



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 35 OF 2006**

**RADHABHAI SHIVJI BHANDERI (suing as**

**the Administrator of the Estate of**

**SHIVJI RAMJIBHANDERI (Deceased).....PLAINTIFF**

**VERSUS**

**JYOTIBHALA S DESAI.....1<sup>ST</sup> DEFENDANT**

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

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

**THE JUNCTION LIMITED.....4<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

**Plaintiff's Case**

1. By an amended plaint dated 16<sup>th</sup> April, 2010 filed on 26<sup>th</sup> April, 2010, the plaintiff herein seeks the following order:
  - (a) A declaration that the Plaintiff is the rightful allottee of 50% shareholding in the 3<sup>rd</sup> Defendant Company
  - (b) A declaration that the 2<sup>nd</sup> Defendant's elevation to the position of Managing Director is null and void.
  - (c) An order directing that the Defendants to pay to the Plaintiff declared dividends for the years 2004 and 2005 to date.
  - (d) A permanent injunction restraining the 1<sup>st</sup> Defendant from holding herself out as a majority shareholder of the 3<sup>rd</sup> Defendant.
  - (e) A permanent injunction restraining the 2<sup>nd</sup> Defendant from holding himself out as a director of the 3<sup>rd</sup> Defendant
  - (f) A permanent injunction restraining the Defendant from dealing with the fixed

**and movable assets of the 3<sup>rd</sup> Defendant to the exclusion of the Plaintiff, and in any other manner otherwise than that provided from the Memorandum and Article of Association of the 3<sup>rd</sup> Defendant.**

**(g) An order cancelling the fraudulent transfer of 33.3% of the issued and paid up shares in the name of the 2<sup>nd</sup> Defendant.**

**(h) The transfer of L.R 330/589/I.R 25911 – Riara Road be the 4<sup>th</sup> Defendant be nullified for attendant fraud.**

**(i) A receiver manager be appointed to run the affairs of the 3<sup>rd</sup> Defendant Company pending the hearing and determination of this suit.**

**(j) In the alternative the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants do pay damages suffered by the Plaintiff on the transaction and proper account of the proceeds of the sale be rendered to the Plaintiff.**

**(k) Any other relief that this honourable court may deem fit to grant**

**(l) Costs of this suit.**

2. As will appear later in this judgement the suit against the 4<sup>th</sup> Defendant was compromise when it was removed from these proceedings. Accordingly, no orders can issue against it. Accordingly, reference to the defendants will unless the context shows otherwise refer to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
3. The Plaintiff's case, according to the said plaint was that at all material times prior to the 3<sup>rd</sup> July, 2002, the 3<sup>rd</sup> Defendant company, Rose Holdings Ltd, had three shareholders each having 33.3% of the issued capital. The said three shareholders were **Champen Vithalbhair Shah**, the First shareholder, **Jyotibala Sumant Desai**, the second shareholder and **Shivjibhai Ramji Bhanderi**, the third shareholder (hereinafter referred to as "the deceased"). By a written agreement dated the 3<sup>rd</sup> day of July 2002, the first shareholder transferred all her shares to the 2<sup>nd</sup> and the deceased shareholder who then became joint shareholders each holding 50% of the issued shares. However, the deceased passed away on the 5<sup>th</sup> April 2005, at which time he was a 50% shareholder in the 3<sup>rd</sup> Defendant company, and through his last will and testament dated 11<sup>th</sup> October, 2002, his shareholding devolved and was bequeathed to his Estate and its beneficiaries. However, despite several request, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, who are wife and husband respectively, have refused, failed and or neglected to acknowledge the entitlement of the Estate of the deceased. Instead the 1<sup>st</sup> defendant herein a co-director and shareholder took over and has since been in full and total control of the assets of the company to the exclusion of the estate of the deceased and has been guilty of material non-disclosure, concealment, fraud and/or negligence thereby causing the estate of the deceased irreparable harm, loss and damage.
4. It was further pleaded that on or around 23<sup>rd</sup> May, 2008 the 1<sup>st</sup> and 2<sup>nd</sup> Defendants without any colour of right fraudulently caused the transfer of the aforesaid 33.3% of the issued and paid up shares formerly held by **Champaben Vithalbhair Shah** (also Deceased) to be effected in the name of the 2<sup>nd</sup> Defendant.
5. The particulars of concealment, non-disclosure, fraud and negligence of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were enumerated as hereunder:

**(i) Refusing, failing and/or neglecting to acknowledge that the late Shivjibahi Ramji Bhanderi was a 50% shareholder, and that upon his demise, the same devolved to his estate.**

**(ii) Holding themselves out as the joint directors and majority shareholders of the**

**third Defendant in total disregard of the Estate of the late Shivjibhai Ramji Bhanderi.**

**(iii) Changing the signatories to the 3<sup>rd</sup> Defendant's Bank Account No. 0200002008, CFC Bank Chiromo Road Branch, to include the 2<sup>nd</sup> Defendant without proper authorization and mandate.**

**(iv) Operating the 3<sup>rd</sup> Defendant's bank accounts and dealing with the assets of the third defendant without proper authorization and mandate.**

**(v) Refusing, failing and/or neglecting to disclose to the Plaintiff the details and amount of funds in the third Defendant's account.**

**(vi) Converting company funds and property to their own use.**

**(vii) Illegally purporting to hold out the 2<sup>nd</sup> Defendant as a co-ordinator of the 3<sup>rd</sup> Defendant.**

**(viii) Holding board meetings without notice and to the exclusion of the Plaintiff.**

**(ix) Illegally appointing the 3<sup>rd</sup> Defendant company's auditors, and adopting the 3<sup>rd</sup> Defendant's statement of affairs.**

**(x) In the alternative and without prejudice to (viii) and (ix), failing to call board meeting and annual general meetings to ensure proper management of the 3<sup>rd</sup> Defendant's affairs.**

**(xi) Refusing, failing and/or neglecting to disclose and/or provide statement of the 3<sup>rd</sup> Defendant's affairs and accounts.**

**(xii) Withholding dividend and/or commissions due to the estate of the late Shivjibhai Ramji Bhanderi**

**(xiii) Refusing and/or failing to disclose the nature and extent of dividends to the Plaintiff.**

**(xiv) Refusing, failing and/or neglecting to acknowledge the nature and equality in extent of the shareholding of the estate of the late Shivjibhai Ramji Bhanderi**

**(xv) Purporting to transfer 33.3% of the issued and paid up shares formerly held by Champaben Vithalbhai Shah (Deceased) in the name of the 2<sup>nd</sup> Defendant in the absence of any proper resolutions and/or meetings of the 3<sup>rd</sup> Defendant company.**

**(xvi) Illegally transferring the aforesaid shares in the name of the 2<sup>nd</sup> Defendant to the detriment of the Estate of Shivjibhai Ramji Bhanderi (deceased)**

**(xvii) Transferring LR 330/589/IR. 25911- Riara Road to the fourth Defendant secretly and without the knowledge of the Plaintiff at a throw-away prices causing financial loss to the estate of the deceased.**

6. The Plaintiff identified the assets of the 3<sup>rd</sup> Defendant Company as including:

**(a) L.R No. 330/589 T.R 25911 - Riara Road**

**(b) L.R No. 9104.143-Bondo Road**

**(c) Bank Account No. 0200002008-C.F Bank – Chiromo Road Branch**

7. To the Plaintiff, the purported sale of L.R 330/589 I.R 25911 to the 4<sup>th</sup> Defendant was done fraudulently and grossly undervalued to defraud the estate of the deceased and in his view the particulars of concealment and fraud by the Defendants were:

**(a) Entering into a contract of sale of the property without consulting and first obtaining the consent of the Plaintiff while fully aware of her interest in the same.**

**(b) Failing to carry out due diligence while transacting the sale of the property.**

**(c) Selling the suit property while fully aware this suit was pending and touching the ownership of the property in issue.**

**(d) Failing to account for the proceeds of the sale to the Plaintiff.**

**(e) Grossly undervaluing the property and the time of the sale leading to a massive loss to the estate of the deceased and the Plaintiff.**

**(f) Putting up a notice of loss of the title of the suit property when the same was available.**

7. As a result of the fraudulent transfer of the suit property to the 4<sup>th</sup> Defendant, the Plaintiff averred that the estate of the deceased and the Plaintiff suffered damage and therefore prayed that the sale of L.R 330/589 I.R 25911 be nullified and declared null and void *ab initio* and the title be reverted to the 3<sup>rd</sup> Defendant company and in the alternative the 4<sup>th</sup> Defendant be ordered to pay the full and true value of the land in the sum of Kshs 110,000,000/= and further that the Defendants jointly and severally be ordered to provide a full and true account of the proceeds to the Plaintiff.

8. It was also sought that pending the hearing and determination of this suit a prohibitory order do issue against Land Parcels L.R. No. 330/589 I.R 25911 – Riara Road and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be restrained from operating Bank Account No. 0200002008 C.F.C Bank Chiromo Road Branch and a Receiver Manager be appointed on the assets of 3<sup>rd</sup> Defendant.

9. In support of the Plaintiff's case the Plaintiff called **Steven Omengo**, as PW1. According to him, he was a registered valuer working with Tysons Ltd, a valuation firm and on 19<sup>th</sup> January, 2012 on behalf of the said firm, he received instructions to value Property LR No. 330/5189, situated along Riara Road (hereinafter referred to as "the suit property") with instructions to inspect the same and submit a valuation report in respect thereof as at 30<sup>th</sup> September, 2009. He accordingly undertook his mandate and submitted his report dated 7<sup>th</sup> May, 2012 to the Plaintiff's and Defendant's Advocates who jointly instructed him.

10. In his view, the market value of the said property as at 30<sup>th</sup> September, 2009 was in the sum of Kshs 100,000,000/- which valuation was based on international standards. This value according to him was based on a willing buyer willing seller basis bargaining at arm's length on assumption that the parties acted knowledgeably without compulsion. He according to him took into account comparable sales on which he largely relied upon to arrive at his opinion which according to him was a true value of the suit property as at the said date. That report was accordingly produced as an exhibit.

11. In cross-examination, by **Mr. Nyakundi**, learned counsel for the Defendants, PW1 explained that although he gave the value of the property as at 30<sup>th</sup> September, 2009, the date of inspection was 20<sup>th</sup> March, 2012. In so doing he considered all the attributes of the property including the improvements thereon though at the time of his inspection all the structures had been demolished and he relied on the information furnished to him by the two advocates for the parties, **Mr Masinde** and **Mr Nyakundi** who furnished him with the reports about the structures that existed at the time. He also considered the valuation report by Chrisca Real Estates though the

- information he obtained from the local authority was inadequate. He disclosed that according to Chrisca, the property's value was Kshs 108,000,000/= which report however never influenced his decision as he further obtained evidence of other sales apart from the one mentioned by Chrisca. He however admitted that apart from Chrisca's sale and one other, there was no mention of any other sales and admitted that he relied on the report as he had no idea of what existed on the ground. He however reiterated that both advocates supplied him with the same information and asked him to rely thereon as well as on Chrisca's Report.
12. Asked about the reports from the local authority, which according to him were dated 1967, he said that such reports are not conclusive since there may be structures on the ground which may not have the approval of the local authority. He accordingly assumed that the information furnished was accurate and that the structures which existed were duly approved.
  13. In re-examination by **Mr Masinde**, learned counsel for the Plaintiff, PW1, testified that in March, 2012 the plot was not vacant and that the site in question is currently where Junction Mall is situated and is an extension of the Shopping Centre. He however based his report on what existed in 2009 and not what is currently there.
  14. Called as the second Plaintiff witness was **Pius Isaiah Khaoya**, a property valuer in the firm of Chrisca Real Estates, with experience in the said field of close to 20 years. According to him, he was instructed by his client **Kishore Banderi** on 20<sup>th</sup> September, 2009 to value the suit property and he proceeded on 23<sup>rd</sup> September, 2009 to the site, inspected the same, took measurements and prepared his report dated 25<sup>th</sup> September, 2009 in which he indicated his observations which included the fact that the houses thereon were rented out in the total monthly sum of Kshs 180,000/= which to him came to Kshs 2,160,000/= per annum. According to him the property was in a prime location and was consistently rented for over 15 years by the American Embassy.
  15. In his opinion he considered that a neighbouring plot LR No. 330/169, a one acre plot, had been sold for Kshs 90,000,000/= and arrived at the open market value of Kshs 108,000,000/= and signed the report on 29<sup>th</sup> September, 2009 giving the value as at 25<sup>th</sup> September, 2009. His report was produced as Plaintiff's Exhibit 2.
  16. In cross-examination by **Mr Nyakundi**, PW2 stated that he was instructed by **Mr Kishore** around 20<sup>th</sup> September, 2009 and the latter was referred to the witness by **Mr Masinde**. The said client wanted to obtain a fair open market value of the suit property. In his evidence, pw2 stated that he just did his professional work and not for the Court as he was unaware of the Court orders. According to him, he relied on the plan, the copy of the title and what had taken place thereon to identify the site. He stated that he based his opinion on the cost of land plus developments and also considered property on LR No. 330/169 along Mbaazi Avenue. He however said that he never came across any other valuation report on the suit property and that as a valuer you do not consider other reports since you are not supposed to censure other reports but to form your opinion as trained.
  17. The witness clarified that the report he had in court was a copy as the originals were given out.
  18. PW3 was **Kishore Bhanderi**. According to him, **Radhabhai Shirji Bhandari** was her mother and she was still alive and had authorised him to prosecute the instant case.
  19. He testified that his father left a will and he passed away in April, 2004 after which his mother obtained a grant of probate and gave him the power of attorney which he produced as an exhibit. He testified that having been involved in this case, he was aware of the terms of the consent filed herein on 3<sup>rd</sup> Jun, 2010.
  20. According to him, his father was a shareholder in Rose Holdings Ltd whose other directors were **Mr Desai** and the wife. The company had properties along Bondo Road in Industrial Area in which there was a go down while the other one was at Riara Road which had two houses fetching Kshs 180,000/= per month. The said houses were however demolished and in their places were constructed commercial properties in the form of a Shopping Mall known as Junction Shopping Mall. He explained that the property no longer belongs to Rose Holdings and that the same was sold by **Mr Desai** without his knowledge and consent in 2009 and that he only noticed the construction going on while the case was in court. This case, he explained was filed in the year 2006.
  21. On conducting a search he found that the property had been sold to Junction Ltd at a throw away price in the sum of Kshs 54,250,000/= in and the transfer was done on 27<sup>th</sup> November, 2009. He

- exhibited the search as Plaintiff's exhibit 4.
22. Being dissatisfied with the sale, he hired a valuer called Chrisca who carried out the valuation of the property and placed the value at Kshs 108,000,000/= as at 25<sup>th</sup> September, 2009 which was the time of the sale. According to him, he was unaware of the sale because he was never told about the affairs of the company as the directors were unwilling to see him. He was however not given the proceeds of the sale and was not involved in the management of the company.
  23. He therefore sought an order for accounts as well as his father's shares and the costs of the case.
  24. In cross-examination by **Mr Nyakundi**, he confirmed that he was aware of the contents of the consent which was filed pursuant to his instructions. He however denied knowledge that it compromised the suit on an interim basis. He however confirmed that the only pending issue was the valuation of the property. He however stated that there were other issues such as accounts for the rent and the money from the properties sold such as Kshs 7,000,000/= which was unaccounted for.
  25. According to him, he had been running the affairs of his father including Rose Holdings though he was not playing any role in it. Before his father's death the company was run by the father and **Mr Desai** and after the father's death, it was run by **Mr Desai**. He however testified that he approached **Mr Desai** who refused to him the details of the accounts of the properties and how the company was being run. According to him he filed the case after the property was sold without his consent but he had no idea how the sale took place. He therefore appointed a private valuer as he was not a valuer himself.
  26. According to him, he was not aware that stamp duty is paid before the property is transferred though he had purchased property before and paid duty. He however admitted that the stamp duty depends on the value of the property by the valuer. Asked about the same he stated that he was unaware that the stamp duty had been paid though the property ought to have been valued before the transfer though it was not a must that it be done by a government valuer. In his evidence he was not aware who came up with the figure.
  27. The witness however admitted that he instituted criminal proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants complaining about the sale of the property, the transfer of shares, change of bank signatories without his consent and fraud whose status he was not aware of. He however denied having withdrawn the case. Referred to the consent he admitted that he gave instructions for the filing thereof and that it had a clause for the termination of the criminal proceedings.
  28. In re-examination by **Mr Masinde**, the witness clarified that his complaint was that the property was sold at Kshs 54,000,000/= and only Kshs 46,000,000/= was transferred hence there was a shortfall of Kshs 7,000,000/= which was not accounted for since the death of his father. Similarly, no dividend had been declared to date and he had no financial information of the Rose Holdings. Before his father's death, his father was a signatory to all the accounts and by then and thereafter, he was not involved in the affairs of the company. On seeking information relating to the company's accounts, he testified that Mr Desai declined to see him hence the institution of these proceedings.
  29. He reiterated that he was not involved in the discussions to sell the Riara property which was sold during the pendency of these proceedings and he was unaware how the figure of Kshs 54,000,000/- was arrived at. He only learnt of the same when he saw the contractor on site. He admitted that he was the one who instructed his advocate to instruct a valuer who returned a figure of Kshs 108,000,000/=. In his view the property was sold at a throw away price. Had they consulted him, he said he would have offered more money.
  30. At the end of the evidence of this witness, the Plaintiff's case was closed.

### **Defendants' Case**

31. The defendants on their part filed an amended defence dated 9<sup>th</sup> June, 2011 on the same date.
32. According to the defendants, the Amended Plaint and suit herein are incompetent and incurably defective and must be struck out and/or dismissed with costs to the Defendants at the earliest possible opportunity as the purported verifying affidavit to the Plaint herein is incurably defective and a nullity.
33. The Defendants while admitting the descriptive parts of the plaint then proceeded to aver that the agreement dated 3<sup>rd</sup> July 2002 did not operate as a transfer of **Mrs. Champaben Vithalbai Shah's** shares but was only an agreement to sell and purchase those shares, and in fact the said

- agreement specifically provided at Clauses 1 and 6 that **Mrs. Shah** would sign a transfer of her shares in the purchaser's favour only after receiving the full purchase price of Kshs 5,000,000/=. However, the deceased did not pay the purchase price to **Mrs. Shah** under the terms of that agreement and therefore was not entitled to the transfer to himself of any of **Mrs. Shah's** shares and that accordingly none of **Mrs. Shah's** shares were liable to be transferred to the Deceased or the Plaintiff. It was further contended that the 2<sup>nd</sup> Defendant purchased Mrs. Shah's shares in the 3<sup>rd</sup> Defendant company for the price of Kshs 5,000,000/= and was therefore the beneficial owner of 33.3% of the issued and paid up shares of the 3<sup>rd</sup> Defendant. Accordingly, the defendants denied that the deceased was the owner of 50% of the shares of the 3<sup>rd</sup> Defendant at the time of his demise on 5<sup>th</sup> April 2004 and asserted that the Deceased owned only 33.3% of such shares which they defendants did not dispute.
34. It was however, the Defendants' position that the issue with regard to the shareholding of the 3<sup>rd</sup> Defendant was settled and or dealt with in paragraph/clause 1 of the consent order dated 3<sup>rd</sup> June, 2010. Further as the Plaintiff is not a director of the 3<sup>rd</sup> Defendant she cannot be involved in its management nor is she entitled to notice of or to attend any board meetings. The Defendants accordingly denied the allegations and particulars of concealment, non-disclosure, fraud and negligence set out in the Amended Plaintiff and averred that the same had been overtaken by events as a result of the said consent order.
35. The Defendants therefore denied fraudulently depriving the Plaintiff or the Deceased's estate of their lawful entitlements as alleged as well as allegations of particulars of concealment and fraud set out in the Amended Plaintiff. They in particular denied the suit property was fraudulently transferred to the purported 4<sup>th</sup> Defendant and asserted that they were not liable for any damage allegedly suffered by the estate of the deceased hence in their view, the Plaintiff had no valid cause of action against them.
36. The Defendants reiterated that the suit herein was compromised pursuant to a consent order dated 3<sup>rd</sup> June, 2010 wherein all the issues raised in this suit were dealt with and/or settled hence the prayers sought in the Amended Plaintiff cannot be granted as the same have been overtaken by events.
37. The defendants on their part called **Muhammed Abdul Samji**, who testified s DW1.
38. According to him, he was a Chartered Surveyor with valuation practice and also a consultant with Syagga and Associates. After testifying on his qualifications and experience, he said that he carried out a valuation on the instructions of **Mr Desai** on LR No.330/589 and prepared a report dated 31<sup>st</sup> August 2010. According to his instructions he was to value the said property as at 1<sup>st</sup> June, 2007 though he could not recall the exact instructions. As at the year 2009, he had valued the said property three times. After carrying out the inspection of the property, he valued the property in the sum of Kshs 59,000,000.0 as at 1<sup>st</sup> May, 2009. His opinion, according to his evidence, was based on the transaction on the neighbouring Plot 330/450 whose purchase price was Kshs 64,000,000/= but which property was slightly bigger than the suit property. According to him the houses in the area were old houses and his view was not influenced in any way as he had no interest in the property. He could not however comment on the other valuation reports. He however did not believe that the value of the suit property could be Kshs 100,000,000/= at that time. He accordingly produced his valuation report as defence exhibit 1.
39. In cross-examination by **Mr Masinde**, the witness asserted that he did the valuation on his own with the assistance of an assistant and he was instructed to provide an open market value of the property as at 1<sup>st</sup> June, 2007. Although he was latter instructed in 2009, the report in Court according to him related to 1<sup>st</sup> June, 2007. He clarified that he was instructed by an advocate on the instructions of **Mr Desai**. According to him an open market value is what would be paid between a willing seller and a willing buyer. Although one of the factors he considered was the effect of the value of the neighbouring properties, he conceded that he did not mention this in his report. Neither did he itemise any comparables in his report.
40. According to the witness the investment method is not relevant if there is a potential change of user, though the possibility of returns is a possible factor. Considering the value of the land and investment, he formed an opinion that the value of the property was Kshs 59,000,000.00 in the year 2009 though that was not reflected in his report. However in June, 2007 the value of the suit

- property was 49,000,000/=. In further cross-examination the witness said that he would not know if the market value would have gone to Kshs 100,000,000/= in 2009 though he doubted it.
41. In re-examination DW1 stated that he was instructed by **Mr Seth Advocate**.
42. In re-examination by **Mr. Thuku**, learned counsel for the Defendant, DW1 reiterated that the goods had never been delivered to them as they were still with the plaintiff to the best of his knowledge hence the plaintiff was liable to pay for the goods.
43. There was no other witness for the defence and the defence case was accordingly, closed.

### **Determinations**

44. Before determining the issues raised in this matter, it is important to set out the terms of the consent order recorded on 3<sup>rd</sup> June, 2010 since that consent is central to the determination of the issues herein. It is important to reproduce the full consent for its full tenure and effect. By that consent, the parties herein compromised this suit in the interim basis, pending full and final settlement on the following terms:

#### **1. Shareholding in Rose Holding Ltd**

**The Plaintiff claims that she paid one million seven hundred and fifty thousand (Kshs 1,750,000/=) out of a total 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 ten thousand shares be distributed prorata 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 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 preemptive right 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 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 outgoing 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> Defendant are found to have fraudulently sold the property at a lesser value (than the value determined by the court) the parties to**

apportion their entailment 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 interested 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> Defendant 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> Defendant 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 terminated 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 precedents over any any/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.**

In my understanding, the above consent settled all matters save for those which by virtue of the consent were expressly identified by the parties are outstanding. A proper reading of the said consent clearly shows that the only issue which the Court could possibly be called upon to decide was the value of **L.R. No. 330/589- Riara Road** in the event that the parties were unable to agree thereon. In my view the effect of the consent entered herein was to give rise to a preliminary decree. As is stated in *Indian Civil Procedure Code 13<sup>th</sup> Edn. Page 12 by Mulla*:

**“A preliminary decree is one, which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then as a result of the further enquiries conducted pursuant to the preliminary decree, the rights of the parties are finally determined and a decree is passed in accordance with such determination”.**

45. In this case what was left to be worked out in the event of disagreement was the value of the said

- property.
46. From the consent it was clear that the parties ought to have, based on their various valuation reports, agreed on the value of the suit property **as at the date of agreement of sale of property to the Junction Ltd.** In other words it was expected that the parties would consider the valuation reports made by the various valuers and come up with the value. As already indicated hereinabove, the consent was dated 3<sup>rd</sup> June, 2010.
47. From the evidence adduced by PW1, his report which was dated 7<sup>th</sup> May, 2012 was in respect of the valuation as at 30<sup>th</sup> September, 2009 at which, according to him the open market value of the suit property was Kshs 100,000,000/=. According to his evidence which was not controverted he was jointly instructed by both advocates and the parties herein and the information he relied upon was similarly furnished to him by both advocates. The valuation report by Chrica Real Estates was on the other hand dated 25<sup>th</sup> September, 2009. The report was signed 29<sup>th</sup> September, 2009 and the valuation was as at 25<sup>th</sup> September, 2009. As for the valuation undertaken by PW3, the report was dated 31<sup>st</sup> August, 2010 and was in respect of the value of the property as at 1<sup>st</sup> June, 2007.
48. The status of opinion evidence was dealt with in **Shah and Another vs. Shah and Others [2003] 1 EA 290** where the learned Judge expressed himself as follows:

**“One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct...The expert opinion is however limited to foreign law science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion and handwriting is one such field...However as a rule of practice, a witness should always be qualified in court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony...The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of the expert in preference to the opinion of the other, is the responsibility of the court...Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion.”**

49. The Court of Appeal, on its part in **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Muniyo Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139** held:

**“Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.”**

50. However, as was appreciated in **Institute of the Blessed Virgin Mary, Kenya (Registered Trustee) vs. The Commissioner of Lands [1980] KLR 5; [1976-80] 1 KLR 1493**, “valuation is not an exact science; otherwise at least two experts of the appellants would have arrived at the same figure.” This view given impetus by the decision of the East African Court of Appeal in **The Collector vs. Kassam Shivji Bhimji and Two Others Civil Appeals Nos. 58 and 60 of 1959 [1959] EA 1063** when it held that:

**“It is no doubt true that the valuation of immovable property is not an exact science and the very best efforts of an expert or a court to fix a market value for a property can never amount to much more than a *quasi* scientific guess, which the court should in the case of compulsory acquisition temper with liberally. The judge ought to be liberal in**

**the sense that he should not be too meticulous or pedantic in dealing with the evidence.”**

51. However, when all is said and done, as was held by the Court of Appeal in **Juliet Karisa vs. Joseph Barawa & Another Civil Appeal No. 108 of 1988**, expert evidence is entitled to the highest possible regard and though the Court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, such evidence must not be rejected except on firm grounds.
52. In this case, I have considered the evidence of the experts adduced herein. Whereas the opinion given by PW1 does not in the circumstances of the case disclose such a wide disparity their opinion is wide apart when considered with the evidence of DW1. It must however be noted that whereas the opinion of PW1 and PW2 was based on the open a market value of the suit property as at the year 2009, that of DW1 was based on the value of the property 2 years earlier. Whereas ordinarily a time difference of two years ought not to give rise to a very big difference in the property value, there may be factors which may either drastically reduce the value or drastically increase it. Whether such factors existed in the instant case, is a matter which cannot be determined on the basis of the evidence on record. What is important however is that the suit property was according to the Plaintiff transferred to the 4<sup>th</sup> Defendant on 27<sup>th</sup> November, 2009. The consent order was express in its terms that the valuation of the aforesaid property was to be **as at the date of agreement of sale of property to the Junction Ltd.** Clearly the valuation report produced by the defendants was not the report contemplated by the parties.
53. It is therefore my view that to be worth consideration in this matter, the valuation to be considered ought to have been as close to the date of sale as possible. In this case whereas the evidence of PW2 and DW1 may not be deemed as independent since their reports were as a result of partisan instructions, PW1's report on the other hand was as a result of joint instructions of both parties and according to him, it was based on the information furnished by the same parties. There is no basis upon which this Court can ignore such a report. In **Petro Ochieng Wasambwa vs. Joshua Otieno Buyu Kisumu HCCC No. 124 of 1997**, the High Court was of the view that where the issue is the determination of a boundary, the Land Registrar together with the surveyor are the best in determining boundary disputes, and unless partiality or bias has been alleged then the report of the Land Registrar which has been sought by consent of the parties should be treated as an award. An appeal against a decision declining to review the said decision was dismissed by the Court of Appeal in **Joshua Otieno Buyu vs. Petro Ochieng Wasambwa Civil Appeal No. 347 of 2000 [2003] KLR 377.**
54. There is no basis upon which this Court can find that the report made by PW1 was tainted with bias or was prejudicial. My view to rely on the said report is further reinforced by the fact that it was the only report that can properly be said to have been made pursuant to the consent order since as opposed to the other two reports, it was the only report made following the valuation carried out subsequent to the said consent order.
55. Accordingly, it is my view and I find that the open Market value of the suit property as at the time of the sale of the suit property was Kshs 100,000,000/=.
56. That leads to the issue whether the suit property was fraudulently sold. It is however trite that fraud is a serious quasi- criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt.
57. However, the word fraud is not statutorily defined. It is a word of general application and no exhaustive judicial interpretation has been laid down. The question whether any transaction shows fraud, it has been held, is a question of fact depending on the circumstances in each case. Knowledge of other people's rights, and the deliberate acquisition of a registered title in face of such knowledge actual or constructive amounts to fraud, which would render voidable the certificate of title, so obtained, and voluntary ignorance is for this purpose the same as knowledge. In **Suleiman Bin Abdulla Bin Mohamed El Kiyuni vs. Azzan Bin Zahor El Ruwehi and Said Bin Azzan Bin Zahor El Ruwehi HCCC No. 57 of 1958 [1958] EA 553**, the Court recognised that:

**“It is a truth confirmed by all experience that in the great majority of cases fraud is not capable of being established by positive and express proofs. It is by its very nature**

**secret in its movements; in the generality of cases, circumstantial evidence is the only resource in dealing with questions of fraud, and if this evidence is sufficient to overcome the natural presumption of honesty and fair dealing and to satisfy a reasonable mind of the existence of fraud by raising a counter presumption, there is no reason whatever why it should not be acted on.”**

58. In this the Plaintiff’s uncontroverted evidence was that the estate of the deceased was completely locked out of the transaction. When PW3 attempted to seek audience with the 2<sup>nd</sup> Defendant, he was denied such audience. Even after the sale of the suit property, the proceeds thereof was not paid to the estate of the deceased. One would ask why the Defendants opted to not only transact the sale in secrecy but why even after that they did not deem it fit to disburse the proceeds due to the deceased to his estate.

59. In **Mbuthia vs. Jimba Credit Finance Corporation and Another [1986-1989] EA 340; [1988] KLR 1** the Court of Appeal held:

**“A sale made at a fraudulent undervalue will be set aside. But the Court will not set aside a sale merely on the ground that it is disadvantageous, unless the price is so low as to be in itself evidence of fraud.”**

60. Therefore, whereas a sale of property at an undervalue without more cannot be evidence of fraud, where the sale is so low as in this case, where the property was allegedly sold at less than half its value, coupled with other factors such as the conduct of the defendant prior and subsequent to the sale, unless there is evidence to the contrary, the Court may well be entitled to find that the sale was fraudulent.

61. In this case, based on the totality of the evidence adduced I find that the sale of the suit property by the 2<sup>nd</sup> Defendant was fraudulent.

### **Order**

62. Pursuant to the consent order aforesaid I direct that the parties do apportion their entitlement, based on and their respective shareholding in the 3<sup>rd</sup> Defendant Company.

63. As all the other issues in the suit had been compromised I make no order as to costs.

64. Liberty to apply granted.

65. Orders accordingly.

**Dated at Nairobi this 24<sup>th</sup> day of June, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered the presence of:**

**Mr Masinde for the Plaintiff**

**Mr Nyakundi for the Defendants**

**Cc Patricia**