interests of the shareholders.*
  - b) *An injunction be issued restraining the respondents either by themselves, their servants, agents, employees, or other parties through whom they may act from in any way interfering with, the intended General Meeting on the 27<sup>th</sup> October 2018.*
  - c) *An injunction be issued restraining the respondents either by themselves, their servants, agents, employees, or other parties through whom they may act from threatening, harassing, intimidating, publishing, posting, writing or otherwise conveying information meant to defame or malign the petitioners.*
  - d) *The costs of this suit and interest thereon until payment in full.*
  - e) *Such other orders as the court may deem fit in the interests of justice.*
2. On 22<sup>nd</sup> November 2018, the petitioners filed an application in which they sought a raft of prayers namely; an order compelling the nominal respondent's Company Secretary to produce minutes and resolutions; interlocutory injunction and leave to amend the petition among other prayers.

3. On 29<sup>th</sup> November 2018, the petitioners filed yet another application seeking the review and setting aside of directions given for the hearing of the respondent's application dated 17<sup>th</sup> October 2018 and that the status quo obtaining in respect to the directorship of the Nominal respondent and further, that the provision of utilities and services be maintained.

4. After several court appearances the Nominal respondent filed an application dated 9<sup>th</sup> July 2019 in which it sought the following orders:-

**1. That this Honourable Court do vacate its orders issued on the 19<sup>th</sup> October 2019 freezing the accounts of the nominal respondent herein, Kihingo Village (Waridi Gardens) held at NIC Bank Limited, Westlands Branch, Account Number 1000158287.**

**2. That in consequence to Order 1 above, this Honourable Court do order NIC Bank Limited to allow the mandate holders to continue operating account number 1000158287 held at NIC Bank for and on behalf of Kihingo Village (Waridi Gardens) Management Limited.**

**3. That in consequence to Order 1 above, this Honourable Court do order NIC Bank Limited to allow the mandate holders to continue operating account number 1006590671 held at NIC Bank for and on behalf of Kihingo Village (Waridi Gardens) Management Limited.**

**4. That the Honourable court do vacate and set aside its orders issued on the 30<sup>th</sup> November 2018 in the form of an interlocutory injunction barring the respondents whether by themselves, or through their agents or servants or in any other manner whatsoever from in any manner dealing with, transferring, disposing of, charging or otherwise interfering with the reversionary interest of and club house erected on Land Reference Number 27754 (IR No. 108885) and more particularly delineated on Survey Plan Number 279507 pending inter partes hearing of the application on all the prayers.**

**5. That a restraining order do issue restraining the petitioners, their agents or servants or any other person acting under their instructions from interfering with the management and the operations of the club house erected on Land Reference Number 27754(IR No. 108885) and more particularly delineated on Survey Plan Number 279507 pending inter partes hearing and determination of the main petition filed herein.**

**6. That the Honourable Court do vary its orders issued on the 4<sup>th</sup> December 2018 directing the Nominal Respondent herein to continue providing utilities and services to the members of the Nominal Respondent, by providing that any such services to be provided only to those members of the Nominal Respondent who have paid services to the Nominal Respondent.**

5. On 10<sup>th</sup> July 2019 the petitioners also filed an application seeking the following orders:

**1. The court do adopt notices of withdrawal dated 21<sup>st</sup> May 2019 in respect of the Notice of Motions dated 22<sup>nd</sup> and 29<sup>th</sup> November 2018 respectively.**

**2. The petition dated 3<sup>rd</sup> October 2018 be marked as compromised and settled in respect of reliefs at paragraphs 23(a), (b) and (c) which are spent following the Special General Meeting held on 13<sup>th</sup> April 2019 by the shareholders.**

**3. The court be at liberty to grant any further relief.**

**4. That court be pleased to make an order of costs of the petition in favour of the petitioners.**

6. When the matters came up for mention before me on 10<sup>th</sup> July 2019, Mr. Gichuhi learned counsel for the petitioners intimated to the court that he had just filed the application (dated 10<sup>th</sup> July 2019) seeking to have the notices of withdrawal of the applications adopted by the court and to mark the petition as settled. At the time, Mr. Maina advocate who appeared for the 1<sup>st</sup>, 2<sup>nd</sup> and Nominal Respondent, intimated to the court that he had no objection to the said withdrawal save for costs.

7. Mr. Otieno, learned counsel for the 3<sup>rd</sup> respondent, on the other hand, expressed reservations on the intended withdrawal of the suit and asked for time to make a response to the application.

8. This court then issued directions that both the applications dated 9<sup>th</sup> and 10<sup>th</sup> July 2019 be canvassed by way of written submissions which the parties would then highlight at a later date. It is to be noted that only the petitioners filed written submissions.

#### **Application dated 10<sup>th</sup> July 2019**

9. As I have already stated in thus ruling, the petitioners seeks orders to withdraw the motions dated 22<sup>nd</sup> and 29<sup>th</sup> November 2018. The petitioners also sought orders to mark the petition as settled on the basis that the same had been overtaken by events after the Annual General Meeting held on 13<sup>th</sup> April 2019 pursuant to a decree issued on 6<sup>th</sup> February 2019 in ELC No. 1225 of 2013 in *Kifaru Investments Limited & Others v Kihingo Village (Waridi Gardens) Ltd* (hereinafter "the ELC case").

10. According to the petitioners, all the prayers sought in the petition are spent save for the issue of costs. Mr. Gichuhi, learned counsel for the petitioners submitted on a party's right to withdraw its case before the court which right, he contended, the court cannot take away. For this argument counsel relied on decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7*

*Others* [2013] eKLR wherein it was held that:

***“A party’s right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate. Recently, a single judge of this court I John O. Ochanda vs Telkom Kenya Limited, Motion No. 25 of 2014, in granting an application for withdrawal of a Notice of Appeal, stated inter alia:***

***“I do hold the view that a prospective appellant is at liberty to withdraw a Notice of Appeal at any time before the Appeal has been lodged and any further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the Civil Procedure Rules of Court of Appeal Rules, the right to withdraw or discontinue proceedings or withdraw a Notice of Appeal respectively ought to be allowed as a matter of right subject to any issue of costs which can be claimed by the respondents if any.” (Emphasis provided)***

11. Counsel also submitted on the issue of the decree in the ELC case, an alleged Arbitral Award, the Annual General Meeting and contempt of court by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. I am however of the humble view that in the context of the application dated 10<sup>th</sup> July 2019, the above issues are extraneous issues that the applicant may pursue at a different forum as they do not take away the fact that the petitioner desires to withdraw both the petition and the applications dated 22<sup>nd</sup> and 29<sup>th</sup> November 2018.

### **3<sup>rd</sup> respondent’s case**

12. The 3<sup>rd</sup> respondent opposed the application through his replying affidavit dated 12<sup>th</sup> July 2019 wherein he avers that the applications sought to be withdrawn have been dispensed with since the orders made therein are in force until the hearing and determination of the petition.

13. He also takes issue with the prayer to mark the petition as compromised/settled on the basis that all the proposals made by the petitioners at the Annual General Meeting were defeated by the majority vote of the shareholders. He avers that the wishes of the company must not be circumvented in the manner proposed by the petitioners. He states that the applications ought to be dismissed so that the court can uphold the sanctity of the decision of the majority shareholders.

14. At the hearing of the application Mr. Otieno, learned counsel for the 3<sup>rd</sup> respondent, submitted that there is no application to withdraw the entire petition and that the petitioners still intend to pursue the petition.

15. Counsel also took issue with provisions of the law cited by the applicants and argued that the same do not provide for withdrawal of applications. He submitted that the petition has not been compromised in light of the Annual General Meeting of 13<sup>th</sup> April 2019 wherein the majority shareholders voted to reject the resolutions.

16. Counsel further submitted that there are subsisting orders issued on 4<sup>th</sup> December 2018 regarding the maintenance of the status quo in respect of the directorship pending the hearing and determination of the petition which orders had not been vacated or set aside. He maintained that in the face of the subsisting orders, the applications on which they were issued cannot be withdrawn.

### **Analysis and determination**

17. I have considered the application dated 10<sup>th</sup> July 2019, the 3<sup>rd</sup> respondents replying affidavit and the parties’ respective submissions together with the authorities that they cited.

18. The application is brought under Order 25 Rules 1 and 5 of the Civil Procedure Rules which stipulates as follows:-

#### ***“Withdrawal by plaintiff.***

***1. At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.***

#### ***Compromise of a suit***

***5. (1) Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.***

***(2) The Court, on the application of any party, may make any further order necessary for the implementation and execution of the terms of the decree.”***

19. The 3<sup>rd</sup> respondent took issue with the provisions under which the application was filed and argued that the same does not allow for withdrawal of applications. I am in agreement with the 3<sup>rd</sup> respondent’s argument that Order 25 Rule 5 of the Civil Procedure Rule does not apply in this case as the applicant has not demonstrated that any agreement was reached with the respondents that would then be construed

to have compromised or settled the suit.

20. The suit may however be withdrawn under order 25 Rule 1 of the Civil Procedure Rule which has also be invoked by the applicant herein. Under Section 2 of the Civil Procedure Act, a suit is defined to mean “ **all civil proceedings in any manner prescribed.**”

21. My take is that there are instances where suits may be initiated by way of applications, miscellaneous applications, petitions, complaints or even originating summons. I find that the applications herein fall within the definition of suits as stated under Section 2 of the Civil Procedure Act.

22. The main issue for determination is whether this court can stop a litigant from withdrawing his suits. Courts have held that the right of a party to withdraw his suit cannot be taken away by the court. (See *Nicholas Kiptoo Arap Korir Salat v IEBC* (supra).

23. In the instant case, the applicants have clearly indicated that all the prayers that they sought in the petition are spent except for the issue of costs. Under these circumstances, I find that it would be foolhardy for this court to hold back the applicants from proceeding with a matter which in their view, is spent/settled. Disallowing this kind of application will, in my humble view, be an exercise in futility as it would be tantamount to compelling a party, to continue with a case which he no longer wishes to pursue.

24. The 3<sup>rd</sup> respondent and indeed the Nominal Respondent, through its application dated 9<sup>th</sup> July 2019, raised the issue of subsisting orders issued in the various application that were filed by the applicants. My finding is that once the applicants withdraw the petition, all the orders issued in the suit cease to exist and are automatically vacated. It is for this reason that I find that the application dated 9<sup>th</sup> July 2019 is spent as it seeks to set aside orders that were made in applications that have, technically, fallen on the wayside following the withdrawal of the petition.

25. For the above reasons I allow the application dated 10<sup>th</sup> July 2019 with costs to the respondents. The respondents are also granted the costs of the petition.

26. It is so ordered.

**Dated, signed and delivered in open court at Nairobi this 14<sup>th</sup> day of November 2019.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Kabugu for Gichuhi for the petitioner

Mr. Maranga for Otieno for 3rd defendant

Mr. Gikonyo for Katika for 1<sup>st</sup>, 2<sup>nd</sup> Nominal respondent

Court Assistant - Sylvia