



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. E1197 OF 2020

BETWEEN

FIROZ NURALI HIRJI.....APPLICANT

AND

TAIB ALI TAIB.....DEFENDANT

AND

SHAROK KHER MOHAMED..... INTERESTED PARTY

CONSOLIDATED WITH

MISC. CIVIL APPLICATION NO. E1212 OF 2020

BETWEEN

SHAROK KHER MOHAMED HIRJI.....APPLICANT

AND

TAIB A. TAIB ADVOCATES.....DEFENDANT

RULING

### Introduction and background

1. Because the two applications deal with the same subject matter, I shall consolidate them. The matters arise from an advocate-client relationship and longstanding litigation. The facts giving rise to the dispute are largely common cause and can be gleaned from the depositions filed and are as follows.

2. Pursuant to a Power of Attorney dated 24<sup>th</sup> February 2003, Firoz Nurali Hirji (“Firoz”) appointed the Sharok Kher Mohamed Hirji (“Sharok”) as his lawful attorney in respect of property L.R. No. NBI/7785 310 Runda Grove, Runda Estate (“the suit property”). Thereafter, Sharok filed **HCCC NO. 226 OF 2003, FIROZ NURALI HIRJI suing through the duly authorised attorney SHAROK KHER MOHAMED ALI HIRJI V HOUSING FINANCE COMPANY OF KENYA & WATTS ENTERPRISES LIMITED** on 25<sup>th</sup> April 2003. The matter was heard and by a judgement delivered on 29<sup>th</sup> November 2010, she was awarded KES. 20,434,226.54 as damages together with interest on account of an unlawful sale of the suit property.

3. On or about March 2012, Sharok decided to change legal representation from *Khalwale & Khalwale Advocates* by appointing the firm of *Taib A. Taib Advocates* (“the Advocates”) at the stage of execution of the decree. At that point, the Judgment Debtor, Housing Finance Company of Kenya Limited (“HFCK”) had decided to appeal the judgment at the Court of Appeal and then to the Supreme Court.

4. The engagement between Sharok, Firoz and the Advocates was based on inter alia, five retainer agreements made and entered into on 20<sup>th</sup> of March 2015, 4<sup>th</sup> March 2016, 4<sup>th</sup> March 2016, 16<sup>th</sup> December 2016 and 16<sup>th</sup> December 2019 where the Advocates were instructed and authorised represent the Sharok and Firoz at a minimum Retainer cost of KES. 60,000,000.00, KES. 15,000,000.00, KES. 15,000,000.00, KES. 35,000,000.00 and KES. 35,000,000.00 respectively and totalling KES. 160,000,000.00 plus VAT thereon of KES. 25,600,000.00 making a grand total of KES. 185,600,000.00 plus expenses and disbursements. There were also two retainer agreements dated 13<sup>th</sup> March 2012 and 6<sup>th</sup> November 2012 (“the Retainer Agreements”).

5. On 11<sup>th</sup> December 2019, Sharok wrote to the Advocates terminating their services and informing them that she had reached a settlement of the matter with HFCK. The Deed of Settlement between Sharok and HFCK was amended in order to make a provision for HFCK to undertake to pay all the legal fees due to all the advocates who had dealt with the matter which included KES. 17.4 million due to the Advocates. On 13<sup>th</sup> December 2019, Sharok’s new advocates, *E.K Mutua & Co. Advocates* wrote to the Advocates communicating the fact that a Petition and an urgent application for stay had been filed before the Supreme Court. They sought to know whether the Advocates had any objection to their dealing with the matter at the Supreme Court. By a letter dated 16<sup>th</sup> December 2019, Mr Taib responded to Sharok’s advocates letter intimating that she had no capacity to instruct any advocate in the matter since Firoz had revoked the Power of Attorney.

6. Sharok insisted that she had instructed Mr. Eric Mutua, advocate in the matter and in view of the pending court appearance on the 18<sup>th</sup> December 2019, *E.K Mutua & Co. Advocates* filed a Notice of Appointment in the matter on the 16<sup>th</sup> December 2019. On 23<sup>rd</sup> January 2020, Firoz filed at the Supreme Court an application seeking orders that he was the right party in the proceedings and that the Advocates were the proper advocates on record in the matter. The Supreme Court heard and dismissed the application on 4<sup>th</sup> September 2020.

7. On 2<sup>nd</sup> October 2020, the Advocates filed a suit **HC COMM NO. E401 OF 2020, TAIB ALI TAIB V FIROZ NURALI HIRJI AND SHAROK KHER ALI HIRJI** seeking to enforce the Retainer Agreements. On 26<sup>th</sup> October 2020, the Advocates e-mailed Sharok two Fee Notes demanding to be paid legal fees of KES. 464,172,991.75 and KES. 2,736,000.00 respectively. It is these Retainer Agreements and Fee Note that are the subject of dispute herein and that precipitated the filing of the two applications.

#### **Application in Misc. No. E1197 of 2020**

8. In this matter, Firoz approached the court by way of the Chamber Summons dated 4<sup>th</sup> November 2020 and made, inter-alia, under **sections 44, 45(2) and (2A), 46 and 47-52 of the Advocates Act (Chapter 16 of the Laws of Kenya), Order 52 Rule 3(1), (2) and (4) of the Civil Procedure Rules, sections 1A (1), (2),(3), 3A and 63(e) of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** where he seeks the following orders:

1. Spent\*

2. THAT the retainer agreements between Firoz Nurali Hirji and/or Sharok Kher Mohamed Ali (as the Client) and Taib Ali Taib (as the Advocate) dated 20th March 2015, 4th March 2016 in respect to Civil Appeal 32 of 2016, 4th March 2016 in respect of Civil Appeal 31 of 2016, 16th December 2019 in respect to Supreme Court Application No. 37 of 2019 and 16th December 2019 in respect to Supreme Court Appeal No. 46 of 2019 be and are hereby set aside.

3. THAT in the alternative and without prejudice to prayer (2) above, the retainer agreements between Firoz Nurali Hirji and/or Sharok Kher Mohamed Ali (as the Client) and Taib Ali Taib (as the Advocate) dated 20th March 2015, 4th March 2016 in respect to Civil Appeal 32 of 2016, 4th March 2016 in respect of Civil Appeal 31 of 2016, 16th December 2019 in respect to Supreme Court Application No. 37 of 2019 and 16th December 2019 in respect to Supreme Court Appeal No. 46 of 2019 be varied by substituting the amount of remuneration fixed therein to such amount as this Honourable Court may deem just and fair

4. THAT without prejudice to prayers number 2 and 3 above, the legal fees and costs relating to the disputed retainer agreements between Firoz Nurali Hirji and/or Sharok Kher Mohamed Ali (as the Client) and Taib Ali Taib (as the Advocate) dated 20th March 2015, 4th March 2016 in respect to Civil Appeal 32 of 2016, 4th March 2016 in respect 2 of Civil Appeal 31 of 2016, 16th December 2019 in respect to Supreme Court Application No. 37 of 2019 and 16th December 2019 in respect to Supreme Court Appeal No. 46 of 2019 be and are hereby referred to taxation by the Deputy Registrar of this Honourable Court.

5. THAT Honourable Court be pleased to make such other orders as it deems fit in the interests of justice.

6. THAT costs of this application be provided for.

9. The application is supported by the affidavits sworn by Firoz on 4<sup>th</sup> November 2020 and 18<sup>th</sup> February 2021 respectively. The Advocates oppose the application through the Replying Affidavit sworn on 5<sup>th</sup> December 2020.

#### **Application in HC COMM No. E1212 of 2020**

10. On her part, Sharok filed the Chamber Summons dated 11<sup>th</sup> November 2020 and made under **section 45(2) of the Advocates Act** where she seeks the following orders:

1. THAT the Honourable Court be pleased to set aside vary and or declare as illegal, null and void the following Retainer Agreements between the Applicant (as the Client) and the Respondent (as the Advocate).

a. Retainer Agreement dated 13<sup>th</sup> March 2012 in respect of High Court Civil Suit No. 226 OF 2003 and all appeals

emanating therein

- b. Retainer Agreement dated 20<sup>th</sup> March 2015 in respect of High Court Civil Suit No. 22 6 OF 2003.
- c. Retainer Agreement dated 4<sup>th</sup> March 2016 in respect of Court of Appeal Civil Appeal NO. 32 OF 2016.
- d. Retainer Agreement dated 4<sup>th</sup> March 2016 in respect of Court of Appeal Civil Appeal No. 32 OF 2016.
- e. Retainer Agreement dated 6<sup>th</sup> November 2012 in respect of High Court Misc Application NO. 833 OF 2011.
- f. Fee Note dated 26<sup>th</sup> October 2020.

2. THAT in the alternative and without Prejudice to prayer 1 above, the Retainer Agreements referred to in Prayer 1 above be varied by substituting the amount of remuneration fixed therein to such amount as the Honourable court may deem just and fair.

3. THAT further in the alternative and without prejudice to prayers 1 and 2 above, the costs in question and or represented in the Retainer Agreements referred to in prayer 1 above be taxed by the Registrar of this Honourable court.

4. THAT this Honourable court be pleased to consolidate this instant application and or suit with High Court Nairobi Commercial and Tax Division Civil Suit Number COMM E401 OF 2020 between the Respondent versus the Applicant and Firoz Nurali Hirji.

5. THAT the instant application be fixed for hearing interpartes on a priority basis and before the hearing of the Respondent's Notice of Motion application dated 2<sup>nd</sup> October 2020 in the High Court of Kenya at Nairobi Commercial and Tax Division Civil Suit Number COMM E401 OF 2020 and or the suit.

6. THAT costs of this application be provided for.

11. The application is supported by Sharok's affidavits sworn on 11<sup>th</sup> November 2020 and 4<sup>th</sup> January 2021 respectively. The Advocates oppose the application through the Replying Affidavit sworn on 5<sup>th</sup> December 2020.

### **Determination**

12. The facts I have outlined are fairly clear. The suit filed by the Advocates and the applications subject of the ruling deal with the Retainer Agreements. While the Advocates seeks to collect the fees thereunder, the Applicants, Firoz and Sharok, seek to avoid them. Indeed, the Advocates have raised the issue whether the applications are *sub-judice* in light of the pending suit being **HC COMM NO. E401 OF 2020**. It is this issue that I propose to address, being a preliminary matter and in doing so, I will exercise great circumspection in commenting on the merits of the matters.

13. The principle of *res sub-judice* is grounded under **section 6** of the **Civil Procedure Act** which provides as follows:

#### **6. Stay of suit**

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

14. In **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) SCK Adv. Ref. No. 1 of 2017 [2020] eKLR**, the Supreme Court made the following observations regarding *sub-judice*:

[67] The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of *res sub-judice* must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives. [Emphasis mine]

15. It is not in dispute that **HC COMM NO. E401 OF 2020**, **MISC. NO. E1212 of 2020** and **MISC. NO. E1197 of 2020** have been filed in this court which is of competent jurisdiction and involve the same parties and the same subject matter. It is also not in dispute that suit **HCCOMM E401 OF 2020** predates the two applications.

16. The Applicants raise the concern that they have not been served with summons to enter appearance in **HC COMM NO. E401 OF 2020** to enable them file their respective defences and counterclaims. The also state that **HC COMM NO. E401 OF 2020** is yet to be determined

as the court is in the process of dealing with an interlocutory application for injunction. The Applicants add that **section 45** of the **Advocates Act** provides a different procedure for challenging a retainer agreement as opposed to a suit by way of a Plaint as the time for taking steps is limited and hence they could not have waited until she is served with summons in **HC COMM NO. E401 OF 2020**.

17. I am satisfied that the Retainer Agreements and their validity is central to the determination across all those suits regardless of the way the parties have approached the court. I am in agreement with the Advocates that proceeding with these suits separately will impose unnecessary costs on the parties, waste the court's valuable time and likely result in conflicting decisions on the same subject matter. I am also of the view that **section 45** of the **Advocates Act** is not the exclusive manner of challenging the Retainer Agreement particularly where the Advocate has filed suit to enforce it. I do not think that the client is precluded from filing a counterclaim in that regard.

### **Conclusion and Disposition**

18. In light of the foregoing, the appropriate order to make is to stay both applications pending hearing and determination of the **HC COMM NO. E401 OF 2020**. In order to ensure that the pending suit is prosecuted, I will also give the necessary directions to that end.

19. For the reasons I have set out above, I now orders as follows:

**a. HC COMM MISC. NO. E1197 OF 2020 and HC COMM. MISC. NO. E1212 OF 2020 be and are hereby stayed pending the hearing and determination of HC COMM NO. E401 of 2020 or until further orders of the court subject hereto.**

**b. The Respondent is directed to serve summons to enter appearance on the Defendants within the next thirty (30) days and if no steps are taken to prosecute the suit within a period of 120 days, the Applicants herein shall be at liberty to apply to discharge the orders herein.**

**c. Costs of the application shall in the cause.**

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF MAY 2021**

**JOHN M. MATIVO**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Mutua instructed by E.K. Mutua and Company Advocates for the Applicant in HC COMM. MISC. NO. E1212 OF 2020.

Mr Muriuki instructed by Kosgey Muriuki and Koome Advocates for the Applicant in HC COMM MISC. NO. E1197 OF 2020.

Mr Taib, SC with him Mr Ojenge instructed by Taib A. Taib Advocates for the Respondent.