

Marshall Islands

Kabua Kabua v. Imada Kabua and Kwajalein Atoll Corporation

Supreme Court
Burnett C.J.; Gunatilaka and Hefner A.J.J.
18 April 1988

- Attorneys—counsel attempted to elicit information from or negotiate with opposing party without consent of opposing party's counsel—whether such counsel had acted unethically—whether such counsel should be disqualified.*
- 10 *Attorneys—counsel for defendant had previously acted for plaintiff in a criminal action—whether counsel should be disqualified from case.*
- Attorneys—counsel for stakeholder—position taken adverse to plaintiff—whether counsel should be disqualified from case.*
- Courts and judges—motion to disqualify sitting judge—standard of “threat to purity of judicial process and its institutions”—whether judge abused discretion.*
- Pleading and practice—joinder of “indispensable party”—Rule 19 of Marshall Islands Rules of Civil Procedure—whether plaintiff “refusal” to name indispensable party—whether burden of joinder of absent parties rests with party asserting necessity of joinder.*
- 20 *Pleading and practice—indispensable party—whether court should order parties to be joined—whether plaintiff's action should be dismissed for failure to amend complaint.*

The Kwajalein Atoll Corporation (K.A.C.) receives a large sum of money annually as a rental payment for use of the Kwajalein Atoll. (See *Observations* for further discussion of facts.) The plaintiff, Kabua Kabua, filed an action against K.A.C. and Imada Kabua seeking a declaration that the plaintiff be recognized, and not Imada Kabua, as the person entitled to receive money previously paid to a predecessor in interest. In 1984 the Court ordered that Amata Kabua, the senior Iroij and traditional paramount chief, as well as constitutional president, be joined as an indispensable party. Appellant voluntarily abandoned that action and began again with actions against Imada Kabua and against K.A.C. (but not against Amata Kabua).

The defendant Imada Kabua sought joinder of other parties and plaintiff Kabua Kabua did not join other parties. The Court then ordered the plaintiff's actions dismissed because he did not join Amata Kabua, pursuant to the order in the previous, but abandoned, action. The plaintiff (now the appellant) appealed against that dismissal. In addition, three motions for disqualification of counsel and one motion for disqualification of the sitting judge were joined in this appeal. The only motion granted below was the disqualification of counsel for the appellant. Motions for disqualification of counsel for both defendants (appellants here) and disqualification of the judge had not been granted. The motion for disqualification of counsel for K.A.C. was directed at the adversarial stance taken by K.A.C., as actively

40 opposing the plaintiff's action.

HELD:

- (1) The plaintiff's actions should not have been dismissed. If indispensable parties were to be joined, the burden was on the defendant (who moved the joinder) to name the parties and prove their indispensability.
- (2) Counsel for the plaintiff had properly been disqualified because he had unethically approached an opposing party.
- (3) Counsel for the defendant Imada Kabua was properly allowed to continue; his defence of the plaintiff in another action years before would not be relevant to this matter.
- (4) Counsel for defendant K.A.C. was properly allowed to continue; any fault was that of his client, K.A.C.
- (5) K.A.C. is to be regarded as a stakeholder, not an adversary, and to abide by the result. K.A.C. shall not further distribute land use payment funds.

Editorial Observation:

This long-running litigation concerns the enormous sums being paid by the U.S. Government for the use of Kwajalein Atoll. Kwajalein is the world's largest coral atoll, some 840 square miles in total area. Intercontinental missiles are fired from Vandenburg Air Force Base, in California, thousands of miles across the Pacific, to splash down in the Kwajalein lagoon. One of the ninety-odd atoll islands, also known as Kwajalein, is the centre of the tracking and monitoring facility, with some 2000 U.S. government employees or dependants.

Amata Kabua, the non-joined indispensable party in this case, has been President of the Republic of the Marshall Islands from independence.

See the Compact of Free Association which is usefully set out in Blaustein and Blaustein, "The Constitutions of the Marshall Islands", *Constitutions of Dependencies and Special Sovereignties*, vol. VII.

Other cases referred to in judgment:

- Bakia v. Southwestern Cotton Oil Co.* 586 F.2d. 191 (10th. Circ. 1987)
Cleveland v. Douglas Aircraft Co. 509 F.2d. 1027 (9th. Circ. 1975)
Day v. Video Connection 602 F. Supp. 100 (N.D. Ohio 1982)
Defenders of Wild Life v. Andrus 77 F. R.D. 448 (D.D.C. 1978)
English v. Seaboard Coast & Railroad Co. 465 F.2d. 43 (5th. Circ. 1972)
Hall v. Kroger 520 F.2d. 1204 (6th. Circ. 1975)
Industrial Bldg. Materials v. Interchemical Corp. 437 F.2d. 1336 (9th. Circ. 1970)
Kearns v. Fred Lavery 573 F. Supp. 91 (E.D. Mich. 1983)
Kop v. Trust Territory 4 T.T.R. 336 (Tr.Div.Truk. 1969)
Lanigan v. La Salle Nat. Bank 108 F.R.D. 660 (N.D. Ill. 1985)
McCorstin v. U.S. Dept. of Labor 630 F.2d. 242 (5th. Circ. 1980)
Meat Price Investigators Ass'n. v. Spencer Foods 572 F.2d. 163 (8th. Circ. 1978)
Moore v. St. Louis Music Supply Co. 539 F.2d. 1191 (8th. Circ. 1976)
Nemeroff v. Ableson 620 F.2d. 339 (2d. Circ. 1980)
Northern Environmental Center v. Hodel 803 F.2d. 466 (9th. Circ. 1986)
Potashnick v. Portcity Const. Co. 609 F.2d. 1101 (5th. Circ. 1980)
Provident Bank v. Patterson 390 U.S. 102, 88 S. Ct. 733, 19 L. Ed. 2d. 936 (1968)
Sierra Club v. Watt 608 F. Supp. 305 (D.C. Cal. 1985)
Solargen Elec. Motor Car Corp. v. Am. Motors Corp. 530 F. Supp. 22 (S.D.N.Y. 1981)
T.C. Theater Corp. v. Warner Bros. Pictures Inc. 113 F. Supp. 265 (S.D.N.Y. 1953)

90 *Thorne v. City of El Segundo* 726 F. 2d. 459 (9th. Circ. 1983)
Trone v. Smith 621 F. 2d. 994 (9th. Circ. 1980)
Unified Sewerage Agency etc. v. Jelco Inc. 646 F. 2d. 1339 (9th. Circ. 1981)
United States v. Mt. Vernon Memorial Estates 734 F. 2d. 1230 (7th. Circ. 1984)
Weingart v. Allan 654 F. 2d. 1096 (5th. Circ. 1981)

Legislation referred to in judgment:

Code of Professional Responsibility, Disciplinary Rule 7-104
Code of Professional Responsibility, Canon 9
Federal Rules of Civil Procedure, rules 11, 19, and 41(a)(1)
Marshall Island Republic Rules of Civil Procedure (M.I.R.C.P.), rules 11, 15, 19, 21,
100 33, and 41

Legal sources referred to in judgment:

5 *Moore's Federal Practice*, para. 41.05(2) (1982)
1B *Moore's Federal Practice*, para. 0.441(4)

HEFNER A.J.

Judgment:

On appeal before this Court are various orders of the trial court in these two consolidated cases. Foremost of those orders is one that dismisses both of these actions for various asserted procedural transgressions committed by the appellant.

110 Additionally, in what appears to be a rash of discontent among counsel, there are three orders of disqualification or non-disqualification of counsel.

Finally, there is an order denying the disqualification of a trial judge.

Finding support for the latter four rulings we affirm those. However, convinced of the trial court's misapplication and erroneous interpretation of the rules of civil procedure, we reverse the dismissals and remand to the trial court for further proceedings.

I. Procedural History

In order to properly and completely understand the current posture of this case and the issues presented on appeal it is necessary to set forth the procedural history of civil action numbers 1984-98 and 1984-102, as well as civil action no. 1984-84.

120 A. *Civil Action No. 1984-84*

On 17 August 1984 Kabua Kabua (hereinafter "appellant") filed civil action no. 1984-84 (hereinafter "1984-84") against the Kwajalein Atoll Corporation (hereinafter "K.A.C.") and Imada Kabua seeking a declaration that the appellant be recognized as the person entitled to receive land use payments from the K.A.C. formerly paid to Irojlablab Manini Kabua.¹ This suit also sought monetary damages against K.A.C. and an injunction preventing the payment of further land use payments to Imada Kabua.

On 22 August 1984 High Court Chief Justice Lanham, *sua sponte*, issued an order

1. K.A.C. acts as the recipient of money from the U.S. Government for land use payments and then distributes the money to the landowners.

130 requiring, in essence, that the appellant join Iroijlablab Amata Kabua as an indispensable party "by appropriate process" and that K.A.C. "inform plaintiff (appellant) as soon as practicable of any other persons who are claiming, or whom they believe will claim, the Iroijlablab title being contested herein, in order that plaintiff (appellant) may also join them as indispensable parties defendant in this action".

On 19 September 1984 a hearing was held on the appellant's motion for a preliminary injunction. This motion was denied on the grounds that, *inter alia*, certain indispensable parties had not been named in the lawsuit. On 17 October 1984, and before any answers were filed, the appellant voluntarily dismissed the action.

140 B. *Civil Action Nos. 1984-98 and 1984-102*

On 23 October 1984, appellant filed civil action no. 1984-98 (hereinafter "1984-98") against Imada Kabua seeking a declaration that the appellant is the rightful holder of the Iroijlablab title. On 26 October 1984 the appellant filed a "Memorandum Opposing Compulsory Joinder" seemingly in anticipation of arguments that he not be allowed to proceed without joining additional parties as was ordered in 1984-84.

On 2 November 1984 the appellant filed civil action no. 1984-102 (hereinafter "1984-102") seeking an order restraining K.A.C. from distributing land use payments pending resolution of 1984-98. A temporary restraining order was issued in 1984-102 on 21 November 1984 enjoining K.A.C.'s distribution of the money. Subsequently, on 29 January 1985 the trial court granted the appellant's motion for a preliminary injunction preventing K.A.C. from distributing any of the disputed funds.

In January of 1985 the People of Bikini moved to intervene in 1984-98 on the ground that adjudication of the Iroijlablab title might involve Bikini Atoll. None of the parties objected and the trial court permitted their intervention.

On 5 May 1985, then counsel for the appellant, Benjamin Abrams, spoke with appellee Imada Kabua at the Majuro Airport. Apparently Mr. Abrams sought to elicit information from the appellee regarding 1984-98.

On 16 May 1985 Imada Kabua filed an application for admission *pro hac vice* seeking to have David Lowe admitted as his co-counsel. On 17 May 1985 the appellant moved to disqualify Mr. Lowe from representing Imada Kabua as Mr. Lowe had previously represented the appellant in a criminal action.

On 28 May 1985 the appellant filed a motion to disqualify George Allen, counsel for K.A.C. On 2 August 1985 the trial judge ordered that Mr. Allen be disqualified as counsel for K.A.C. This order is not on appeal. Subsequently, on 27 August 1985 Francis O'Brien was retained as counsel for K.A.C.

On 10 July 1985 the appellee Imada Kabua filed a motion to disqualify Mr. Abrams as the appellant's counsel. On 29 July 1985 hearings were held on the cross-motions to disqualify Lowe and Abrams. The Court in a written order dated 23 August 1985 found that on 5 May 1985 Abrams had attempted to discuss settlement with Imada Kabua at the Majuro Airport and that this was done without the knowledge or consent of the appellee's attorney. The Court then ordered Abrams disqualified from further participation in 1984-98. On 9 September 1985 the appellant's new counsel, Douglas Cushnie, argued the appellant's motion for a stay pending appeal of the order disqualifying Abrams. This motion was summarily denied.

Also on 23 August 1985 the Court issued a written order denying the appellant's motion to disqualify Lowe finding that, *inter alia*, the issues presented in 1984-98 were completely different from those in the appellant's criminal case heard nine years earlier, and that Lowe, in the course of this prior representation, did not receive any confidential information about the appellant's geneology.

On 9 September 1985 a status conference was held at which the parties were asked to disclose all motions they anticipated filing in 1984-98. A status conference order was filed to this effect on 10 September 1985.

On 18 September 1985 K.A.C. filed a motion to disqualify Abrams from participation in 1984-102. This motion was heard on 30 September 1985 at which time the Court entered an order disqualifying Abrams from participation in 1984-102. This order was subsequently filed on 2 December 1985.

On 30 September 1985 the appellant moved to disqualify Judge Doi based on his association with the appellant while the appellant was a District Judge in Majuro, claiming that Judge Doi was personally biased against the appellant. On 6 November 1985 a hearing was held before Judge Soll on this motion. On 2 December 1985 Judge Soll issued an order denying the appellant's motion to disqualify Judge Doi.

On 7 November 1985 the appellant's motion to disqualify O'Brien as counsel for the K.A.C. was denied and a written order to this effect was filed 2 December 1985. Also on 7 November 1985 K.A.C. moved to consolidate 1984-98 and 1984-102 and brought a motion to dismiss the appellant's claims for failure to join necessary parties. At this time appellee Imada Kabua filed a motion to require joinder and a motion to dismiss.

On 26 February 1986 the Court granted K.A.C.'s motion to consolidate 1984-98 and 1984-102. Also on that date the appellant filed a document entitled "First Amended Complaint" naming as appellees various individuals believed to be claiming the Iroijlablab title.

C. The Trial Court's Rulings

On 27 April 1986 Judge Doi entered his "Findings of Fact and Conclusions of Law"² in the consolidated cases. Judge Doi dismissed the actions without prejudice, and attached as a condition to reinstatement of any litigation arising out of the appellant's claim to the Iroijlablab title, the requirement that the appellant pay all costs, including travel costs for parties, witnesses, and attorneys, excluding attorney's fees, incurred by appellees Imada Kabua, K.A.C., and the people of Bikini in defence of 1984-98 and 1984-102.

Specifically, the dismissal was based on the Court's following determinations, *inter alia*.

2. It is conceded that the appellees prepared this document. As such, these findings and conclusions, prepared by a non-objective advocate, might not fully and accurately reflect the thoughts entertained by an impartial judge at the time of his initial decision (*Industrial Bldg. Materials v. Interchemical Corp.* 437 F.2d 1336, 1339 (9th. Cir. 1970)). The definite trend, at least in the U.S. federal courts, is to avoid having counsel prepare the findings and conclusions of the court. The chance of an "overkill" is thus avoided. These cases appear to be classic examples of the pitfalls that can occur when zealous advocates prepare a decision for an impartial judge. This Court also views the nomenclature used—Findings of Fact and Conclusions of Law—as an anomaly. M.I.R.C.P. Rule 41 provides for findings and conclusions for any action *tried* in the High Court and for the subsequent entry of the appropriate judgment based on findings and conclusions. Obviously, such was not the case here. Be that as it may, this panel will review the document as a final order subject to appeal as any other order of dismissal. See *Thorne v. City of El Segundo* (9th. Cir. 1983) 726 F. 2d 459, 468.

1. The appellant was aware of the identities of the certain indispensable parties prior to August 1984.
2. The following individuals "are or may be indispensable parties to this action within the meaning of Rule 19, Rules of Civil Procedure: (1) Amata Kabua; (2) Imada Kabua; (3) Michael Kabua; (4) Anjojo Kabua; (5) Kitlan Kabua; (6) Jikul (Seagull) Kabua; (7) the People of Bikini; (8) the Republic of the Marshall Islands; (9) K.A.C.; and (10) Drile James". Notably the Court expressed "no opinion" as to whether these individuals or entities may be properly joined as parties to this or any other action relating to the Irojlablab title. Nor did the Court express any opinion as to whether these above-listed individuals and entities are the only indispensable parties.
3. The appellant's failure to name the indispensable parties in a timely, appropriate fashion was "conscious and deliberate".

II. What is Effect of Civil Action 1984-84 on 1984-98 and 1984-102?

The appellant voluntarily dismissed civil action no. 1984-84 in October of 1984 pursuant to M.I.R.C.P. Rule 33(a)(1).³ This rule allows an appellant to dismiss his complaint without any order of the court. This dismissal must be accomplished before the appellee files an answer. Such was the case in 1984-84.

It is a well settled proposition that if an action is voluntarily dismissed without prejudice pursuant to Federal Rule 41(a)(1) (M.I.R.C.P. 33(a)(1)), the parties are left as if the action had never been brought (*Moore v. St. Louis Music Supply Co.* 539 F.2d 1191, 1194 (8th. Circ. 1976); *Cleveland v. Douglas Aircraft Co.* 509 F.2d 1027, 1029-30 (9th. Circ. 1975); *Hall v. Kroger* 520 F.2d. 1204, 1205 (6th. Circ. 1975); see also, 5 J. Moore, *Moore's Federal Practice* 41.05(2) (1982)). For this reason civil action no. 1984-84 is of no consequence for purposes of these actions. Indeed, the Court should view 1984-84 as if it had never existed. Therefore, civil action no. 1984-84 cannot be said to be determinative of the identity of any "indispensable" party to the present action, nor does it provide any basis for collateral estoppel or issue preclusion in any subsequent lawsuit.⁴

III. Did Court Abuse Discretion?

Did the trial court abuse its discretion by dismissing the appellant's complaint,

3. Rule 33(a)(1) is identical to Federal Rule of Civil Procedure 41(a)(1). Except in certain instances, the M.I.R.C.P. mirror the federal rules. Therefore this Court will look to United States cases for interpretation and application of similar or identical rules (*Kap v. Trust Territory* 4 TTR 336, 338 (Tr. Div. Truk 1969)).

4. Appellee Imada Kabua claims that the order of Judge Lanham in 1984-84 is determinative for all subsequent proceedings citing *United States v. Mt. Vernon Memorial Estates* 734 F.2d. 1230 (7th. Circ. 1984) and *Defenders of Wild Life v. Andrus* 77 FRD 448 (D.D.C. 1978). A review of those cases does not support this conclusion. The cases were not 41(a)(1) dismissals. Furthermore, the issue preclusion doctrine was applied in those cases because the issues were fully litigated and the decisions were not tentative. See 1B J. Moore, *Moore's Federal Practice* 0.441[4].

In his order, Judge Lanham, *sua sponte*, found that Amata Kabua may be an indispensable party. The basis of this determination was a probate case filed in the High Court for the probate of the personal property of Iroj J. Lojelan Kabua. Exactly how this relates to the successor of Irojlablab Manini Kabua is not discerned. Judge Lanham referred to Rule 21 M.I.R.C.P. as authority for his *sua sponte* action. The few cases found which have applied Rule 21 reveal that the cases had proceeded to such a point that either with or without a motion being made the indispensable party was clearly identified and his/her claim established. See, for example, *Day v. Video Connection* 602 F. Supp 100 (N.D. Ohio. 1982) and *Lanigan v. La Salle Nat. Bank* 108 F.R.D. 660 (N.D. Ill. 1985).

without prejudice, pursuant to M.I.R.C.P. Rule 33, where the appellant failed to properly name certain parties pursuant to M.I.R.C.P. Rule 19?

A. Standard of Review

The determination and propriety of a dismissal of an action for failure to join an indispensable party is within the discretion of the trial court and the standard of review is abuse of discretion (*Bakia v. County of Los Angeles* 687 F.2d.299,301 (9th. Circ. 1982); *Northern Environmental Center v. Hodel* 803 F.2d.466,468 (9th. Circ. 1986)).

B. Rule 19

Rule 19 of the Marshall Islands Republic Rules of Civil Procedure (M.I.R.C.P.) mirrors Rule 19 of the Federal Rules of Civil Procedure (F.R.C.P.). As such, M.I.R.C.P. Rule 19 carries the construction placed upon it by the Federal Courts. See, *Kap v. Trust Territory*, *supra* 4 T.T.R. 336, 338.

1. *Burden of Persuasion*—Much has been made of who has the burden of asserting that a nonjoined party must be joined as indispensable under Rule 19. The Court below found that plaintiff's "refusal" to name the asserted indispensable parties demonstrated "bad faith". However, refusal to join contemplates a motion to require joinder. Although defendant Imada Kabua did file a motion to require joinder coupled with his motion to dismiss, joinder was never actually ordered by the trial court.

Cases involving Rule 19 seldom address the issue of which party has the burden of naming absent, indispensable parties. The reason for this is obvious. If the plaintiff wishes to sue "indispensable" parties, he/she just names them in the complaint. It is the opposing party who must raise the concern or need to add parties.

The Court in *Sierra Club v. Watt* 608 F. Supp. 305 (D.C. Cal. 1985) found that the burden of joining absent parties rests with the party asserting the necessity of their joinder. The Court in *Sierra Club* noted two important reasons for its conclusion. First, that such an allocation is consistent with the allocation of burden in most cases, in that the issue of nonjoinder is ordinarily brought before the Court by a motion to require joinder or dismissal, and the general rule is that the proponent of a motion bears the burden of proof. Secondly, when a party in a lawsuit has raised the issue of joinder, that party has the burden of persuading the Court that joinder is necessary, citing *Provident Bank v. Patterson* 390 US 102, 111, 88 S. Ct. 733, 738, 19 L.Ed.2d 936 (1968); *Sierra Club v. Watt supra* 608 F. Supp at 320-1.

Throughout this suit appellees have asserted that certain parties were indispensable to this action. Yet only appellee Imada Kabua filed a motion to require joinder. It was the burden of the appellee to: (1) identify the indispensable parties; and (2) persuade the Court that they were actually indispensable.⁵ The Court below abused its discretion by not requiring the appellee to meet this burden and to fulfil its obligations under Rule 19.

2. *Rule 19 Requirements*—Rule 19 requires a trial court to engage in a two-step

5. The Rule 19 motion of Imada Kabua filed on 6 November 1985 is patently defective. It attempts to put the burden on the appellant to name the indispensable parties and consequently neither names the indispensable parties nor shows why they are indispensable. (See pp. 3, 5, 7, and 8 of appellee's motion.)

analysis. The first step is to consider whether nonjoinder would prevent the award of complete relief, or the absentee's interests would otherwise be prejudiced or the persons already parties would be subject to a substantial risk of double or inconsistent obligations. *Bakia v. County of Los Angeles*, supra 687 F. 2d. at 301 (emphasis added). Although there is no precise formula for determining whether a particular non-party should be joined under Rule 19(a), underlying policies include the plaintiff's right to decide whom he shall sue, avoiding multiple litigation, providing the parties with complete and effective relief in a single action, protecting the absentee, and fairness to the other party (*id.*).

The second required step is to decide under Rule 19(b) whether "in equity and good conscience" a court should proceed without the absent party. *Provident Bank v. Patterson*, supra, 390 U.S. at 109, 88 S. Ct. at 737. Rule 19(b) then goes on to list four factors to be considered in making this determination.

In the present case, the trial court did not engage in the above-cited required analysis. With regard to the first step, the Court found only that certain named individuals or entities "may or may not be indispensable parties to this action within the meaning of rule 19". The Court then specifically expressed "no opinion" as to whether these individuals or entities could be properly joined to this action or whether they were the only indispensable parties. Consequently, in expressing no opinion as to what, if any, nonjoined parties were indispensable to this action, the Court was not able to consider whether the nonjoinder of these parties would prevent an award of complete relief, whether their interests would be prejudiced, or whether the parties to this action would be subject to inconsistent obligations.

Secondly, the Court engaged in no analysis as to whether it would be proper to proceed without the individuals or entities which the Court found "may or may not be indispensable parties". Indeed, in failing to determine if any of the named individuals or entities actually were indispensable, the Court effectively precluded any finding as to whether the action could proceed without these individuals or entities.

3. *Rule 19 Procedure*—Rule 19 states that if a person is found to be indispensable within the meaning of the Rule, if he has not been joined in the action, "the court shall order that he be made a party" (emphasis added).

In this case, the Court found that the appellant failed to name indispensable parties to this action. Even if it were incumbent upon the appellant to name these parties, which it was not, the Court clearly had an obligation under Rule 19(a) to order that these individuals or entities deemed by the Court to be indispensable be joined. Only if the appellant then failed to comply with the Court's order directing the appellant to amend his complaint to add the indispensable parties would the Court be justified in ordering a dismissal of the appellant's action for failure to comply with an order of Court. (*English v. Seaboard Coast Railroad Co.* 465 F. 2d. 43, 47-8 (5th Cir. 1972).

For the foregoing reasons we find that the Court below abused its discretion in using the appellant's failure to name certain parties which "may or may not be indispensable parties to this action within the meaning of Rule 19" as a basis for dismissing this action.

IV. Did Appellant Violate M.I.R.C.P. Rule 15?

In filing his first complaint did the appellant violate M.I.R.C.P. Rule 15? Rule 15

provides that a party may amend his pleading as a matter of course at any time before a responsive pleading is served, or within twenty days if no responsive pleading is permitted and the action has not been placed on the trial calendar. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party.

340 In this case, the appellant attempted to file an amended complaint without leave of court or the consent of appellees. The Court below found this amended complaint to be a "legal nullity". However, whether the appellant's amended complaint was a legal nullity or not is of no moment here since the appellees, as noted above, had the burden of filing any joinder motions pursuant to Rule 19. The appellant's attempt to amend its complaint to include certain parties which the Court found "may be indispensable" appears to be an attempt to do the very thing that the Court wanted. For the Court to then dismiss the action for the appellant's failure to name necessary parties misconstrues the Court's obligation to order the appellants to amend their complaint pursuant to a finding that these indispensable parties have not been named.

350 As the appellant attempted to give the Court what it apparently wanted, dismissal of the action was not warranted in the absence of a prior order requiring joinder of specific parties as indispensable.

V. Did Appellant's Conduct Demonstrate Bad Faith?

Did the appellant's conduct demonstrate bad faith in violation of M.I.R.C.P. Rule 11? Rule 11 states that "[t]he signature of a counsel constitutes a certificate by him that he has read the pleadings; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed from delay".⁶

360 The standard for the imposition of sanctions under Rule 11 is bad faith, *Nemeroff v. Ableson* 620 F.2d. 339, 350[7] (2d. Circ. 1980); and the dismissal of an action under such rule must be predicated on a finding of subjective bad faith in bringing the action (*Solargen Elec. Motor Car. Corp. v. Am. Motors Corp.* 530 F. Supp 22, 23, n. 1 (S.D.N.Y. 1981)). Such a motion should not be granted unless the moving party has been severely prejudiced or misled (*McCorstin v. U.S. Dept. of Labor* 630 F.2d. 242, 244, n.6[2] (5th. Circ. 1980).)

370 In this action the Court determined that the appellant's actions were characterized by demonstrable bad faith. The Court found that these actions included "the consistently late filing of documents, the failure to apprise the Court or opposing counsel of his intentions in a timely fashion, and the refusal to name these indispensable parties". As noted above, the appellant's "refusal" to name indispensable parties cannot be deemed bad faith as the appellant was never under any obligation to so name these individuals or entities. It is also noteworthy that the Court's "Findings of Fact" are conspicuously void of any findings that the appellees were prejudiced by the appellant's late filings or failure to apprise the Court or opposing counsel of his intentions in a timely fashion. Without such a finding of prejudice the Court erred in finding the appellant acted in bad faith justifying a dismissal.

Finally, it should be recognized that M.I.R.C.P. Rule 11 provides that "[f]or a

6. M.I.R.C.P. Rule 11 is the "old" federal Rule 11 (pre-1983) and therefore any interpretation of the rule in referring to federal cases must take this into account.

380 wilful violation of this Rule *counsel* may be subject to appropriate disciplinary action" (emphasis added). Here it was the appellant, not his counsel, who suffered the effects of the Court's dismissal of the action. The order requires the appellant to pay the costs incurred in these actions before he may file a new claim for the Iroijlablab title.

The appellee, Imada Kabua, argues the authority for Judge Doi's Rule 11 order is found in M.I.R.C.P. Rule 33(d) which reads:

390 (d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

The extent of any application of this rule would pertain to only the prior dismissed case, 1984-84, and the rule provides no authority for "post-dating" the costs to any potential third lawsuit. Additionally, the unauthorized penal nature of the order for costs is even more evident when it would require the appellant to pay costs of the intervenor, People of Bikini, even though that party was not involved in 1984-84.

It is clear that the main thrust and basis of the trial court's dismissal order was the perceived Rule 19 violation by the appellant.⁷

Accordingly, the Court's dismissal based on any perceived violations of Rule 11 was improper.⁸

400 VI. Was Denying Judge Doi's Disqualification Abuse of Discretion?

Was the Court's order denying the disqualification of Judge Doi an abuse of discretion? Chief Judge Nelson K. Doi was the presiding judge in this action from approximately May 1985 until April 1986. He has since resigned from the Marshall Islands judiciary. However, the appellants contend that Judge Soll's order denying the appellant's motion for disqualification of Judge Doi should be reversed as he might possibly be given an assignment relating to this litigation as a retired judge.

The standard of review for determining whether Judge Doi should have been disqualified is abuse of discretion (*Weingart v. Allan* 654 F.2d 1096, 1107 (5th. Circ. 1981)).

410 The appellant claims that Judge Doi's activities in this litigation create an appearance of prejudice requiring disqualification. However, since Judge Doi is no longer on the bench it is difficult for this Court to fathom how any refusal to disqualify him would "threaten the purity of the judicial process and its institutions"

7. The motions filed by Imada Kabua and K.A.C. and which resulted in the dismissal of the appellant's complaints were based on Rule 19 violations. The appellee's attempt to argue that the dismissal is also authorized by Rule 33(b); this argument appears to be an attempt to sidestep the inability to sustain the order on asserted Rule 19 violations. The briefs filed by all parties accurately reflect that Rule 19 is the crux of the matter. This is what the appellant focused his attention on and the appellees and intervenor so responded.

8. It is also noted that, for all practical purposes, the order of the trial court precluded the appellant from ever filing a subsequent action. With this case being dismissed and no order for costs being entered, the appellant has no basis for determining the amount he would have to pay the appellees prior to filing any subsequent lawsuit.

(*Potashnick v. Port City Const. Co.* 609 F.2d 1101, 1111 (5th. Circ. 1980)).

In addition, Judge Soll found under the circumstances that there was no basis for the disqualification of Judge Doi. We find no abuse of discretion.

VII. Was Denying Lowe's Disqualification Abuse of Discretion?

Was the trial court's order denying the disqualification of Attorney Lowe an abuse of discretion? The appropriate standard of review of a court's ruling on a motion for attorney disqualification is whether the ruling was an abuse of discretion (*Unified Sewerage Agency, Etc. v. Jelco, Inc.* 646 F.2d 1339, 1351 (9th. Circ. 1981)). The rationale for this standard is that the primary responsibility for controlling the conduct of lawyers practising before the trial court lies with that court, not with an appellate court (*id.*; see also, *Trone v. Smith* 621 F.2d. 994, 999 (9th. Circ. 1980)).

The appellants have sought to disqualify Attorney Lowe because he previously represented the appellant when the appellant was prosecuted for homicide.

Where the cause of action or matters involved in a former suit are substantially related to the present action, an attorney who represented a client in that former suit should not represent his adversary in the present action (*T.C. Theater Corp. v. Warner Bros Pictures, Inc.* 113 F. Supp. 265, 268 (S.D. N.Y. 1953)).

The trial court, in reviewing the appellant's motion to disqualify Lowe, found that the matters presented and the causes of action in the former homicide prosecution and those presented in this action were completely dissimilar. A review of the record presents no basis for finding that the previous ruling was an abuse of discretion.

VIII. Was Granting Abrams's Disqualification Abuse of Discretion?

Did the Court abuse its discretion when it ordered that Attorney Abrams be disqualified? Mr. Abrams was the original attorney for the appellant in this action.

The Court below found that Abrams had acted unethically in communicating with an opposing party who was represented by counsel, in violation of Disciplinary Rule 7-104 of the Code of Professional Responsibility.

Disciplinary Rule 7-104 clearly proscribes negotiations by any lawyer with another person who is represented by counsel without first obtaining the permission of that person's lawyer (*Kearns v. Fred Lavery* 573 F. Supp. 91, 96 (E.D. Mich., 1983)). Attorneys for Imada Kabua have consistently maintained that Abrams never sought permission to speak with their client, nor does Abrams contend that he ever sought such permission as mandated by D.R. 7-104.

In determining whether an attorney should be disqualified from participating in a lawsuit because of an alleged violation of D.R. 7-104, three competing interests must be balanced: (1) the client's interest in being represented by counsel of its choice; (2) the opposing party's interest in a trial free from prejudice due to disclosures of confidential information; and (3) the public's interest in the scrupulous administration of justice (*Meat Price Investigators Ass'n. v. Spencer Foods* 572 F.2d 163, 165 (8th Circ. 1978)).

A balancing of the above-cited interests leads this panel to conclude that the Court below did not abuse its discretion in disqualifying Abrams. First, the appellant is being represented by the counsel of his choice despite Abrams's disqualification, in that Mr. Burdick was representing the appellant prior to his co-counsel Abrams being disqualified. Second, Imada Kabua's apparent disclosure of confidential information to Abrams, whether verbal or non-verbal, ostensibly is of a kind which could prejudice his interests. Finally, the public has a significant interest in

determining attorneys from bypassing counsel and seeking to communicate with opposing parties "as old friends".

Moreover, permitting Abrams to continue as counsel for the appellant in this case would violate Canon 9 of the Code of Professional Responsibility, which states: "A lawyer should avoid even the appearance of professional impropriety". Ethical Consideration 9-6 mandates that every lawyer "... conduct himself so as to reflect credit upon the legal profession and to inspire the confidence, respect and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety".

470 Based upon these facts, we find that the Court below did not abuse its discretion in disqualifying Abrams.

IX. Was Not To Disqualify O'Brien Abuse of Discretion?

Was the Court's decision not to disqualify O'Brien an abuse of its discretion? Appellants contend that the Court below erred in refusing to disqualify O'Brien as counsel for K.A.C. since he has consistently taken positions adverse to the appellant and, since the appellant is a member of K.A.C., O'Brien has breached his fiduciary duty to the appellant.

480 K.A.C., not O'Brien as an individual, has taken a position adverse to the appellant. It would appear that disqualifying O'Brien would not effect K.A.C.'s position *vis-à-vis* the appellant. Additionally, the fact that K.A.C. takes a position contrary to one of its members does not preclude K.A.C. from retaining counsel in order to protect its interests.

This case is analogous to a situation in which shareholders bring an action against the corporation in which they own stock. It cannot be maintained that because the shareholders have an interest in the corporation, the corporation, through its attorney, is completely precluded from taking any position adverse to its shareholders. (See *Campbell v. Southwestern Cotton Oil Co.* 586 F.2d. 191 (10th. Cir. 1987); also *Fletcher Cyc Corp.*, S6025 (1984).)

490 The order dated 2 December 1985 denying the disqualification of Attorney O'Brien gives no reason for the conclusion reached by the Court, but the record reveals no abuse of discretion by the Court. The reason for this is that any "conflict" is not that of O'Brien's but is what this panel perceives as a blatant disregard by K.A.C. of the preliminary injunction order issued by Judge Lanham on 29 January 1985.

500 This order, *inter alia*, found that K.A.C. violated its fiduciary duties by distributing money to Imada Kabua when it knew a bona fide dispute existed as to the proper distributee and K.A.C., through its Board of Directors, directed its attorneys to provide a defence against the Irojlablab claim of the plaintiff. Additionally, the trial court found K.A.C. breached the interim allocation agreement by distributing the money when the Iroj title dispute existed.

K.A.C. was enjoined from any further distributions and from making any determination on its own as to who is the rightful successor to Irojlablab Manini Kabua. Implicitly, if not expressly, K.A.C. was ordered not to actively oppose the plaintiff's claim. Yet that is exactly what K.A.C. has done. In violation of Judge Lanham's stern admonition, K.A.C. has continued to retain counsel and has filed a brief which, in large part, parrots the opposition filed by Imada Kabua.

As aptly pointed out by the trial court, K.A.C. is strictly the stakeholder and its proper position in these cases is to be nothing more than an intervenor and not a

partisan or advocate for the interests of Imada Kabua or any other claimant to the Iroijlablab title.

This panel views the actions of K.A.C. to be such an affront and violation of the direction of the trial court that, upon remand, certain action must be taken by the trial court. It shall monitor the activity of K.A.C. closely so that its role in these matters be strictly that of a stakeholder. Within a reasonable time, to be established by the trial court, K.A.C. shall provide an accounting to the Court of all expenses (attorney fees, travel costs, and the like) which K.A.C. incurred from 29 January 1985 to the present for the direct and/or indirect opposition to the plaintiff's claim in these matters. Upon the establishment of the amounts paid, the trial court shall ascertain the amount which should be reimbursed to K.A.C. by the parties affected in the preliminary injunction.⁹

It has also not escaped the attention of the Court that the People of Bikini, as an intervenor under M.I.R.C.P. Rule 24, have taken the role of an advocate in this litigation, actively aligning themselves with appellee Imada Kabua. At oral argument, counsel for the People of Bikini chose not to argue his brief but rather deferred to counsel for Imada Kabua. A review of the brief submitted by People of Bikini demonstrates that the positions taken therein substantially duplicate those of appellee Imada Kabua.

The People of Bikini appear to have intervened in this action in order to keep apprised as to the specific status, duties, and powers concomitant with the Iroijlablab title. They have consistently maintained that any adjudication of the Iroijlablab title should have no effect on the rights of the People of Bikini. Therefore, the role of the People of Bikini should be limited to protection of their own interests.

The preceding discussion regarding the proper role of K.A.C. is also applicable to the People of Bikini. Upon remand, the trial court is hereby instructed to monitor the activities of the People of Bikini, through their counsel, in all further proceedings in this matter in order to ensure that their role is limited to protection of their specific interests and does not include taking any active role in determining the holder of the Iroijlablab title.

X. Conclusion

The decisions of the trial court with respect to the disqualification of Abrams and the denial of the motions to disqualify Lowe, O'Brien, and Judge Doi are hereby affirmed.

The order for payment of costs by the appellant is reversed.

The dismissal of this action pursuant to M.I.R.C.P. Rule 33 is hereby reversed and remanded to the High Court with these specific instructions.

1. Appellee Imada Kabua shall have thirty days upon notice of remand to file a Rule 19 motion and the trial court shall proceed to resolve this matter as expeditiously as possible. If the Court orders joinder, the appellant shall be provided the right to amend his complaint. Should no Rule 19 motion be filed within thirty days, the matter shall proceed with the parties of record.
2. Should the appellant desire to amend his complaint, he has thirty days from the notice of remand to file a Rule 15 motion. Any Rule 19 motion and Rule

9. The injunction was addressed to K.A.C., its officers, agents, servants, employees, and attorneys who receive actual notice of the injunction by personal service or otherwise. It will be the duty of the trial court to ascertain these individuals and to assess the amounts to be reimbursed K.A.C.

15 motion can be heard at the same time in the discretion of the trial court and with a view of expediting these proceedings.

3. The preliminary injunction previously entered on 29 January 1985 which prohibits K.A.C. from distributing the disputed land use payment funds shall be reinstated and is to be deemed the law of this case.
4. K.A.C. will limit its role in this action to that of a stakeholder as mandated by the preliminary injunction order. The trial court is hereby instructed to monitor the role of K.A.C. and its counsel. In the event that K.A.C. continues to strike the pose of an advocate the trial court should exercise its power to limit K.A.C.'s activities to those of a mere stakeholder in this action.
5. K.A.C. will account for all attorney fees and costs expended in opposing the appellant's claim to the Irojlablab title subsequent to 29 January 1985. The trial court will then determine whether these fees and costs were incurred in violation of the preliminary injunction order and make an appropriate order for the reimbursement of said amounts.
6. The trial court shall monitor the activity of the People of Bikini in these proceedings as indicated above.

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