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| Case Number: | Civil Appeal 55 of 1993 |
| Date Delivered: | 16 Dec 1993 |
| Case Class: | Criminal |
| Court: | Court of Appeal at Nairobi |
| Case Action: | Judgment |
| Judge: | Mathew Guy Muli |
| Citation: | King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd & another v M/s Kaplan & Straton Advocates [1993] eKLR |
| Advocates: | Mr Kamau for Appellants, Mr Hiram for the Respondents |
| Case Summary: | <p>King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd & another v M/s Kaplan & Straton Advocates</p> <p>Court of Appeal, at Nairobi December 16, 1993</p> <p>Muli JA</p> <p>Civil Appeal No 55 of 1993</p> <p>(Appeal from the ruling and order of the High Court of Kenya at Nairobi</p> <p>(Mr Justice Shields) dated 25th February, 1993</p> <p>in HCCC No 279 of 1993)</p> <p>Advocate/client – conflict of interest - advocate acting for several parties – whether such advocate can proceed to act for one or more of the parties against the other(s) in a suit involving a matter where he/she was their common advocate.</p> <p>Advocate/client – retainer – nature of - personal</p> |

to each client - fiduciary relationship between client and advocate - whether there is a fiduciary relationship between two or more clients of a common advocate.

The appellants sought injunction in the superior court to restrain the respondent from acting in a matter involving the appellants and two other defendants on the grounds that the respondent was a common advocate for all the parties in that suit.

The application for injunction was dismissed by the superior court prompting an appeal. It was argued on behalf of the appellant that the respondents having drawn the loan agreement, the debenture, the legal charge as well as the legal opinion on behalf of the lenders and the appellants were disqualified from acting for the lender in any subsequent litigation or dispute arising from the same loan transaction in which the validity of the loan and security documents were challenged.

The question for determination by the Court of Appeal was whether the respondents having accepted to act for both the appellants and the Acceptances in the loan transaction between the appellants and the London Bank and the acceptances, they were in breach of their fiduciary relationship of client and advocate by representing the lenders in any litigation arising from the said loan transaction in which the validity of the loan and security documents were challenged.

Held:

1. Once the retainer is established, then the general principle is that an advocate should not accept instructions to act for two or more clients where there is a conflict of interest between those clients.

2. The retainer created a contractual relationship between the advocate and the client irrespective of whether two or more clients are involved. That is to say that the relationship is not tripartite, each client has a separate retainer relationship with the common advocate.

3. The respondents' advocates having accepted

to act for the appellants, the borrowers and the lenders, in putting together the loan transaction had a duty to the borrower and should not subsequently act for the lenders to enforce repayment of the loan because the advocate had obtained relevant knowledge of the borrower's financial position when acting for him in connection with the original loan transaction: in these circumstances, he would take unfair advantage prejudicial to the borrowers if he so acts for the lenders because of apparent conflict of interest.

4. 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 anyone else without that client's consent. That fiduciary relationship exists even after conclusion of the matter for which 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.

5. There exists no fiduciary relationship between the two or more clients of the common advocate.

6. Although the common advocate acting for two or more clients will be able to complete the transaction speedily and save 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 without the consent of the client in the retainer.

Appeal allowed.

Cases

1. *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] KLR 898; [1982-88] 1 KAR 639

2. *Radusen v Ellis Munday & Clerke* [1912] 1 Ch 831; [1911-13] All ER Rep 813

3. *Solicitors, Re a firm* [1992] 1 All ER 353; [1992]

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| | <p>QB 959</p> <p>4. <i>Supashare Retail Ltd v Coward Chance (affirm)</i> [1991] 1 All ER 668; [1990] 3 WLR 1278</p> <p>Statutes</p> <p>No statutes referred.</p> <p>Texts</p> <p><i>Orderly on Solicitors</i> 7th edition page 70</p> <p>Advocates</p> <p><i>Mr Kamau</i> for Appellants</p> <p><i>Mr Hiram</i> for the Respondents</p> |
| Court Division: | Criminal |
| History Magistrates: | - |
| County: | Nairobi |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Appeal allowed |
| History County: | - |
| Representation By Advocates: | Both Parties Represented |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |
| <p>The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.</p> | |

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Muli JA)

CIVIL APPEAL NO 55 OF 1993

KING WOOLEN MILLS LTD (formerly known as Manchester

Outfitters Suiting Division Ltd) & GALOT INDUSTRIES APPELLANTS

VERSUS

M/S KAPLAN & STRATON ADVOCATES..... RESPONDENTS

(Appeal from the ruling and order of the High Court of Kenya at Nairobi

(Mr Justice Shields) dated 25th February, 1993

in HCCC No 279 of 1993)

JUDGMENT

The appellants, the Manchester Outfitters Suiting Ltd and Galot Industries, are limited liability companies incorporated and registered in Kenya and carrying on the business of manufacturing clothes and property developers respectively. The former is a subsidiary company of the latter hereinafter collectively referred to as “the borrowers” where the context so requires. The respondents are a prominent firm of advocates practicing law in Kenya and based in Nairobi.

The 1st appellant negotiated successfully a loan from the Standard Merchant Bank Ltd, (the London Bank), through the East Africa Acceptances Ltd; another company incorporated in Kenya, (The Acceptances), to the tune of 1.3 million Deutsche Marks and 1.05 million Swiss Francs. The loan was guaranteed by the Acceptances Ltd, hereinafter collectively referred to as “the lenders” where the context so requires. The names of the 1st appellant and Acceptances appear to have changed but nothing turns on this.

The respondents were initially retained to act for the London Bank and the Acceptances during the negotiations and the preparation of the loan agreement and security documents.

The 1st appellant wrote to the respondents on 9th October, 1981, as follows:-

“M/S Kaplan & Stratton,

Advocates

PO Box 404111

Nairobi

Attn: Mr J M Kibuchi

Gentlemen,

We have negotiated a medium term loan for Kshs 12.00 million, from Standard Chartered Bank, (Merchant banking Division), through East African Acceptances Ltd, Nairobi

The loan is secured against an unconditioned guarantee from East African Acceptances Ltd (EAA). In turn we have agreed to a first legal charge on our property at Athi River, and a Debenture on the Assets of the company in favour of East African Acceptances Ltd.

The loan documents from Standard Chartered bank have now been received by East African Acceptances and they will shortly be instructing their advocates to draw up the legal charge and debenture. As you are aware, the property in question is in plot No2, of the land at Athi River. Since the main title and sub-titles are under registration, we would request you to confirm to East African Acceptance Ltd, as under.

1. That you are acting on our behalf through Galot Industries Ltd, in the matter of transfer and registration of titles this piece of land.
2. That you would be issuing a professional undertaking to surrender the title pertaining to plot 2, to East African Acceptances, upon receipt of the same, so as to register the legal charge as mentioned above.

Through this letter, we request you to issue the letter of undertaking, so that we could obtain the disbursement of loan at the earliest.

We understand that your firm would also be acting on behalf of East African Acceptance Ltd, and the loan documentation being forwarded by them for legal opinion. We would very much appreciate, if you could clear the documents on our behalf also and advise us accordingly.

Yours faithfully

Manchester Outfitters Suiting Division Limited

Signed

T R Laxman

Secretary”

This letter constituted the request by the 1st appellant that the respondents do act for them in clearing the loan and security documents as well as advising them accordingly. The 1st appellant received a copy of the letter from the respondents to the Acceptances informing them that the respondents were acting for the 2nd appellant in connection with the purchase of properties, one of which was to be offered to the Acceptances as security for the loan to the 1st appellant company and that the respondents would hold the Deed Plan, when released, to the Order of the Acceptances. As this letter is also relevant in the negotiations, I reproduce it's contents hereunder:-

“East African Acceptances Ltd

Stanbank House

Nairobi

Dear Sirs,

Galot Industries Ltd Purchase of LR Nos 1337 and 1338/2.

We represent Galot Industries Ltd in connection with the purchases of the above mentioned properties. When the transfers of the properties, which have been presented at the Land Office, are complete, a sub-division scheme which has already been approved by the Commissioner of Lands, will be implemented resulting in thirty sub-divisions of which one will be offered to you as security for a loan in the name of Manchester Outfitters Suiting Division Limited. We confirm that when all the formalities have been finalized, and the Deed Plan for the sub-division designated LR No 12867/1 is released by the Director of Survey, we shall hold the same to your order.

We understand that you will be instructing us separately in connection with the completion of a Legal Charge in your favour over the said property.

Yours faithfully,

Kaplan & Straton

Signed

J M Kibuchi

cc Manchester Outfitters Suiting

Division Limited
JMK/mb”

On the 23rd October, 1981, the Acceptances confirmed their instructions to the respondents as follows:-

“Messrs Kaplan & Straton

Queensway House

Kaunda Street

Nairobi

(Your Ref: JMK(23577)

Dear Sirs

Manchester Outfitters Suiting Division

We write with reference to your letter dated 16th October, 1981, and our earlier telephone conversation with Mr Keith and confirm as follows:

1. That you will approve on behalf of Standard Chartered Merchant Bank the Loan Agreement referred to in the letter of 1st October, 1981
2. You will approve on our behalf of the guarantee to be issued by us to Standard Chartered Merchant Bank, London and confirm Exchange Control approval thereof.
3. To act on our behalf in the preparation of all Assets Debenture to be issued to us by Manchester Outfitters Suiting Division.
4. To prepare a Legal Charge over Plot No 2 at Athi River. We observed your remarks that the factory was apparently being constructed on Plot No 1. The Company had in fact confirmed that the construction is Outfitters we do not think that we shall require any further tangible security since Manchester Outfitters is offering adequate security to cover the loan.

We enclose herewith a photocopy of Central Bank of Kenya letter of approval dated 26th August, 1981. We being carried out on Plot No 1. We therefore request you to prepare a Legal Charge over the plot or plot being occupied by the building.

Regarding the guarantee to be issued by Manchester Outfitters we do not think that we shall require any further tangible security since Manchester Outfitters is offering adequate security to cover the loan.

We enclose herewith a photocopy of Central Bank of understand that this letter has since been amended to cover the remittances of the loan and interest without having to produce evidence of receipt of machinery into the Country in an approved manner. This was necessary because our loan was not directly related to the importation of the machinery.

We assume that the Certificate of Approved Enterprise has erroneously been issued and we expect the borrower to obtain the correct Certificate of an Approved Enterprise in accordance with your advice.

We have been advised by Standard Chartered Merchant Bank, London that they would prefer Kaplan & Straton to draft a suitable guarantee and to submit the text to them for final approval. Regarding the borrowing powers of the Company we shall expect you to advise them to make the necessary amendments to the Memorandum of Articles of Association to enable the Company to borrow as necessary. This will be appropriate since we have no objection to your acting for Manchester Outfitters and ourselves. In the event of an apparent conflict of interest we expect you to advise us accordingly.

We note that you require a substantial deposit on account of legal expenses related to this transaction. We shall make arrangements to pay this as soon as you advise us of the figure.

Yours faithfully

For: East African Acceptances Limited

Signed

General Manager

Encls.”

On the same date, Mr K H W Keith for the respondents, wrote to Mr Mohan Galot, Chairman of the 2nd appellant's company as follows:-

“Mohan Galot Ese,

Chairman,

Galot Industries Ltd

PO Box 57387

Nairobi

Dear Mr Galot

Re: Standard Chartered Merchant Bank Limited Loan to Manchester Outfitters Suiting Division Limited

I refer to my meeting with you of yesterday and as arranged now enclose a copy of my letter of today's date to East African Acceptances Limited for your information and action where necessary.

As you will appreciate, East African Acceptances Limited and Standard Chartered Merchant Bank Limited are my principal clients in this particular transaction and accordingly if at anytime it appears that there is or there may be conflict between yourselves and East African Acceptances Limited, I must reserve the right to continue acting for them and ask you to seek independent legal advice. At the present time however, there does not seem to be any difficulty.

You agreed that you would expedite the obtaining of the sub-divisional land survey Deed Plan, so that the two sites presently owned by Galot Industries Limited could be transferred to Manchester Outfitters Suiting Division Limited as a matter of urgency. Will you please also forward to me a copy of the original Certificate of Incorporation of Manchester Suiting Division and Manchester Outfitters Limited together with further copies of the Memorandum and Articles of Association all certified by yourselves as being true copies of the originals. If the companies have passed any resolution amending the Memorandum and Articles of Association, I also require certified copies of those.

I also require a copy of the Central Bank's approval which you apparently hold for the borrowing so that I may ensure that it covers all matters which require Exchange Control approval.

Finally, you will recall that I discussed the likely amount of my Firms fees, which I estimate will amount to Pound 10,000. Of this I require Pounds 5000 to be paid now and I look forward to receiving this amount within the next few days, and the balance together with the disbursements or stamp duty etc should be paid when the documentation is ready for execution.

I will let you know as soon as I receive further instructions from East African Acceptances Limited with regard to the necessary revision to the Loan Agreement. As requested, I enclose a further copy of the Loan Agreement.

Yours sincerely,

Signed

K H W Keith

KHK/as

Encl.

This letter confirmed conclusion of the respondents acceptance to act for the appellants' as well as for the London Bank and the Acceptances. For the period from 1981, to 1982, the respondents so acted for the appellants, the borrowers, on the one part and the London Bank, the lender and the Acceptances, on the other part. They were thus accepted to act for the appellants as well as their principal clients (the London Bank and the Acceptances).

There was no dispute that the respondents so acted as the common advocate for the appellants, the London Bank and the Acceptances. During this period the formalities of the loan were successfully completed. The loan was guaranteed by the 1st appellant with the legal charge and all assets Debenture in favour of the Acceptances. The respondents had prepared the loan agreement, the guarantee, the debenture and the legal charge on behalf of the London Bank, the Acceptances and the appellants as well as furnishing the requisite legal opinion. There were also other transactions concerning the security property at Athi River. The loan agreement and the security documents were duly executed by the parties without any objection. The transaction having been successfully concluded the London Bank disbursed the loan to the appellants under the loan agreement.

In 1989, disputes arose between the appellants and the Acceptances resulting in an action being filed by the appellants in the High Court (HCCC Suit No 5002 of 1990) against the Acceptances and their appointed Receivers, particulars of which were pleaded in an Amended plain containing 39 paragraphs, a defence and counter-claim containing 62 paragraphs and a reply thereto containing 35 paragraphs. This suit is pending before the High Court and I will say no more about it except that on the eve of the resumed hearing of that suit, the appellants filed the present suit from which this appeal lies.

The appellants instituted the present suit against the respondents praying for a declaration that they were not entitled to represent or to act for the Acceptances, the London Bank, and the receivers or any other party which was involved in the borrowing transaction entered into between the appellants, the London Bank and the Acceptances. They also sought an injunction to restrain the respondents from breaching the terms of the client / advocate contract of retainer entered into by the appellants between 1981 and 1982.

The application by way of chamber summons for an injunction to restrain the respondents from so acting for the Acceptances and other associated companies or persons came up before the superior court (Shields, J) who in his usual short and crisp ruling dismissed the appellants' application with costs. Hence this appeal.

Mr Kamau, for the appellants filed some ten (10) grounds of appeal which he argued together. He advanced three proposition, namely:

1. An advocate who acts for both the purchaser and the seller will be restrained from acting for the seller in any action in which validity of any document is challenged by the borrower.
2. The principles upon which this Court will upset the decision of the High Court is laid down by Madan, J

in the *United India Insurance Co v EA Underwriters* CA No 36 of 1983.

3. That the respondents having drawn the loan agreement, the debenture, the legal charge as well as the legal opinion and their legal advice thereof on behalf of the lenders, and the appellants are disqualified from acting for the lenders and in any subsequent litigation or dispute arising from the same loan transaction in which the validity of the loan and security documents are challenged.

Looking at the grounds of appeal as a whole, we are of the view that these revolve around the above propositions and may be telescoped in one main ground, namely –

The respondents having accepted to act for both the appellants and the Acceptances in the loan transaction between the appellants and the London Bank and the Acceptances, are they in breach of their fiduciary relationship of client and advocate by representing the lenders in any litigation arising from the said loan transaction in which the validity of the loan and security documents are challenged. Put simply, is the advocate who acts for both the borrower and the lender in a transaction disqualified from acting or representing one of the parties or clients in any subsequent litigation concerning the said transaction" I am of the view that the points raised in the other grounds of appeal are incidental thereto.

It is not in dispute that the respondents accepted and acted for both the appellants, the London Bank and the Acceptances in all the transactions involving the loan to the appellants from the London Bank and the guarantee, the legal charge and the Debenture in favour of the Acceptances. Mr Keith of the respondents firm of Advocates was responsible for putting together the transaction. For all intents and purposes, he was the advocate for both the borrower (the appellants) and the lenders (the London Bank and the Acceptances). The fiduciary relationship of advocate / client existed upon Mr Keith's acceptance of the retainer from the appellants. This is quite clear from his letter of 23rd October, 1981, to the Chairman of the 2nd appellant: (*supra*) –

“As you will appreciate East Africa Acceptances Ltd and the Standard Chartered Bank Ltd are my principle clients in this particular transaction and accordingly if at any time it appears that there is or there may be conflict between yourselves and the East African Acceptances Ltd; I must reserve the right to continue acting for them and ask you to seek independent legal advice. At the present time however, there does not seem to be any difficulty.”

Thus there was a retainer – a contractual relationship between the appellants and Mr Keith on behalf of his firm whereby he undertook expressly or by implication to fulfil the appellants obligations in connection with the transactions involving the loan from 1981-1982.

Once the retainer is established, then the general principle is that an advocate should not accept instructions to act for two or more clients where there is a conflict of interest between those clients. Of course there are exceptions to this general principle in the instant case the respondents through Mr Keith were the advocates for their principle clients, the London Bank and the acceptances. They accepted the retainer from the appellants although they put a caveat that in the event of a conflict of interest arising between the appellants and their principal clients that they reserved the right to continue acting for that principal clients and to ask the appellants to seek independent legal advice. However, Mr Keith saw no conflict of interest at that time, although he foresaw such an eventuality arising subsequently.

The retainer created a contractual relationship between the advocate and the client irrespective of whether two or more clients are involved. That is to say that the relationship is not tripartite. Each client has a separate retainer relationship with the common advocate. For example like in the instant case, Mr Keith for the respondents having accepted to act for the appellants, the borrowers, and the lenders, in

putting together the loan transaction, he has a duty to the borrower and should not subsequently act for the lenders to enforce repayment of the loan because he had obtained relevant knowledge of the borrower's financial position when acting for him in connection with the original loan transaction. In these circumstances, he would take unfair advantage prejudicial to the borrowers if he so acts for the lenders because of apparent conflict of interest.

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 anyone else without that client's consent. That fiduciary relationship exists even after conclusion of the matter for which 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 fiduciary 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 client 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 the 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. As such the conflict of interest is apparent and the common advocate should not act for one of his client or clients against the other client or clients in a subsequent litigation arising from the original transaction or the subject matter.

I am persuaded to adopt the rule as has emerged since in *Rukusen vs Ellis, Munday and Clerk* as reported in *orderly on solicitors* 7th edition page 70.

"A solicitor who has been retained by a client is under an absolute duty not to disclose any information of a confidential nature which has come to his knowledge by virtue of a retainer, and to 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 damnify the client and award damages for breach. There is no general rule prohibiting a solicitor who has acted for one client in a matter acting for an opposite party in the same matter, but where a solicitor owes a duty to a third party which conflicts his duty to a particular client he is not relieved of his duty to that client."

In *Rakve v Ellis, Munday & Clerk* [1912] 1 Ch p 831 Conzens – Hardy MR as he then was put the principle as follows p 835:

"A solicitor can be restrained as a matter of absolute obligation and as a general principle from disclosing any secrets which are confidently reposed in him. In that respect, it does not very much differ from the position of any confidential agent who is employed by the principal. But in the present case we have to consider something further. It is said that in addition to the absolute obligation not to disclose secrets

there is a general principle that a solicitor who has acted in a particular matter, whether before or after litigation has commenced, cannot act for the opposite party under any circumstances, and it is said that that is so much a general rule and the danger is such that the Court ought not to have regard to the special circumstances of the case. I do not doubt for a moment that the circumstances may be such that a solicitor ought not to be allowed to put himself in such a position that, human nature being what it is, he cannot clear his mind from the information which he has confidentially obtained from his former client, but in my view we must treat each of the cases, not as a matter of form, not as a matter to be decided on the mere proof of a 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 his solicitor is allowed to act.”

The injunction was refused notwithstanding proof of contract of retainer and the general principle that once the solicitor has acted for a client, he should never act for the client or opponent client in a subsequent litigation arising from the transaction or subject matter for which he had acted for the client. Rukusen had consulted Munday and no one else. Clerke was on vacation and knew nothing about Rukusen’s consultation with Munday. The solicitors in the firm of Ellis, Munday and Clerke used to act for clients separately without the knowledge of the other solicitor. Clerke was a complete stranger to Rukusen’s communications to Munday. In the special circumstances of that case, there was no possibility of Clerke disclosing confidential information imparted to Munday by Rukusen. There was no mischief or probability of mischief or prejudice ever arising from clerke acting for the opponent company.

Rukusens v Ellis Munday & Clerke was considered in *Re-A Firm of Solicitors* [1992] 1 All ER 353, 354. In that case a firm acted for ASM. Both the firm and ASM received much confidential information from ASA and its subsidiaries which would be of value to Mr Derby in the main action and that they should not therefore be permitted to act for Mr Derby in that action. The issues raised in the main action were very closely bound up with the matters being investigated by ASM and the firm between 1982-1985.

It was held Parker, LJ p 354:

“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 (Per Parker L J and Sir David Croom-Johnson) 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 (per Stanghton L J) there was some degree of likelihood of mischief, ie of the confidential information imparted by the former client being used for the benefit of the new client. If (Stanghton L J dissenting) 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

2. (Stanghton LJ dissenting) On the facts, a reasonable man with knowledge of all the facts including the measures for a Chinese Wall proposed to be taken by the firm would, notwithstanding those measures, still consider that if the firm was allowed to continue to act for the defendant, there would be a risk that some of the confidential information provided by the ASA companies to the firm when it was acting for ASM might inadvertently be revealed to the firm’s team who were to act for the defendant. Accordingly, the appeal would be dismissed and the injunction restraining the firm from acting for the defendant would be continued...”

The facts in the present case are simple, Mr Keith of the firm of advocates (the respondents) acted for the appellants as borrowers and the lenders between 1981-1982 or thereabout. He was to put together a deal whereby the appellants were to borrow money from the lenders – the off-shore Bank through the

Acceptances. In all, Mr Keith drew up at least six documents and advised both his clients accordingly. It was not in dispute as evidenced by correspondence exchanged between the parties (*supra*) that contractual, fiduciary or retainer relationship existed between Mr Keith and the individual clients as their common advocate. That being the case the information imparted to Mr Keith by the individual clients was confidential. Mr Keith owed a duty to his individual clients not to disclose or divulge any confidential or secret information imparted to him in confidence to anyone else including the other clients in the loan transaction without the consent of the client imparting the confidential information. There is no doubt in my mind that to put together the loan transaction of this magnitude for the appellants to get the loan from the off-shore Bank, the appellants must have furnished much confidential information to Mr Keith to convince the off-shore Bank that they were viable. The many loan and security documents which were necessary to put together the loan transaction needed disclosure by the appellants of secrets and confidential information about themselves and their background. Mr Kamau for the appellants submitted that Mr Keith had knowledge of the appellants' financial positions and vulnerabilities."

Quite apart from the loan and security documents and the correspondence exchanged between the parties and in particular the preparation of the debenture whose validity is now challenged by the appellant, Mr Keith must have had much more confidential information to enable him to draw up the debenture and the other loan and security documents. The debenture, the loan agreement, the legal charge, the guarantee and the amendment of the appellant companies Memorandum and Articles of Association, in themselves may not be confidential because some of them had to be exchanged and executed by the appellants, the lenders and the Acceptances. Similarly the letters exchanged between the appellants and the respondents (*supra*) necessary for the preparation of the loan and security documents, in themselves may not be confidential because, by their very nature were necessary and common information to all the parties to enable Mr Keith to conclude the loan and security documents. Nevertheless, much more confidential and secret information must have been imparted to Mr Keith by the appellants. The lenders may not have imparted much confidential information for their desire was to be satisfied that the appellants were viable borrowers and the loan and security documents were watertight in their favour. I would imagine Mr Keith of the respondents firm enquiring from the appellants of their viability, background and financial standing. For instance I would imagine Mr Keith asking whether the appellant companies were solvent or not. Whether they had borrowed from the local banks and if so whether the loans so raised had been liquidated, whether there were pending suits, whether there were pending suits against the appellant companies, the assets and liabilities of the appellant companies, the financial turn-over of the appellants' companies business, creditors of the appellant companies, whether or not any of the directors of the appellants companies has been declared bankrupt or discharged bankrupt and so forth. The questionnaire may not be exhaustive. This information imparted to Mr Keith on these and such other question is confidential and secret between the appellants, Mr Keith and the respondents and should never be revealed to anyone else including the lenders without the appellants' consent. It was confidential information and secrets of the appellants imparted to Mr Keith and the respondent in confidence under retainer to enable Mr Keith to successfully conclude the loan as transaction. Mr Keith and the respondents had knowledge of this vital confidential information which would, in all probabilities, damnify the appellants in the pending suit between the appellants and the Acceptances to which the respondents have been acting and intend to act for the Acceptances and their appointed receivers against their former clients, the appellants in the original loan transaction.

The respondent's case is based on the affidavit of Mr Keith in opposition to the Chamber Summons dated 2nd February, 1993. Mr Keith admitted that there existed a contract of retainer by both the appellants who also knew the existence of the retainer by the lending London Bank and the Acceptances. As a matter of practice, Mr Keith deponed that it is common in Kenya for the advocates instructed by the lending Financial Institution or Bank also to act for the borrowers for conveniences of speed, saving costs and lack of conflicts which cannot be resolved. According to Mr Keith, there was an

express term of the retainer that in the event of any conflict arising between the appellants and the lending bank or the Acceptances, the respondents reserved the right to continue to act for the lending bank and the Acceptances. He also believed that there was an implied term of the retainer that all information from all clients would be made available to the other clients who were parties to the original loan transaction, unless the client providing the information expressly stipulated that the information was to be kept confidential from one or more of the other parties. That he had never received any request that he should treat any information confidential as against the other clients involved in the transaction. That no conflict arose during 1981 and 1982 during preparation of the loan and security documents. That he never acted for the parties thereafter although he acted for the Acceptances in the appointment of Receivers and Managers who were appointed in September, 1990. That at no time did the appellants complain or object to the respondents continuing to act for the Acceptances until after the hearing of the main suit had commenced and at no time did the appellants complain about the validity of the Debenture until the allegation appeared for the first time in the re-amended plaint.

In his opinion, Mr Keith deponed as follows in Paragraph 32:

"I verily believe that it would cause a great injustice to SCFS and the Receivers if they were forced to change advocates in the middle of the hearing as complex as this particularly when the plaintiffs have acquiesced in their continued representation by the defendants for so long and there is no information in the defendants' possession of a confidential nature which it acquired from the first plaintiff. It will be extremely difficult, time consuming and costly for another firm to become fully familiar with all the details of the case. It may well necessitate an adjournment which would be very lengthy given the commitments of Counsel and the congestion in the Courts which will probably be made worse by the impending Election Petitions. SCFS and the Receivers are at the moment constrained by an interim injunction from enforcing their security until the hearing so that it is of the utmost importance to them that there is a speedy hearing".

Quite apart from the affidavit containing argumentative statements, the above is pure opinion of Mr Keith and Mr Deverell who is conducting the defence in the main suit.

Mr Guram for the respondents submitted firstly that there was no confidential information imparted to Mr Keith by the appellants and secondly there was no possibility of real mischief arising if the respondents are allowed to continue acting against their former client, the appellants. The thrust of the respondents' case is that there was no confidential information pleaded in the re-amended plaint and none can exist in a transaction where the advocate is acting for two or more clients because he owed all the clients a duty under the retainers.

I do not think for a moment that it can be argued that no confidential information existed because the respondent were acting for the appellants, the lending bank and the Acceptances in the original loan transaction. The very nature of the contract of retainer imposed a duty on Mr Keith to treat the information imparted to him by the appellants as confidential. It also imposed on him an obligation not to disclose such confidential information to anyone else including the other clients involved in the transaction without the consent of the client providing the confidential information in this case the appellants. Nor do I think for a moment that it can be argued that the duty and obligations imposed on him as a common advocate ceased after conclusion of the transaction for which the retainers were made. Further, the mere delay in raising the point of objection to the respondents continuing acting against the appellants does not defeat or change the duty or the obligations of the common advocate imposed on him under the retainer. Mr Keith has already admitted that he had discussed the transactions with Mr Deverrel, and the advocate of the respondents' firm.

The learned trial judge refused the injunction sought on the following lines –

“I must confess I envisage no sort of confidential information disclosed by the borrowers to his solicitors or his advocate that could by being disclosed to the lender, would work any mischief to the borrower’s detriment”.

With greatest respect this was a misdirection. The learned trial judge failed to appreciate that the information under the retainer was confidential *ab initio*. Although he applied the principle correctly, he failed to appreciate that the respondents may have had more confidential information. He also failed to appreciate that the validity of one of the security documents was challenged in the main suit and that the respondents being the authors thereof knew much more behind the documents than is apparent on the documents and are bound to use that knowledge at the trial against the appellants; their former clients.

Mr Keith admitted in his affidavit (*supra*) that he had a discussion with Mr Laxman and Mr Mohan Galot on 25th March, 1982 when they discussed the Debenture now under challenge to provide additional facilities. This discussion was confidential with the result that if the respondents are permitted to continue to act for the Acceptances, the information imparted during those discussions will be used by the respondents to defeat the very challenge of the validity of the Debenture by the appellants.

I have used the phrase “Mr Keith and the respondents” because, unlike in *Rukusen v Ellis, Munday and Clerke’s* case where Mr Munday alone acted for Rukusen separately and independently with exclusive knowledge while Mr Clerke was on holiday and unaware of the communication imparted to Mr Munday by Mr Rukusen, this is not so in the present case for there is evidence of other advocates, Mr Kibuchi and Mr Deverrel of the same firm of the respondents acting for the same parties during the period in question. The respondents had imputed knowledge of the vital confidential information imparted to Mr Keith by the appellants – So I hold.

Reverting to the consideration of the main issues, Counsel referred us to the recent decision in *Supasave Retail Ltd v Coward Chance and others* [1991] 1 All ER p 668 in which *Rukusen v Ellis, Munday & Clerke* and *Re A Firm of solicitors (supra)* were applied and followed. In that case Sir Nicolas Browne – Wilkinson V-C summed up the general rule at p 673 as follows:-

“The English law on the matter has been laid down for a considerable period by the decision of the Court of Appeal in *Rukusen v Ellis, Munday & Clerke* [1912] 1 Ch 831... The law as laid down there is that there is no absolute bar on solicitor in a case where a partner in a firm of solicitors has acted for one side and another partner in that firm wishes to act for the other side in litigation. The law is laid down that each case must be considered as a matter of substance on the facts of each case. It was also laid down that the Court will only intervene to stop such a practice if satisfied that the continued acting of one partner in the firm against a former client of another partner is likely to cause (and) real prejudice to the former client unhappily, the standard to be satisfied is expressed in numerous different forms in *Rukusens* case itself. Cozens – Hardy MR laid down the test as being that a Court must be satisfied that real mischief and real prejudice will, in all human probability result if the solicitor is allowed to act As a general rule, the Court will not interfere unless there be a case where mischief is rightly anticipated”.

Applying the above tests to the facts in the present case, I must be satisfied that real mischief or real prejudice are rightly anticipated. It must be remembered that the pending main suit prays for declaration that the security documents and in particular, the Debenture are unenforceable and should be discharged. The appointment of Receivers and Managers is also unenforceable being based on invalid security documents. There are other prayers in the main suit all arising from the loan transaction and the

appointment of Receivers and Managers. The loan and security documentation as well as transactions for the appointment of Receivers and Managers were all drawn by Mr Keith on behalf of the respondents. In order to conclude these documents much more confidential information was imparted to Mr Keith by the appellants. Mr Keith also acted for the defendants in the main suit to enforce realization of the loan securities on the ground of non-repayment of the loan. I have no doubt in my mind that the respondents will consciously or unconsciously or even inadvertently use that confidential information acquired from the appellants under the retainer during preparation of the loan agreement and the security documents as well as knowledge of subsequent events against the appellants in the main suit. The result will be that the appellants will not only be confronted with their own confidential information but will suffer great injustice and prejudice during the trial of the main suit. Mr Keith admitted in his affidavit that the defendants in the main suit will suffer great injustice if they changed advocates at this late hour when the main suit is pending as part-heard. If great injustice is to be suffered by any party, it will be the appellants who have so far engaged several advocates on several occasions in an attempt to get one to represent them in this suit which Mr Keith describes as "complex". I am of the view that the appellants will suffer prejudice if the respondents are allowed to continue acting for the defendants in the main suit. I am also satisfied that it cannot be said that the respondents will not take unfair advantage of the confidential information they acquired from the appellants during the formation of the loan transaction to defeat the appellants case during the hearing of the main suit. There is a dispute as to the validity of the Debenture and Mr Keith admitted having disclosed what was discussed between him, Mr Laxman and Mr Mohan Galot regarding the excess facilities provided thereunder. This alone is a mischief because the information will now be thrown at the appellants faces in an attempt to uphold the validity of the Debenture. The extent of the confidential information acquired from the appellants between 1981-1990 and which is now in the possession of the respondents is not know but is there. There has been no measures taken to protect disclosure of that information even by the use of the impregnable barrier of a Chinese Wall to prevent that confidential information being used against the appellants at the trial of the main suit.

Mr Guram sought to distinguish the *Rukusens* case (Supra) on the facts of this case on the ground that although there was confidential information, that information was not known by Mr Clerke. Hence refusal of the injunction. He also sought to distinguish *Re" A Firm of Solicitors* case on the ground that the confidential information was contained in a long letter whose contents appear in the judgment, hence grant of the injunction. In *Supasave Retail v Cowards Chance's* case, injunction was granted because no adequate measures were taken to prevent disclosure of the confidential information. Mr Guram submitted further that if there be breach of the duty and obligations of the respondents in respect of any disclosure of confidential information, the appellants remedies, other than injunctions, lay elsewhere. I do not agree. The appellants are perfectly entitled to take any measures including issuance of an injunction to stop mischief and prejudice occurring at the trial of the main suit.

I have considered authorities which were cited by both counsel and their submissions and have come to the firm conclusion that real prejudice and real mischief are anticipated if the respondents are permitted to act for the defendants in the main suit.

In the result, I would allow this appeal, set aside the Ruling and orders of the superior court. I would grant an order for injunction to restrain Mr Keith and any partner in the respondents firm of advocates from continuing to act for the defendants in the main suit or in any litigation or proceedings arising from the loan transactions of 1981 – 1982. I would award costs of the appeal to the appellants. As Cockar and Akiwumi J J agree judgment is hereby entered on the terms I have proposed.

Dated and Delivered at Nairobi this 16th day of December, 1993,

M.G. MULI

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JUDGE OF APPEAL



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