REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

MISCELLANEOUS CIVIL APPLICATION 523 OF 2007

GIOVAMNI GAIDA & 79 OTHERS ….....APPLICANTS

VERSUS

GIAN CARLO FERRARI & OTHERS …….RESPONDENTS

R U L I N G

This is a notice of motion application dated 5-9-08 made under Order 9 Advocates (Practice) Rules, Advocates Act, section 134 Evidence Act (Cap 80) and section 3A.

It seeks that an order for injunction do issue restraining the firm of Rachier and Amollo Advocates, the partners thereof, their employees, servants and/or agents and/or anyone of them, from acting any further for the applicants in any other matters incidental.

(b) In the alternative and without prejudice, that the court be leased to bar the firm of Rachier and Amollo Advocates, the partners, their employees, servants and/or agents, and or/any one of them, from acting any further as advocates for the applicants in this matter or matters incidental to or connected thereto.

The application is premised on grounds that:

(1) The 1st respondent (who is now the applicant herein) is the Managing Director of Mahican Investments Ltd and Katma Investments Ltd. The former is the proprietor of an estate in fee simple in plots No. 657 and Plot No. 654, Mambrui in Malindi (formerly Kilifi District) while the latter is by application, the manager of all the common arrears making part of the complex known as Karibuni Hotel and Villas.

(2) Mahican Investments Ltd (MIL) is the successor in title of the said properties having purchased them from Caluwa Ltd. MIL also owns plot No. 1156 upon which Caluwa Ltd erected garages leased to some of the tenants who leased the chalets. There was an error in the description of the plot and most of the leases of the garages appear to have been issued on plots NO. 657 and Plot No. 654 Mambrui instead of Plot No. 1156 Mambrui.

(3) The said Caluwa Ltd caused to be erected on the aforesaid pieces of land, dwelling houses, shops, restaurants and other utilities in the complex popularly known as Karibuni Hotel and Villas.

(4) That Caluwa entered into leases for the various chalets for terms of 99 year leases. One of the conditions upon which the premises were let out was inter alia the entry into a management agreement with the said MIL or a party apportioned by the said MIL for that purpose. Katmai Investments Ltd (KIL) is the manager for purposes of the lease.

(5) That when MIL purchased the complex, it inherited some contracts that had been entered into by Caluwa Ltd with various tenants. MIL was desirous of effecting changes in the contracts an act which the applicants herein resisted, leading to arbitral proceedings that are the genesis of the orders allegedly breached and which are now sought to be enforced by the proceedings presently in court. Those who signed the new contracts received additional services on additional terms. There is pending before this court HCC Msc. 17 of 2008.

(6) That the firm of Rachier and Amollo represented the applicants herein in the arbitral proceedings and in all other proceedings that were and are incidental thereto, while 1st respondent MIL and KIL were initially represented by the firm of Muli and Ole Kina Advocates in the initial stages of the arbitral proceedings and thereafter the firm of Harit Sheth and Co. Advocates before the re-appointment of the firm of Muli & Ole Kina Advocates on 11th August 2008 when the matters were transferred to High Court sitting in Malindi.

(7) That the advocates indicated as members of the firm of Rachier and Amollo Advocates are A. D. O. Rachier, Otiende Omollo, J. Okme Arwa, Paul Mungla, Francis Olalo, Stephen Olalo, Stephen Ligunya, Alvin Rachier, Desma Nungo and Caroline Oduor.

(8) Clause 1(s) the lease provides that:

"***Not to assign, sublet, charge or part with possession of the said premises or any part thereof, without previous notice in writing to the company. The notice shall contain all dates concerning the transferee and his address"***

(9) The clause following provides:

"***Not to assign or transfer the entirety of the said premises unless simultaneously with such assignment or transfer, the assignee or the transferee make and execute a deed of convent with the company that he and his successor in the title shall duly observe and perform all the covenants, restrictions and stipulations herein contained and on the side of the lessee to be observed and performed (also of a lateral nature) to the same extent as were the assignee or transferee the original lessee thereto"***

(10) Unbeknown to the 1st respondent, and in circumstances that remain unclear to the 1st respondent, MIL and KIL, Mr. A.D.O Rachier and Otiende Amollo became the owners of Chalet No. 4, 181 and 180. No notice had been given to MIL and KIL as mandated.

(11) It is especially not clear to the 1st respondent how on 25th March 2004, Cherubini Gariela, sold Chalet No. 180, leased to Ronchi Rafaele to Mr. A.D.O. Rachier. The transfer was registered at the Mombasa Coast Registry on 26th March 2004 on Cr. 28711/2 and at the same time Cherubini Gariela transferred her Chalet No. 4 to Mr. A.D.O Rachier – the two named are not resident in Kenya and A.D.O. Rachier would have to explain these transactions.

(12) Also unbeknown to 1st respondent or his companies, on 24th July 2004, Mr. A. D. O. Rachier sold Chalet No. 180 earlier leased to Ronchi Raffaele and transferred to him under mysterious circumstances to Mr. Paul Otiende Amollo. The transfers in these cases are drawn by advocates related to the same firm and the documents executed in the presence of Mr. Francis A. Olalo, an advocate listed as a member of the firm of Rachier and Amollo.

(13) The information related to the transfer of ownership of the leases and the chalets listed came to the 1st respondent herein when a list enclosed in a letter dated 31-3-08 indicating to KIL that management fees payable directly to it, but which the firm of Rachier and Amollo had appointed themselves the receiving agents, was held by them. This means that with the encouragement of the firm of Rachier and Amolo, - management fees payable to KIL are in the custody of the said advocate.

(14) The respondent objected to the continued representation and appearance in these proceedings as advocates for the applicants, the firm of Rachier and Amolo, the partners thereof, their employees, servants and/or agents or any one of them because members of that firm have an interest far beyond the reasonable honouranium they are entitled to, for representing the applicants. They have acquired the character of litigants, managers of MIL property, abrogated to themselves and appointed themselves receiving agent for the condominium fees the 1st respondent's companies are mandated by the lease to receive.

(15) The respondents have no confidence in the professional independence of the advocates appearing for the applicants by reason of them having deliberately acted contrary to the terms of the lease and have departed from their professional responsibilities as officers of the court in this matter.

(16) That issues between the applicants and the respondents revolve around the allegation of provision or withdrawal of services by the 1st respondent and his companies. The advocates from the firm are competent and compellable witnesses as the chalets they own and to the manner in which they comply or disrespect the term of the lease and the services they claim they are denied by the respondents and the companies belonging to the 1st respondent.

(17) The consideration of Ksh 600,000 and 700,000/- shown for the sale of the chalets is suspect as the same are selling for over 1.5m. The combined effect of the mystery surrounding the sale of the chalet and the prices quoted creates a situation devoid of certainty, craving answers that can only be supplied by the applicant's advocates on record.

(18) That to avoid instances where it is likely that an advocate or firm of advocates may be embarrassed by circumstances arising in the proceedings, and where the advocate involved fail to take heed, the court has power to ensure that for protection of its dignity and the officers appearing before it, the orders sought herein are granted.

I'll only say this – a lot of what is included in the body of the application as grounds really ought to have formed part of the affidavit in support of the application by Ginacarlo Ferrari. In fact a large portion of the supporting affidavit is a reproduction of what was already been presented as grounds upon which the application is based. The present applicant wrote to the firm of Rachier and Amollo on 11-6-08 (ex 12) seeking further information about the transactions but none was forthcoming. A request to the said firm of advocates (ex 15) requesting them to exit voluntary from these proceedings is also presented along with the application.

The application is opposed and in a replying affidavit sworn by Otiende Amollo Advocate wherein he confirms having personally had the conduct of the matter during the arbitral proceedings and that he also had conduct of **Malindi HC Msc Civil Application No. 17 of 2008** and he avers that the application is bad in law, and fundamentally misplaced because;

(1) The jurisdiction of this court has been wrongly invoked as the provisions of Rule 9 of the Advocates (Practice) Rules and section 134 Evidence Act are not applicable.

(2) The applicant has sought an order for injunction which only issues in suits as against a party thereto – in this instance the firm of Rachier and Amolo Advocate are not a party thereto.

(3) The instant case is in the nature of contempt proceedings instituted after the determination of the dispute vide Arbitration. The issue of the advocates in the firm of Rachier and Amollo Advocate being competent and compellable witnesses is therefore neither here nor there.

(4) The prayers sought lack foundation because although Ambrose Otieno Rachier and Otiende Amollo admittedly own chalets in the complex, they are not parties in this application and the ownership of the chalets is irrelevant in the pending contempt proceedings which originated after the collusion of the dispute.

(5) That in any event the firm of Rachier and Amolo advocate is an entity distinct from Otiende Amolo and Ambrose Rachier and applicants have failed to demonstrate the interest far beyond that of representation as allegedly held by the firm of Rachier and Amollo advocate to warrant them being barred from representing the applicant.

(6) The applicants have failed to demonstrate conflict in the firm of Rachier and Amolo representing the applicant and if the application is granted, it will infringe on the applicant's constitutional right to legal representation of his choice.

(7) As regards the grounds on the application Mr. Amollo avers that ground 2 and paragraph 3 of the affidavit are irrelevant to these proceedings and that the lease documents in any event provide for mode of redress in the event of breach, which process is yet to be involved by the respondent.

(8) It is denied that the firm of Rachier & Amollo have apportioned themselves as receiving agents of the condominium fees and that the extent of dealing with the management fees is professional and vide instructions from its clients including the applicant herein.

(9) That at all material times, the firm of Rachier and Amollo Advocate received management fees on behalf of its clients for onward transmission to respondent upon instructions from its clients.

(10) That the continued holding of the management fees by the said firm of advocates is due to lack of response by respondent to a letter dated 14-2-08 asking for clarification in view of the unilateral charge of management, to enable the management fees be forwarded to the correct managing company.

(11) It is clarified that Msc. Criminal Appeal 17 of 2008 is actually consolidated with this case.

The respondents herein pray that the application be dismissed with costs.

At the hearing of the application, Mr. Ole Kina submitted that the application is not based on advocate – client privilege and it is not suggested that there was any privileged information that may have flowed from respondent to the advocate. So what is the basis of seeking to bar the said firm from these proceedings?

Mr. Ole Kina says it's the actions that have taken place in the course of representing applicant that have necessitated this application. He submits that, his clients basic concern is that while executing their duty, the advocate in that firm made purchases of property in circumstances that are in direct contravention of the terms of the lease and so their continued appearance in this matter needs to be checked. He points out that the documents which created those transactions are drawn by the firm of Rachier and Amollo and witnessed by a partner from that firm. In response to the replying affidavit he seeks to rely on the decision in **Uhuru Highway Development Ltd & others V Central Bank Ltd & others EALR 2000 Vol. 2 page 654 at pg 657** and asks the court to note that even in the cited case, Oraro was not a party to the proceedings but there was a prayer for Oraro's firm to be restrained by an injunction from appearing on the matter.

The same situation was reflected in **HCC 1517/97 LTI-Kiss Safaris Ltd & others V Deutsche Invesments – Und** where the firm of Kaplan and Stratton were not parties to the proceedings but the court dealt with an application for injunction to restrain the firm from acting.

Mr. ole Kina argues that the situation he has alluded to is considered in the case of **King Wollen Mills Case (1990 - 1994) EA 244** and submits that the advocate here is litigating his own cause through proxy and the court should stop that situation by allowing the application.

In response, Miss Nungo submits that the fact of ownership is a personal right of the particular named advocate and has nothing to do with the firm of Rachier and Amolo who are not even parties in the contempt proceeding pending before court.

She explains that the cause of action here is an action by one particular applicant in the nature of contempt proceedings and the fact of ownership is beside the point.

She draws to the court's attention the manner and style of acquisition which is not the subject of the proceedings – those are contempt proceedings and there is no conflict of interest demonstrated and there is no possibility of any of the partners in the firm being called to give evidence since the arbitral proceedings were concluded. Miss Nung'o argues that if the applicant herein is aggrieved as to the manner of acquisition, then he would have to originate another suit and that the contempt proceedings are limited to checking whether or not an order of the court has been disobeyed and it has not been demonstration that the two advocates will be required to give *viva voce* evidence with regard to the contempt.

What about receiving of management fees?

Miss Nungo submits that the firm of advocates is acting as a receiving agent and the issue of management is a subject of the contempt proceedings as she poses the question whether the respondent should be given an opportunity to raise issues on the contempt which has been barred by the applicant regarding the representation. She says it is not a strange fact that the firm is holding management fees on behalf of its clients as in the past the firm has received and forwarded the management fees to the management company of the applicant.

She points out that the situation envisaged by section 134 of the Evidence Act concerns privilege between an advocate and client – which is not applicable here and there is no prejudice.

She relies on the case of **Imana V Ethuro & 20 others Vol. 3 KLR (2008) pg 10 & LTi – Kisii Safaris Investments Ltd** and says different circumstances are treated differently. Mr. ole Kina's response to this is that from the letter dated 31-3-08 with the list of concerned claimants, there is no doubt that Mr. Amollo and Mr. Rachier have descended into the arena of conflict and that this confirms their clients interest as they may be called as witnesses and forced to disclose information that may transcend and enter into the subject of conflict. Further that the choice of a witness is not a subjective one and the relevant question to be asked is objective, saying that even the **Ethuro case** addressed the question of competing interests.

The issue here is very simple, should the firm of Rachier and Amolo continue acting in this matter or not. It is not disputed that:

(a) the two advocates own some chalets which form part of what was the property in the arbitration dispute.

(b) The issue here is not advocate – client relationship – nothing about privileged communication.

The issue is simply whether the kind of interest the two advocates share is such that it makes them potential witnesses in the pending application which is yet to be argued.

In order to understand the situation I have looked at the pending application dated 22-5-07 which are contempt of court proceedings under section 5 of the Judicature Act – being an application by Giovanni Ganda for the committal of Gian Carlo Ferrari and Giungorelli Marco for contempt of court.

The application refers to the two individuals named, as disobeying judgment of court delivered on 11-10-05 and the consequential decree issued on 27-1-06. Among the issues raised are introducing charges to the service contracts without consultation with the applicants.

Denying unconditional access of the complex to applicant's guests. Those would appear to have nothing to do with the two advocates and even if they are affected, they are not the ones being alleged to be in contempt or to have given legal advice to the situation leading to the contempt.

However, there is the issue of:

"***The respondents have failed to mutually consult with the applicant on matters concerning the management of the complex and have instead gone ahead and made demands upon the applicants including the demand on makuti roofing without consultation"***

So what aspect of management is in issue?

"***The claimants do continue paying management fees based on terms of contract entered between them and the third respondents"***

It becomes abundantly clear that the issues in the contempt proceedings have nothing to do with mode of acquisition of the chalets and Miss Nungo is quite right that if there are such issues then applicant herein would have to file a separate suit or exercise his option of redress as provided under the terms and conditions of the lease.

I have no doubt in my mind that the application is properly before this court seeking prayers for injunction to issue against the firm of Rachier to cease acting in this matter and any other further matters relating to and arising out of the property in issue – so the issue of the applicant being misplaced and the jurisdiction of this court being improperly invoked does not arise – indeed such was the application in the **Uhuru Highway Development Case,** however the scenario obtaining there in terms of content was different from this one as it revolved around advocate-client relationship and disclosure of information, so section 134 Evidence Act doesn't apply.

The situation here is that the two advocates who are partners in the firm are actually in the arena of conflict more so in relation to the receipt of management fees – which they had not been appointed to do, in the first instance.

All the decisions cited both by Mr. ole Kina and Miss Nungo address the question of client –advocate relationship which both concede is not the issue here. The receipt of management fees is one of the issues in the contempt proceedings and the firm of Rachier and Amolo are spat right in it – not only receiving that money but holding it – whatever their explanation – that in fact is the kind of explanation which may turn into a reality requiring them to attend court as witnesses and be cross-examined on the circumstances under which they now receive the management fee contrary to what the lease stated. It may require them to even explain what they understood by the terms of that lease and I agree with Mr. ole Kina that that is not a speculative prospect – it is objective and a very likely scenario which indeed places the firm of Rachier and Amollo in the arena of conflict. It is not lost to me that even though it is argued that the purchase of the chalet was a personal issue – (which I agree it was) yet the management fees is being held and received not by Mr. Rachier or Mr. Amolo as individuals, but rather as a firm of advocates and I cannot become myopic about that. It is not so much the fact of having drawn the agreement, but the fact that they are part of the contested orders regarding management fees, which is an item in the pending application and which may easily embarrass them were they to continue acting and be compelled to be witnesses – really there is no bar to applicant applying to have them cross examined or even swear an affidavit regarding the management fees. Rule 9 of the Advocates (practice) Rules provides as follows:

"***No advocate may appear as such before any court or tribunal in any matter in which 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 or 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 non contentious matter of fact in any matter he acts or appears."

The situation obtaining in the present case fits in squarely with the situation envisaged under Rule 9 of the Advocates (practice) Rules.

It is on this limb that I find the application merited and uphold it.

Consequently, I grant the orders restraining the firm of Rachier and Otiende Advocates under the partners thereof, their employees, servants and/or agents and/or anyone of them from acting any further in this matter

(2) Costs of this application shall be borne by the respondents herein.

Delivered and dated this 3rd day of November 2008 at Malindi.

H. A. Omondi

JUDGE

Mr. Ole kina present for applicant

Miss. Aulo holding brief for Rachier and Amollo for respondent.

H. A. Omondi

JUDGE