REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NO. 59 OF 2003

SHALIMAR LIMITED…………………….……………1ST APPLICANT

SAZ CATERERS LIMITED…………...…….….………2ND APPLICANT

ZULFIKAR RAHEMTULLA………...……………….....3RD APPLICANT

VERSUS

SADRUDIN KURJI……….…………………………..1ST RESPONDENT

AKBAR KURJI…………………………………….2ND RESPONDENT

R U L I N G

INTRODUCTION

1. In the application dated 18th December 2014 and filed in court on the same day, the Applicants who are the Respondents in the main suit (“ **the applicants**”) are seeking the following orders;

a. ***That the Honourable court be pleased to order that this application be heard in priority to the pending notices to show cause.***
b. ***That this Honourable court do order that the firm of Hamilton Harrison & Mathews appearing for the respondents in this matter either in the said name or the name of HHMOraro or Hamilton Harrison & Mathews (incorporating Oraro & Co) as the case may be, cease to appear or continue to appear for the Claimants/Decree Holders in this suit; and/or***
c. ***That this Honourable court do stay the representation by the firm of Hamilton Harrison & Mathews either in the said name or the name of HHMOraro or Hamilton Harrison & Mathews (incorporating Oraro & Co) as the case may be, for the claimants in this suit; and/or***
d. ***That the firm of Hamilton Harrison & Mathews either in the said name or the name of HHMOraro or Hamilton Harrison & Mathews (incorporating Oraro & Co) be restrained by an injunction whether by themselves, their partners, servants or agents from representing the claimants in this action.***
e. ***That the Honourable court do issue such or consequential orders as it may deem fit.***
f. ***That the costs of this application be provided for***

2. The application is supported by the affidavit of Akbar Kurji, the second respondent in this matter sworn

on 18th December 2014 and a further affidavit of Sadrudin Kurji the first respondent in the matter sworn on 4th February 2015.

3. The application is primarily premised on the allegations that the Respondents/Applicants former Advocates Messrs Oraro & Co Advocates withdrew from acting for the Respondents/Applicants due to a potential conflict of interest as the said firm had merged with the Claimant's Advocates Messrs Hamilton, Harrison & Matthews, which merger is a matter in the public domain. It is the Respondent/Applicants assertion that if the firm of Oraro & Co Advocates withdrew from this matter due to the merger between the said firm and the Applicant's firm Messrs Hamilton, Harrison & Matthews, it follows that the same action ought to apply to Hamilton, Harrison & Matthews as there is a potential and serious conflict of interest as a result of the merger. This is particularly so as the matter has been handled exclusively by the two firms over a period in excess of seventeen years (including an initial Arbitration between the Parties) meaning that both firms as currently constituted have intricate information on the present matter. The Respondents/Applicants aver that in the circumstances it is not only possible but actually probable, especially as the merged firm will be sharing Registries, staff and facilities that the Claimants Counsel may come across (even if such access was un-intentional) confidential and privileged information that was once in the custody of the Respondent/Applicants former lawyers Messrs Oraro & Co. Advocates. This is particularly cogent as the Respondents/Applicants have in the past shared confidential information with their former Counsel that will have a bearing on the pending execution proceedings which information is extremely confidential and privileged. As the position to be taken by the Respondents in the present matter is clearly adverse to the position taken or to be taken by the Claimants it is extremely crucial that the firm of HHMOraro be compelled to step aside hence this application. The Respondents stand to suffer extreme prejudice if the present Application is not allowed and in the circumstances and in light of this apparent potential conflict the Respondents pray that the present Application be allowed as prayed.

4. The application is opposed. Mr. Kiragu Kimani who is the advocate having the conduct of this matter on behalf of the Claimants has sworn affidavits which were filed in court on 27th January 2015 and 6th February 2015 respectively.

5. With the leave of the court parties filed written submission. The Applicants filed their submissions on 11th February 2015 and replying submissions on 27th February 2015, while the Respondents did the same on 19th February 2015. I have carefully considered those submissions and the authorities cited in support thereof. From the patties submissions the issues for determination are only tow, and these are the issues, that I will determine in this application.

a. ***Whether the Applicants have met the test for grant of an order to disqualify the firm of Hamilton Harrison & Mathews (incorporating Oraro & Company) form continuing to represent the Claimants in this matter.***
b. ***Whether the Applicants has met the test for grant of injunction sought.***

6. On the first issue, the Applicants submitted that the Respondents had shared with their previous Counsel certain privileged information relating to this matter and particularly in relation to the execution Proceedings that are ongoing. The applicants submitted that there has been no rebuttal to the said assertion above and the only affidavit in reply on record is that of the Advocate currently acting for the Claimants. Nothing could have been easier than a rebuttal by the Advocate previously acting for the Respondents particularly when mention is made of this in paragraphs 13, 14, 15, 16 and 17(e) of the Replying Affidavit. The applicant submitted that the test on conflict of interest is what a common man in the streets would perceive of the circumstances prevailing in this situation. It is their submission that the perception in this case would be one of a potential conflict of interest. The ongoing proceedings relate to warrants seeking the incarceration of the Respondents. As such when the Court is considering the rights of the Claimants it must also weigh this as against the rights of the Respondents and the apparent prejudice that would result if the merged firm of HHMOraro were to remain on record for the Claimants having previously represented the Respondents as well through the firm of Oraro and Company.

The assertion by the Respondents that the firm of Oraro and Company chose to withdraw from the matter

as a result of a potential conflict of interest is not controverted. If that firm withdrew on those grounds then, the applicants submitted surely the merged entity of HHMOraro should be precluded from this action. The applicants submitted that the purpose of the present Application is not to critique the bonafides of the individual Counsel who are acting for or have acted for either the Claimant or Respondent. Rather, the Application raises serious weighty and important issues that relate to or affect the rights of the Respondents and should be considered as such. The applicants referred this court to the case of **Francis Mugo & 22 others v James Bress Muthee & 3 others [2005] eKLR** where Justice Daniel Musinga (as he then was) had this to say on the rights of a party to instruct an advocate of his choice vis a vis the duty bestowed on Counsel:

"While I agree that the choice of counsels is a prerogative of a party to a suit, it must be borne in mind that in the discharge of his office, an advocate has a duty to his client, a duty to his opponent, a duty to the court, a duty to himself and a duty to the state as was well put by Richard Du Cann in "THE ART OF THE ADVOCATE." As an officer of the court, he owes allegiance to a cause that is higher than serving the interests of his client and that is to the cause of justice and truth."

Basing their argument on above case, the applicants submitted that the firm of Hamilton, Harrison and Matthews (incorporating Oraro & Company) or HHMOraro as they are properly known owe an allegiance to a cause that is higher than serving the interests of their Clients. The nature of the siamesetic relationship that now exists between the firms known as Hamilton, Harrison and Matthews and Oraro and Co. is so intertwined, the possibility of access to confidential matter divulged by the Respondents so evident, the resultant prejudice to the said Respondents so grave that it is only fair and just that the Application herein be allowed in its entirety it was submitted.

The Applicants also relied on **Cordery on Solicitors Issue 13 of May 2001 at Para. F144** on "***Amalgamation of two firms of Solicitors***" where author observed that:

"Where as a result of an amalgamation of two firms a conflict of interest arises … the general rule is that the new firm <u>must</u> cease acting for both clients. In exceptional circumstances the best interests of the client may permit the amalgamated firm to continue to act for one or, rarely, both clients. In order to continue to act in 'exceptional circumstances' the firm has to be able to maintain an effective 'Ethical wall' and the following circumstances <u>must</u> apply:

a. ***There must be no embarrassment to the solicitors involved.***
b. ***<u>Both clients</u> must have consented.***
c. ***<u>Both Clients</u> must have obtained full and frank independent advice, prior to the giving of consent, and;***
d. ***Despite the possession of knowledge concerning a client obtained while acting for them, the overriding duty to act in the best interests of the client must demand , as an exception to the general rule, that the amalgamated firm continue acting despite the conflict of interest. <u>An</u> 'Ethical wall' can only be sustained where the personnel who are acting for the respective clients are physically separated into different rooms which are as far apart as reasonably practicable, and there is a similar physical separation of the property and papers of each client.***

The applicants also cited the case of **<u>Delphis Bank Limited vs Chatthe & 6 Others Limited [2005] I KLR 766</u>** the Court of Appeal found that in as much as it was a constitutional right of a party to be represented by an advocate of his choice that right could be put to serious test if there was a conflict of interest, which could endanger the principle of confidentiality in an advocate/client fiduciary relationship or where an advocate could also double up as witness.

7. On their part, the Respondents submitted that the test for disqualifying an advocate from acting for a party in a suit was stated in the case of **<u>Rakusen v Ellis, Munday & Clarke [1912]</u> CH 831,** at page 835 per **Cozens Hardy M.R**. as follows:

"….but in my view we must treat each of these cases, not as a matter of form, not as a matter to be decided on the mere proof of former acting for a client, but as a matter of substance, before we allow

the special jurisdiction over solicitors to be invoked, we must be satisfied that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act".

The Court of Appeal of Kenya in the case **Delphis Bank Limited v Chatthe & 6 others [2005] 1 KLR 766** followed the decision in **Rakusen v Ellis, Munday & Clarke supra,** and held;

"there is no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by the Court of Appeal is whether real mischief or real prejudice will in all human probability result".

The court further held that each case must turn on its own facts to establish whether real mischief and real prejudice will result.

The Respondents submitted, that for the court to find that real mischief and real prejudice will result if a firm of advocates or an advocate continues to appear for a client in a matter, the court must be satisfied that confidential information has passed from the client to the advocate and which would prejudice the client if the confidential information is disclosed. It is not sufficient for the applicants to only state that they have passed confidential information to the advocate. The Respondents also cited the case of **Re a firm of solicitors [1995] 3 ALL 482,** where at page 489 it was held as follows:

"….on the issue whether the solicitor is possessed of relevant information, it is in general not sufficient for the client to make general allegation that the solicitor is in possession of relevant confidential information if this is in issue: some particularity as to the confidential information is required".

The Respondents submitted that it is not enough just to state that confidential information has been passed by a party to his advocate. The applicants must prove on a balance of probabilities that such confidential information has been passed by giving the particulars of the alleged confidential information as required by the law. The burden of proving this lies on the applicants and they must discharge it to the satisfaction of the court. The applicants must establish to the court that there exists a real risk that relevant confidential information is possessed by the advocate. In *Re a firm of solicitors, s*upra, at pages 491 and 492 the court stated that the applicable test is the existence of a real risk that relevant confidential information is possessed by the advocate and not a mere possibility of such communication being in the possession of the advocate.

The Respondents submitted that the applicants have not met the test as stated above as they have not demonstrated to this court that they passed any confidential information to the firm of Oraro & Company Advocates and that they stand to suffer any real mischief or real prejudice if the firm of Hamilton Harrison & Mathews (incorporating Oraro & Company) continue to represent the claimants in the matter. The Respondents further submitted before granting an order to disqualify an advocate or firm of advocates the court must also be satisfied that there is risk of disclosure. They cited the case of **Century Oil Trading Company Limited v Kenya Shell Limited HC Misc 1561 of 2007** where the court held as follows:

"..As for the circumstances in which the court will intervene by granting an injunction, it will not intervene if it is satisfied that there is no risk of disclosure. But if it is not so satisfied it should bear in mind that the choice as to whether to accept and/or continue with instructions from the new client rests with the advocate".

8. As to whether the Applicants have met the test for grant of the injunction sought, the Respondents submitted that the test for the grant of an injunction was set out in the case of **Giella v Cassman Brown & Co. Ltd [1973] E.A 358.** The Court held that for the grant of an order for injunction an applicant must prove the following;

a. ***A prima facie case with a probability of success.***
b. ***That should the injunction not be granted, the applicant will suffer irreparable injury.***

c. ***If the court is in doubt, it will decide the application on a balance of convenience.***

In **Mrao Ltd v First American Bank of Kenya Ltd & 2 others (2003) KLR 125** the court determined what a prima facie case and held that;

"It is a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter".

It is submitted that the applicants have not at all presented to this court material which would lead the court to come to the conclusion that the applicants have demonstrated that they have a prima facie case with a probability of success. This is because they have not only failed to give the particulars of the alleged confidential information as required by the law, but they have also failed to prove that they will suffer any real mischief and real prejudice and also the risk of disclosure if the firm of Hamilton Harrison & Mathews (incorporating Oraro & Company) continues to represent the claimant in this matter.

The Respondents submitted that the balance of convenience tilts in the favour of allowing the firm of Hamilton Harrison & Mathews (incorporating Oraro & Company) to continue acting for the claimants in order to facilitate the expeditious disposal of this long standing dispute. If the court were to direct that another firm of advocates come on record for the claimants, the new advocates will have to familiarize themselves with the matter and it will take a while before the new advocates are able to settle down and finalise the case. The arbitral award sought to be enforced by the claimants in these proceedings was rendered in January 1997. This is more than 18 years ago and it is in the interest of justice to allow the firm of Hamilton Harrison & Mathews (incorporating Oraro & Company) to continue acting for the claimants in order to bring this long standing dispute to a close.

9. I have carefully considered this application and opposition to it.

10. In my view, the matter at hand is quite peculiar. This is because two law firms which previously acted for the opposing parties to the suit have now merged and one of the law firm opt not to represent its Client for fear that the merger may cause conflict of interest. The other law firm is therefore put in a defensive position as to why it should also not opt out. To begin with I must commend the cautious approach taken by the firm of Oraro & Company Advocates to opt out of representing the Respondents. That was a courageous act meant at ensuring that no room is given to a possibility of conflict of interest arising from that merger. The action on the part of Oraro & Company Advocates is not one that is demanded by law. It is one of extreme caution. This is so because it is now a matter of law when and under what circumstances a conflict of interest may arise between an advocate and a client or a former client or even as a result of a merger like the one being considered. The Constitution also now gives a party the right to be represented by a counsel of its choice and so the matter of ceasing to act has ceased to be unilateral conduct. M/s Hamilton, Harrison and Mathews have not seen it necessary to cease acting for the Respondents, and they are entitled to hold that potion as long as they consider that no conflict of interest is likely to be occasioned to any of the parties. They need not necessarily follow the cautious approach adopted by M/s Oraro & Company Advocates. What matters is whether or not, in their assessment, which must be practical, there is no reason for prejudice. In this practical aspect, Mr. Kiragu Kimani depones in his affidavit that What the court will be called upon to determine is whether there has been any breach of the duty of confidentiality in this case. Mr. Kiragu submitted that the applicants have failed to establish this. Mr. Chacha Odera, who was the advocate representing the applicants prior to the merger of the two firms, is an advocate of high standing with considerable experience and is aware of his duty as an advocate not to communicate to any one, not even to his partners, any confidential information regarding his clients in order to ensure that the clients are not put to risk that the confidential information may be used against the them. After the merger, the firm of Hamilton Harrison & Mathews (incorporating Oraro & Company) took a decision to continue representing the claimants in this suit. Since handing over his file regarding this matter back to the applicants, Mr. Chacha Odera is no longer involved in the matter at all. I have also noted the submissions that as a precautionary measure at the time of arranging the said merger, the firm of Hamilton Harrison & Mathews ensured that no advocate who was previously working in the firm of Oraro & Company will be in a position to come into contact with

the claimants' file in this matter and neither of them has been consulted or involved in this matter after the merger. This has clearly been stated at paragraph 14 of the affidavit of Mr. Kiragu Kimani filed in court on 27th January 2015 and at paragraph 4 of the further affidavit of Mr. Kiragu Kimani filed in court on 6th February 2015.

Further, the principle upon which the court may restrain an advocate from acting against a former client is the prevention of abuse of the confidence reposed in the advocate by the former client and before such an order can be made the court must be convinced that there exists such confidence and the probability of it being abused. There is no absolute rule that an advocate may not act in litigation against a former client where there is no breach of the duty of confidentiality **See Cordery's Law relating to Solicitors, 8th Edition supra, pages 64 and 65.**

11. In his affidavit filed in court on 27th January 2015, Mr. Kiragu Kimani has set out the standards and practice of the firm of Hamilton Harrison & Mathews (incorporating Oraro & Company). The standards and practice of the firm as set out in the affidavit ensures that no confidential information of any one particular client is shared out. Indeed Mr. Kiragu Kimani who takes care of the claimants in this litigation has stated clearly in his affidavit that he has not consulted or discussed this matter with Mr. Chacha Odera and there is therefore no risk at all that any confidential information that Mr. Chacha Odera may have regarding the applicants will pass to him or any other advocate in the firm.

The allegation made by the applicants that the confidential information which they had previously been given to Oraro & Company will be shared out as a result of the merger of the two firms is therefore just a mere apprehension and is without basis and more particularly because the applicants have not demonstrated what confidential information they have passed to the firm of Oraro & Company and/or to Mr. Chacha Odera which is likely to be disclosed.

12. The Applicants have also not demonstrated that as a result of the firm of Hamilton Harrison & Mathews (incorporating Oraro & company) continuing to represent the claimants in the matter the alleged issue of conflict of interest will arise. The applicants are required to lead evidence to prove the alleged conflict which they have not done. In the case of **Charles Gitonga Kariuki v Akuisi Farmers Co. Ltd [2007] e KLR** the court stated as follows regarding the issue of conflict of interest;

"…The fact that an advocate acted for a litigant does not, per se, lead to a situation of conflict of interest. The applicant was required to establish, and present to the court evidence that would persuade the court to reach a conclusion that indeed there was a possibility that a conflict of interest would arise where the advocate is allowed to act for the opposing party against such a litigant. In the present case apart from stating that Mr. Karanja had acted for it in several matters, the defendant did not present to the court material upon which this court could make a determination that indeed there were grounds upon which this court could reach a determination that there exist a possibility of conflict of interest".

13. It is my position therefore that the failure by the applicants to present to the court material upon which this court could make a determination that indeed there are grounds upon which this court could reach a determination that there exist a possibility of conflict of interest is a sure reason that the alleged conflict of interest does not arise. Further, even where a firm is acting for an opposing party, the disqualification of the entire firm may not be required. In the case of **Sunrise Properties Limited v National Industrial Credit Bank & 2 others [2007] e KLR** the court referred to the case of **National Bank of Kenya Limited v Peter Karat & another civil case No. 77 of 1997** wherein the court stated as follows;

"…even in a situation where the firm was actually acting for the opposite party, disqualification of the entire firm may not be required".

14. In this regard, even if the court is satisfied that there was any confidential information passed to the firm of Oraro & Company by the applicants prior to the merger, which is not the case in this matter, the court should apply the principle as stated in the case of **National Bank of Kenya Limited v Peter Karat & another civil case no. 77 of 1997** supra and disqualify only those advocates who were previously working in the firm of Oraro & Company and not the entire firm of Hamilton Harrison & Mathews

(incorporating Oraro & Company).

15. In my view, the circumstances of this matter does not require the court at all to make the drastic decision of interfering with the claimants' right to representation by an advocate of their choice as guaranteed under Article 50 (1) of the Constitution of Kenya which requires that a party be granted a fair hearing before a court of law. It will be unfair to deny the claimants a chance to be represented by an advocate of their choice. In the case of **Delphis Bank Limited v Chatthe & 6 others [2005] 1 KLR 766 Supra,** at page 771, it was stated as follows;

"….in sum, there is no evidence before us, as there should be for consideration before the drastic decision of interfering with a party's constitutional right to counsel of his choice is interfered with".

16. The test for disqualifying an advocate from acting for a party in a suit was stated in the case of **Rakusen v Ellis, Munday & Clarke [1912] CH 831,** at page 835 per **Cozens Hardy M.R**. as follows:

"….but in my view we must treat each of these cases, not as a matter of form, not as a matter to be decided on the mere proof of former acting for a client, but as a matter of substance, before we allow the special jurisdiction over solicitors to be invoked, we must be satisfied that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act".

The Court of Appeal of Kenya in the case **Delphis Bank Limited v Chatthe & 6 others [2005] 1 KLR 766** followed the decision in **Rakusen v Ellis, Munday & Clarke supra,** and held;

"there is no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by the Court of Appeal is whether real mischief or real prejudice will in all human probability result".

The court further held that each case must turn on its own facts to establish whether real mischief and real prejudice will result.

Before granting an order to disqualify an advocate or firm of advocates the court must also be satisfied that there is risk of disclosure. In the case of **Century Oil Trading Company Limited v Kenya Shell Limited HC Misc 1561 of 2007** the court held as follows:

"..As for the circumstances in which the court will intervene by granting an injunction, it will not intervene if it is satisfied that there is no risk of disclosure. But if it is not so satisfied it should bear in mind that the choice as to whether to accept and/or continue with instructions from the new client rests with the advocate".

It is accepted, according to **Cordery's Law relating to Solicitors, 8th Edition,** that a solicitor who has been retained by a client is under an absolute duty not to disclose any information of any confidential nature which has come to his knowledge by virtue of the retainer, and exercise the utmost good faith towards his client not only for so long as the retainer lasts but even after the termination of the retainer in respect of any information acquired during the course of and by virtue of the retainer and the court will restrain the solicitor by injunction from any breach likely to injure the client and award damages for breach.

I am persuaded by those authorities and legal writings on this issue, and I do not think that this is an appropriate application to grant, given the facts and the law on the issues, before the court.

17. Arising from the foregoing, the order that best commends itself to this court is to dismiss the Respondent's/Applicant's application dated 18th December 2014 with costs to the Claimant/Respondent.

Orders accordingly.

DATED, READ AND DELIVERED AT NAIROBI THIS 17TH DAY OF APRIL 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Mwiti for Plaintiffs

Mr. Angila holding brief for Makori for Defendants

Teresia – Court Clerk