



**Hirji v Hirji & 3 others (Constitutional Petition E301 of 2020) [2022] KEHC 13190 (KLR)
(Constitutional and Human Rights) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13190 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E301 OF 2020**

AC MRIMA, J

SEPTEMBER 30, 2022

BETWEEN

FIROZ NURALI HIRJI PETITIONER

AND

SHAROK KHER MOHAMMED ALI HIRJI 1ST RESPONDENT

ERIC MUTUA T/A E. K & CO ADVOCATES 2ND RESPONDENT

HOUSING FINANCE COMPANY OF KENYA LTD 3RD RESPONDENT

WATTS ENTERPRISES LIMITED 4TH RESPONDENT

RULING

Introduction:

1. The legal profession is among the oldest professions in the world. It traces its origin in Greek and Roman city states.
2. The *Advocates Act*, cap 16 of the Laws of Kenya and the regulations thereunder majorly deal with various aspects of the legal profession in Kenya.
3. Section 55 of the *Advocates Act* provides that every advocate and every person otherwise entitled to act as an advocate shall be an officer of the court and shall be subject to the jurisdiction thereof.
4. In this matter, Sharok Kher Mohamed Ali Hirji, the 1st respondent herein, (hereinafter referred to as ‘Sharok’ or ‘the 1st respondent’) was aggrieved by, and sought the disqualification of the firm of Messrs Taib A Taib Advocates from representing the petitioner herein, Firoz Nurali Hirji (hereinafter referred to as ‘Firoz’ or ‘the petitioner’).



5. The 1st respondent initially filed an application to that end by way of a notice of motion dated October 13, 2020. The application was amended with the leave of this court and subsequently the 1st respondent filed an amended notice of motion dated March 11, 2021.
6. The applications were filed by Messrs E K Mutua Advocates as advocates on record for the 1st respondent. I will hereinafter refer to the amended notice of motion dated March 11, 2021 to as ‘the application’.
7. The petitioner vehemently opposed the application by way of a replying affidavit sworn by Mr Taib A Taib, senior counsel. The rest of the parties did not take part in the instant application.
8. This ruling is, therefore, in respect of the application.
9. At this point in time, it is of essence to note that the court directed parties to file written submissions on the application. Whereas both counsel indicated that they had electronically filed their respective submissions, the same seem not to be on the court’s portal. Be that as it may, since the application and the response thereto are comprehensive and in view of the age of this matter, this court will nevertheless deal with the application.

The Amended Notice of Motion:

10. The application sought the following orders: -
 1. That the firm of Taib A Taib advocates be restrained by an injunction, or otherwise disqualified, whether by themselves, their partners, servants or agents, from representing the petitioner in this action.
 2. That the costs of this application be borne by the firm of Taib A Taib Advocates personally.
11. The application was supported by the affidavit sworn by the 1st respondent on October 13, 2020, which affidavit was in support of the initial notice of motion.
12. Sharok raised eight grounds in support of the application. They are contained in the body of the application as follows: -
 1. That an advocate-client relationship existed between the firm of Taib A Taib Advocates and the 1st respondent is incontestable. This is borne out of the fact that:
 - i. On or about March 20, 2015 the 1st respondent engaged the firm of Taib A Taib Advocates to represent her and the petitioner in High Court civil suit No 226 of 2003, Firoz Nurali Hirji (suing through his duly authorized Attorney-Sharok Kher Mohamed Ali Hirji) v Housing Finance Company of Kenya & Watts Enterprises Limited.
 - ii. On or about March 4, 2016 the 1st respondent instructed the firm of Taib A Taib Advocates to represent her (upon lodgment of a notice of appeal) in Court of Appeal civil appeal No 31 of 2016, Housing Finance Company Of Kenya Limited & v Sharok Kher Mohamed Ali Hirji & Watts Enterprises Limited and Court of Appeal civil appeal No 32 of 2016, Housing Finance Company of Kenya Limited & v Sharok Kher Mohamed Ali Hirji & Watts Enterprises Limited.
 - iii. Taib A Taib Advocates are privy to information and circumstances under which I filed the suit before the High Court and the execution of the power of attorney by the petitioner.



2. Section 134(1) bars an advocate, unless with his client's express consent, from disclosing any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment."
3. In the *locus classicus* case of *King Woolen Mills & another v Kaplan & Stratton Advocates* 1990 - 1994) EA244, the Court of Appeal held: -

"...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. 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... 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.
4. In other words, the fiduciary relationship between the client and advocate requires that the information acquired by the advocate while representing the client should be confidential and not disclosed to another person unless the client consents to it;
5. This trite legal principle, that advocate-client privilege can only be waived by a client, was upheld in the case of *Conlons v Conlons* (1952) 2 ALL ER 462 in the following terms;

"What is the rule [as to privilege] and what is the meaning of the rule? ... The object and meaning of the rule is this; that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentlemen whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communication be so makes to his should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enable properly to conduct his litigation. That is the meaning of the rule. "
6. The principle that communications passing between an advocate and client are privileged out of the acknowledgement that they are necessary for the purposes of obtaining legal advice by a client and last throughout a particular transaction and even thereafter.
7. Advocate-client confidentiality is necessary "to encourage full and frank communication between attorneys and their clients.
8. Confidentiality is an ethical duty and subsists even after the relationship has ended.



13. The above grounds were further expounded in the affidavit of Sharok Kher Mohamed Ali Hirji sworn on October 13, 2020.
14. She deposed that she was the former wife of the petitioner. In her capacity as wife of the petitioner, the firm of Taib A Taib Advocates acted for her in her individual capacity and agent of the petitioner in High Court civil case No 226 of 2003, Court of Appeal civil appeal No 31 of 2016 & Court of Appeal civil appeal No 32 of 2016. The said firm thereafter sued the 1st respondent seeking payment of their fees in respect of the said matters.
15. In light of the above, it was her view that the continued representation of the petitioner by the said firm was in breach of the principle of confidentiality.
16. The deponent further outlined that the said firm was aware that her erstwhile marriage subsisted between April 17, 1978 and December 28, 1999. During the pendency of their union, the petitioner and 1st respondent jointly acquired five properties; all except one, registered in the name of the petitioner. Thereafter two properties were developed.
17. Following the divorce proceedings terminating their relationship, the 1st respondent deposed that the petitioner unilaterally sold their jointly acquired properties. It was subsequently agreed that proceeds of sale of the properties would be shared equally. Furthermore, parties agreed to share rental income obtained from one of the tenants in their properties.
18. The deponent stated that she had disclosed classified information to Taib Advocate during the pendency of the events outlined above herein. This included information regarding her financial contributions, the reason behind registration of the properties in favor of the petitioner, grounds for divorce, agreements between the parties as well as the issues pitting the petitioner and 1st respondent in two opposite ends of the boxing ring.
19. She is thus apprehensive, that Mr Taib has used such privy information to file the present suit and subsequently use the information against her.
20. Consequently, the 1st respondent sought that the application be allowed as prayed.

The Response:

21. As stated before, the application was opposed by the petitioner through the replying affidavit of his counsel. The affidavit was sworn on March 26, 2021.
22. Taib Ali Taib, the deponent and advocate practicing in the firm of Taib A Taib Advocates, stated that the firm's substantial client has always been the petitioner. The 1st respondent, was a lawfully appointed attorney and agent of the petitioner thus never their client.
23. It was added that all litigious pleadings, including those cited by the 1st respondent, and documents filed by the 1st respondent were done so in her capacity as the duly appointed agent of the petitioner. He made several references to descriptions delineating this in several pleadings.
24. He deposed further that no documentary evidence was presented before this court to support her assertion that the said firm acted for her on several occasions.
25. The petitioner maintained that the 1st respondent lacked authority as she was no longer the petitioner's duly appointed agent. This followed the revocation of the power of the attorney dated December 16, 2019. To this end, the 2nd respondent was not duly appointed to act on behalf of the petitioner at the



Supreme Court or any other matter. It was thus the petitioner's contention that the said action of drafting a consent order at the Supreme Court was fraudulent.

26. In the same vein, it was deposed that the 1st respondent lacked authority to seek removal of the firm of Taib A Taib Advocates as counsel for the petitioner. Flowing from the above, no legal basis compels this court to restrain the said firm by injunction or otherwise disqualifying them from representing the petitioner.
27. Finally, the petitioner maintained that the grant of the orders sought would be a breach of his constitutional right to counsel of his choice. The orders thus were unsustainable.
28. It is on the basis of the foregoing that the petitioner sought the dismissal of the application with costs.

Analysis:

29. The application was made pursuant to articles 159 and 165 of the Constitution and section 134(1) of the Evidence Act, cap 80 of the Laws of Kenya.
30. Article 159 of the Constitution deals with judicial authority whereas article 165 of the Constitution establishes the High Court and defines its jurisdiction.
31. Section 134 of the Evidence Act is on the privilege of advocates. It states as follows: -
 - (1) No advocate shall at any time be permitted unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
Provided that nothing in this section shall protect from disclosure—
 - (a) any communication made in furtherance of any illegal purpose;
 - (b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.
 - (2) The protection given by subsection (1) of this section shall continue after the employment of the advocate has ceased.
32. From the respective parties' cases, the crux of this matter rests on two issues. They are whether there existed an advocate-client fiduciary relationship between the 1st respondent and the firm of Messrs Taib A Taib Advocates and if so, whether the firm of Messrs Taib A Taib Advocates ought not to appear for the petitioner in this petition.
33. As such, this court will deal with those issues herein below:

Whether There Existed An Advocate-client Fiduciary Relationship:

34. There is no doubt that the petitioner favored the 1st respondent with a special power of attorney dated February 24, 2003. A copy of the power of attorney was exhibited on page 532 of the petitioner's bundles of documents.
35. Paragraph 2 of the power of attorney donated the following specific power to the 1st respondent: -



2. To commence any action or any other proceeding in any court of justice, for the recovery of any debt sum of money right, interest or property matter or anything whatsoever in relation to property LR No Nbi/7785 310 Runda Grove, Runda Estate, now due or payable or to become payable or in case belonging to me by any means , and the same action or proceeding to prosecute or discontinue if the attorney- shall see cause, and to appoint any advocate to prosecute or defend in the circumstances aforesaid as may be required.
(emphasis added)
36. As a result of, and on the basis of the said power of attorney, the 1st respondent instituted Nairobi High Court civil suit No 226 of 2003 Firoz Nurali Hirji (Suing through his duly authorized Attorney – Sharok Kheir Mohammed Ali Hirji) v Housing Finance Company Limited and Watts Enterprises Limited.
37. It is the 1st respondent who instructed the firm of Messrs Taib A Taib Advocates in the above suit since the power to appoint and instruct any advocate no longer rested on the petitioner herein.
38. Like instructions were given by the 1st respondent to Messrs Taib A Taib Advocates in respect of the resultant appeals from the said Nairobi High Court civil suit No 226 of 2003 to the Court of Appeal. The appeals are civil appeals No 31 of 2016 and civil appeal No 32 of 2016.
39. In a suit filed in the commercial and admiralty division of the High Court at Nairobi on October 2, 2020 between Taib A Taib v Firoz Nurali Hirji and Sharok Kher Ali Hirji, senior counsel Mr Taib A Taib demanded for *inter alia* specific performance of 3 retainer agreements in respect of fees for professional services he rendered on the basis of the instructions he had received from the 1st respondent.
40. Paragraph 9 of the plaint partly stated as follows: -

By 3 retainer agreements made and entered into on March 13, 2015, March 4, 2016 and December 16, 2019, between the plaintiff and the 2 defendants, the defendants instructed and authorized the plaintiff to represent them at a minimum retainer of Kenya shillings 65,000,000.00 in: -

 - i. HCCC No, 226 of 2003 Firoz Nurali Hirji (Suing through his duly authorized Attorney – Sharok Kheir Mohammed Ali Hirji) v Housing Finance Company Limited and Watts Enterprises Limited it was agreed
 - ii. Court of Appeal civil appeal Nai 32 of 2016 Between Housing Finance Company of Kenys Limited & Watts Enterprises Limited v Firoz Nurali Hirji ((suing through his duly authorized Attorney – Sharok Kheir Mohammed Ali Hirji), it was agreed
 - iii. Supreme Court of Kenya civil application No 27 of 2019 Housing Finance Company of Kenys Limited & Watts Enterprises Limited v Firoz Nurali Hirji ((suing through his duly authorized Attorney – Sharok Kheir Mohammed Ali Hirji), it was agreed



41. The Court of Appeal in civil appeals 286 of 2001 & 15 of 2002, *Uburu Highway Development Ltd & 3 others v Central Bank of Kenya & 4 others* [2003] eKLR spoke to the manner in which a court may ascertain whether an advocate-client relationship existed. The court stated as follows: -
- Whether the plaintiffs were the counsel's client may be discerned from a careful consideration of the correspondence on record. A careful consideration of the same is, of course, required.
42. With such guidance and to be able to address the issue, this court ought to deal with what a fiduciary duty or fiduciary relationship is all about.
43. The 11th Edition of the *Black's Law Dictionary* defines a 'fiduciary duty' as follows: -
- .. a duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as an agent or a trustee) to the beneficiary (such as the agent's principal or the beneficiaries of the trust;... a duty to act with the highest degree of honesty and loyalty toward another person and in the best interest of the other person-....Also termed as duty of loyalty, duty of fidelity; duty of faithful service; duty to avoid conflict of interest.
44. In *Wolf v Superior Court* (2003) 107 Cal App 4th 25, 29 [130Cal Rptr 2d 860], the court defined a 'fiduciary relationship' as follows: -
- any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent.....
45. The Court of Appeal in *King Woolen Mills & another v Kaplan & Stratton Advocates* (1990 - 1994) EA 244 acknowledged that a retainer agreement between an advocate and a client creates a fiduciary relationship. The exact words of the court have already been captured in this ruling under the rubric 'amended notice of motion' hereinabove.
46. Section 2 of the *Advocates Act* further defines who a 'client' is. It states as follows: -
- “client” includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs;
47. Returning to the case at hand, it is apparent that there existed retainer agreements between the 1st respondent and the firm of Messrs Taib A Taib Advocates. That fact has been expressly admitted by and pleaded to by senior counsel Mr Taib A Taib above.
48. Further, the contention by Mr Taib, SC that he all along acted for the principal who is the petitioner herein and was never instructed by the 1st respondent, whom he acknowledges to have been a duly nominated agent of the petitioner, is settled by the definition of who a client is in section 2 of the *Advocates Act*.



49. Therefore, the totality of the foregoing is that there is evidence to affirm the position that the firm of Messrs Taib A Taib Advocates was duly instructed by and acted for and on behalf of the 1st respondent and the petitioner herein.
50. Resulting from the above, this court finds and hold that the was an advocate-client fiduciary relationship between the firm of Messrs Taib A Taib Advocates and the 1st respondent and the petitioner in this matter.

Whether the firm of Messrs Taib A Taib Advocates ought not to appear for the petitioner:

51. Section 134 of the Evidence Act precludes disclosure of any communication or information between an advocate and a client except with the client's consent.
52. Section 136 of the Evidence Act also provides for instances where the grant of the consent can be presumed. The provision states as under: -
136. Waiving of privilege of advocates, etc.
- (1) If any party to a suit or proceeding gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 134(1) of this Act.
- (2) If any party to a suit or proceeding calls any advocate, interpreter, clerk or servant as a witness, he shall be deemed to have consented to such disclosure as is mentioned in section 134(1) of this Act only if he questions such witness on matters which, but for such question, the witness would not be at liberty to disclose.
53. The gist of the instant petition in this matter is the validity or otherwise of the instructions to counsel to appear before the Supreme Court and to enter into a consent order on the basis of the power of attorney.
54. The 1st respondent contended that in the course of dealing with Mr Taib A Taib, SC, she disclosed to him, and the counsel became privy to various and specific information. The exact nature of the information was enumerated in paragraph 12 of the supporting affidavit of the 1st respondent sworn on October 13, 2020.
55. Having carefully considered the contents of paragraph 12 of the supporting affidavit of the 1st respondent and the petition herein, what comes to the fore is that there is a nexus between the circumstances under which the power of attorney was executed and the issue of the instructions before the Supreme Court.
56. From the record, the 1st respondent deposed to having extensively shared the said circumstances with Mr Taib A Taib, SC and that, counsel undertook to protect the interest of the 1st respondent in the matter more so since the petitioner and the 1st respondent were lawfully married and had underwent grueling divorce proceedings.
57. It is of essence to note that Mr Taib A Taib, SC did not dispute the 1st respondent's above disposition.
58. In this matter, the 1st respondent, who was a client to Mr Taib A Taib, SC is opposed counsel representing the petitioner, who was the 1st respondent's husband. Sharok is apprehensive that whatever she shared with Mr Taib A Taib, SC, when she was a client, is likely to be disclosed in the event the counsel continues to represent the petitioner in the matter.



59. Pursuant to section 134(2) of the *Evidence Act*, the advocates' duty of non-disclosure continues even after the employment of the advocate has ceased.

60. The Court of Appeal addressed the above privilege in *Mohammed Salim Balala & another v Tor Allan Safaris Limited* civil appeal No 28 of 2014 (2015) eKLR where the court stated that: -

Of particular importance is that the advocate client privilege is only there for the sake of the client not the advocate. It is for the client to choose whether or not to lift the privilege. All that the advocate can do is plead privilege if sued. (see. *Halsbury's Laws of England* 4th edition vol 44 at page 52). This does not mean that an advocate cannot be sued on the basis of his relationship with his client. It only means that he cannot be compelled to disclose information thus obtained unless his client chooses to lift or pierce the privilege.....

61. In Nairobi High Court Misc application No 15 of 2020 *Murgor & Murgor Advocates v Kenya Pipeline Co Ltd* this court, upon review of various decisions from both local and other jurisdictions, enumerated various guiding principles in disqualification of advocates from appearing for parties in matters. The court stated as follows: -

41. From the foregoing, the following are some of the general principles guiding the disqualification of advocates from appearing for a client in a matter: -

- i. The basis upon which a court disqualifies an advocate from acting arises from the need to protect the interests of administration of justice. Whereas it is understood that choice of counsel is an entitlement of a party, such counsel must always bear in mind that he/she becomes an officer of the court and as such owes an allegiance to a higher cause (justice and truth) than serving the interests of the client.
- ii. Disqualification of an advocate is only desirable in contentious matters and where there is or was an advocate-client relationship;
- iii. It must be apparent that the advocate sought to be disqualified will be required as a witness to give evidence in the matter;
- iv. It is desirable that when the principle of confidentiality in an advocate/client fiduciary relationship will be prejudiced or where there is a possibility of real conflict of interest, then an advocate sought to be disqualified ceases to appear in the matter;
- v. The fact that an advocate acted for a litigant does not, per se, lead to a situation of conflict of interest;
- vi. Conflict of interest is an issue of fact which must be proved by way of evidence;
- vii. It is not a requirement that in a situation where a firm of advocates acted for the opposite party all the advocates in the firm be disqualified from the matter. In such an instance, only the advocates who are in possession of confidential information relevant to the matters in issue before court or tribunal may be called upon to cease from appearing in the matter;

62. Further exposition on the rule was made in *Conlons v Conlons* (1952) 2 ALL ER 462 which decision was referred to by the 1st respondent in the application and the relevant excerpt reproduced.



63. On the subject of conflict of interest, the Court of Appeal in *King Woolen Mills Ltd & another v Kaplan and Straton Advocates* (1990-1994) EA 244 observed as follows: -

An advocate who has acted for two common clients cannot later act for either party in litigation when a dispute arises between the common clients concerning the original transaction or the subject matter for which he acted for the clients as a common advocate.

64. In the current matter, the firm of Messrs Taib A Taib Advocates acted for the 1st respondent on the basis of a power of attorney granted by the petitioner. The firm later sued both the petitioner and the 1st respondent for recover of fees for services rendered.

65. The issues before court in these proceedings relate to the validity of the power of attorney. As such, the current proceedings concern or have a bearing to the original transaction or the subject matter for which the firm of Messrs Taib A Taib Advocates acted for the petitioner through the 1st respondent. The advocates were, therefore, common advocates to both parties.

66. From the above discussion and going by the decision in *King Woolen Mills Ltd & another v Kaplan and Straton Advocates*, it can only be the position that the firm of Messrs Taib A Taib Advocates is not properly suited to represent either the petitioner or the 1st respondent in current proceedings.

67. The issue under consideration is, hence, answered in the affirmative.

Costs:

68. It has been argued that the costs of the application be personally borne by the firm of Messrs Taib A Taib Advocates. Given that the court did not have the advantage of the submissions on this issue, the court will not consider the same.

69. The order which this court will make in the circumstances of this matter is that the costs of the application be borne by the petitioner.

Disposition:

70. As I come to the end of this ruling, I must profusely apologize for its late delivery. The delay was mainly occasioned by the number of election-related matters which were filed in the Constitutional and Human Rights Division from December 2021. From their nature and given that the country was heading to a general election, the said matters had priority over the rest, hence, the delay.

71. Having considered the issues raised in this matter, this court now makes the following final orders: -

- a. The firm of Messrs Taib A Taib Advocates be and is hereby disqualified, whether by themselves, their partners, servants or agents, from representing the petitioner and/or the 1st respondent in these proceedings.
- b. The petitioner shall bear the costs of the notice of motion dated October 13, 2020 and amended on March 11, 2021.
- c. The Hon Deputy Registrar shall fix a date for directions in this matter.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 30TH DAY OF SEPTEMBER, 2022

A. C. MRIMA



JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. E.K. Mutua, Learned Counsel for the 1st Respondent/Applicant.

Mr. Taib A. Taib, SC, Learned Counsel for the Petitioner.

Kirong/Benard – Court Assistants.

