



Taib A Taib Advocates v Hirji & another; Housing Finance Company of Kenya (Third party) (Civil Case E401 of 2020) [2024] KEHC 5395 (KLR) (Commercial and Tax) (14 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5395 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E401 OF 2020
FG MUGAMBI, J
MAY 14, 2024**

BETWEEN

TAIB A TAIB ADVOCATES PLAINTIFF

AND

FIROZ NURALI HIRJI 1ST DEFENDANT

SHAROK KHER ALI HIRJI 2ND DEFENDANT

AND

HOUSING FINANCE COMPANY OF KENYA THIRD PARTY

RULING

Background

1. This ruling determines the application dated 31st October 2023, filed by the defendant under the provisions of *Order 1 rule 33*, seeking third party directions. The application is supported by the affidavit of Sharok Kher Mohamed Ali Hirji, the applicant, sworn on even date.
2. The proceedings before the Court relate to the validity of retainer agreements entered into between the plaintiff and the applicant for representation in respect of the following matters (the matters):
 - i. HCCC No. 226 of 2003 Firoz Nurali Hirji (suing through his duly authorized Attorney Sharok Kher Mohamed Ali Hjrji) V Housing Finance Company of Kenya Limited and Watts Enterprises Limited;
 - ii. CACA No. 31 of 2016, consolidated with CACA No. 32 of 2016 Housing Finance Company of Kenya Limited v Sharok Kher Mohamed Ali Hirji and Watts Enterprises Limited; and



- iii. HC Misc. Appl No. 833 of 2011, Judy Thongori & Company Advocates V. Firoz Nurali Hirji (suing through his duly authorized attorney Sharok Mohamed Hirji).
3. It is the applicant's further case that on or about 11th December 2019, the 3rd party, HFCK and the applicant signed a Deed of Settlement, which compromised all the matters together with a pending appeal at the Supreme Court, being an appeal from the Court of Appeal in CACA No. 31 of 2016, consolidated with CACA No. 32 of 2016. The said Deed of Settlement included an Addendum which dealt with payment of legal fees to the advocates who had acted for the applicant in the matters.
4. The said addendum provided *inter alia* that:
- “It is hereby agreed between HFC Limited, a Limited Liability Company incorporated in the Republic of Kenya whose address is care of Post Office Box Number 30085—00100 Nairobi in the aforesaid Republic (“The Company”) of the one part and Sharok Mohamed Ali Hirji (Attorney for Firoze Nurali Hlrjl) whose address is core of Post Office Box Number 22378-00400 Nairobi aforesaid (“The Claimant”) that the Company shall pay The Claimant’s Advocate’s fees as follows:
- (d) Taib Ali Taib Refainer Kshs. 17.4 Million
- Minimum fees payable in accordance with the Advocates retainer agreement dated 13th March 2012 and 6th November 2012, plus any other fees as agreed between the parties or taxed by a competent authority.”
5. It is on this basis that the applicant avers that the Deed of Settlement and the Addendum are so intrinsically connected to the claim by the plaintiff that it would be just if the entire dispute is decided within the suit. The question to be determined as between the defendant and the third party as well as the plaintiff and the third party is whether the third party is liable to pay the plaintiff's legal fees and if so, the quantum.
6. The applicant further points to the fact that there is an arbitration agreement in the Deed of Settlement but since the plaintiff is not a party to the same, the arbitration agreement does not bind him.
7. The application is opposed *vide* the Grounds of Opposition filed by the third party and dated 17th November 2023. As far as the third party is concerned, in the ruling delivered on 11th November 2023 this court made a determination that the parties would await the outcome of the suit (between the plaintiff and defendant) which will determine whether liability of the third party would arise. The application before the Court is therefore *res judicata*.
8. The third party further opposes the application as there is no direct cause of action between the plaintiff and the third party. Finally, the third party submits that it has not submitted to the jurisdiction of this Honourable Court since there is in place an arbitration agreement with the applicant. It is for this reason that the third party has not filed any defense and as such it would not be possible for this Court to determine the liability of the third party.

Analysis

9. Upon careful consideration of the application, response and submissions filed by the parties as supported by the authorities that they have cited, the issue that comes up for determination is whether the applicant is deserving of the orders sought. The application by the defendant seeks to involve the third party, HFCK, on the basis that they have a role in settling the legal fees owed to the plaintiff as per the Deed of Settlement and its Addendum.



10. Two preliminary issues have been raised by the third party that require to be considered in priority. As to whether the issue of the third-party directions is *res judicata*, I refer to the ruling of this Court (Mshila, J), of 11th November 2022. Paragraph 48(ii) confirms the submission by the third party as to the directions of this Court. This was to the effect that:

“The parties to await the outcome of the suit which will determine whether the suit between the plaintiff and the defendants will raise liability of the 3rd party.”

11. For the avoidance of doubt, this Court deferred the determination of third-party liability until the conclusion of the suit between the plaintiff and defendant.

12. Further, the presence of an arbitration agreement between the applicant and the third party affects the jurisdiction of this Court to determine any dispute between them. This Court hears the third party to be stating that should the outcome of the suit favor the plaintiff against the defendant, then the third party may invoke the arbitration clause that exists in the agreement between the defendant and the third party to settle whatever issue may need to be determined at that point.

Disposition

13. For these two reasons this Court is of the view that the application dated 31st October 2023 is premature and the same is dismissed with costs to the third party.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 14TH DAY OF MAY 2024.

F. MUGAMBI

JUDGE

