



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Misc Appli 699 of 2004**

**MARTIN KAMAU NJUGUNA & ANOTHER.....**  
**APPLICANTS**

**VERSUS**

**MUKUYUNI FARMERS COMPANY LTD.....**  
**.....RESPONDENT**

**RULING**

This Ruling is delivered in the Preliminary objection filed by the Respondents herein on 8<sup>th</sup> March 2006 challenging the Notice of Motion of 7<sup>th</sup> June 2004 under which this suit was instituted. The points raised in the Notice of Preliminary objection are that:

1. The application is incompetent as drawn and filed and does not lie in law being non complaint with the provisions of the Companies Act.
2. The applicants have no locus standi.
3. The application is an abuse of the Court process.

The Notice of Motion was first listed before this Court on 25<sup>th</sup> October 2005 when the court pointed out that the suit may have been, in the eyes of the court, improperly instituted by way of Notice of Motion. The advocate for the applicant insisted that the same was not so and that he had authorities to support his submission that the procedure adopted was correct. The court then stood over the matter to 22<sup>nd</sup> November 2005 to enable counsel submit on procedure. The record does not show what happened on 22<sup>nd</sup> November 2005. It would appear perhaps the matter was not listed. The applicant then had the matter fixed for hearing on 16<sup>th</sup> March 2006 when both parties appeared before the Hon. Mr. Justice Osiemo and by consent had the Notice of Motion stood over generally to pave way for the Preliminary objection which had then been filed on 8<sup>th</sup> March 2006. The same was fixed for hearing on 2<sup>nd</sup> May 2006 when a Miss Onjuro appeared and sought an adjournment on the grounds that Mr. Mugo who was seized of the matter was unwell. As no proof of illness was produced and Counsel for the Respondent protesting that he had not been informed of the illness or that an adjournment would be sought, the same was refused. There was no appearance at the hearing which had been set for 10.30 a.m. in the presence of both Miss Onjuro holding brief for Mr. Mugo.

In his submissions Counsel for the Respondent pointed out that the application had been brought under a non existent provision, Rule 89(C) of the Companies (High Court) Rules. Looking at the application and the relevant provisions of the Companies Act (High Court) Rules it is clear to me that the said citation of Rule 89 (c) is a typographical error since the applicable provision is Rule 8(c) . I therefore do not consider this to be a fatal defect incapable of a cure by amendment and will, suo moto, amend the same

accordingly in exercise of my inherent powers and jurisdiction. Having done so I have considered whether the application is validly filed as a Notice of Motion which I find in the affirmative, in light of Rule 8, which provides that among the applications to be made by way of a Notice of Motion are

- (i) Application seeking the appointment of inspector(s) to inspect the affairs of a Company under Section 165 and 166 of the Companies Act (Cap 487)
- (ii) Applications asking the Court to set a time limited within which a report of investigations with company affairs shall be filed.

The above notwithstanding certain restrictions as to the filing of an application under the above Rule are imposed under Section 165 and 166 of the Act wherein an application seeking an order for the appointment of investigators can only be made by at least 200 members in the case of a company limited by shares or by 1/5 of the members where the company is not so limited. This restriction forms a main ground of opposition to the application coupled with the contention that the applicants lack locus standi in light of those provisions. Counsel for the Respondents referred this court to an earlier order by the Hon. Lady Justice Aluoch wherein the applicants had been directed on 20<sup>th</sup> September 2004 to tender affidavit evidence annexing copies of their share certificates to prove membership which to date they have not done.

The grounds upon which this application has been brought have been plucked, as it were, right from the provisions of section 166 which provide in what circumstances orders as are prayed for may be awarded by the court. As rightly submitted by the Respondents herein this court can only and must order the appointment of competent inspectors to investigate the affairs of the company in the manner sought where the members have by resolution declared that such investigation is necessary. The court can also and may order such appointment upon production of a report by the Registrar justifying such investigations as is envisaged under section 166. The aggrieved members can also approach the court for orders where they contend that they have not been given all the information with respect to the affairs of the company which they may reasonably expect. The applicants herein have alleged that to be so in ground ( c) of their application but the same has not been addressed in the supporting affidavit for my consideration.

Taking into account all the above factors and the clear provisions of the law which do not, in my view, support the application, I find the preliminary objection to be legally sound and do uphold the same. Consequently the Notice of Motion dated 7<sup>th</sup> June 2004 is hereby struck out with costs to the Respondents. It is so ordered.

Dated and Delivered at Nairobi this 31<sup>st</sup> day of July 2006

**M.G. MUGO**

JUDGE

31<sup>st</sup> July 2006

Coram: Mugo J.

Issa Court Clerk

No appearance for the Applicant

No appearance for the Respondent

Order: Ruling delivered signed, sealed and Dated in the absence of parties as they had due notice.

**M.G. Mugo**

Judge