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

Misc. Cause 937 of 2006

HADSON MOFFAT KAMAU…….……...……PLAINTIFF

VERSUS

MAKOMBOKI TEA FACTORY LIMITED…….....…..……..DEFENDANT

R U L I N G

By a summons dated **30th August 2006**, filed on **1st September 2006**, Hadson Moffat Kamau has brought an application under **sections 132, 135** and **165** of the Companies Act Cap 486 Laws of Kenya, and **Rules 8 (c)** and **(h)** of the Companies (High Court) Rules, seeking *inter alia*, orders for an extraordinary general meeting of Makomboti Tea Factory Limited, *(the respondent Company)*, to be called and held, and competent inspectors to be appointed to investigate the affairs of the respondent Company. In response to this application two replying affidavits have been filed.

One is a replying affidavit sworn by John Kennedy Omanga on the **19th October 2006**, and filed on the same date. The second affidavit is sworn by Jeremiah F. Luhango also sworn and filed on the **19th October 2006**.

By a notice of a preliminary objection filed on **27th October 2006**, the Applicant objects to the two replying affidavits contending:

(1) That the affidavits have been filed without authority.

(2) That the affidavits are fatally defective and inadmissible.

(3) That the affidavits have been filed in express violation of the Companies Act, Cap 486, and the Oaths and Statutory Declarations Act Cap 15.

Mr. Kamwendwa, the advocate for the applicant has submitted that the two replying affidavits have not been sworn with the authority of the Company as no authority under the corporate seal of the company as required under **Order III Rule 2 C** of the Civil Procedure Rules, has been exhibited. Mr. Kamwendwa therefore, maintains that the two affidavits are fatally defective. In this regard Mr. Kamwendwa relied on the following cases:

· ***Microsoft Corporation vs Mitsumi Computer Garage Limited & Another HCCC 810 of 2001 (Milimani Commercial Courts),***

in which Ringera J. (as He then was), struck out an affidavit sworn on behalf of a Corporation on the

ground that the deponent did not depone to the fact that she was authorized by the Corporation to swear the affidavit.

· ***Affordable Homes Africa Limited vs Ian Henderson & 2 Others HCCC 524 of 2004 (Milimani Commercial Courts),***

where Njagi J. held that a suit instituted without authority from the Board of Directors was incompetent and struck out the suit and the verifying affidavit, as having been filed without authority.

· ***Kariuki Njoroge & Others vs Stephen Mugo Mutothori and 2 Others HCCC 609 of 2004 (Nairobi),***

in which Mugo J. struck out the suit against the applicants as the respondent failed to show the court that they were authorized to take out proceedings in the name of the Company**.**

It was further submitted by Mr. Kamwendwa that the affidavits were incompetent, as they were drawn and filed by an advocate who had no authority to act on behalf of the Company as no resolution of the Company was exhibited to demonstrate any such authority.

The following authorities were relied upon in support of this submission: -

· ***Burgerere Coffee Growers Limited vs Sebanduka & Another [1970] E A 147,***

in which a suit commenced on behalf of a Company without any resolution of the Company or Board of Directors authorising the institution of the suit was dismissed and the advocate who had brought the legal proceedings without authority of the purported plaintiff held personally liable to the defendant.

· ***Bunson Travel Service Limited & Others***

vs Kenya Airways Limited HCCC No.304 of 2004 (Milimani).

In response to the preliminary objection, Mr. Wamiti drew the court's attention to paragraph I of each of the affidavits wherein the deponents of the affidavits swore that they were duly authorized to swear the affidavit. He maintained that, the averment was sufficient to show that the deponents had authority to swear the affidavits. He contended that there was no legal requirement for the deponent to annex a document from the corporation giving such authority.

Mr. Wamiti submitted that the authorities relied upon by the applicant's counsel were distinguishable as they all concerned the issue as to whether a company can institute proceedings in its name without a resolution and whether in such a case the lawyer involved in filing the suit had authority.

Mr. Wamiti further distinguished the current case as dealing with a situation where the Company was defending itself and not the initiator of the suit. He further contended that the question as to whether there was a resolution of the Company authorizing the suit is one of fact and cannot therefore be dealt with as a preliminary issue. He added that the court had already dealt with an application filed on **15th February 2007**, which was argued on behalf of the respondent. He urged the court to dismiss the preliminary objection as a mere attempts to delay the suit.

The preliminary objection raised herein appears to be twofold. First, that the proceedings taken on behalf of the defendant have been done without authority as the advocate who purported to act on behalf of the company had no authority to do so. No resolution of the company appointing him having been exhibited. Secondly, that the affidavits in reply sworn by John Kennedy Omanga and Jeremiah F. Luhongo are both defective as the same were sworn without authority. As was stated in Mukisa Biscuit Manufacturing Ltd vs. West End Distributors Ltd [1969] EA 696:

"**a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and if argued as a preliminary point may dispose of the suit**."

In my view, the issues raised herein are not a pure point of law which has been pleaded or which arises by clear implication out of the pleadings. They are issues which are based on disputed facts. Moreover, in the two replying affidavits, each of the deponents has clearly indicated the capacity in which they are swearing the affidavit, the fact that they are conversant with the matters in dispute, and the fact that they are duly authorized to swear the affidavits on behalf of the respondent.

I have considered the authorities which were cited by Mr. Kamwendwa. I find that the case of **Microsoft Corporation vs. Mitsumi Computers Garage Limited & Another** is distinguishable as the deponent of the disputed affidavit did not state that she had the authority to make that affidavit. In this case, both the deponents of the disputed affidavits have clearly indicated that they are authorized by the defendant to swear the affidavit.

It is obvious that under **Order III Rule 2(c)** of the Civil Procedure Rules, a corporation can only perform certain acts by recognized agents and that such agents must be officers of the corporation duly authorized under the corporate seal. Such acts or actions must be construed to be those described under **Order III Rule 1** of the Civil Procedure Rules as "**any application to or appearance or acts in any court required or authorized by the law to be made or done by a party in such court."**

A replying affidavit which has been sworn in response to an application is a matter of evidence. A party if personally seized of the matter, can swear the affidavit, or otherwise authorize any other person who is seized of the facts to swear an affidavit on its behalf. This is different from the situation envisaged under **Order III Rule 2 (c)** of the Civil Procedure Rules, which requires the authority to be under the corporate seal. In my considered view, Jeremiah F. Luhongo and John Kennedy Omanga have sworn replying affidavits as witnesses who are conversant with the matters in issue, and who have therefore, been authorized to swear the affidavit.

As regards the authority of the defence counsel, the situation is different from that in the cited cases (**Affordable Homes Africa Limited vs. Ian Henderson & 2 Others [**supra**], Burgerere Coffee Growers Limited vs Sebanduka & Another [1970] E A [**supra**]**). In those cases, the competence of the suit filed by the company was in issue. That was a matter of jurisdiction which the court had to deal with as a preliminary issue. In this case, the company is the defendant. The issue of jurisdiction does not arise.

The issue as to whether the company has instructed the defence advocate, is again one of evidence and therefore, not appropriate to be dealt with by way of preliminary objection. For these reasons, I find no substance in this preliminary objection and do overrule it and order the parties to take a date for the hearing of the chamber summons dated **30th August, 2006**.

Orders accordingly.

Dated, signed and delivered this 19th day of March, 2008.

H. M. OKWENGU

JUDGE