



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 147 OF 2010

**MAKOMBOKI TEA FACTORY CO.
LIMITED.....PLAINTIFF**

VERSUS

JOSEPH MWANGI MBOTE.....1ST DEFENDANT
HUDSON MOFFAT KAMAU MBUE.....2ND DEFENDANT
JOSEPH KNUTH GITONGA.....3RD DEFENDANT
JOSEPH MUTURI MARITE.....4TH DEFENDANT
BENSON MWANGI.....5TH DEFENDANT
FRANCIS GICHUI KARANJA.....6TH DEFENDANT

RULING

The subject matter of this ruling is the summons dated 26th October 2010, in which Makomboki Tea Factory Co. Ltd., the plaintiff herein, has sought for the following orders:

- 1. This Honourable court be pleased to certify this matter as urgent and dispense with service thereof in the first instance.***
- 2. A temporary injunction do issue against the defendants restraining them from entering upon the premises of the Plaintiff and/or interfering with the management, operations, assets and business of the Plaintiff Company pending the hearing of this application inter partes and thereafter pending the determination of this suit;***
- 3. A temporary injunction do issue against the Defendants restraining them from holding themselves out as directors and/or as other officers of the Plaintiff Company pending the hearing of this application inter partes and thereafter pending the determination of this suit;***

4. *Costs of this application be provided for.*

The application is supported by the affidavit of John Kennedy Omanga. When served, Joseph Mwangi Mbote, Hudson Moffat Kamau Mbue, Joseph Kinuthia Gitonga, Joseph Muturi Marite, Benson Mwangi and Francis Gichui Karanja being the 1st – 6th Defendants respectively filed the replying and a further replying affidavit of Hudson Moffat Kamau Mbue and grounds of opposition to resist the application.

I have considered the grounds set out on the face of the summons and the facts deponed in the affidavits filed for and against the summons plus the grounds of opposition. I have further considered the oral submissions of learned counsels from both sides. It is the submission of the Applicant that the requisition for an Extra Ordinary General Meeting made by the shareholders vide the letter dated 6th September 2010 did not meet the requirements of *Section 132(1) and (2)* of the Companies Act. It is said that the letter was signed by one person without a list of at least 10% of the members. It is also alleged that the letter is not signed by all the requisitionists. It is also alleged that no share certificate was attached to the requisition. The Plaintiff further alleged that the resolution passed in the meeting of 28th October 2010 to dissolve the Plaintiff company's board of directors did not comply with the requirements of *Section 185* of the Companies Act. It is said no notice was given to the directors. It is said a notice was given on 29th September 2010 and a meeting was held on 28th October 2010. The Plaintiff alleged that a notice of 23 days was given instead of 28 days.

The Defendants on their part, urged this Court to dismiss the Summons. It is said that the Plaintiff, being in possession of the register of its members has failed to show this court that the Defendants are not members of the Company. It was pointed out that the letter dated 6th September 2010 was received with a letter enclosing a list of members equivalent to 10% of the Company's entire membership hence the notice complied with the provisions of *Section 132* of the Companies Act. It is said that the law required that a requisitionist need to give notice of 21 days and not 28 days.

From the material and the submissions presented to this Court, it is clear that the main issues in dispute are twofold: First is whether or not the requisitionists of the meeting held on 23rd October 2010 complied with *Sections 132* of the Companies Act?

Secondly, whether or not the members complied with the provisions of *Section 185* of the companies Act before passing a resolution to dissolve the Plaintiff's board of directors. It is the Plaintiff's submission that the Defendants did not comply with *Section 132* when they called for the Extra Ordinary General Meeting of 23rd October 2010. Before determining the issue, it is important to discover the importance of *Section 132* of Companies Act. Under *Section 132 (1)* of the Companies Act, 10% of the membership of a company may requisition to convene an Extra Ordinary General Meeting. That requisition, under *Section 132 (2)* of the same Act, must set out the objects of the meeting and must be signed by the requisitionists and deposited at the Company's registered office. The law is very clear that if the directors do not hold a meeting within 21 days from the date of receipt of the requisition then the requisitionists will proceed to convene the meeting. Having set out the requirements of *Section 132*, let me now discover whether or not the Defendants complied with the aforesaid law. To begin with, I must state from the outset that the requisitionists were required to give the directors a notice of 21 days to convene a meeting and not 28 days as suggested by the Plaintiff. The Plaintiff and the Defendants agree that the notice issued is dated 6th September 2010. They also agree that the notice contained the agenda of the meeting. They do not agree in the following aspects:

- (i) The period of notice.

(ii) Whether or not the notice was signed by 10% of the members of the company.

I will start with the first issue. I have already stated that the requisitionists were required to give a notice of 21 and not 28th days. The Plaintiff admits it was given 23 days but the directors did not convene a meeting as required. The members were therefore entitled to convene a meeting anytime thereafter. On the second issue as to whether or not 10% of the membership signed the requisition. I have carefully perused the letter dated 6th September 2010 and it is clear that the list of founder shareholders who were over 1000 members was given. The Plaintiff aver that its members number 5000. A simple arithmetic will reveal that 10% of 5000 is 500 members. The list attached to the letter requisitioning the meeting comprise of 1,158 members. The list is signed by majority of the members. It is therefore obvious that the members who requisitioned the Extra Ordinary General Meeting were more than 10%. They all signed the requisition and gave a valid notice of 21 days in compliance with *Section 132* of the Companies Act.

Having come to the conclusion that the requisitionists complied with *Section 132* of the Companies Act, let me now examine whether or not the members complied with *Section 185* of the Companies Act when they passed a resolution to remove the entire board of directors. Under *Section 185* of the Companies Act, if a director or directors is/are to be removed, a special notice shall be required of any resolution to remove a director(s). On receipt of the notice of the intended resolution to remove a director company shall send a copy of the notice to the director(s) concerned and the director(s) shall be entitled to be heard on the resolution at the meeting. The Plaintiff has cried foul that the board of directors were removed without strict compliance with *Section 185*. The Plaintiff admits that the Defendant gave a notice which had many agendas. I have carefully perused the notice and I must state that there was no agenda for the passing of a resolution to remove or dissolve the board of directors. In the absence of such an agenda, I regret to state that the resolution to dissolve the board of directors is null and void because the provisions of *Section 185* of the Companies Act. In short there was no evidence that a special notice was served upon each director affected. Had that notice been given, I believe the directors would have availed themselves at the meeting to be heard. It is on this basis that I have formed the view that the Plaintiff has shown that it has a *prima facie* case with a probability of success, hence it is entitled to the equitable remedy of injunction. I am further convinced that the Plaintiff being a Public Limited Liability Company will suffer irreparable loss if the order is denied. The purported act of dissolving the board of directors cannot obviously be compensated in monetary terms. I hasten to state further that the party who is likely to be more inconvenienced is the Plaintiff.

In the end I find the Summons dated 26th October 2010 to be well founded. It is allowed in terms of prayers 2 and 3 with costs to the Plaintiff.

Dated and delivered at Nyeri this 18th day of February 2011.

J. K. SERGON

JUDGE

In open court in the presence of Waithaka Mwangi for the Defendant and Kibicho for Plaintiff.

Waithaka Mwangi: We need a hearing date.

Kibicho: That is o.k.

Court: Parties to file the agreed or separate issues within 7 days.

Mention on 4th March 2011 for further orders and directions on the hearing of the suit.

J. K. SERGON

JUDGE