



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Miscellaneous Case 937 of 2006**

**HADSON MOFFAT KAMAU ..... PLAINTIFF**

**VERSUS**

**MAKOMBOKI TEA FACTOR LTD. .... DEFENDANT**

**RULING**

This matter originates under the provisions of the **Companies Act, Cap. 486** Laws of Kenya. It is in the matter of appointment of inspectors to investigate the affairs of MAKOMBOKI TEA FACTORY LIMITED under **Section 165**.

It is commenced under **Section 132, 135 and 165** of the **Act** and **Rules 8 (c) and (h) Companies High Court Rules**. Orders sought are:-

- 1. Extra Ordinary General meeting be ordered;***
- 2. Appointment by Court of Inspectors to investigate the affairs of Makomboki Tea Factor Ltd. and report to court and interim report or final report be submitted and such other ancillary orders as necessary.***

The application is based on the grounds that the company's business

is being conducted in an oppressive manner to members and that the directors are guilty of fraud, misfeasance and misconduct towards other members, disregarding the Companies Articles of Association and in violation of **Companies Act**. The company is likely to lose Kshs.424,254,221/=.

Thereafter on 15/9/2006 a Preliminary Objection was raised by the Company/Respondent, on the ground that the application contravenes mandatory provisions of **Companies High Court Rules** and therefore jurisdiction of court is not properly invoked. There is no jurisdiction under **Section 132** for granting orders sought. The requisitions and applicant have not alleged having convened or attempted to convene an Extra Ordinary General Meeting is required under **Section 132 (3)** of the **Act**.

Jurisdiction conferred by **Section 135** is without basis and therefore the application is premature since the applicant has not exhausted the remedies provided and is an abuse of court process. The applicant has not complied by **Section 165** and has not alleged to hold 10% of shares issued. The applicant swears that he is a member of the company and together with 484 founder shareholders including himself, requisitioned for an Extra Ordinary General Meeting under **Section 132 (1)** but directors have failed to

convene such a meeting.

The convening of an Extra Ordinary General Meeting is provided for under **Section 132** and the requirements of the law are set out under that **Section**. If the directors do not comply with the requisition within 21 days from the date of the deposit of the requisition the requestors may

proceed to convene the meeting. In this case, it does not appear as if they took action to convene such a meeting. **Section 135** of the **Act** gives power to court to order a meeting where for any reason, it is impracticable to call a meeting of a company in any manner in which meetings of the company may be called, the court may either of its own motion or on application of any director or any member of the company entitled to vote at the meeting, order a meeting to be called.

**Section 165** empowers the court to appoint one or more competent inspectors to investigate the affairs of the company and to report thereon in such manner as the court directs on application of not less than two hundred members or of members holding not less than 1/10 of the shares issued. The applicant shall show good reason for requiring the investigation. The rules invoked **8 (c)** provides for the application for the appointment of inspectors under **Section 165** which shall be by Notice of Motion. Applications under **Section 135** shall be by summons.

In the case of **Florence I. Makoteri t/a On Connections & another vs. Fortune Propertis Ltd. & another [2006] eKLR**. It was held that where an application is brought to court by a Notice of Motion is brought instead by Chamber Summons, the same is incompetent and ought to be struck off. The same was the outcome in the case of **HCC No.534 – Devji Meghji & Brothers Ltd. vs. Prospectus Thika Ltd, Dr. Peter Kibunja Gitau, Dr. Mwangi Gitonga**. The application was dismissed on a preliminary point.

In the decision of Ringera, J. (as he then was) in **HCC No. Morris & Co. vs. Kenya Commercial Bank Ltd. & others**, it was said:-

***“An application for a mandatory injunction can only be made pursuant to provisions of Section 3A of the Civil Procedure Act.”***

So in an application where the applicant sought both interlocutory prohibitive and mandatory injunction, it was incumbent on him to do so in a motion on notice for under our procedural law, it is established that where a matter falls partly within the scope of a summons in Chambers and partly within a motion on motion, the large procedure namely, the motion is to be invoked. In the present case **Rule 8 (c)** requires Notice of Motion and **9 (h)** requires application to be made by summons.

The application is brought under summons and not Notice of Motion. Both parties filed written submissions which I have perused. I have also perused the authorities relied upon by the parties. It is clear to me that the so called Preliminary Objection is not a pure point of law. It requires several issues to be investigated for example the capacity of the applicants.

I therefore, overrule the Preliminary Objection and order the application be heard on its merit. The costs of the application shall be in the cause.

Orders accordingly.

**DATED, SIGNED and DELIVERED** at Nairobi this 30<sup>th</sup> day of October, 2009.

**JOYCE N. KHAMINWA**

**JUDGE**