



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

Civil Case 663 of 2005

PRAB HULAL TEJPA HARIA1ST PLAINTIFF

MRS. MANJU PRABHULAL HARIA2ND PLAINTIFF

VERSUS

PRAVINCHANDRA MEGHJI DODHIA1ST DEFENDANT

REKHA PRAVINCHANDRA DODHIA2ND DEFENDANT

BHAVISHA PROPERTIES LTD.3RD DEFENDANT

RULING

The application for my determination is the Originating Motion dated 21st July, 2005 brought under Section 118 of the Companies Act and Rule 17 of the Companies Rules. The prayers sought in the application are:

- (1) that the register of members of Bhavisha Properties be rectified by striking out the name of the 2nd respondent, Mrs. Rekha Pravinchandra Dodhia, as the holder of 25 shares in the 3rd respondent entitling her to own Maisonette No. 8 on L. R. No.1870/111/324 situated in Westlands Nairobi.**
- (2) That the names of the applicants herein be substituted for that of the 2nd respondents or be restored in the register of the 3rd respondent.**
- (3) That the 2nd respondent do give the applicants vacant possession of Maisonette No.8 situate on L.R. No.1870/111/324 in Westlands Nairobi.**
- (4) That in addition to 3 above, the 2nd respondent do pay to the applicants mesne profits at Kshs.40,000/= per month from 12th January, 1994 to the date of judgement, for committing trespass to the applicant's maisonette No.8 on the said L.R. No.1870/111/324.**
- (5) That the respondents do forthwith give to the Registrar of Companies notice of the rectification.**
- (6) That the respondents do pay the costs of this suit.**

It is alleged that the applicants in 1985 lawfully acquired 25 shares in the 3rd respondent which entitled them to own maisonette No.8 on L.R. No.1370/111/324. Then the names of the applicants were entered in the members' register of the 3rd respondent upon completion of the purchase price. It is the contention of the applicants that they never sold or made any gift of or howsoever alienated to any person in any manner their said 25 shares in the 3rd respondent. And in particular their right to own Maisonette No.8.

It is also alleged that the management of the 3rd respondent was vested solely and primarily in the hands of the 1st and 2nd respondents, hence they were required to act in good faith and in the interest of the Company and all its shareholders and never to allow a conflict to develop between their own interests and those of the Company. And by virtue of their position the 1st and 2nd respondents were prohibited from undertaking a registration of any instrument of transfer which is improper.

It is further contended that on 12th January, 1994, the 1st and 2nd respondents conspired with one **Tanuj G. Raja** to deprive the applicants of their house, maisonette No.8 and rent from the same which was then being paid by a tenant in occupation of the same. And on the same dates the names of the applicants were cancelled from the register of members of the 3rd respondent and in their place the name of the 2nd respondent inserted. After being registered, the 2nd respondent from 12th July, 1994 has let the said maisonette to various tenants whom she has received rent and converted to her own use in the capacity of a pretended owner of the said shares and property.

As a consequence, the 1st and 2nd respondent on 25th May, 1996 filed with the Registrar of Companies a false return stating the applicants had allegedly sold their shares in the 3rd respondent to the 2nd respondent on 20th November, 1992.

It is also deposed that the applicants and 1st and 2nd respondents were neighbours until August 1991, when the applicants left after purchasing a bigger house on L.R. No.209/3428, Nairobi. The applicants allegedly bought the second house from one **Tanuj G. Raja** who was the chairman of board of directors of **Bullion Finance Company Limited**. They bought for Kshs. 4 million with assistance of a loan. The applicants had a sum of Kshs.2.5 million but got the balance of Kshs. 1.5 million from **Bullion Finance Company Limited**. As a security a charge was secured over the property L.R. No.209/3428. They also agreed to sign blank share transfer of their interest in the 3rd respondent company.

The chairman of the financing bank then agreed with the applicants to take a lease in respect of maisonette No.8 but the rent would be credited into the loan account of the applicants to enable them settle their indebtedness to the bank quickly. It was also agreed that the house would be transferred to **M/S Jitesh P. Haria** and **Milan P. Haria**, who are sons of the applicants. The applicants then gave vacant possession of the said maisonette No. 8 to **Bullion Finance Company** through **Mr. Tanuj** in August 1991.

It is contended by the applicants they completed repayment of the loan in early 1994. And upon completion they requested **Mr. Tanuj** for the title documents in respect of Plot No.209/3428 Nairobi and the blank share transfer forms earlier signed as a security. The title documents in respect of 209/3428 was released but the blank share transfer form was never located and/or given to the applicants. In early 1996 it came to the knowledge of the applicants that **Mr. Tanuj** was conspiring with the 1st and 2nd respondents to deprive them of their shares and maisonette No.8. They complained to the police and **Mr. Tanuj** was charged.

The response of the 1st and 2nd respondent is that they bought the maisonette No. 8 from one **Gulabchand Raja**, who applicants obtained a loan of Kshs. 4 million to enable them purchase property No.209/3424 situate in Parklands for a consideration of Kshs. 2.5 million. He paid the said sum of Kshs.2,500,000/= in **Bullion Finance Bank** in an account in the names of **Jitesh Haria** and **Milan Haria**, the applicants sons. And the applicants were well aware that they had divested themselves from the shares or any interest in the 3rd respondent. That is why they never made any payments nor attended

any shareholders meeting when it was held.

It is also response of the respondent that sometimes **Mr. Gulabchand Raja** passed away and his son **Tanuj Gulabchand Raja** became the chairman of **Bullion Finance Limited**. And the applicants have since 1991 been aware that the shares on **L.R. 1870/111/324** had been transferred by **Bullion Finance Bank** and it is by the death of **Gulabchand Raja** that they felt emboldened enough to try and fraudulently obtain the property. It is also the case of the respondents that they are innocent purchasers for value from 1991. And have been in occupation or in control of the maisonette No. 8 since 1991.

The applicants are also accused of being guilty of material non-disclosure as they have failed to show the service of the funds of Kshs.2,500,000/= which was the balance of the purchase price for **L.R. No.1870/111/324** or how their sons account was credited with the said sum.

According to **Dr. Kamau Kuria** learned counsel for the applicants, the applicants never sold their shares to the 2nd respondent. They made any gift, therefore the notification is fraudulent. The alteration occurred because the 1st and 2nd respondents are the life directors of the company. And by virtue of being directors for life any other person can be appointed a director by them.

The application was opposed by **Mr. James Singh** on behalf of the respondents. He submitted that section 118 of the company's Act has no relevance as it is only limited if any member is omitted from the register, the person aggrieved may apply for rectification. He submitted that the prayers in the application are beyond the scope of the provisions of Section 118 of the Company's Act. Generally **Mr. James Singh** termed the whole application as mischievous and urged for its dismissal.

I have taken into consideration the submissions of both Advocates and the affidavits in support of each party's position. The application is brought under the powers of the court to rectify a register under Section 118 of the company's Act Cap 486 Laws of Kenya.

Section 118(1) of the Companies Act;

(a) the name of any person is without sufficient, cause entered in or omitted from the register of members of a company or

(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,

the person aggrieved or any member of the company or the company, may apply to the court for rectification of the register.

(2) Where an application is made under this section, the court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved".

In my view a Company's register must contain all the information about the company. Generally speaking a company's register of members is a prima facie evidence of the matter recorded in it. And if the register does not show the person who is really entitled to shares as the registered holder of them or if it contains any other incorrect entry, the company can be compelled by the court to rectify the register. In this there is a rival claims laid by the parties herein.

The rival claims is mainly based on fraud to have been committed by the respondents. The respondent also contest the position of the applicants and claim a legal right of innocent purchaser for values. In my view the summary powers of the court can be invoked in plain and clear cases, where there is no need for a trial. The 1st and 2nd respondents are saying that they have obtained the title to the suit property and transfer of shares with sufficient cause. The powers under section 118 of the company's Act cannot be invoked when there is a real and complicated dispute as to the real interests of the parties.

The issue of title to the shares and the suit property cannot be appropriately decided at this stage on the heavily contested facts and documents. The procedure adopted by the applicants to remedy the alleged acts committed in 1991 cannot be an expedient method to address those grievances. It is therefore my position that the application is premature and cannot remedy the grievances put forward by the applicant. I do not think it is appropriate for me to invoke my discretionary powers in favour of the applicants at this stage. The facts and issues are not clear to me and it would be grave injustice to order rectification on affidavit evidence. It is therefore my view that the summary powers of the court cannot be invoked when the issues in dispute are not plainly clear. I refuse to exercise my discretion in favour of the applicants.

Order: the application dated 21st July, 2005 is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 31st day of May, 2007.

M. A. WARSAME

JUDGE