



**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.....1<sup>ST</sup> PETITIONER**

**DUNCAN MWAURA KAMAU.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**KIAI MBAKI.....1<sup>ST</sup> RESPONDENT**

**WAWERU MUGO.....2<sup>ND</sup> RESPONDENT**

**THIONGO KIUNGA.....3<sup>RD</sup> 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 (UN SOUND MIND).....RESPONDENTS**

**RULING**

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

2. The quest to withdraw is opposed by the Respondents and the 2<sup>nd</sup> petitioner on three main grounds.

The Applicant lacks locus standi to withdraw the Petition. Secondly an Order of Court granted herein on 22<sup>nd</sup> 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 1<sup>st</sup> Petitioner is dead and no Personal Representatives to his Estate have been appointed. It is true that in the Petition as originally presented the 1<sup>st</sup> Petitioner was Gichuki Macharia and it is common ground that he has since passed on.

5. Although Mr. Kirundi told Court that the 1<sup>st</sup> 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 5<sup>th</sup> May, 2016 is hereby struck out.

8. Costs of the Proceedings in respect to the withdrawal to the 2<sup>nd</sup> Petitioner and the Respondents.

**Dated, Signed and Delivered in Court at Nairobi this 20<sup>th</sup>Day of December, 2016.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Ndirangu holding for Kirundi for 1<sup>st</sup> Petitioner

Wangalwa for 2<sup>nd</sup> Petitioner

Wangalwa for Gachomo for Terrace Hotels

Alex - Court Clerk



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