



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT 18 OF 2011**

**1. CYNTHIA PATRICIA SICOBO**

**2. PHILIPPE GERNIERS.....PLAINTIFFS/APPLICANTS**

**-VERSUS-**

**1. FULLMOON LIMITED**

**2. ALEXANDRE GERNIERS.....DEFENDANTS/RESPONDENTS**

**RULING**

The main cause, which is the plaint of **4<sup>th</sup> February, 2011** and in which the prayers were for injunctions and arrears of rent, was lodged together with an application by Notice of Motion, regarding the suit properties: subdivision No. 7839 (original No.4874/2), Section I, Mainland North, Mombasa (C.R. No. 22442) and subdivision No. 7843 (original No.4874/6), Section I, Mainland North, Mombasa (C.R. No. 22446). It is this application that came up for hearing, under certificate of urgency, on **21<sup>st</sup> February, 2011**, though it was soon thereafter overtaken by a different application by the plaintiffs/applicants who were contesting the propriety of the respondents' designated Advocates bearing the conduct of the matter. The latter application, in its turn, occasioned an application by the defendants/respondents, for Orders for the attendance of the plaintiffs/applicants for the purpose of cross-examination on their affidavit evidence.

After hearing learned counsel **Ms. Moolraj** for the defendants and **Mrs. Kawere** for the plaintiffs, I overruled the application for cross-examination, (partly) in these terms:

*“A guiding principle in the discharge of this Court’s functions, is that litigation should come to an end. Interminable litigation is to be discouraged; all issues in dispute must be settled timeously.*

*“The issues in the instant matter are on record; and the applicants’ prayers speak for themselves. I consider that there is no justification for the most intricate path of settlement, which is destined to push the main cause lodged, way back into the mists of time, so it may not ever be known soon what the merits*

of the case were.”

The subject of this Ruling is the plaintiffs’ Notice of Motion of **22<sup>nd</sup> February, 2011** in which the main prayer is:

*“THAT the firm of K.A. Kasmani & Co., Advocates be disqualified from acting as Advocates for and on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> defendants in this suit.”*

The application rests on the following grounds:

- (i) *the firm of K.A. Kasmani & Co., Advocates prepared the lease dated **19<sup>th</sup> August, 2009**;*
- (ii) *Mr. K.A. Kasmani from the said law firm witnessed the signatures of the plaintiffs herein;*
- (iii) *the said firm of K.A. Kasmani & Co., Advocates also prepared an undated “variation of lease” which is alleged to have been signed by 2<sup>nd</sup> plaintiff and an unidentified director of 1<sup>st</sup> defendant, which document was not witnessed;*
- (iv) *some of the terms of the lease dated **19<sup>th</sup> August, 2009** and the purported “variation of lease” are disputed by the plaintiffs;*
- (v) *Mr. K.A. Kasmani who witnessed the plaintiffs’ signatures and the Advocates from the said firm who prepared the lease and the alleged “variation of lease” will be required to appear in Court as witnesses;*
- (vi) *the lease dated **19<sup>th</sup> August, 2009** and the undated “variation of lease” are in dispute;*
- (vii) *the circumstances in this suit warrant the exercise of the Court’s discretion under Rule 9 of the Advocates (practice) Rules.*

**Cynthia Patricia Sicobo**, acting for herself and for 2<sup>nd</sup> plaintiff, swore an affidavit on **22<sup>nd</sup> February, 2011** in support of the application; and the same was replied to by **Alexandre Gerniers**, a director of 1<sup>st</sup> defendant, in his affidavit of **28<sup>th</sup> February, 2011**.

The 2<sup>nd</sup> defendant deposes that *“no conflict of interest arises from [his Advocate] appearing in Court [in this matter].”* He deposes that *“Messrs K.A. Kasmani & Co. Advocates were at all times acting for 1<sup>st</sup> defendant only, and there was no fiduciary relationship between the Advocates’ firm and the plaintiffs”*; that **Mr. Kasmani’s** name has not been given in the list of witnesses to be called at the hearing; and that **Mr. Kasmani’s** evidence if any, would be merely formal evidence regarding the lease.

The deponent averred that **Mr. K.A. Kasmani** had prepared the lease on the instructions of 1<sup>st</sup> defendant, and had witnessed all the signatures, while acting solely for the defendants and not for the plaintiffs.

The deponent deposed that he was certain, as a party executing the lease, *“that no alterations were made to the lease after execution”*, and that *“in fact, all the pages were initialled,”* and it was *“not possible that any insertion or change [would] be made to any page or paragraph of the lease.”*

At the hearing of this matter learned counsel, **Mr. Okong’o** and **Ms. Moolraj**, respectively, represented the plaintiffs and the defendants. **Mr. Okong’o** stated the main object of the applicants herein: *“To disqualify M/s. K.A. Kasmani & Co., Advocates from acting for the defendants.”* Counsel invoked the discretion of the Court [s.3A of the Civil Procedure Act (Cap.21, Laws of Kenya) and Rule 9 of the Advocates (Practice) Rules]. The burden of counsel’s submission was constructed around an unascertained fact: that M/s. K.A. Kasmani & Co. Advocates, after quite properly witnessing the lease agreement between the parties, had on an unspecified date, made a covert change to the text of the said lease. This fact-type allegation is firmly denied by 2<sup>nd</sup> defendant who shows the normal safety features to

the lease as originally done: each and every page signed and confirmed by every one of the parties – and this feature remaining undisturbed to-date.

The allegation of variation to the lease is the plaintiffs' basis for urging that the Advocates perceived to have made the same, should not have the conduct of the instant matter, for they are in that regard, potential witnesses as to obligations of landlord and tenant.

Although the applicant's counsel invoked certain case-authorities [***Uhuru Highway Development Limited & 3 Others v. Central Bank of Kenya & 4 Others***, Civil Appeal No. 286 of 2001; ***Austin Salmon Katololo v. Middle East Bank Ltd & 3 Others***, Mombasa HCCC No.40 of 2006], the Court was not given a clear indication of the critical statements of principle flowing therefrom, nor were those cases related to the *factual basis* of the grievance in the instant suit.

**Ms. Moonraj** contested the application, specifying its gravamen as: the lease drawn by *M/s. Kasmani & Co., Advocates* was tampered with, and so those Advocates must come forth and give evidence. Learned counsel submitted that all the parties did execute the lease; then each and every party initialled each page of the lease; and the pagination of the document, which was executed in triplicate, was entirely consistent. Counsel urged that the design of the contractual document left no scope for any insertion of an amendment as alleged by the plaintiffs/applicants.

**M/s. Moonraj** submitted that the content of the lease document was consistent in every sense: the land undoubtedly belonged to the lessor; the fixtures and fittings belonged to the lessee; the termination clause was clear enough – lessee to do no more and no less than hand back the land itself, in good state.

Counsel submitted that the spectacle of alleged tampering with the lease bore no relation to reality, and had merely been contrived to disqualify *M/s. Kasmani & Co., Advocates* in their professional role; for the plaint filed on **7<sup>th</sup> February, 2011** had made no mention of the lease being tampered with; and had this been a real grievance it would have been incorporated into the pleadings at the very beginning.

Learned counsel urged that the application, not being founded upon the gravamina in the pleadings, should be struck out.

Counsel, secondly, submitted that disqualification for *M/s. Kasmani & Co., Advocates* would in any event, not arise, since that firm had not participated in any matter in the nature of a *fiduciary relationship*; hence there would be no conflict of interests if that firm continued to represent the defendants in this matter; **Mr. Kasmani** had acted exclusively for 1<sup>st</sup> defendant; the lease was drawn on the instructions of 1<sup>st</sup> defendant; **Mr. Kasmani** did not at any time act for the plaintiffs. Counsel submitted that the plaintiffs would suffer no prejudice or mischief, occasioned by a breach of confidentiality in this matter by *M/s. Kasmani & Co., Advocates*. Counsel invoked case-authority in support of her submissions: ***The Delphis Bank Limited v. Channan Singh Chatthe & 6 Others***, Civil Application No. Nai. 136 of 2005; ***H.F. Fire Africa Ltd. v. Gharieb***, Nairobi MCCCC No. 665 of 2003; [2005] eKLR (***Emukule, J.***). The latter case involved a challenge to the role of counsel, as in the instant matter; and the learned Judge thus ruled:

***“Those agreements are in the public domain and expressed what the parties said in relation thereto and are not likely to be allowed to say anything else to explain anything else beyond those agreements. I cannot therefore say that acting for one party by counsel who drew these agreements, would in any way prejudice the defendant's case in the original action...”***

Similarly in the instant case, counsel submitted that *“the lease itself contains the sum total of the agreement; there is no extra evidence apart from the content of the lease itself.”*

Counsel urged further that the instant application, for no good cause, stood against a *constitutional principle*: the defendants' right to counsel – and that the application was for dismissing.

As already noted, the application herein would probably not have been lodged, but for the perception that there was a *tampering with the lease agreement* which is the basis of the suit. But before

this Court, there is no *prima facie* evidence of such “tampering”; it is not asserted as a fact in the pleadings; and an examination of the lease document only reveals its integrity to be intact. *Prima facie*, therefore, the application before the Court lacks a foundation. There is no reason for this Court to disqualify *M/s. Kasmani & Co., Advocates* from having the conduct of the case, on behalf of the defendants. Besides, were it to prove necessary for counsel for the defendants to testify in the course of the suit, this would touch on no more than pure *formality*. Hence there is no basis for depriving the defendants of their constitutional rights in the choice of legal representation.

***I dismiss the plaintiffs’ application by Notice of Motion of 22<sup>nd</sup> February, 2011. Costs to the defendants.***

***The plaintiffs’ application by Notice of Motion of 4<sup>th</sup> February, 2011 shall be listed for hearing within 14 days of the date hereof.***

***Orders accordingly.***

**SIGNED at NAIROBI .....**

**J.B. OJWANG  
JUDGE**

**DATED and DELIVERED at MOMBASA this 12<sup>th</sup> day of March, 2012.**

**.....  
M.A. ODERO  
JUDGE**