



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 779 of 2005

**RAJESH CHHOTALAL RAJANI (Suing on his own behalf and on behalf of the Estate of RUPIN CHHOTALAL RAJANI (Deceased)).....PLAINTIFF**

**VERSUS**

**DAVID GILBERT HASTIE .....1<sup>ST</sup> DEFENDANT**

**JESSICA ENID KAZINA .....2<sup>ND</sup> DEFENDANT**

**TOM SINDIGA NYARIKI .....3<sup>RD</sup> DEFENDANT**

**THE REGISTRAR OF LANDS .....4<sup>TH</sup> DEFENDANT**

**RULING**

(1) In this Application, the Plaintiff is seeking, among other orders:

(a) a temporary injunction to restrain David Hastie and Jessica Kazina (the First and Second Defendants respectively) from entering, developing, remaining in or interfering with the lease-hold property comprised in Title No. Nairobi/Block 94/31 (“**the suit property**”);

(b) restraining the First and Second Defendants from selling, disposing of, transferring, alienating or charging the suit property;

(c) an order against the Registrar of Lands, the Fourth Defendant, inhibiting registration of any dealings in respect of the suit property.

(2) Rajesh Chhotalal Rajani (the Plaintiff) claims to be the proprietor of the suit property in common with his late brother, Rupin Chhotalal Rajani, who died on the 5<sup>th</sup> June 2000. They acquired the suit property on the 15<sup>th</sup> April 1996. The Plaintiff has brought this suit on his own behalf and also on behalf of the estate of his late brother, for which he is the Administrator. The Rajani brothers owned a Company called Monty’s Wines & Spirits Ltd. (“**the Company**”).

(3) On the 31<sup>st</sup> July 1997, Trust Bank Ltd. (In Liquidation) (“**the Bank**”) lent the Company a sum of K.Shs.7,000,000/= against the security of a Charge over the suit property. The Charge was registered on that date. It would appear that the loan was not repaid and the Bank went into liquidation before the Title Deeds were returned to the Plaintiff and his brother.

(4) The Plaintiff has now sued the four Defendants seeking the reliefs set out in the Plaint filed on the

23<sup>rd</sup> June 2005. These include a declaration that each and every transaction purporting to divest the Plaintiff ownership of the suit property were executed and registered fraudulently, unlawfully and illegally and are consequently null and void; a declaration that the Third Defendant lacked the legal capacity to transfer the suit property to the First and Second Defendants; injunctions against the First and Second Defendants in the terms I have already summarized hereinabove; cancellation of all the registrations subsequent to the Plaintiff's registration; general damages against all the Defendants; and costs of the suit.

(5) The Plaintiff says that on the 25<sup>th</sup> January 2005, notably more than eight years after the Bank granted the Company a loan on the security of a Charge on the suit property, he conducted a search at the Lands Registry and discovered that on the 19<sup>th</sup> January 1999, there was a Transfer of Lease in favour of Tom Sindiga Nyariki, the Third Defendant. He was registered as proprietor on the 12<sup>th</sup> February 1999. The instrument of Transfer was registered by the Fourth Defendant.

(6) The Plaintiff also says that on the 17<sup>th</sup> December 2003, the Third Defendant sold and transferred the suit property to David Gilbert Hastie and Jessica Enid Kazina, the First and Second Defendants. He says that these transfers were fraudulent because to date, the debt has not been repaid and the Title Deeds are still in the custody of the Central Bank of Kenya, the Liquidator of the Bank. The Plaintiff further avers that the signature on the instrument of Discharge of Charge dated the 27<sup>th</sup> August 1999 purporting to be the signature of Pravin Dhirajlal Malkan, the duly authorized Attorney of the Bank, was also forged. He has procured an affidavit from Malkan, who left Kenya and is now residing in India, in which the deponent says that the signature in the Discharge of Charge is not his.

(7) The Plaintiff also says that neither he nor his late brother signed the instrument of Transfer in favour of the Third Defendant and that the signatures on that document were also forged. By reason thereof, the Plaintiff avers that the First and Second Defendants are fraudulently, unlawfully, irregularly and illegally in occupation of the suit property.

(8) The First and Second Defendants filed a Defence on the 2<sup>nd</sup> September 2005 and denied the Plaintiff's claim in its entirety. They say that the suit property was advertised for sale by Neptune Shelters Ltd., a firm of estate agents, in November 2003. They conducted a search of the title to the suit property and confirmed that the Third Defendant was the registered proprietor thereof. They bought it from the Third Defendant at the price or sum of K.Shs.5,600,000/= and the Transfer of Lease in their favour was registered on the 23<sup>rd</sup> December 2003 and were issued with a Certificate of Lease. They took possession and have since built a residence/home on it at a cost in excess of K.Shs.16,000,000/=. They deny the allegations of fraud made against them by the Plaintiff. They contend that they were innocent purchasers for value without notice. And they have raised a counter-claim against the Plaintiff seeking a declaration that they are the registered proprietors and a permanent injunction restraining the Plaintiff from interfering with their quiet possession of the suit property.

(9) The substance of the First and Second Defendants' defence is repeated in the Replying Affidavit of David Gilbert Hastie sworn on the 24<sup>th</sup> October 2005. The essence of that defence is captured in paragraphs 17 and 18 of the affidavit which are in the following terms:-

**“17. The 2<sup>nd</sup> Defendant and I are strangers to the allegations by the Plaintiff that the Transfer of Lease to the 3<sup>rd</sup> Defendant is a forgery or of the other allegations by the Plaintiff seeking to challenge the 3<sup>rd</sup> Defendant's Title.”**

**“18. The 2<sup>nd</sup> Defendant and I are not aware neither are we privy to the alleged fraud or alleged illegality or alleged irregularity to the Transfer in favour of the 3<sup>rd</sup> Defendant”.**

(10) Apart from the defence raised by these two Defendants, there is also the salient issue of the Charge in favour of the Bank. The Plaintiff claims that the Title documents relating to the suit property are still lying with the Central Bank of Kenya as the Liquidator of the Bank. I would have thought that any

attempt to impeach the First and Second Defendants' title must of necessity start with an explanation from the Liquidator as to how the suit property ended up in the market before the debt was repaid and without the exercise of the Bank's statutory power of sale. If the power was irregularly or improperly exercised, the law provides a remedy in damages for any person injured thereby against the person exercising the power.

(11) I listened very carefully to the submissions made by Mr. Philip Nyachoti on behalf of the Plaintiff but with great respect, I must reject them because the Plaintiff has not established a *prima facie* case with a probability of success against the First and Second Defendants, particularly in the absence of any explanation whatsoever from the Central Bank of Kenya with regard to the issue of the Charge in favour of the Bank to which I have already alluded. As I am not trying this suit, I cannot at this stage and as a court of equity accept the averments respectively contained in the affidavits of Pravin Dhirajlal Malkan and Rajesh Chhotalal Rajani to grant the injunction sought by the Plaintiff. In reaching this decision, I have considered these averments in conjunction with the particulars of fraud and negligence respectively set forth in paragraphs 19 and 20 of the Plaint and noted that none of the allegations of fraud and/or negligence have been attributed to the First and Second Defendants or either of them. In any event, and even if I were in any doubt, the balance of convenience most certainly lies with the First and Second Defendants.

(12) Learned counsel for the Plaintiff cited a number of authorities, which I have also read, but for the purposes of this Application, and again with respect, I did not find them particularly helpful.

(13) In the final analysis, and for the foregoing reasons, this Application fails and it is ordered that the Chamber Summons dated and filed on the 23<sup>rd</sup> June 2005 be and is hereby dismissed with costs to the First and Second Defendants.

Dated and delivered at Nairobi this Fifth day of June 2006.

P. Kihara Kariuki

Judge.