**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: E. M. GITHINJI, HANNAH OKWENGU &**

**J. MOHAMMED JJ.A.)**

**CIVIL APPEAL NO. 159 OF 2016**

**BETWEEN**

**RADHABAI SHIVJI BHANDERI**

*(Suing as administrator of*

**SHIVJI RAMJI BHANDERI *(Deceased)*...APPELLANT**

**AND**

**JYOTIBALA A. DESAI.....................1st RESPONDENT**

**SUMANT A. DESAI.........................2ND RESPONDENT**

**ROSE HOLDINGS LIMITED............3RD RESPNDENT**

***(Appeal from the Judgment and Decree of the High Court of Kenya***

***at Milimani Commercial Court, Nairobi, (Odunga, J.)***

***dated 24th June, 2015***

**in**

**CIVIL SUIT NO. 35 OF 2006)**

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## JUDGMENT OF THE COURT

[1] This appeal arises from a judgment that was delivered in the High Court (Odunga, J) following a suit that was filed by **Radhabai Shivji Bhanderi** suing as the administrator of the estate of **Shivji Bhanderi** *(deceased)* who is now the appellant before us. The appellant had sued **Jyotibala A. Desai, Sumant A. Desai, Rose Holdings Limited** who are the 1st, 2nd and 3rd respondents respectively, and the **Junction Limited.**

[2] The subject of the suit was the shareholding and management of the company *(hereinafter referred to as "the company")*. The appellant maintained that the estate of the deceased owned 50% of the shareholding in the company in accordance with the will of the deceased who was formerly holding the shares. The appellant further claimed that since the death of the deceased, the 1st and 2nd respondents who are husband and wife have taken total control of the assets of the company and have disposed of some assets of the company to the exclusion of the estate.

[3] The appellant sought judgment for several orders including a declaration that the estate of the deceased is the rightful allottee of 50% shareholding in the company; an order directing the respondents to pay to the appellant declared dividends for the years 2004 and 2005, and an injunction restraining the respondents from dealing with the fixed and movable assets of the company to the exclusion of the appellant.

[4] The 1st respondent, 2nd respondent, and the company filed a joint defence that was later amended. In the amended defence the respondents maintained that the appellant's suit was incompetent and incurably defective. The respondents further maintained that the deceased owned only 33% of shares in the company; that the 1st respondent was validly appointed as a director of the company; that though the registered shareholders were the deceased, the 1st and 2nd respondents, the 1st respondent is the beneficial owner of the shares of 2nd respondent having purchased the same from her; and that the appellant could not be involved in the management of the company as she was not a director of the company.

[5] Following a consent that was signed by the parties' counsel and adopted by the court, an order was issued by the court on 7th June, 2010 partially compromising the suit. The pertinent part of the order was as follows:

**<u>IT IS HEREBY ORDERED BY CONSENT</u>**

**"THAT the Plaintiff, 1st and 2 nd Defendants compromise this suit in the interim basis, pending full and final settlement as hereunder:-**

**1. <u>Shareholding in Rose Holdings Limited.</u>**

**The Plaintiff claims that she paid One Million SevenHundredandfiftythousand (Kshs.1,750,000/=) out of a total of Five Million (Kshs.5,000,000/=) paid by the 2nd Defendant for the total of ten thousand shares that were available for sale from the estate of late Mr. V. A. Shah. The Plaintiff, the 1st and the 2nd Defendants have agreed that the ten thousand shares be distributed prorate (Sic) 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. <u>L. R. 209/3829 – Bondo Road Industrial Area</u> The Plaintiff has agreed with the 1stand the 2nd Defendants, who are the directors of the 3rd 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 rights then bids from three bidders shall be obtained and the property shall be sold to the highest bidder thereof and proceeds thereof be banked in the company account pending the apportionment according to each parties shareholding in the 3rd Defendant.**

**3. <u>Dividends</u>**

**The Plaintiff, the 1stand the 2ndDefendants shall share all dividends due in the corresponding ratio of their shareholding in the 3rd Defendant Company less all outgoings and taxes.**

**4. <u>L.R. No.330/589 – Riara Road</u>**

**The Plaintiff, 1st and 2nd 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 Limited and the three valuation reports be used to determine the market value of the aforesaid property sold and transferred to M/s. The Junction Limited. 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 3rd 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 1st and 2nd 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 entitlement based on and their respective shareholding in the 3rd defendant Company. The net proceeds from the sale of the property after deduction of agency commission, advocate fees and disbursement shall be deposited in an interest earning account at CFC Stanbic Bank in the joint names of the Advocates of the parties herein to await full valuation and disposal of the other immovable property referred to in (2) above. In lieu of any agreement the dispute be determined by the court by way of oral evidence. The Plaintiff, 1st and 2nd Defendant can by consent agree to disburse the sum held in the joint fixed deposit account.**

**5. <u>Buyout/winding up of the 3rd Defendant Company</u> Upon valuation of all company assets the 1st and 2nd Defendants shall be at liberty to buy out the entire shareholding of the Plaintiff in the 3rd Defendant Company and upon full payment of all dues the Plaintiff shall relinquish his entire interest and shareholding in the 3rd Defendant Company. In the alternative and in lieu of a buyout the parties shall wind up the 3rd 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 3rd Defendant Company less all outgoings, taxes and liabilities.**

**6. <u>Termination of legal proceedings</u>**

**The Plaintiff and the 1st and 2nd 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 1st and 2nd 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 and/or all other consents which may have been signed between the parties and/or their representatives prior to the date hereof.**

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

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

**11. This matter be mention on 17th June, 2010" Given under my hand and seal of this Court this 3rd day of June, 2010 Issued at Nairobi this 7th day of June, 2010."**

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[6] Following the adoption of the consent, the matter came up for mention on several occasions but the parties were unable to agree on the valuation. Finally, the matter was listed for hearing. Steven Omengo, a registered valuer employed by Tysons Limited testified and produced a report showing that he valued the property known as LR. No.330/589 - Riara Road *(hereinafter referred to as the Riara Property),* at Kshs.100,000,000/= as at 30th September 2009. He explained that both parties instructed him jointly. Isaiah Kahoya, a property valuer in the firm of Chrisca Real Estates who was instructed by the appellant also testified. He valued the Riara property at Kshs.108,000,000/= as at 25th September 2009. Mohammed Abdul Samji a valuation consultant with Siaga & Associates also testified that he valued the Riara Property in 2007 and 2009. In June, 2007 he valued the property at Kshs.49,000,000/= and on 1st May, 2009 he valued the property at Kshs.59,000,000/=.

[7] The appellant also testified and stated that the deceased who was his father was a shareholder in the company; that the company had 2 rental houses on Riara Road (that is the Riara property*)*; that these houses were demolished; that he later learnt that the property was transferred to Junction Limited at Kshs.54,250,000/= sometime in November, 2009; that the estate of the deceased was not consulted nor involved in the transaction; that the property was sold as at an undervalue; that the Riara property was valued at Kshs.108,000,000/= as at 25th September, 2009; and that his efforts to get any explanation from the respondents were frustrated as the respondents refused to see him.

[8] In his judgment, the learned judge ruled that the consent entered into by the parties constituted a preliminary decree that determined most of the issues between the parties; that what was left to be worked out in the event of a disagreement was the value of the Riara property; that the valuation report produced by Mohammed Abdul Samji did not meet what was contemplated in the consent order as it was not the valuation as at the date of the agreement of sale of the Riara property to the Junction Limited; and that the valuation report of Steven Omengo in which the property was valued at Kshs.100,000,000/= as at 30th September, 2009 was more reliable being near the date of the sale to Junction Limited and having been undertaken on the joint instructions of the parties.

[9] In addition, the learned judge found that the sale of the property at less than its value coupled with the conduct of the respondents prior to and subsequent to the sale, was sufficient to lead to a conclusion that the sale of the Riara property by the 2nd respondent was fraudulent. The judge directed the parties to apportion their entitlement in accordance with the consent order based on their respective shareholding in the company.

[10] Being aggrieved by the judgment of the High Court, the appellant has lodged an appeal raising 5 grounds contending that the learned judge erred in law in delivering a judgment that did not address all issues in dispute; in restricting his judgment to issues captured by the consent letter dated the 23rd June, 2010 when the consent letter did not settle all the matters in dispute; in failing to consider and determine all issues in the amended plaint and the issues framed thereafter; in failing to determine the steps to be taken in winding up the company hence leaving a vacuum in execution of his judgment; and in depriving the appellant his entitlement to costs by ordering that each party meets the costs of the suit, without assigning any reason.

[11] The respondents who were similarly not satisfied with the judgment lodged a cross appeal raising 5 grounds contending that the learned judge misdirected himself in failing to make a finding that the prayers sought by the appellants had been overtaken by events by virtue of the consent order dated 3rd June, 2010; in failing to consider and determine all the issues raised in the consent order dated 3rd June, 2010; in failing to consider that valuation is just a quasi-scientific guess that is not binding; by totally disagreeing with the evidence adduced in court on behalf of the respondents; and by entirely relying on opinion of experts when the opinion was not binding on the court. The respondents urged that the cross appeal be allowed; the judgment of the learned judge be set aside; and the valuation of the suit be carried out by a valuer to be agreed upon by the parties.

[12] Following directions given by the court and agreed upon by the parties, hearing of the appeal and cross appeal proceeded by way of written submissions. Accordingly the parties duly filed and exchanged written submissions and authorities.

[13] For the appellant, it was submitted that the appellant was partially aggrieved by the judgment to the extent indicated on the memorandum of appeal. The five grounds of appeal were compressed into three. Firstly, whether the learned judge addressed all the issues for determination in accordance with the pleadings and evidence presented before him by the appellants. Secondly, whether there is a vacuum in the execution of the judgment of the High Court; thirdly, on the issue of costs, whether the learned judge properly exercised his discretion.

[14] In regard to the first issue it was submitted that the learned judge failed to make a specific order requiring the 1st and 2nd respondents to pay into the company's account a sum of Kshs.46,000,000/= being the loss arising from the fraudulent sale of the Riara property; and failing to make an order for account on proceeds of sale on the property. It was argued that the affairs of the company could not be wound up without the 1st and 2nd respondents rendering a true account of the affairs of the company; and this would make it impossible for the appellants to get their due shares from the investments in the company.

[15] In regard to the issue of costs, the appellant maintained that the consent order dated 3rd June, 2010 did not dispose of the entire suit as there was the issue of fraudulent transaction and concealment regarding the sale of the Riara property; that the suit was necessitated by the respondents unwillingness to provide the appellant with access to the details of the financial affairs of the company; that the respondent resorted to a lot of delaying tactics in the implementation of the consent, which necessitated the filing of several applications to enforce the consent order; that the respondents conduct made the estate of the deceased to incur substantial loss in establishing their interest in the company; that a party who engages in tactics that leads to escalation of costs should be penalized for such acts ***(Meru Farmers Co-operative Limited vs*** ***Abul Aziz Suleiman (No.2) 1966 EA 442)*** and that costs should be a means of discouraging frivolous litigation. ***(The estate of Boaz Harrison Ogolla (High Court of Kenya, Nairobi Misc. Civil*** ***Application No.19 of 1976).*** Noting that the learned judge did not give any reasons as to why he ordered the parties to meet their own costs, the appellant urged the Court to act in accordance with the authority of **Allibhay Bailunji vs Essa Thawar 1991** **-1912) 4KLR,** by looking at the circumstances of the case and reviewing the orders on costs. It was reiterated that the Court had jurisdiction to interfere with the exercise of the lower court's discretion on costs if it failed to follow the laid down principles.

[16] On the cross appeal, the appellants submitted that the learned judge did not interfere with, nor depart from the terms of the consent order recorded by the parties; that although the consent only partially compromised most of issues in contention, the learned judge restricted himself to the contents of the consent overlooking the outstanding issues. The appellant supported the findings of the learned judge in regard to the value of the Riara property pointing out that the parties had agreed by consent to have the Riara property valued to determine its value at the time of the contested sale in November 2009; that Stephen Omengo who valued the Riara property at Kshs.100,000,000/= was appointed by the consent of both parties; that the judge was right in rejecting the valuation done on the instructions of the respondents; that the judge clearly stated why he rejected the evidence of the valuer instructed by the respondent; that in any case the evidence adduced in court by the appellant was not controverted. The court was therefore urged to allow the appellant's appeal.

**[17**] On their part, the respondents argued their cross appeal by condensing the 5 grounds into 2. That is, the issue of valuation done by Steven Omengo, and the failure by the court to find that the valuer did not act independently. The respondent submitted that the valuation was carried out by two different valuers appointed by each party, and Tysons Limited appointed by the parties to perform another valuation; and that the court erred in adopting the valuation done by Steven Omengo of Tysons Limited, and overlooking the valuation reports submitted by the respondents.

[[18] The respondents dismissed the valuation report done by Tysons Limited contending that it was not independent as it entirely relied on the valuation report done by Chrisca Limited; that during the cross examination, the valuer Steven Omengo, admitted that the information he had was inadequate and therefore his valuation was not independent; and that Steven Omengo was in actual fact a witness for the appellant. The respondents relied on ***White House*** ***vs Jordan [1981] 1WLR 246,*** where it was held that an expert witness report presented before the court should be seen as an independent product of the expert; and that the expert should provide independent assistance to the court by way of objective and unbiased opinion in relation to matters within his expertise.

[19] In regard to the appellants appeal, the respondent maintained that the issue of shareholding was dealt with in the consent order dated 3rd June, 2010 and the prayers of the appellants were overtaken by events once the consent order was adopted; that the only issue pending was the valuation of the Riara property; and that the appellant should therefore restrict himself to the issue of valuation which was the only matter before the court.

[20] In regard to the order for costs, the appellant maintained that the court had discretionary powers pursuant to **section 27** of the **Civil Procedure Act.** The appellant relied on several authorities including ***Cecilia Karuri vs Barclays Bank of Kenya & Another*** ***2016 eKLR*** and ***Harlsbury Laws of England***, for the proposition that the court has an absolute and unfettered discretion to award or not to award costs. Finally the respondent cited ***Rufas Njuguna*** ***Miringu & Another vs Martha Miringu & 2 Others [2012] eKLR*** for the submission that consent order cannot be interpreted to mean that one or the other party has succeeded in the suit.

[21] We have carefully considered this appeal and the submissions made before us together with authorities cited. It is common ground that the parties through their advocates duly signed a consent letter which was adopted by the court. That consent had the effect of compromising several of the matters that were in issue.

[22] In his judgment, the learned judge having considered the consent order stated as follows:

> ***"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 (sic) 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".***

[23] The learned judge has been faulted for failing to address some issues alleged to be outstanding. The issues were identified by the appellant as failure to make any finding or order with regard to the rendering of accounts and financial records of the company to the estate of the deceased, thereby making it difficult for the appellant to get their fair share of their investments in the company.

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

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

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

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

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

[29] The court was called upon to determine the market value for the Riara property as the parties failed to agree. The respondents have challenged the determination by the court placing the open market value of the Riara property at Kshs.100,000,000/=. It is evident from the record that the parties' advocates jointly appointed Steven Omengo whose valuation report the court relied upon. This valuer was therefore not a specific witness for the appellant but was merely giving a report on his findings following his instructions. The learned judge clearly explained why he did not find the report by the respondents' valuer useful as he felt that it was partisan having been made on the instructions of the respondents and being also based on a valuation that had been carried out 2 years earlier. We find that the learned judge properly considered the valuation reports and the evidence of the valuers before him. His determination of the market value of the Riara property was proper and cannot be faulted.

[30] Once the open market value of the Riara property was determined, the consent provided at clause 4 as follows:

> ***"Should this Honourable Court determine a higher value than the sale price and provided only if the 1st and 2nd 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 entitlement based on and their respective shareholding in the 3rd defendant Company. The net proceeds from the sale of the property after deduction of agency commission, advocate fees and disbursement shall be deposited in an interest earning account at CFC Stanbic Bank in the joint names of the Advocates of the parties herein to await full valuation and disposal of the other immovable property referred to in (2) above".***

[31] The learned judge having determined that the open market value of the Riara property was Kshs 100,000,000/= which was much higher than the price at which the property was sold to the Junction Ltd, and further found that there was an element of fraud, the provisions in clause 4 kicked in. The clause did not provide for the respondents to be refunded the amount that was above the sale price as per the open market valuation of Kshs 100,000,000/=. The learned judge was bound by the consent and could only do what was agreed upon by the parties, and according to the consent the valuation was for determining the open market price for purposes of apportioning the parties entitlement that was to be based on that open market value and the parties respective shareholding in the company.

[32] Clause 4 together with clause 7 that removed the Junction Limited from the proceedings compromised prayer (h) in the appellant's amended plaint. The only other issue was the disbursement of the proceeds from the sale of the properties, and this was dependent on the appellant making an election in regard to the Bondo Road property.

[33] Clause 5 of the consent provided for the buyout/winding up of the company based on valuation of all the company assets. Again the finalization of this part of the consent was dependent on the valuation of the company assets an issue that has already been addressed. Further, the clause resolved the issue of management and dealing with the company assets that was a subject of paragraph (b), (e), (f,) (i) and (j) of the prayers in the appellants amended plaint.

[34] From the above we are satisfied that the consent order addressed all the issues in the suit in regard to the shareholding, management, and buyout/winding up of the company. The court's role was only making a determination in regard to the open market value of the Riara property, and a finding on whether there was any fraudulence regarding the price at which the property was sold to Junction Limited. On our own evaluation of the circumstances and the evidence before the trial court, we are satisfied that the court discharged its role satisfactorily by properly addressing the issues and coming to the correct conclusion. As provided in clause 10 of the consent order, parties are free to make any application in the High Court for enforcement or determination of matters contained in the consent order. Indeed, section 34 of the Civil Procedure Act gives that jurisdiction to the High Court.

[35] In regard to the issue of costs, it is clear that the Court has discretion in determining the issue. However such discretion must be exercised judicially. In this case, although the learned judge ordered each party to bear their own costs, he did not give any reasons for this.

We agree with the appellants that the litigation in this matter was necessitated by the lack of transparency on the part of the respondent. We find that in the circumstances of this case, it would have been fair to award the appellants costs of the suit.

[36] The upshot of the above is that except on the issue of costs in regard to which we award the appellants costs of the suit in the lower court, we find no merit in the appeal or the cross appeal and the same are hereby dismissed. The appellant having succeeded on the issue of costs, we direct that the respondent shall bear 50% of the appellant's costs in the appeal.

Those shall be the orders of the Court.

**Dated and delivered at Nairobi this 2nd day of February, 2018.**

**E. M. GITHINJI**

**....................................**

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

**...................................**

**JUDGE OF APPEAL**

**J. MOHAMMED**

**...................................**

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

***DEPUTY REGISTRAR***