



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Commercial Suit 13 of 2005**

CARNEVALI FAUSTO

ANGELA M. SANTELLI.....PLAINTIFFS

VERSUS

GIANLUIGI CERNUSCHI

MARIELLA PIZZIGONI

SEASTAR MALINDI LIMITED.....DEFENDANTS

RULING

The defendants herein, took out a motion pursuant to rule 9 of the Advocates (practice) Rules and under Section 3A of the Civil Procedure Act in which they sought for the firm of Inamdar & Inamdar Advocates by itself, its partners, associates, employees and or agents to be barred and removed from record as representing the plaintiffs in this suit. The motion is supported by the affidavit of Gianluigi Cernuschi, the 1st defendant herein.

The plaintiffs resisted the motion by relying on the replying affidavit of Carnevali Fausto, sworn on authority of Angela M. Santelli, the 2nd plaintiff herein.

It is the submission of Mr. Kinyua learned advocate for the defendants that the firm of Inamdar & Inamdar Advocates should be disqualified from representing the plaintiffs because the firm and or its partners, agents or employees participated in 12 meetings of the 3rd defendant hence they managed to gain privileged information exchanged between the 3rd defendant and its advocates. The learned advocate also argued that it is embarrassing to the defendants to have to sit in the same meetings with the plaintiffs' Advocates to discuss issues relating to this suit especially when the plaintiffs advocate have been gathering evidence. It is submitted that in the circumstances the defendants are likely not to obtain a fair determination of the issues if the firm of Inamdar & Inamdar is not restrained from appearing in this suit for the plaintiffs. That firm is accused of having obtained confidential information to the utter detriment of the defendants. There is evidence that one Timothy Bryant, an associate to the firm of Inamdar & Inamdar attended an annual general meeting of the 3rd defendant on 12th April 2006 held in the offices of Equatorial Secretaries and Registrars, Jubilee Insurance Building 3rd Floor, Mombasa, as a proxy for the 1st plaintiff.

It is also deponed that Abdulhafaz Noorani an advocate in the firm of Inamdar & Inamdar Advocates attended a meeting held in the same offices on 17/4/07 to discuss the status of the plaintiffs in the company as well as the contents of a letter written to the defendants' advocates by the 3rd defendant's

company Secretaries. It is the submission of the defendants that their defence will be severely prejudiced as they are sued jointly and severally. It is also alleged that the firm of Inamdar & Inamdar had written to the 3rd defendant's auditors on 29/11/2006 questioning the financial statements and expressing some strong opinions relating to matters that are pending before this court.

I have already indicated that the firm of Inamdar & Inamdar Advocates opposed the motion using the replying affidavit of Carnevali Fausto. It is admitted by the 1st plaintiff that he appointed Timothy Bryant to attend the Annual General Meeting of the third defendant held on the 12th day of April 2006. It is also admitted that Abdulhafez Noorani attended the 3rd defendant's extra ordinary general meeting on behalf of the firm of Inamdar & Inamdar Advocates as proxy to the plaintiffs. It is the argument of the plaintiffs that no privileged information relating to this case passed to the firm of Inamdar & Inamdar during those meetings hence the defendants are not prejudiced. It is also alluded that since the client has consented to the disclosure of the communication hence they waived the privilege.

It is said that the dispute before court is about a breach of contract and not in respect of ownership or the company or its ownership or its dealings.

The legal position such regarding disputes is set out in rule 9 of the Advocates (practice) Rules which states as follows:

“ No Advocate may appear as such before any court or tribunal in any matter which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit, and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration on affidavit, he shall not continue to appear.

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter which he acts or appears.”

There is no denial that the firm of Inamdar & Inamdar Advocates attended the Annual General Meeting on 12/4/2006 of the 3rd Defendant on behalf of the 1st plaintiff. The same firm also attended the extra ordinary General meeting of the same company held on 17.4.2007 on behalf of the 1st and 2nd plaintiffs. I have carefully considered the rival submissions made by learned counsels on both sides, I have come to the conclusion that the employees, partners and or associates of the firm of Inamdar & Inamdar who attended the 3rd defendant's meetings came into possession of material information which they may use to the prejudice of the defendants. The court of appeal in the case of **King Woolen Mills Ltd & Anor =Vs= Kaplan & Stratton Advocates C.A No. 55 of 1993 (V,R)** stated as follows:

“The fiduciary relationship created by the retainer between client and advocate demands that the knowledge acquired by the advocate while acting for the client be treated as confidential and should not be disclosed to any one else without that client's consent.

....This principle applies equally where an advocate acts for two or more clients in the same transaction or subject matter because the retainer is specific between the individual client and the common advocate.....

The corollary to this cardinal Principle is that the advocate having so acted for two or more clients should be wary to act for one client against the other client or clients in a subsequent action or litigation concerning the original transaction or subject matter for which he acted for the clients as their common Advocate.

The reason for this is not far fetched. The information or knowledge so acquired and which is confidential by reason for the fiduciary relationship between the opponent client and the common advocates will place the other client or clients at a disadvantage or information is used against them by

the common advocate in a subsequent litigation.”

In the end I am satisfied in this particular case that real prejudice and mischief will be result if the firm of Inamdar & Inamdar Advocates are allowed to act for one of the parties in this suit.

Consequently I allow the order sought in the motion dated 24/4/2007. Costs shall abide the outcome of the suit.

Dated and delivered this 15th day of February 2008.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Noorani for plaintiff.

Ngeno h/b Kinyua for Defendant