REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS CAUSE NO 5 OF 1978

ABUBAKER MADHUBUTI.....APPLICANT

OMAR ATHMAN ABAFAE.....APPLICANT

VERSUS

SALIM MOHAMMED BALALA .....RESPONDENT

SALEH MUHSINI SHIGOG .....RESPONDENT

JUDGMENT

This is an application by chamber summons filed on 11th March 1978 for an order convening an extraordinary general meeting of the shareholders of Coffee & Tea Packers Ltd under section 135 of the Companies Act for the purpose of considering and, if thought fit, passing the following resolutions as special resolutions of the company namely:

> (i)that article 103 of the company's articles of association be amended by deleting the word "four" at the end of the first sentence thereof and by substituting the word "two".
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> (ii)that Mr Salim Mohamed Balala and Mr Saleh Muhsini Shigog be removed forthwith as directors of the company.
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> (iii)that Mrs Anisa Shigog be appointed a director to act with the continuing directors, Mr Abubaker Madhbuti and Mr Omar Athman Abafae.

The applicants are Mr Abubaker Madhbuti, whose supporting affidavit sets out the history of events leading to the present application, and Mr Omar Athman Abafae who are directors and shareholders of the company.

Mr Saleh Muhsini Shigog and Mr Salim Mohamed Balala are two other directors, making four in all. I will refer to them as "the respondents".

Mrs Anisa Shigog, Mr Shigog's wife, is the third shareholder. It is not in dispute that, although the respondents are not shareholders, they are the nominees and agents of Mrs Shigog on the board of directors.

At an extraordinary general meeting of shareholders held on 22nd January 1977, Mr Shaikh Balala held her proxy. It appears that she does not take an active part in the operation of the company and is content

to leave her part to her husband and Mr Shaikh Balala. There was a suggestion that she might be a purdah lady.

Originally on 25th June 1976 Messrs Shigog, Abafae and Madhbuti subscribed to the memorandum and articles of association of the company, with one share each. On 28th June it was incorporated and they were its first directors with Mr Shigog as the managing director. In November (or early December) disputes arose between him and the other two directors who felt that he was guilty of mismanagement. Mr Shigog transferred his share to his wife and he also caused a blank transfer of Mr Madhbuti's share to be made to her. Mr Madhbuti objected. On 7th January 1977 at a meeting of the shareholders and directors it was agreed that Mr Madhbuti should receive back his share and that Mrs Shigog should be a shareholder instead of her husband.

On 17th February the applicants, being again dissatisfied at the way the company's affairs were being run, wrote to the company's secretaries, Equatorial Registrars (Kenya) Ltd (hereinafter referred to as "the secretaries") requesting them to convene an extraordinary general meeting of the shareholders of the company to discuss and decide, *inter alia*, to retire the respondents as directors of the company.

On 14th March, the secretaries wrote to the directors informing them that they were resigning but, on the next day, they wrote to the directors and shareholders informing them that the meeting would take place in their offices as scheduled. On 19th March, the respondents wrote to the secretaries, with copies to the applicants and the Registrar of Companies, protesting against the holding of the meeting in their offices after they had resigned. The letter refers to the purpose of the meeting as being to remove them as directors and then Mrs Shigog as a shareholder, and states that they will not attend (which suggests that they could dictate to her, as only she as a shareholder was entitled to attend). I am not sure how substantial the objection was merely to the venue of the meeting. On 24th March, the secretaries wrote to the shareholders and advised them that, as a result of the telephone call from Mr Handa (the deputy Registrar- General), the meeting should be postponed indefinitely. No meeting took place.

Here Mr Inamdar, for the applicants, commented that he did not see what the internal management of a private company had to do with the Registrar-General. The initiative must have come from the respondents who were determined to baulk the holding of the meeting. This is perhaps understandable as they would be committing *hari-kari* as directors if Mrs Shigog attended the meeting as a minority shareholder where she would be outvoted by the applicants. Her presence was necessary in order to constitute a quorum of three member shareholders; if within half an hour of the time appointed for the meeting a quorum is not present, the meeting (if convened on the requisition of members) shall be dissolved (articles 63 and 64 of the articles of association). If the meeting had taken place the applicants could have invoked section 185 of the Companies Act which provides:

> A company may by ordinary resolution remove a director before the expiration of his term of office notwithstanding anything in the articles or in any agreement between it and him.

In May another dispute arose between the applicants and respondents, as set out in paragraphs 17 to 20 of Mr Madhbuti's affidavit as follows:

> 17.That in early May 1977 as a result of further efforts to resolve the differences between the shareholders and the directors of the company, the company agreed to sell the company's leasehold plot numbered MSA/ Block/1/151 together with all improvements thereon (including the company's factory and equipment for clearing, processing, roasting and packing coffee) to Kenjaro Ltd. In pursuance of this agreement, the company delivered up possession of the said plot together with the improvements thereon to the said Kenjaro Ltd in anticipation of the completion of the sale. Subsequently, however, in or about July 1977 the said sale was rescinded by mutual consent and on 15th July 1977 Messrs AB Patel & Patel, advocates of Kenjaro Ltd, offered to return possession of the said plot together with the improvements thereon to the company. I annex hereto a Photostat copy of Messrs AB Patel & Patel's letter of 15th July 1977 ...
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> 18. That as a result of Messrs AB Patel & Patel's letter referred to in the preceding paragraph, a

> further dispute arose between Balala and SM Shigog on the one hand and Abafae and myself on the other as to who should receive possession of the company's said property from Messrs AB Patel & Patel. I annex hereto ... a bundle of correspondence containing some twenty-three letters in which the adverse claims made by the two sets of directors of the company are more clearly set out.
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> 19.That with a view to resolving the deadlock existing between the two sets of directors of the company as aforesaid, on 31st August 1977 Abafae and I delivered to the directors of the company a requisition requiring the latter to convene an extraordinary general meeting of the company 'for the purpose of considering and, if thought fit, passing the sub-joined resolutions: (i) that article 103 of the company's articles of association be amended by deleting the word "four" at the end of the first sentence thereof and by substituting the word "two"; (ii) that Mr Balala and S M Shigog be removed forthwith as directors of the company; and (iii) that Mrs Shigog be appointed a director to act with the continuing directors, Mr Abubaker Madhbuti and Mr Omar Athman Abafae'. I annex hereto a Photostat copy of the said requisition ...
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> 20.That on the same date, namely 31st August 1977, I, as a director of the company issued a notice to all directors that in pursuance of the aforesaid requisition, a meeting of the board of directors of the company will be held at Al-Amin Auto Stores, Nkrumah Road, on 8th September 1977 'to consider a requisition for the convening of an extra-ordinary general meeting of the company received by Mr Madhbuti and Abafae'. I annex hereto a photostat copy of the said notice ...

When the applicants' advocates were informed on 6th September that Mr Shaikh Balala was in Nairobi and would be unable to attend the meeting of directors on 8th September they agreed to postpone the meeting until 12th September. On 12th September, the respondents' advocate wrote stating that they would not attend the meeting at Al-Amin Auto Stores. Again, the significance of the venue was not explained to me. The letter makes it clear that the respondents are the nominees of Mrs Shigog. On 14th September the applicant's advocates requested the respondent's advocate to suggest another venue for the meeting. There was no reply to this letter. The meeting could not be held as article 103 of the articles of association provides: "the quorum necessary for the transaction of the business of directors should be four".

As the directors had failed to requisition the meeting under section 132 (1) and (2) of the Companies Act, the applicants fell back on section 132 (3) and themselves, as requisitions, convened an extraordinary general meeting of the shareholders at the same venue on 28th October 1977 for the purpose of considering the same three resolutions. Mrs Shigog did not attend the meeting which, under article 64, had to be dissolved.

As all efforts to resolve the deadlock between the directors and shareholders have been frustrated by the deliberate absences of the respondents from meetings of directors and of Mrs Shigog from meetings of shareholders of the company, the applicants now seek to invoke section 135(1) of the Companies Act which provides as follows:

> If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called, or to conduct the meeting of the company in manner prescribed by the articles of this Act, the Court may, either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit, and where any such order is made may give such ancillary or consequential directions as it thinks expedient; and it is hereby declared that the directions that may be given under this subsection include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

Mr Satchu, for the respondents, in answer to this application relies on the short point that as the notice to Mrs Shigog convening the meeting on 28th October had left the date of the meeting blank she had never

received a valid notice. This was revealed for the first time in her affidavit sworn on 15th March 1978 after the chamber summons had been taken out on 11th March. It is not now disputed that the notice was invalid. During the course of the hearing I suggested that the application should be adjourned and that a fresh, valid notice should be served on Mrs Shigog to put the matter beyond doubt; but Mr Inamdar would only agree to this if an undertaking was given that she would attend the meeting, to which Mr Satchu would not agree. He also insisted on the present application being first dismissed. The hearing continued.

Mr Satchu asks how it can be said that it is impracticable to hold a meeting when the applicants have not exhausted the machinery provided under the articles of association and by statute serving Mrs Shigog with a valid notice as is provided for by Article 56? He relies on *Re El Sombrero Ltd* [1978] 3 All ER 1, the headnote of which reads as follows:

> The applicant held 90 per cent of the shares of a private company, which was incorporated in March 1956; and each of the two directors of the company held 5 per cent of the shares. By the company's articles of association, the quorum for general meetings of the company was two members present in person or by proxy, and, if within half an hour from the time appointed for a meeting a quorum was not present, the meeting, if convened on the requisition of members, was dissolved. No general meeting of the company had ever been held. On 11th March 1956, the applicant requisitioned an extra-ordinary general meeting, under section 132 of the Companies Act 1948, for the purpose of passing resolutions removing the two directors and appointing two other persons as directors. The directors having failed to comply with the requisition, the applicant himself convened an extraordinary meeting for 21st April 1958. The directors deliberately did not attend the meeting either in person or by proxy, and, as a quorum was not present, the meeting was dissolved.
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> On 29th April 1958, the applicant served a special notice, under section 142 of the Act of 1948, of his intention to move the same resolutions, under sections 142 and 184, at the next extraordinary general meeting of the company.
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> On the same day he took out an originating summons asking for a meeting to be called by the Court, under section 135(1), for the purpose of passing the resolutions, and for a direction that one member of the company should be deemed to constitute a quorum at such meeting. The application was opposed by the directors.
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> **Held**: (i) as a practical matter the desired meeting of the company could not be conducted in accordance with the articles of association and the Court had jurisdiction under section 135(1) of the Companies Act 1948 to order a meeting to be held notwithstanding opposition by the shareholders other than the applicant.
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> (ii) an order for the meeting to be held and that one member present should constitute a quorum would be made because (a) to refuse the application would be to deprive the applicant of his statutory right under section 184 to remove the directors by means of an ordinary resolution, and (b) the respondent directors had failed to perform their statutory duty to call an annual general meeting for the reason that if they had convened a general meeting, they would have ceased to be directors.

Mr Satchu distinguishes that case in that there was evidence that the directors deliberately did not attend the meeting called to consider the requisition for an extraordinary general meeting of members. He submits that there is no evidence that Mrs Shigog will fail to attend a properly convened meeting. It is just conjecture and hypothesis to say that she will not attend. He seeks to isolate Mrs Shigog as a shareholding member from the respondents as non-shareholding directors. With respect I think it would be unrealistic to do so. They were her alter ego.

Although the respondents, as directors, were powerless to prevent the applicants requisitioning a meeting under section 132(3) of the Act, I am satisfied from the past history of the matter and their intransigence that they would have seen to it that Mrs Shigog did not attend the meeting. Mr Inamdar makes the point

that the serving of a valid notice is not a condition precedent to the exercise by the Court of its powers under section 135(1) of the Act. It is sufficient to show that its is improbable that Mrs Shigog submits that this is a reasonable inference from the facts of the case. As was said by Wynn-Parry J in *Re El Sombrero Ltd* at page 5:

> Examine the circumstances of the particular case and answer the question whether, as a practical matter, the desired meeting of the company can be held, there being no doubt of course that it can be convened and held.

And:

> It is obvious that the only reason why the respondents refused to call the annual general meeting is because the inevitable result of convening and holding that annual general meeting would be that they find that they would cease to be directors.

That is the position here. *Re El Sombrero Ltd* was followed in *Re HF Paul & Sons, The Times,* 17th November 1973, where, Brightman J held that quorum provisions in the articles were not a right vested in the minority to enable it to frustrate the wishes of the majority: [1973] *Current Law Year Book* 333. Here the board of directors is split down the middle and the affairs of the company cannot be managed. If there are three directors and three shareholders the deadlock could be broken. There would be nothing to prevent Mr Shigog being his wife's nominee as a director so as to safeguard her rights as a shareholder. There is no justification for two nominees. The applicants' rights as majority shareholders are not to be frustrated. For the above reasons, I grant the application as prayed, including costs. If the form of the order cannot be agreed between the parties advocates I will consider the matter further. Liberty to apply.

Order accordingly.

Dated and delivered at Mombasa this 12th day of April 1978

D.J SHERIDAN

JUDGE