



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

Misc Civ Case 937 of 2006

IN THE MATTER OF MAKOMBOKI TEA FACTORY LIMITED

AND

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF AN EXTRA ORDINARY
GENERAL MEETING OF MAKOMBOKI TEA FACTORY LIMITED UNDER SECTIONS 132
& 135 OF THE COMPANIES ACT (CAP 486 LAWS OF KENYA)**

AND

**IN THE MATTE OF AN APPLICATION FOR APPOINTMENT OF INSPECTORS TO
INVESTIGATE THE AFFAIRS OF MAKOMBOKI TEA FACTORY LIMITED UNDER
SECTION 165 OF**

THE COMPANIES ACT (CAP 486 LAWS OF KENYA)

BETWEEN

HADSON MOFFAT KAMAUAPPLICANT

VERSUS

MAKOMBOKI TEA FACTORY LIMITEDRESPONDENT

RULING

The application for my determination is expressed under Order 1 Rule 10 of the Civil Procedure Rules. The application seeks that;

“This Honourable court be pleased to grant leave to (1) Joseph N. Muchiri (2) Francis N. Njau, (3) Joseph Njenga Wagatu (4) Joseph Mwangi Mbote (5) Ephraim Mwaniki Kinuthia (6) John Muchiri Kimani (7) James Mwaura (8) Samuel Gikonyo Mwaniki (9) Christopher Nganga (hereinafter referred to as the intended applicants) to be joined as applicants in this matter”.

It is the contentions of the Applicants that they are tea farmers and members of the Respondent Company as shareholders. And they have greatly been prejudiced and affected by the oppressive manner in which the directors of the Respondent Company have conducted the Company’s business. That in any case, they would be adversely affected and/or prejudiced by any order that may be issued by this

Honourable court.

It is the case of the Applicants that for a long time, the Directors of the Respondent Company have through fraudulent and fictitious accounting misappropriated the Respondent's funds. And equally the Directors of the Respondent Company have conducted the Company's business in a manner oppressive to its members including the intended Applicants. It is further alleged by the Applicants that their concerted efforts to question the financial impropriety of the Respondent's Directors either at the Annual General Meeting or otherwise have always been thwarted by the said directors who have always ensured that their personal whims prevail to the detriment of the Respondent members.

The reply of the Respondent is as follows:- That all the transactions being questioned has been fully accounted for and it is not possible for the Company to lose what is already in its books of accounts, hence the claim by the Applicants that the Respondent Company is set to lose is simply devoid of basis. It is also contended that Kenya Tea Development Agency Limited (K.T.D.A.) is the Managing Agent of the Respondent (among other tea factories countrywide). The arrangement under which K.T.D.A. invests on behalf of the Respondent and other factories had been in place since its inception and is of substantial benefit to the Respondent.

Mr. Wamiti Advocate for the Respondent submitted that there was no bona fide mistake made not to join the Applicants into this suit, as the Applicants are not proper parties for the determination of the suit. He also submitted that the Applicants are not necessary parties to this proceedings, who were omitted due to bona fide mistake.

It was further submitted by Mr. Wamiti Advocate that this proceedings is not a suit, as it is an application under the Company's Act seeking the convention of an Extra Ordinary Meeting of the Respondent Company under Section 135 of the Company's Act. The Company has over 4,000 members and it is not necessary for the intended Applicants to be joined into this proceedings.

Order 1 Rule 10(1) provides that;

“where a suit has been instituted in the names of the wrong persons as Plaintiff or where it is doubtful whether it has been instituted in the name of the right Plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any person to be substituted or added as Plaintiff upon such terms as the court thinks fit”.

Under Order 1 Rule 10, a party seeking to benefit from the discretion of the court must satisfy the condition set out, which are;

- (1) That the omission/addition has been made through a bona fide mistake.
- (2) That the applicant is necessary party for the determination of the real matter in dispute.
- (3) The applicant is a person who ought to have been joined at the first instance and that his presence before it may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit.

It is clear that the only party who can be joined a plaintiff or Defendant is one who ought to have been joined or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. The legitimate to pose is whether the Applicants are necessary parties but whether they were improperly left out of the suit. It is the case of the applicants that they would not be mere spectators in this matter but would join the original Applicant in the articulation of their grievances against the Directors in management of the Respondent Company.

In SARKAR'S Law of Civil Procedure Vol. 1 at page 531 – a necessary party is defined as;

“for determination of the question who is a necessary party there are two tests;

- (a) There must be a right to some relief against such a party in respect of the matter involved in the proceedings in question and
- (b) It should not be possible to pass on effective decree in the absence of such a party”.

This proceedings is against the Directors of a company in which the Applicants are members and/or shareholders. It is alleged that the Directors are misusing their fiduciary duties towards the Company and its shareholders. The bone of contention is whether the company directors are performing their duties and obligations towards the Company and its shareholders properly. The Applicants are saying that they are shareholders of the Respondent Company, therefore they have a right and/or stake in the way the Respondent is managed by the directors. And that their efforts to force the directors of the Respondent company to account for the funds have been frustrated by the said directors of the Respondent.

In the main application, the central issue is whether the directors are managing and/or running the Company to satisfaction of its members and shareholders. The prayers the Applicant seeks includes an order of an extra ordinary General meeting of the Respondent Company be called and conducted in such manner as the court may think fit and just. The Applicant in the main Chamber Summons also seeks that this court be pleased to appoint competent inspectors to investigate the affairs of the Respondent Company, so that all the alleged financial misappropriation may be unearthed.

It is also contended that due to poor management and lack of financial accountability by the directors and management of the Company, the Company is destined to loose substantial amounts of money to the detriment of the shareholders. It is the contention of the intended Applicants that they would be prejudiced by any orders made by this court in their absence.

Now having read the various material presented before me and heard the submissions of both Advocates, I am satisfied that the Applicants have a legitimate rights which needs articulation before court. The right in their absence would not be properly and adequately be canvassed by the present Applicant. I think the issues intended to be raised are common to the issues by the original Applicant in this matter. And it is fair and just to join the Intended Applicants, so that the issues central in this matter can be adjudicated and determined once and for all. I hold that the presence and participation of the Applicants in this matter is necessary for the just determination of the dispute between the directors of the Respondent Company and some of the shareholders of the Company. If some of the shareholders of the Company are inclined to question the action and omission of the persons given the mandate to run their company, then the court has a duty to allow their plea.

I think in order to avoid duplicity and multiplicity of suits, the Intended Applicants have grievances, which require intervention and investigation by the court. The plea of the intended Applicants to question the way their Company is managed by the directors is a legitimate issue, which needs to be advanced before this proceedings. The only way to settle the grievances raised by the Applicants against the directors of their Company is to make them parties to this proceedings.

In the premises the application dated 15th February, 2007 is allowed with no orders as to costs.

Dated and delivered at Nairobi this 28th day of March, 2007.

M. A. WARSAME

JUDGE