



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. 35 OF 2006**

**RADHABAI SHIVJI BHANDERI (Suing as the administrator of  
the estate of SHIVJI BHANDERI (deceased).....PLAINTIFF/DECREE HOLDER**

**VERSUS**

**JYOTIBALA A. DESAI.....1<sup>ST</sup> DEFENDANT**

**SUMANT A. DESAI.....2<sup>ND</sup> DEFENDANT**

**ROSE HOLDINGS LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The controversy that rages on in respect to the affairs and assets of Rose Holdings Ltd (**the 3<sup>rd</sup> Defendant or Rose Holdings**) may be needless. This is demonstrated by this short Ruling.
2. The late Shivji Ramji Bhanderi (**Shivji**) together with Jyotibala A. Desai (**the 1<sup>st</sup> Defendant**) and Sumant A. Desai (**the 2<sup>nd</sup> Defendant**) were Directors and shareholders of Rose Holdings. Upon the demise of Shivji, his Estate commenced these proceedings on grievances regarding the running of the affairs of the Company. It has turned out to be a long drawn litigation.
3. An early end may have been in sight when a consent of 3<sup>rd</sup> June 2010 was entered between the parties but that, sadly, never came to be.
4. The consent is in the following terms:-

**“That the Plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> Defendants compromise this suit in the interim basis, pending full and final settlement as hereunder:-**

**1. Shareholding in Rose Holdings Ltd.**

**The Plaintiff claims that she paid One Million Seven hundred and fifty thousand (Kshs 1,750,000/-) out of a total of Five Million (Kshs.5,000,000/-) paid by the 2<sup>nd</sup> Defendant for the total of ten thousand shares that were available for sale from the estate of late Mr. V.A Shah. The Plaintiff, the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants have agreed that the ten thousand shares be distributed prorate to the above contribution. The percentage thereof to be worked out by the Company Secretary and Company Accountant and the books of Company be amended accordingly.**

**2. L.R. 209/3829 – Bondo Road Industrial Area**

**The Plaintiff has agreed with the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants, who are the directors of the 3<sup>rd</sup> Defendant Company to engage valuers/jointly and severally to value the aforesaid property and upon confirmation of its market value, the Plaintiff will have first priority to purchase the aforesaid property and in event that she declines to exercise her pre-emptive rights then bids from three bidders shall be obtained and the property shall be sold to the highest bidder thereof and proceeds thereof be banked in the company account pending the apportionment according to each parties shareholding in the 3<sup>rd</sup> Defendant.**

### 3. Dividends

The Plaintiff, the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants shall share all dividends due in the corresponding ratio of their shareholding in the 3<sup>rd</sup> Defendant Company less all outgoings and taxes.

### 4. L.R NO. 330/589 – Riara Road

The Plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> Defendants have agreed that each party obtain a valuation of the aforesaid property as at the date of agreement of sale of property to The Junction Ltd and the three valuation reports be used to determine the market value of the aforesaid property sold and transferred to M/s. The Junction Ltd. The parties to agree jointly on the market value and thereafter to apportion their entitlement based on the agreed value and their respective shareholding in the 3<sup>rd</sup> Defendant Company. In the event parties do not agree on the value then this Honourable Court to determine the value. Should this Honourable Court determine a higher value than the sale price and provided only if the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are found to have fraudulently sold the property at a lesser value (than the value determined by the Court) the parties to apportion their entitlement based on and their respective shareholding in the 3<sup>rd</sup> Defendant Company. The net proceeds from the sale of the property after deduction of agency commission, advocate's fees and disbursement shall be deposited in an interest earning account at CFC Stanbic Bank in the joint names of the Advocates of the parties herein to await full valuation and disposal of the other immovable property referred to in (2) above. In lieu of any agreement the dispute be determined by the Court by way of oral evidence. The Plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> Defendants can by consent agree to disburse the sum held in the joint fixed deposit account.

### 5. Buyout/winding up of the 3<sup>rd</sup> Defendant Company

Upon valuation of all Company assets the 1<sup>st</sup> and 2<sup>nd</sup> Defendants shall be at liberty to buy out the entire shareholding of the Plaintiff in the 3<sup>rd</sup> Defendant Company and upon full payment of all dues the Plaintiff shall relinquish his entire interest and shareholding in the 3<sup>rd</sup> Defendant Company. In the alternative and in lieu of a buyout the parties shall wind up the 3<sup>rd</sup> Defendant Company and share all the proceeds from the sale of the Company assets and dividends held in CFC Stanbic Bank proportionate to their shareholding in the 3<sup>rd</sup> Defendant Company less all outgoings, taxes and liabilities.

### 6. Termination of legal proceedings

The Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants hereby agree that the dispute between them is purely of a civil nature to be determined by this Honourable Court and accordingly upon execution of this consent the Plaintiff hereby withdraws the criminal proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the same shall be determined and/or withdrawn. The Director of CID is hereby directed to close the file in relation to this matter.

7. The parties have further agreed that M/s The Junction Limited be and are hereby removed from the proceedings herein.

8. This consent shall supersede and take precedent over any and/or all other consents which may have been signed between the parties and/or their representatives prior to the date hereof.

9. All applications pending before this Court are hereby stayed.

10. The parties hereby agree not to file any further applications save for the enforcement and/or determination of matters contained in this Consent order.

11. This matter be mentioned on 17<sup>th</sup> June, 2010".

5. The Estate of Shivji has now filed a Notice of Motion dated 16<sup>th</sup> January 2019 seeking the following orders:-

1. That the same be certified as urgent and be heard on priority basis as the Judgment/Debtors are disposing their movable property and may leave the jurisdiction of the Honourable Court without satisfying the decree herein to the detriment of the Decree/holder.

2. The Judgment/Debtors be ordered to provide books of accounts and all financial records in their possession relating to the third Defendant Company for purposes of preparing Final Accounts to enable the winding up of the said Company.

3. The Judgment/Debtors jointly and severally be ordered to pay into the joint deposit account the sum of Kshs.54 million being the difference between the true value of L.R. 330/589 – Riara road as determined by Court which they sold fraudulently without the consent of the Decree/Holder and the sum realized on the said sale.

4. The Judgment/Debtor jointly and severally be ordered to furnish security for the full performance of the decree herein.

5. The Judgement/Debtor do provide a full list of their assets.

6. The Decree/Holder be allowed to execute the decree by way of Notice to Show cause.

## 7. Costs of this Motion be granted.

The Defendants oppose the application.

6. The Consent as is evident on its face and substance was on interim basis. It resolved certain controversies with finality but others required the taking of further steps. One of the latter was in respect to valuation of LR. No.330/589 – Riara Road. This was a property which had previously belonged to Rose Holdings but had been sold to Junction Ltd. The Estate of Shivji had assailed the sale as fraudulent and at an undervalue.

7. In a judgment of 24<sup>th</sup> June, 2015 Odunga J. made two significant findings in respect to the sale. First, that the sale was fraudulent and second that the open market value of the property at the time of sale was Ksh.100,000,000.00. These two findings by the Judge were upheld by the Court of Appeal in Civil Appeal No. 159 of 2016- Radhabai Shivji Bhanderi (suing as administrator of Shivji Ramji Bhanderi (deceased) and JYOTIBALA A. DESAI & 2 others).

8. In that decision the Court of Appeal made certain observations that demonstrate that the controversy now still playing out may be all about nothing. For its importance, the Court reproduces it in extenso:-

**“[24] It is therefore necessary to examine the consent that was signed by the parties in order to establish whether there were any issues that remained unresolved in the dispute between the parties. In clause 1 of the consent that we have reproduced at paragraph 5 of this judgment, the issue of shareholding in the company was addressed. There is an acknowledgment that the plaintiff only paid Kshs.1,750,000/= out of a total of Kshs.5,000,000/= paid by the 2nd respondent for the total of 10,000 shares that were available for sale. It was agreed that the 10,000 shares of the company be distributed prorata in accordance with the above payments. This addressed prayers (a) of the appellant’s plaint that sought a declaration that the appellant is the rightful allottee of 50% shareholding in the company, prayer (d) that sought a permanent injunction restraining the 1st respondent from holding himself out as a majority shareholder of the company, and prayer (g) that sought an order cancelling the alleged fraudulent transfer of 33.3% of the issued and paid up shares in the name of the 2nd respondent. Therefore, the issue of the appellant’s shareholding in the company was resolved through that consent and was not an issue open for consideration by the learned judge.**

[25] At paragraph (c) of his prayers in the amended plaint, the appellant sought an order directing the respondent to pay him declared dividends for the years 2004 to date. Clause 3 of the consent provided that the plaintiff, the 1st and 2nd respondents would share all dividends in the corresponding ratio of their shareholding in the company less all outgoing taxes. The issue of the shareholding having been resolved through clause 1, it follows that the issue of the dividends was also resolved as the consent provided how this was to be done.

[26] The above leaves prayer (b), (e), (f) (h), (i) and (j) in the amended plaint. Essentially these prayers concerned the management of the company and sought a declaration that the 2nd respondents elevation to the position of Managing Director is null and void; permanent injunctions restraining the 2nd respondent from holding himself out as the Director of the company; and, restraining the respondents from dealing with the fixed and movable assets of the company to the exclusion of the appellant and in any other manner otherwise than provided for in the memorandum and articles of the company; an order for nullification of the transfer of the Riara property to Junction Limited; an alternative prayer for the respondents to pay the full value of the Riara Property and provide a full and proper account of proceeds of the sale to the appellant. These prayers can be categorized into two issues, first, the management of the company and disposal of the company assets generally, and secondly, the transfer of the Riara property.

[27] Clause 2 of the consent order addressed the issue of the company property known as No. LR. No. 209/389 Bondo Road, and resolved the matter by giving the plaintiff 1st priority to purchase the property, and providing that the property would only be sold to the highest bidder if the plaintiff did not take up that right. Paragraph 6 and 7 concerns the issue of termination of criminal proceedings against the 1st and 2nd respondents. No dispute has arisen in regard to this part of the consent.

[28] The dispute regarding the consent revolves around clause 4 and 5 in the consent that provided for valuation of the Riara property; and buyout/winding up of the company. Our understanding of clause 4 is that it required determination of the market value of the Riara property as at the date of agreement of sale to Junction Limited, based on two valuation reports each to be provided by the parties individually, and a third valuation done by a valuer appointed by the two parties jointly. The parties were to agree on the market value based on these three reports, and if they were unable to agree the court was to determine the open market valuation. It was after either agreement or determination of the open market valuation that the parties entitlement was to be determined in accordance with their respective shareholding in the company”.

9. With this short backdrop, the Court is now able to deal with the issues raised in the application.

10. The Court starts with the prayer that the Defendants (it must be the 1<sup>st</sup> and 2<sup>nd</sup> Defendants) be ordered to pay into a joint deposit account the sum of Ksh.54 million being the true value of LR. No.330/589. Did the consent order of the judgment contemplate this? Is the deposit necessary for purposes of an effectual resolution of matters herein?

11. It is clear from the consent, the High Court judgment and Court of Appeal decision that the purpose of taking the valuation was to establish if there was a fraudulent under sale and if so, then the apportionment of the shareholder’s entitlement to that property would proceed on the basis of the market value found and not the sale price. In this regard, the sale was found to be fraudulent and the true market price at the time of sale to be Kshs.100,000,000.00. The apportionment must therefore proceed on the basis of the value of Kshs.100,000,000.00.

12. Important as well is that the Defendants had, by force of a Court order, deposited Kshs.46 million from the sale price in a joint account of the lawyers for the parties herein pending the hearing and determination of this suit. In that way Kshs.46 million is preserved and would be available for payout to the Estate of Shivji upon apportionment. This Court is not told by the Applicant that the deposited sum is inadequate to meet its entitlement. I would therefore have no reason to order the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to deposit the difference of Kshs.54 million or to furnish any further security.

13. This Court is fortified in its findings because of what the Applicant says in paragraph 21 of the Affidavit sworn on 18<sup>th</sup> January 2019;-

***“That in lieu of the security being sought the judgement Debtors should forfeit their sum of Kshs.46 million held as security in the suit”.***

14. In respect to the possible winding up of the Company clause 5 of the consent provides:-

***“Upon valuation of all Company assets the 1<sup>st</sup> and 2<sup>nd</sup> Defendants shall be at liberty to buy out the entire shareholding of the Plaintiff in the 3<sup>rd</sup> Defendant Company and upon full payment of all dues the Plaintiff shall relinquish his entire interest and shareholding in the 3<sup>rd</sup> Defendant Company. In the alternative and in lieu of a buyout the parties shall wind up the 3<sup>rd</sup> Defendant Company and share all the proceeds from the sale of the Company assets and dividends held in CFC Stanbic Bank proportionate to their shareholding in the 3<sup>rd</sup> Defendant Company less all outgoings, taxes and liabilities”.***

15. Although worded as an alternative to the purchase of the Company by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, winding up appears to be the option upon failure of a sale. I say so because of use of the words **“and in lieu of a buyout”** in the consent. In the Concise Oxford English Dictionary (12<sup>th</sup> Edition) **“in lieu of”** means **“instead of”**. The winding up of the Company could proceed instead of the buyout. That would make the buyout the first option.

16. From the two letters annexed to the Applicant’s affidavit (KBS 5 and KBS 6), it would seem that the Estate of Shivji has been keen on the winding up. However for purposes of fidelity to the terms of the consent, the Estate should give the 1<sup>st</sup> and 2<sup>nd</sup> Defendants an opportunity to exercise the option of a buyout before pursuing winding up. This is what the 1<sup>st</sup> and 2<sup>nd</sup> Defendants seem to ask for in paragraphs 12 and 13 of the 2<sup>nd</sup> Defendant’s affidavits:-

***“12. That the Plaintiffs are not even giving it the option of buying out the Company before it is wound up despite the terms of the consent clearly providing for the same.***

***13. That the purported winding up is immature, unreasonable and against the spirit of the said consent order”.***

17. That said, and notwithstanding the option to be taken, the taking of accounts of the Company is necessary, if not inevitable. In this regard the Estate of Shivji bespeaks the books of accounts and all financial records of the Company for purposes of preparing final accounts. In paragraph 13 of the Replying affidavit the 2<sup>nd</sup> Defendant accedes to this request.

18. For the reasons stated the Notice of Motion of 16<sup>th</sup> January 2019 succeeds to the very limited extent in terms of prayer 2 thereof, which I hereby allow. The books of accounts and all financial records of the Company shall be furnished within 30 days of today. The other prayers are disallowed. Costs of the application shall be to the Defendants.

**Dated, Signed and Delivered in Court at Nairobi this 28<sup>th</sup> Day of June, 2019.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

**Masinde for Plaintiff**

**Nyakundi for Defendant**

**Nixon – Court Assistant**