REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1517 OF 1997

LTI-KISII SAFARI INNS LTD. ……... 1ST PLAINTIFF

DR. CHARLES GEKONDE OTARA ……. 2ND PLAINTIFF

DR. MRS. CHRISTA MARIANNNE OTARA …….. 3RD PLAINTIFF

VERSUS

DEUTSCHE INVESTITIONS-UND

ENTWICKLUNGSGELLSCHAFT ……..... 1ST DEFENDANT

LTI HOTELBETEIGUNGS-UND

INVESTITIONSGESELLSCHAFT MBH …….. 2ND DEFENDANT

COOPERS & LYBRAND TRUST CORPORATION … 3RD DEFENDANT

KEITH LAW GRANT SINCLAIR …….. 4TH DEFENDANT

PRATUL HEMRAJ SHAH …….. 5TH DEFENDANT

RULING

The first plaintiff is a limited liability company incorporated in Kenya whose sole shareholders and members of the board of directors are the 2nd and 3rd plaintiff, both medical practitioners and husband and wife. They have brought this suit against the defendants following a dispute between them and the defendants relating to a business venture involving the development of a tourist hotel at Diani Beach, Kwale District.

The 1st and 2nd defendants are German based and registered companies involved respectively in development financing and management of hotels and also in tour operations. The 3rd defendant is a locally registered company which provides services of receivers and managers to lending institutions.

According to the averments in the plaint, the 1st plaintiff was in the process of completing the construction of the hotel at Diani when through the 2nd and 3rd plaintiffs it approached the 1st and 2nd defendants for funds to complete the project. The 1st and 2nd defendants agreed to provide the finance on condition that the 1st plaintiff permitted the 2nd defendant to become a shareholder in the 1st plaintiff. Upon agreement being reached between the parties, the 1st plaintiff entered into a management and technical assistance agreements as well as a pre-opening contract with the 2nd defendant on 24.4.1999 and on 20.5.1991, following which the share capital of the plaintiff, which hitherto was Kshs.10 million was increased by Shs.95 million to Shs.105 million divided into 5,250.000 shares of 20/= each. 1.5

million of the shares were allotted to the 2nd defendant, 2,299,999 to the 2nd plaintiff and 1,519,998 to the third plaintiff. In respect of its allotted shares, the 2nd defendant paid Shs.30 million.

In the course of the arrangements referred to above, the 1st plaintiff altered its original memorandum and articles of association, entered into a co-operation agreement with the 1st and 2nd defendants and made in favour of the 1st defendant and other lenders, a debenture trust deed by virtue of which the 1st and 2nd defendants had the power to appoint receivers and managers of the 1st defendant's undertakings in the event of breach by the 1st plaintiff of its obligations under a loan agreement between the parties dated 16.6.1991.

It is the plaintiff's case that the firm of Kaplan & Stratton Advocates acted for the 1st plaintiff as borrower and the 1st and 2nd defendants as lenders as well as the third defendant the trustee of the 1st defendant in connection with the preparation of the documentation for financing the hotel project and also in connection with all the other agreements that relate thereto. It is also contended by the 2nd and 3rd plaintiff's that they relied on the advice of the said firm of advocates in signing the said documents and also on the advice of the 1st and 2nd defendants in entering into the contracts for borrowing. www.kenyalawreports.or.ke 4

On account of what is stated above, the plaintiffs have lodged this application under O. I Rule 10, O. XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules to restrain M/S Kaplan & Stratton Advocates (K & S) from continuing to act for the 1st to 5th defendants in this matter. The grounds upon which the application is made are, as stated in the Chamber Summons dated 14.7.1998, that:-

> ***"(a) in the contracts***
>
> ***(i) of borrowing entered into on the one hand by the first plaintiffs in which the second and third plaintiffs are the majority shareholders, and by the first and second defendants on the other hand, on whi ch contract a part of the plaintiffs' cause of action is founded, and***
>
> ***(ii) of the reconstitution of the first plaintiff to permit the second defendant to become both a shareholder on the plaintiff and the manager of the plaintiffs' business, the said Messrs. Ka plan & Stratton Advocate acted for both the plaintiffs and the first and second defendants;***
>
> ***(b) in the course of the said Messrs, Kaplan & Stratton Advocates' acting as the plaintiffs' advocates, the plaintiffs imparted to them confidential information which they will use to the plaintiffs' detriment if they act for the defendants in this case; and***
>
> ***(c) a conflict of interests bars the common advocates for the lender and borrower from acting against either of them in a suit arising from the transaction they acted in."***

Though M/S K & S in an affidavit sworn on their behalf by Mr. Hime, a partner in the said firm admit having acted for the 1st plaintiff, they contend that the acting was limited solely to the following matters:-

> ***"i. making an application to the Central Bank of Kenya and to obtain the necessary Exchange Control approval to create the Charges required by DEG (the 1 st defendant) as security for its loan.***
>
> ***ii. drafting the alterations to the Articles of the 1 st plaintiff to give effect to the provisio ns of the Loan Agreement and the Cooperation Agreement.***
>
> ***iii. dealing with the change in the 1 st plaintiff's business name and the change in the proprietorship of the name to accord with the new situation.***
>
> ***iv. drafting and filing a contract covering the is sue of fully paid up share capital for consideration other than cash to Charles Otara (the 2 nd plaintiff) or his nominee."***

Mr. Hime further swears that K & S did not act generally for the 1st applicant or for that matter either for the 2nd and 3rd applicants in the transaction; he also depones that his firm did not offer any advice to the plaintiffs with regard to the legal and commercial terms of the transactions between the plaintiffs and the defendants. For all those reasons, K & S contend that there is no legal basis for barring them from acting in the matter. They also say that to do so will occasion the defendants unnecessary additional expenses and will also delay the finalisation of the suit.

The principles to be applied in considering this type of application were stated in the case of King Wollen Mills Ltd. and Another V. M/S Kaplan & Stratton Advocates (Court of Appeal, Civil Appeal No. 55 of 1993) as follows:-

> ***"The fiduciary relationship created by the retainer between client and advocate dema nds that the knowledge acquired by the advocate while acting for the client be treated as confidential and should not be disclosed to anyone else without that client's consent. That fiduciary relationship exists even after conclusion of the matter for whi ch the retainer was created. 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. There exists no f iduciary relationship between the two or more clients of the common advocate. Any knowledge received from each client and their common advocate, although the common advocate acting for two or more clients will be able to complete the transaction speedily and save the clients expense by engaging one common advocate; this fact alone is for convenience only and does not affect the general principle that he should not so act or divulge the confidential information received by him from one client to the other c lient or clients without the consent of the client in the retainer imparting the confidential information. 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 t he other client or clients in a subsequent action or litigation concerning the original transaction or the 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 of the fiduciary relationship between the opponent client and the common advocates will place the other client or clients at a disadvantage occasioning prejudice if that knowledge or information is used against them by the common advocate in a subsequent litigation arising from the original transaction or subject matter for which he acted for the clients as their common advocate."***

In delivering the leading judgment in that case, Muli J.A. cited with approval a passage in the case of in Re-A Firm of Solicitors (1992) 1 ALL E.R. 353 at page 354 where Parker L. J. stated:-

> ***"1. There was no general rule that a firm of solicitors who had acted for a former client could never thereafter act for another client against the former client, but a firm of solicitors would not be permitted to act for an existing client against a former client if a reasonable man with knowledge of the facts would reasonably anticipate that there was a danger that information gained while acting for the former client would be used against him or there was some degree of likelihood of mischief, i.e. of the confidential information imparted by the former client being used for the benefit of the new client. If there was such a conflict of interest it was only in very special cases that the court would consider that a Chinese Wall would provide an impregnable barrier against the leakage of confidential information ……"***

As regards the instant case, M/S K & S admit as shown above having acted for the 1st plaintiff in connection with the making of the application to Central Bank of Kenya to obtain the necessary Exchange Control approval to create the charges required by the 1st defendant, as security for its loan; they also admit having drafted the alterations to the Memorandum and Articles of association of the 1st plaintiff to give effect to the provisions of the Loan Agreement and the Co-operation Agreement. They further concede having dealt with the change in the 1st plaintiff's business name and the change in the proprietorship of the name of the 1st plaintiff to accord with the new situation and also in drafting and filing a contract covering the issue of fully paid up share capital for consideration other than cash to the 2nd plaintiff or his nominee.

Although in the course of hearing this application, Mr. Deverell spent a lot of time in cross-examining the 2nd plaintiff in an attempt to show that his firm did not generally act for the 1st plaintiff or for either the 2nd or 3rd plaintiffs in the transaction and offered no advice to them with regard to the legal and commercial terms of the transaction and also that no confidential information passed from the plaintiff to K & S, in my view it should be obvious to any disinterested person that the plaintiffs could not have given to K & S all the information that was necessary for the purpose of enabling K & S to prepare the contracts of borrowing between the 1st plaintiff and the 1st and 2nd defendants, the reconstitution of the 1st plaintiff to permit the 2nd different to become both a shareholder in the plaintiff and the manager of the 1st plaintiff's business and all the other documents mentioned in Mr. Hime's affidavits without disclosing some confidential information. I say so because as observed by Muli, J.A. in the case of King Wollen Mills Ltd. (Supra) I do not see how K & S could have effectively completed the documentation aforesaid and at the same time advise the lenders as to the propriety of the project from a legal stand point without first enquiring from the plaintiffs of their viability, background and financial standing; whether they solvent, had borrowed from local banks and if so whether the loans had been repaid; whether there were pending suits against the 1st plaintiff, what were their assets and liabilities; their financial turnovers etc etc. All such information would in my view be confidential information in respect of which a reasonable man with knowledge of the facts of the matter would reasonably anticipate could be used against the plaintiffs if K & S continued to act for the defendants in this matter. With due respect that conclusion is reinforced by the fact that throughout the transactions the plaintiffs were not represented by any other firm of advocates which to me suggests that they treated as adequate whatever they were getting from K & S by way of advice in connection with the transactions.

In reaching the above conclusion, I have not overlooked the claim by Mr. Hime in his affidavit that he had personally told the 2nd plaintiff that he should seek separate legal advice as K & S were not prepared to give him or the 3rd plaintiff any advice on the desirability of the transaction from their point of view. But in view of the fact that K & S did act for the plaintiff in certain transactions in connection with the project, in the absence of any documents specifying the limit of their so acting and also in the face of the plaintiffs' evidence that K & S generally advised them on the project, I am unable to accept Mr. Hime's statement. And as regards the claim in the same affidavit that Mr. David Hutchison of Bellhouse Mwangi Ernest & Young appeared to be giving advice to the 2nd plaintiff, I would observe that Mr. Hutchison however experienced he may be, he is only a certified accountant and not a legal practitioner and could not therefore have provided the type of advice we are talking about in this matter.

For all the above reasons, I think, on the facts of this case, a reasonable man would consider that if K & S were allowed to continue to act for the defendants, there would be a risk that some of the confidential information provided to them by the plaintiffs might inadvertently be revealed to the defendants. If that happened, the plaintiffs would be greatly prejudiced. Accordingly, I am further satisfied that the plaintiffs have established a case for the grant of an injunction to restrain K & S from continuing to act for the defendants in this matter. The application is therefore granted in the terms sought in the Chamber Summons dated 14th January, 1998 with costs to the plaintiff.

Dated at Nairobi this 16th day of February, 2001.

T. MBALUTO

JUDGE