



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 317 OF 2007

PRABHULAL TEJPAR HARIA.....1ST PLAINTIFF

MANJU PRABHULAL HARIA.....2ND PLAINTIFF

-VERSUS-

PRAVINCHANDRA MEGHJI DODHIA.....1ST DEFENDANT

REKHA PRAVINCHANDRA DODHIA.....2ND DEFENDANT

BHAVISHA PROPERTIES LIMITED.....3RD DEFENDANT

JUDGMENT

[1] This suit was commenced by the Plaint dated 21 June 2007 by the two Plaintiffs, **Prabhulal Tejpar Haria** and his wife **Manju Prabhulal Haria (now deceased)** for the following reliefs:

[a] A Declaration that the purported removal by the Defendants of the Plaintiffs' name from the register of members of the 3rd Defendant as owners of 25 shares in the 3rd Defendant and Maisonette No. 8 on LR No. 1870/III/324, and insertion of the name of the 2nd Defendant as the owner of the same, is fraudulent, a breach of the Articles of Association of the 3rd Defendant; and is null and void;

[b] A declaration that the 2nd Defendant holds the 25 shares in the 3rd Defendant which go with Maisonette No. 8 on LR No. 1870/III/324, upon trust for the Plaintiffs;

[c] A declaration that the 2nd Defendant has committed trespass on the said Maisonette No. 8 on LR No. 1870/III/324 since 1996;

[d] An order that the 2nd Defendant accounts to the Plaintiffs for all the rent received from Maisonette No. 8 on LR No. 1870/III/324 since 1996, together with interest at bank rates;

[e] As an alternative to [d], the 2nd Defendant pays to the Plaintiffs *mesne* profit at Kshs. 40,000 from 1 January, 1996 to the date of Judgment together with interest at bank rates;

[f] An order that the 3rd Defendant rectifies the Register of Members by substituting the names of the Plaintiff for that of the 2nd Defendant as the holder of 25 shares;

[g] As an alternative to [f] above, the Register of Members of the 3rd Defendant be rectified by striking out the names of the 2nd Defendant as the holder of 25 shares in the 3rd Defendant purporting to entitle her to own 25 shares which go with Maisonette No. 8;

[h] An order that the 2nd Defendant do give vacant possession of the said Maisonette No. 8 forthwith;

[i] An order that the 3rd Defendant do grant to the Plaintiffs a lease for 99 years from 1 June 1981 in respect of Maisonette No. 8 on LR No. 1870/III/324;

[j] An order that the Defendants do pay the costs of this suit.

[2] There appears to be no dispute that the 2nd Plaintiff died on or around **28 December 2013** and that no substitution has been effected under **Order 24 Rule 3(1) of the Civil Procedure Rules**; and therefore that her cause of action has since abated. The 1st and 2nd Defendants are husband and wife who incorporated the 3rd Defendant on **24 September 1980** with a view of developing 8 maisonettes on **LR No. 1870/III/324**, each of which comprised of 25 shares in the ownership of the 3rd Defendant. As its first shareholders, the 1st and 2nd Defendants had total control of the operations of the 3rd Defendant.

[3] It was further pleaded in the Plaint that the maisonettes were constructed before **1985** and sold out to shareholders by the Defendants; and that the 1st and 2nd Defendants retained two maisonettes, being Maisonette No. 1; which they used as their home, and Maisonette No. 8 which was subsequently purchased by the Plaintiffs. It is the Plaintiffs' contention that they thereafter used Maisonette No. 8 as their home until **1991** when they bought a bigger house on **LR 209/3428 (the Parklands Property)**.

[4] It was the contention of the Plaintiffs that **LR 209/3428** was purchased by them at **Kshs. 4 million**, of which **Kshs. 1.5 million** was to be a loan from Bullion Finance Limited for which the security offered comprised of a Charge over **LR No. 209/3428** and a blank Share Transfer in respect of the 25 shares in the 3rd Defendant. In addition, the Plaintiffs were to let out their maisonette to the lender for use by its employees. According to the Plaintiffs, they duly complied with the terms of the lending and gave vacant possession of their maisonette to **Bullion Finance Limited**; and repaid the loan between **1991 and January 1994**; but that upon that completion, only title documents for **LR No. 209/2328** were released to them by Bullion Finance Limited; and that it was not until **1996** that the Plaintiffs discovered that the Defendants had perpetrated a fraud on them with a view of taking away their shares and Maisonette No. 8, hence this suit.

[5] In support of the claim, the 1st Plaintiff, **Prabhulal Tejpal Haria (PW1)**, relied on the witness statement prepared by him dated **9 July 2012**, in which he reiterated that by virtue **Articles 23 and 24** of the 3rd Defendant's Articles of Association, the 1st and 2nd Defendants became the first directors of the 3rd Defendant upon its incorporation in **September 1980**; and that after the 3rd Defendant constructed 8 maisonettes on **LR No. 1870/III/324** sometimes before **1985**, they allotted 25 shares per maisonette to the persons who purchased and became owners of the said 8 maisonettes. Thus, it was the evidence of **PW1** that by virtue of **Article 10** of the 3rd Defendant's Articles of Association, every shareholder was entitled to a maisonette if he held 25 shares in the 3rd Defendant.

[6] **PW1** further stated that among the persons who acquired 25 shares in the 3rd Defendant, and consequently a maisonette on **LR No. 1870/III/324**, were the 1st and 2nd Defendants and **Manilal Rajpal Shah** and **Mrs. Manjula Manilal Shah** who were the initial owners of Maisonette No. 8 and from whom the Plaintiffs purchased Maisonette No. 8. It was the evidence of **PW1** that having bought the said maisonette, **Mr. and Mrs. Shah** gave them vacant possession together with a Transfer of Shares which

was produced herein and **marked P4** (at page 18 of the Plaintiff's Bundle of Documents). They were thereafter issued with a Share Certificate, **marked P5**. He added that upon becoming shareholders, their names were entered in the 3rd Defendant's Members' Register and their names appeared as members in the Company's annual returns for the period between **1985** and **1991 (marked P6)**.

[7] **PW1** further testified that between **1985** and **July 1991**, they used the said Maisonette No. 8 as their matrimonial home and lived therein with their two sons, namely, **Jitesh Prabhulal Haria (DW1)** and **Milan Prabhulal Haria**; and that when they got an opportunity to buy another property, being **LR No. 209/3428**, also referred to herein as the **Parklands property**, they seized the opportunity. **PW1** explained that the Parklands property was being sold by the Chairman of the Board of Directors of **Bullion Finance Limited**, one **Tanuj G. Raja** at **Kshs. 4 million**; and that since they had only **Kshs. 2.5 million**, Bullion Finance Limited agreed to give them a loan to cater for the difference; and that as security they were required to and did sign a blank Share Transfer of their shares in the 3rd Defendant, which **Bullion Finance Ltd** would hold until the loan was fully repaid. A copy thereof was produced and **marked P7**. In addition thereto, the Plaintiffs were to let out Maisonette No. 8 to the employees of **Bullion Finance Ltd** at a monthly rent that would be paid to the loan account.

[8] Thus, **PW1** testified that they gave vacant possession of the subject maisonette to **Bullion Finance Ltd** and opened, with **Bullion Finance Ltd, Account No. 40-8273** in the names of their sons, **Jitesh** and **Milan**. The funds were accordingly disbursed and the Parklands property purchased. According to **PW1**, they finished repaying the loan to **Bullion Finance Ltd** in or about **January 1994** and in proof thereof, a Statement of Account **marked P8** was exhibited herein. Thereupon **Bullion Finance Ltd** released the title documents in respect of the Parklands property, but informed them that they could not locate the blank Share Transfer, promising to release the same as soon as it was found. The Title for the Parklands property was produced by **PW1** and is **marked P10A** herein.

[9] It was the evidence of **PW1** that between **1994** and **1996**, when **Bullion Finance Ltd** collapsed, they kept checking with **Bullion Finance Ltd** to find out if the Share Transfer document had been traced, to no avail; and that all this while, Maisonette No. 8 was occupied by persons who they believed were employees of **Bullion Finance Ltd**; and so it was that the Plaintiffs got to learn in **1996** that the Defendants, together with the Chairman of **Bullion Finance Ltd**, **Tanuj Raja** had perpetrated a fraud on them that had the effect of dispossessing them of their 25 shares in the 3rd Defendant along with Maisonette No.8 and the rent which the Maisonette was fetching. **PW1** testified that they got to learn that on **27 May 1996**, the Defendants filed with the Registrar of Companies, a fraudulent Notification of Change of Directors and Secretaries (**marked P11**) purporting that he and his deceased wife had on **20 November 1992** sold their 25 shares to the 2nd Defendant for **Kshs. 2.5 million**.

[10] **PW1** was categorical that they neither sold their shares in the 3rd Defendant to the 2nd Defendant as alleged, or to Tanuj Raja, or at all; nor did they resign as directors/shareholders of the 3rd Defendant. Citing **Article 15** of the 3rd Defendant's Articles of Association, **PW1** testified that any person intending to transfer his/her shares was required to give notice in writing to the company of that intention; and that they had not given any such intention. He added that it was strange that he would sell his shares and have the purchase price paid in the name of his sons without his authority or instructions.

[11] According to **PW1**, the only account in **Bullion Finance Ltd** held in the name of his sons was **Account No. 40-8273** which was opened for the purposes of the loan for the purchase of the Parklands property. Thus, on the discovery of the fraud, he caused the matter to be reported to the Police for investigation; and that following those investigations, **Tanuj Raja** disclosed that another account in the name of his two sons had been opened, being **Account No. 10671** in which the alleged sum of **Kshs. 2.5 million** was deposited by the 1st and 2nd Defendants. It further emerged that the said funds were purported to have been withdrawn by his two sons on **10 July 1991** through a Debit Authority; but that the investigations revealed that the said Debit Authority was a forgery. **PW1** added that **Tanuj Raja** was subsequently charged in **Criminal Case No. 550** of **2000** along with others for forging the said Debit Authority and the Charge Sheet and Judgment were produced herein as Exhibits **P12** and **P14**. He accordingly urged the Court to believe their version of the matter and grant the prayers set out in the

Plaint.

[12] PW2 herein, **Gitonga Aritho**, testified that he was instructed to carry out a valuation of **Maisonette No. 8** on **LR No. 1870/III/324** to ascertain its current market value and work out the rental income that the Plaintiffs lost from **1991** to **2015**. He produced his Valuation Report dated **25 June 2015** as an exhibit herein, and it shows that following those instruction, he inspected the property and thereafter prepared his Valuation Report aforementioned. His expert opinion was that the Open Market Value of the property as of **June 2015** was **Kshs. 24,670,000**; while the Cumulative Rental Value for the period **1991** to **May 2015** was **Kshs.21,387,350**.

[13] Although the Plaintiffs filed herein a witness statement prepared by **Jitesh Haria**, he was not called as a witness for the 1st Plaintiff. Instead **Jitesh Haria** was called as a witness for the Defence and he testified herein as **DW1**. His evidence was that, between **1985** and **1991**, he lived with his parents at Maisonette No. 8 on **LR No. 1870/III/324**; and that for the purchase of the Parklands Property, **PW1** obtained a loan from **Bullion Finance Ltd** for which an account was opened in the joint names of himself and his brother **Milan**, being **Account No. 40-8273**. **DW1** further stated that the loan was fully repaid and the account aforementioned closed as per the Statements of Account marked **P8**. It was the testimony of **DW1** that he never opened any other account with **Bullion Finance Ltd**, either alone or jointly with his brother, **Milan**. He also denied having received **Kshs. 2.5 million** through an account in **Bullion Finance Ltd**; and confirmed that the alleged deposit of **Kshs. 2.5 million** into their account was the subject of **Chief Magistrate's Criminal Case No. 550 of 2000** in which **Tanuj Gulabchand Raja** was charged with forgery in connection with the fraudulent sale of **PW1's** shares. He reiterated the posturing of **PW1** that **PW1** never sold his shares in the 3rd Defendant as alleged. He confirmed that he had initiated the criminal proceedings in **Criminal Case No. 550 of 2000** against **Tanuj Raja**; and that the charges against **Tanuj Gulabchand Raja** were dismissed.

[14] On behalf of the Defendants, Written Statements of Defence were filed herein dated **4 September 2007** in which it was conceded that the Plaintiffs purchased shares in the 3rd Defendant Company in **1985**, when they bought Maisonette No. 8. They however contended that the property was thereafter sold to the 1st and 2nd Defendants when the Plaintiffs bought the Parklands property and thereby ceased their shareholding in the 3rd Defendant. It was therefore the defence contention that the removal of the Plaintiffs' names from the Register of Members of the 3rd Defendant was lawful. In addition to **DW1**, evidence was adduced for the Defence by **Pravinchandra Meghji Dodhia (DW2)** who is the 1st Defendant herein. He adopted the witness statement that was filed herein on **17 March 2015**, in which he confirmed that he was a Director of the 3rd Defendant, a limited liability company that was incorporated in **September 1980** for the purpose of purchasing **LR 1870/III/324** and developing maisonettes thereon for the shareholders. He testified that the purchase was to be financed partly by the shareholders contribution and partly by a loan obtained from **Old Mutual Society** by way of mortgage. **DW2** further confirmed that under the aforesaid scheme, a **Mr. Manilal Shah** purchased one of the maisonettes, which is the maisonette that is the subject of this suit, **Maisonette No. 8**; which he subsequently sold to the Plaintiffs herein.

[15] It was further the evidence of **DW2** that the Plaintiffs were not good neighbours and that, as a result, several altercations ensued between them and other residents leading to several complaints. An example thereof was given in the form of the letter dated **8 May 1991** that was written to **Spring Valley Police Station** by several householders; and that thereafter, the Plaintiff's lawyers, **Khanna & Company Advocates**, wrote a letter to the 3rd Defendant offering to sell Maisonette No. 8 for **Kshs. 2,200,000**, whereupon the 3rd Defendant made a counter-offer of **Kshs. 1,200,000**.

[16] **DW2** further testified that he was aware that the Plaintiffs were very good friends with **Gulabchand Raja** (now deceased) who was then the Chairman of **Bullion Finance Ltd**; and that sometime in **1991**, the said **Gulabchand Raja** informed him that the 1st Plaintiff had approached his bank and applied for a loan to enable his sons, **Jitesh Haria** and **Milan Haria**, purchase **LR 209/3424** situated in Parklands; which had been developed by his (Raja's) companies. It was the evidence of **DW2** that, **Mr. Raja** told

him that the Plaintiffs had agreed to transfer their shares in the 3rd Defendant company for a consideration of **Kshs. 2,500,000** and obtain a loan for **Kshs. 1,500,000** from **Bullion Finance Ltd** to raise the purchase price of **Kshs. 4,000,000**; and that Mr. Raja wanted to know whether he was interested in purchasing the Maisonette. **DW2** added that since the Maisonette No. 8 had been under their control for the purposes of the Old Mutual loan repayment and the payment of utility expenses, they agreed on the sale price of **Kshs. 2,500,000** which was to be paid to a **Bullion Finance Ltd** account in the names of **Jitesh** and **Milan Haria**. So the contention of **DW2** was that he complied and made the payment and that the maisonette has been theirs since.

[17] According to **DW2**, the Plaintiffs were well aware that they had divested themselves of the shares and any interest in the 3rd Defendant; and that this was the reason they had neither made any payments, nor attended any shareholders' meetings since; and further, that this was the reason the Plaintiffs had not collected any rent or visited the property to ascertain its status as would be expected of a landlord. It was further the evidence of **DW2** that it was only after the death of **Gulabchand Raja** that the Plaintiffs raised the allegation that the property had been illegally transferred. He confirmed that the Plaintiffs caused them to be investigated for fraud along with **Tanuj Raja**, the son of the deceased **Gulabchand Raja**; and that although **Tanuj Raja** was ultimately charged and prosecuted, the charges were dismissed.

[18] It was the evidence of **DW2** that they have had control of the maisonette since **1991**; adding that if the Plaintiffs had only pledged their shares as security, then they would have annexed the bank's Letter of Offer. He also testified that the Plaintiff's failed to show the source of the **Kshs 2,500,000** which they allegedly paid for the Parklands property. **DW2** accordingly urged for the dismissal of this suit with costs.

[19] From the foregoing summary, quite a number of facts are not in dispute. It is not in dispute, for instance, that the 1st and 2nd Defendants incorporated the 3rd Defendant company, **Bhavisha Properties Ltd**, for the purpose of purchasing **LR No. 1870/III/324** and constructing maisonettes thereon for the benefit of the shareholders, who were each entitled to a maisonette and 25 shares in the 3rd Defendant. It is further not disputed that some of the shareholders were Mr. Manilal Rajpal Shah and his wife, **Mrs. Manjula Manilal Shah**, who thereafter sold their Maisonette No. 8 and 25 shares in the 3rd Defendant to the Plaintiffs. It is also common ground that the founding directors were the 1st and 2nd Defendants, and that **Article 25(a)** of the Company's Articles of Association gave them immense powers. That article reads:

"The said PRAVINCHANDRA MEGHJI DODHIA and REKHA PRAVINCHANDRA DODHIA, the first directors of the company shall hold office until he or she dies or resigns or ceases to hold Twenty Five shares in the Company. While the said PRAVINCHANDRA MEGHJI DODHIA and REKHA PRAVINCHANDRA DODHIA hold office as Directors all powers authorities and discretions vested in the Directors by the Companies Act Table A or these articles shall be vested in them and all other directors (if any) for the time being of the Company shall exercise such powers only as the said PRAVINCHANDRA MEGHJI DODHIA and REKHA PRAVINCHANDRA DODHIA may delegate to them and they shall be bound to confirm to their directions in regard to the Company's business."

[20] Thus, the Plaintiffs occupied Maisonette No. 8 until **1991** when they purchased the Parklands property and moved houses. There seems to be no dispute that to purchase the Parklands property, the Plaintiffs signed a blank Share Transfer form and handed over the same to **Bullion Finance Ltd** as part of the security for the **Kshs. 1,500,000** loan that they received from **Bullion Finance Ltd** to shore up the purchase money. It is however disputed as to how the 2nd Defendant got to be registered as the owner of Maisonette No.8 and as the owner of the 25 shares entailed thereby.

[21] The Plaintiffs filed a List of Issues on **5 December 2010**, setting out a total of 16 issues for the Court's determination. However, granted that some of the issues are no longer in dispute, I would narrow them down to the following:

[a] Whether the Defendants perpetrated a fraud on the 1st Plaintiff by devising to obtain ownership

and possession of Maisonette No.8 and the 1st Plaintiff's 25 shares;

[b] Whether as a further condition of the loan, the Plaintiffs let to the lender, **Bullion Finance Ltd**, Maisonette No. 8 during the period of the loan, on understanding that the lender would credit into the Plaintiff's loan account, for the purpose of reducing the loan, the monthly the rent due to them;

[c] Whether on **24 May 1996**, the Defendants filed with the Registrar of Companies a fraudulent Notification of Change of Directors; and whether the 1st and 2nd Defendants acted in breach of their fiduciary duties as directors of the 3rd Defendant by purporting to remove the Plaintiffs from the Register of Shareholders of the 3rd Defendant and transferring their shares to the 2nd Defendant.

[f] Whether the 1st Plaintiff is entitled to the reliefs prayed for in the Pleint.

[22] Before delving into a consideration of the issues aforesated, it is necessary to dispose of a few preliminary points that came up in the course of the trial and in the written submissions namely:

[a] Whether the suit is incompetent by reason of the abatement of the claim by the 2nd Plaintiff.

[b] Whether or not the suit is barred by the Limitation of Actions Act, Chapter 22 of the Laws of Kenya;

[c] Whether or not the suit is *res judicata*.

[d] The Plaintiff's application to amend Prayers (c), (d) and (e) of the Pleint;

[23] On the abatement of the 2nd Plaintiff's suit, whereas there is no dispute that the 2nd Plaintiff died on **28 December 2013**, the Defence disputed the contention by the 1st Plaintiff that the cause of action is competently before the Court and that upon the 2nd Plaintiff's death, the 1st Plaintiff, as the surviving spouse, automatically assumed ownership of the deceased's shares. According to them, it was incumbent upon the Executor of her Estate to apply to be made a party to the suit, failing which, the suit abated pursuant to **Order 24 Rule 3** of the Civil Procedure Rules; which provides that:

"(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit;

(2) Where within one year no application is made under sub rule (1), the suit shall so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff."

It was thus the Defence contention that since no Letters of Administration were taken to operationalize **Clause 15(b)** of the Articles of the 3rd Defendant, the suit abated and is incompetent for all intents and purposes.

[24] The 1st Plaintiff conceded that after the death of the 2nd Plaintiff, no substitution by a legal representative took place as required by **Order 24 Rule 3 of the Civil Procedure Rules**; and therefore that her cause of action abated; but contended that the cause of action survived and continues to him as envisaged by **Order 24 Rule 2 of the Civil Procedure Rules**, which stipulates that:

"Where there are more plaintiffs or defendants than one, and any one of them dies, and

where the cause of action survives or continues to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

The 1st Plaintiff therefore seeks judgment herein in his own right; and since the Share Certificate **marked P5**, at page 19 of the Plaintiffs' Bundle of Documents is indivisible, I would agree that the suit is otherwise competent in so far as the 1st Plaintiff's claim is concerned and that the 2nd Plaintiff's cause of action survives and continues to the 1st Plaintiff; and I so find.

[25] As to whether or not the suit is barred by the **Limitation of Actions Act**, it was the submission of the Defence Counsel that the shares were transferred to the 1st and 2nd Defendants in **1991**; and that the Plaintiffs were aware of the transfer as far back as **1996**, as evidenced by the letter dated **24 May 1996** written by **Makecha & Company Advocates** on behalf of the Plaintiffs (at page 44 of the Defendants' Bundle of Documents). Relying on **Sections 4(1)(d) and (e) and 26** of the **Limitation of Actions Act**, it was the argument of the Defendants that this action ought to have been brought within 6 years.

[26] I however have no hesitation in rejecting this argument as well as the argument that the suit is *res judicata*, noting that these very issues had been raised before **Lesiit, J** and a Ruling thereon delivered on 5 December 2008 thus:

"It is quite clear that even though the parties in both suits are the same and that the matters were substantially similar, the previous suit was not heard and determined on the merits. I find and hold that this suit is not *res judicata* and therefore that plea is not available to the Applicant...It is my view that in the light of my finding herein above, there is sufficient reason to believe that the Plaintiffs' claims also lies in trust. That being so, the Plaintiffs' suit cannot be said to be statute barred. The application to strike out the Plaintiffs' suit for being *res judicata*, statute barred and an abuse of the court process is in the circumstances without merit..."

[27] As for the application to amend Prayers (c) (d) and (e) in the Plaintiff, it was the 1st Plaintiff's case that though the issues of trespass, accounts and *mesne* profits were claimed as from **1996**, as the year when the trespass was committed and when the *mesne* profits started accruing, the Defendants admitted in their evidence that they took possession of Maisonette No. 8 in **1991**. Reference in this regard was made to paragraph 19 of the 1st Defendant's witness statement, in which he stated that:

"...since 1991 Rekha Pravinchandra Dodhia and I have been in occupation or in control of the Maisonette number 8 since 1991. We have collected rents and met all outgoings due on the property..."

[28] Accordingly, on the authority of **Odd Jobs vs Mubea [1970] EA 476** and **J. C. Patel vs B. D. Joshi [1952] 19 EACA 42**, the Court was urged to conclude that since the issue of trespass and the rent are some of the real questions in controversy herein, the proposed amendment should be allowed; and if not, should be left to the court for decision even though the claims were not pleaded from **1991**. It was further argued that the Court has power to permit an amendment of pleadings no matter how late, if the other side shall not be prejudiced thereby.

[29] The application for amendment was however opposed by the Defendants, their contention being that parties are bound by their pleadings; and that such high premium prayers cannot be introduced as late as in the final submissions. It was further argued that the prayers are an afterthought which, if granted, would require the re-opening of the case for scrutiny. Reliance was placed on the case of **Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others [2014] eKLR** and **AdetounOladeji (NIG) Ltd vs Nigerian Breweries PLC S.C 91/2002** for the holding that in our adversarial system of trial, as opposed to the inquisitorial system that is at work in some jurisdictions, the court sits to hear and determine issues raised by the parties. Counsel also cited the case of **Beatrice**

Wayeko (suing as Administratrix of the Estate of Oscar Smith Njinuli - Deceased) vs Cellulant Kenya Limited [2014] eKLR in which it was held that:

"The claimant did not include such a prayer in her pleadings and its inclusion in final submissions amounts to an irregular amendment of pleadings..."

Counsel for the Defendants therefore urged the Court to disallow the application for amendment, positing that to allow this application for amendment would cause prejudice to the Defendants.

[30] By dint of **Order 8 Rule 3(1) of the Civil Procedure Rules**, the Court has the power and discretion to allow any party to amend his pleadings at any stage of the Proceedings on such terms as to costs or otherwise as may be just. It reads:

"...the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings."
(emphasis supplied)

[31] It is immaterial then at what stage, before judgment, when the application for amendment is made; the key consideration being whether it is warranted and whether or not it will be prejudicial to the opposite party for which an award of costs would not suffice. It may be argued that the 1st Plaintiff's Counsel may have been negligent in not noting this need for amendment earlier; but even this is immaterial, as was held in the case of **J.C Patel vs B.D. Joshi [1952] 19 EACA 42** thus:

"...The rule of conduct of the court in such a case as this is that however negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side."

[32] Indeed, in the case of **Central Kenya Limited Vs Trust Bank Limited [2000] 2 EA 365** the Court of Appeal held that :

"...all amendments should be freely allowed at any stage of the proceedings provided that the amendment or joinder did not result in prejudice or injustice to the other party that could not be properly compensated in costs... The overriding considerations were whether the amendments were necessary for the determination of the suit and whether the delay was likely to prejudice the opposing party beyond compensation for costs."

[33] A similar viewpoint was expressed in the case of **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR**, by the Court of Appeal thus:

"Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice...It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the alter of strict adherence to provisions of procedural law which at times create hardship and unfairness..."

[34] The proposed amendments are set out at page 5 of the 1st Plaintiff's written submissions. It is proposed that prayers c), d) and e) in the Plaint be amended to read as follows:

"c) A declaration that the 2nd Defendant has committed trespass on the said maisonette no. 8 on LR No. 1870/III/324 since 1991;

d) An order that the 2nd Defendant accounts to the Plaintiffs for all the rent received from maisonette no. 8 on LR No. 1870/III/324 since 1991, together with interest at bank rates;

e) As an alternative to d) above, the 2nd Defendant pays to the Plaintiffs *mesne* profits in the sum of Kshs. 21,387,350/- as of 30th June, 2015 and additional rent at Kshs. 115,000 per month thereafter until payment."

It is the 1st Plaintiff's case that the amendment to the prayers is based on the evidence adduced by the Defendants, which is not disputed; which evidence is that the Defendants took possession of Maisonette 8 in **1991**, and not **1996** as was pleaded by the Plaintiff; so that it cannot be said, in the circumstances, that the Defendants would suffer any prejudice by reason of the amendment. Counsel for the Defendant conceded that the proposed amendments are key to the Plaintiffs' case, and on the material availed before me, I am satisfied that they are necessary and warranted. In the premises, I would allow the same as proposed, being satisfied as I am that no prejudice will thereby be suffered by the Defendants, as they seek to merely align the 1st Plaintiff's case with the pleadings and evidence adduced by the Defendants themselves.

[35] Turning now to the issues for determination, the first one being whether the 1st Plaintiff was wrongfully and fraudulently dispossessed of Maisonette No. 8 and 25 shares in the 3rd Defendant, evidence was adduced with a view of demonstrating that he and his wife were tricked by **Bullion Finance Ltd** into giving **Tanuj Gulabchand Raja** a blank but signed Share Transfer and keys for the maisonette; and that neither **PW1** nor his late wife signed any contract with the Defendants for the sale of their shares or the maisonette. In his hypothesis of how the fraud must have been perpetrated, the following steps were set out in the Plaintiff's written submissions:

[a] That the fraud was planned to take place as the Plaintiffs were buying the Parklands property and was to be made possible by the friendly relationship existing then between the 1st Plaintiff and **Tanuj Gulabchand Raja**, who was selling the Parklands property to the Plaintiffs;

[b] that to perpetrate the fraud, two things were required, namely a signed Share Transfer form in respect of the Plaintiff's 25 shares in the 3rd Defendant and vacant possession of Maisonette No. 8;

[c] That upon securing the two requirements abovementioned, **Tanuj Gulabchand Raja** would sell the shares and Maisonette No. 8 at whatever price he agreed with the 1st and 2nd Defendants;

[d] That to give a veneer of legitimacy to the transaction, they would both claim that the price was **Kshs. 2.5 million** which was the component of the purchase price of the Parklands property, and neither the Plaintiffs nor their sons were to know this;

[e] That for the desired result to be acquired, **Tanuj** had to lie to the Plaintiffs that they needed a second security for the **Kshs. 1.5 million** loan, namely the signed but blank Share Transfer;

[f] That **Tanuj** had also to secure vacant possession through lying to the Plaintiffs that their maisonette was required by the bank to provide accommodation for its staff and that the bank would let it and that the rent fetched would be used to meet loan repayment obligation;

[g] That **Tanuj**, as the Chairman of the Board of Directors of **Bullion Finance Ltd** would have control of the records and was to make available to the 1st and 2nd Defendants the signed but blank Share Transfer for their use in removing the names of the Plaintiffs from the Membership Register of the 3rd Defendant;

[h] That when the loan repayments were completed, **Tanuj** would lie to the Plaintiffs that their signed but blank Share Transfer form had been misplaced by his financial institution; and that the Plaintiffs would never know what happened.

[36] However, Counsel for the Plaintiff knew only too well that hypothesis is not proof on a balance of probabilities. It was incumbent upon the 1st Plaintiff to discharge the burden of proving its case to the requisite standard. Having carefully considered and weighed the evidence adduced herein by the 1st Plaintiff as against the evidence adduced by the Defendants, the following factors stand out:

First and foremost, it was the case of the 1st Plaintiff that to enable them purchase the Parklands property, he received **Kshs. 2,500,000** from his sister, **D.V. Shah**, who was then based in Kisumu, and that the money came from **Lake Credit Finance Bank**. The Plaintiff has all along known that that portion of the purchase price for the Parklands property, which they bought for **Kshs. 4 million**, was in controversy. Yet he did not find it necessary to call his sister as a witness and did not avail any proof of this payment. In cross-examination, he contended that the money was paid in cash and handed over by him to **Tanuj Raja** in cash, and that **Tanuj Raja** gave him no receipt for it. In effect, there was absolutely no proof availed herein that he paid Tanuj Raja Kshs. 2,500,000 in cash for the purchase of the Parklands property.

[37] Secondly, **PW1** stated that even for the loan of **Kshs. 1,500,000** that he obtained from **Bullion Finance Ltd**, he did not sign any document. He conceded that it was **Gulabchand Raja** who advised him to apply for the loan; and that he did not sign any document. It is also noteworthy that though he contended that he made an application in writing, he did not produce any copy thereof or a copy of the loan agreement.

[38] Thirdly, it is totally inexplicable that for a loan of Kshs. 1,500,000 over which a Charge was made in favour of **Bullion Finance Ltd** for **Kshs. 4,000,000**, the Plaintiffs would be required to provide additional security by way of a blank Share Transfer, which, in any case, was not acknowledged, as well as vacant possession of Maisonette No. 8 without any written agreement in that regard. This is more curious in the face of the letters dated **8 May 1991** and **10 May 1991** (at pages 3 and 5 of the Defendants' Bundle of Documents). which showed that the relationship between **PW1's** family and the rest of the residents at the suit property was not cordial; and that the Plaintiffs were eager at the time to sell Maisonette No. 8. The letter dated **10 May 1991** from Khanna & Co. Advocates to the 3rd Defendant reads:

"...Our client intends to sell his flat and offers to sell the same to the other existing members at the price or sum of Kenya Shillings 2.2 Million (Kenya Shillings Two point two million). This option must be exercised within the next two week failing which our client will be free to sell the same to a purchaser of his choice."

[39] It is noteworthy that the aforementioned letters were written shortly after **Khanna & Co. Advocates** served the 3rd Defendant with notice of the 1st Plaintiff's intention to institute criminal proceedings for assault and battery that was allegedly committed against him by **Dinker Rai Joshi**, the owner of Flat No. 6 and the 1st Defendant on **2 April, 1991**. The irresistible conclusion to draw in the circumstances is that the 1st Plaintiff, after failure by the Defendants and other shareholders of the 3rd Defendant failed to take up his offer to sell Maisonette No. 8 turned to his good friend **Gulabchand Raja** for help; thus explaining why he handed over the blank Share Transfer and keys for Maisonette No. 8 to **Bullion Finance Ltd**. There is no reason why he never raised any complaint during the lifetime of **Gulabchand Raja** or why he failed to call the son, **Tanuj Gulabchand Raja** as his witness or sued him herein, and yet he was, according to the hypothesis of **PW1**, a key player in the alleged fraud. It is also instructive that **Jitesh Haria (DW1)** emphatically contradicted his father by stating that his aunt in Kisumu is a house wife and that she never lent them the **Kshs. 2,500,000** that was paid for the Parklands Property.

[40] Connected with the foregoing issue, is the question as to whether, as a further condition of the loan, the Plaintiffs let to **Bullion Finance Ltd** Maisonette No. 8 during the period of the loan, on understanding that the lender would credit into the Plaintiff's loan account, for the purpose of reducing the loan, the monthly the rent due to them. As stated herein above, **PW1** conceded in cross examination that he had nothing in writing to confirm that the blank Share Transfer document was required as additional security by Bullion Finance Ltd. An excerpt of what **PW1** had to say on this point in cross-examination is reproduced here below:

"I gave my shares of Bhavisha Properties Ltd as security to Bullion Finance and Tanuj Raja. We orally agreed that once I paid all the monies, Tanuj Raja would give me my house. My security was sufficient to the bank but they asked for additional security because Central Bank of Kenya had demanded that such security be given ... When I moved out, Tanuj Raja offered to take a lease in respect of Maisonette No. 8. He told me he would deduct the rent and pay towards the loan. We did not agree how much was to be paid as the tenants were family members. I was only happy when I got the money in the bank. I do not know if the rent was agreed at Kshs. 40,000. I never received a single shilling. Tanuj Raja never paid any money to Bullion Account. He told me we would discuss the issue later but Bullion Finance collapsed. Until 1994, the bank was operational but I never received any money."

[41] Here is a landlord, who had allegedly given vacant possession of his house for the purpose of earning rents to help him reduce his loan; but for four years he received no single cent and did not consider terminating the tenancy or taking any steps to assert his rights. Moreover, it was the uncontested evidence of the Defendants that from 1991, PW1 never visited the premises or bothered with the payment of the Old Mutual loan. Again, from the picture painted by PW1, the Court is far from satisfied that there was any tenancy agreement between the Plaintiffs and Bullion Finance Ltd; and that when he handed over vacant possession and signed the blank Share Transfer, it was to have Tanuj Raja dispose of the property in return for the Kshs. 2,500,000 that was needed for the purchase of the Parklands Property. This is a logical conclusion granted the evidence by Jitesh Haria (DW1) herein that their aunt in Kisumu never gave out the Kshs. 2,500,000 that was paid for the Parklands property as alleged by PW1.

[42] I note that the particulars of fraud were set out in paragraph 23 of the Plaint. A key plank thereof is the contention that the Plaintiffs never sold Maisonette No. 8 to the Defendants; and that the Defendants colluded with Tanuj Raja of Bullion Finance Ltd to effect the transfer and the changes in the Members Register. DW2 however testified that he was approached sometime in 1991 by Gulabchand Raja who informed him that the Plaintiffs required Kshs. 4,000,000 to purchase the Parklands property and that he had agreed to transfer their shares in Bhavisha Properties Ltd for a consideration of Kshs. 2,500,000 and obtain a loan from Bullion Finance Ltd for Kshs. 1,500,000 to clear the purchase price. That Gulabchand Raja asked him whether he was interested in purchasing the Plaintiff's shares in Bhavisha Properties Ltd; and that they agreed on the sale at the price of Kshs. 2,500,000. According to DW2, he thereafter paid that amount to an account at Bullion Finance Ltd in the names of Jitesh and Milan Haria. It is instructive that it was in 1991 that PW1 expressed to the 3rd Defendant his intention to sell Maisonette No. 8; and given the evidence aforesaid, to the effect that the PW1 did not satisfactorily explain where he obtained the Kshs. 2,500,000 that was paid for the Parklands property, and the contradiction by his son Jitesh that the money did not come from PW1's sister in Kisumu, it is easy to see that the allegations of fraud cannot stand as they have not been proved to the requisite standard.

[43] First and foremost, it is not true, in view of the evidence adduced that the sale transaction occurred between the Plaintiffs and the Defendants. It is evident that PW1 dealt with Gulabchand Raja; and it was Gulabchand Raja that reached out to the Defendants. This is understandable in view of the sour relationship that was evidently in existence at the time between the parties. Secondly, it has not been explained as to why the Plaintiffs had to wait until after the death of Gulabchand Raja to raise this issue, and even then failing to call as a witness, or implead, Tanuj Raja, who took over from Gulabchand Raja at Bullion Finance Ltd. Thirdly, Tanuj Raja was subjected to criminal proceedings in Chief Magistrate's Criminal Case No. 550 of 2000 and was acquitted of charges of forgery, uttering forged documents and stealing. In its Judgment, the trial court found as a fact that:

"In his testimony before this court PW3 Jitesh Haria confirmed to the court that he did have two accounts with Bullion Bank. One was account no. 10671 with his wife and his brother Milan Haria (that is the account on which the contentious Debit Voucher was written). The other was account no. 82733 which was the loan account. The joint account had been opened in 1991. However PW5 Milan Haria in his evidence tells the court that he does not know of account no. 10671 held at Bullion Bank and denies that he was ever involved in opening this account. Be that as it may the court finds as a fact that this account no. 10671 did exist and one of the signatories by his own admission was PW3...there is absolutely no evidence that it

was the accused who forged the debit authority."

[44] It is noteworthy too that in his evidence herein, **Jitesh Haria**, who was the complainant in the criminal case, stated that there was no theft and that the charges against **Tanuj Raja** were unfair. He conceded that he did not know the source of the money that found itself in their joint **Account No. 10671** and which was the subject of the criminal case. In the premises, it cannot be said that the allegations of fraud have been proved. It cannot be gainsaid that allegations of fraud are serious allegations which must be proved strictly proved. Authorities abound in support of this well settled legal principle. For instance, in the case of **Neepu Auto Sparres Limited vs Narendra Chaganla Solanki & 3 Others [2014] eKLR**, the Court of Appeal held that:

"on the grounds of appeal relating to alleged fraud and acts of criminality against Solanki the Pandyas did not lead any evidence to meet the threshold required in law to establish fraud. Such evidence is in law to be led to satisfy a standard above balance of probabilities but below beyond reasonable doubt ... "

[45] In the light of the foregoing, it cannot be said that, on **24 May 1996**, the Defendants filed with the Registrar of Companies a fraudulent Notification of Change of Directors; or that the 1st and 2nd Defendants acted in breach of their fiduciary duties as directors of the 3rd Defendant by purporting to remove the Plaintiffs from the Register of Shareholders of the 3rd Defendant and transferring their shares to the 2nd Defendant; for the inevitable conclusion that arises from a consideration of the pleadings, the evidence and the written and oral submissions filed herein is that the 1st Plaintiff has failed to make out his case against the Defendants, and is therefore not entitled to the reliefs prayed for herein. I would accordingly dismiss the 1st Plaintiff's case, which I hereby do, with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH 2017

OLGA SEWE

JUDGE