



**Events and Functions Limited v County Government of Kisumu & another; Saracen Media Limited (Third party) (Civil Case 6 of 2020) [2023] KEHC 293 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 293 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL CASE 6 OF 2020  
JN KAMAU, J  
JANUARY 25, 2023**

**BETWEEN**

**EVENTS AND FUNCTIONS LIMITED ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF KISUMU ..... 1<sup>ST</sup> DEFENDANT**

**SAFARICOM LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**SARACEN MEDIA LIMITED ..... THIRD PARTY**

**RULING**

1. In its *ex parte* chamber summons application dated October 8, 2021 and filed on March 15, 2022, the 2<sup>nd</sup> defendant herein sought leave to issue a third party notice upon Saracen Media Limited, an agent it had contracted.
2. The said application was supported by an affidavit that was sworn by its Senior Legal Manager- Legal and Secretarial Services Department, Corporate Affairs Division, Daniel Ndaba, on October 8, 2021.
3. The 2<sup>nd</sup> defendant pointed out that the plaintiff had sued it and the 1<sup>st</sup> defendant for both special and general damages arising out of an alleged breach of contract by the 1<sup>st</sup> defendant herein. It averred that it contracted the intended third party to brand a monument which in turn sub-contracted Scoreline Communications Limited to carry out the branding works.
4. It added that Scoreline Communications Limited obtained approval to brand the monument but that the plaintiff had claimed that the 1<sup>st</sup> defendant breached the contract as it had issued it with a license to brand the monument.



5. It averred that it was necessary to enjoin the intended third party with a view to determining the issues relating to liability and thus urged this court to allow its application.
6. In opposition to the said application, the intended third party's Chief Operating Officer, George Wanjohi, swore a replying affidavit on April 29, 2022. The same was filed on May 5, 2022.
7. The intended third party denied having been a party to the alleged contract and that the same could not be enforced by or against it as the causes of action between the plaintiff and the 2<sup>nd</sup> defendant and between it and the 2<sup>nd</sup> defendant were different. It was its contention that there was no congruence of causes of action or subject matter that required to be demonstrated before leave to issue a third party could be granted.
8. It asserted that it properly discharged its duty to conduct pre-execution to confirm that there were no encumbrances on the branding rights over the monument. It contended that nothing had been placed before this court to demonstrate any illegal or unlawful acts on its part.
9. It termed the present application misplaced, ill-advised and erroneous and urged this court to dismiss and strike out the same as it was not a necessary party to the proceedings herein.
10. Daniel Ndaba swore a further affidavit on June 14, 2022. The same was filed on June 23, 2022. The 2<sup>nd</sup> defendant averred that the intended third party was its agent and not of a disclosed party. It was emphatic that there was privity of contract between the intended third party and its sub-contractor, Scoreline Communications Limited and that the intended third party was properly suited to be enjoined as a party herein.
11. The plaintiff informed this court that it would not be filing any documents. The 2<sup>nd</sup> defendant's written submissions and list of authorities were both dated June 14, 2022 and filed on June 23, 2022 while the intended third party's written submissions and list of authorities were both dated and filed on June 28, 2022.
12. This ruling is therefore based on the said written submissions which the appellant relied upon in their entirety.

### Legal Analysis

13. The 2<sup>nd</sup> defendant placed reliance on the provisions of order 1 rule 15(1) of the [Civil Procedure Rules, 2010](#) and the cases of [Oceanfreight \(EA\) Ltd v Technomatic Ltd & Another \[2010\] eKLR](#), [Cberuiyot Edwin Mutai v Cyrus Ngaruiya \[2020\] eKLR](#) amongst several other cases where in a nutshell, the common thread was that a third party was necessary with a view to determining the issues that had been placed before the court so as to avoid a multiplicity of suits.
14. On the other hand, the intended third party placed reliance on the case of [Kenya Commercial Bank v Suntra Investments Bank Ltd \[2015\] eKLR](#) where it was held that a third party was enjoined in proceedings if the court was satisfied that there was a proper question to be tried as to the liability of a third party and the defendant.
15. The intended party also cited the cases of [Anthony Francis Wareham t/a Wareham & 2 Others v Kenya Post Office Savings Bank Limited \[2004\] eKLR](#) and [Savings & Loans \(K\) Limited v Kanyenje Karangaita Gakombe & Another \[2015\] eKLR](#) which dealt with the issues of a disclosed principal and agency and the doctrine of privity of contract respectively.



16. Notably, order 1 rule 15 (1) of the [Civil Procedure Rules](#) provides as follows:-

“Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—

- a. that he is entitled to contribution or indemnity; or
- b. that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
- c. that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the court within fourteen days after the close of pleadings for leave of the court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers *ex parte* supported by affidavit.”

17. Order 2 rule 13 of the [Civil Procedure Rules](#) further stipulates that:-

“The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.”

18. The 2<sup>nd</sup> defendant filed its statement of defence on September 9, 2020. Interlocutory judgment was entered against the 1<sup>st</sup> defendant on September 14, 2020. The plaintiff did not file a reply to the 2<sup>nd</sup> defendant’s statement of defence. The pleadings therefore closed on September 28, 2020.
19. Notably, when the matter came up in court on June 22, 2021, the plaintiff’s counsel informed the court that both the plaintiff and the 2<sup>nd</sup> defendant had filed their respective witness statements and bundle of documents and they were therefore seeking a ruling date. It appeared that counsel intended to pray for a hearing date.
20. At that point, the 2<sup>nd</sup> defendant’s counsel indicated that it would be filing third party proceedings within thirty (30) days. The plaintiff’s counsel did not object and the matter was adjourned to September 29, 2021 to confirm if the said proceedings would already have been filed. The matter was mentioned several times and on March 16, 2022 the third party’s counsel confirmed that the third party had been served with the third party proceedings. The intended third party was then granted time to respond to the said application.
21. The present proceedings have not really complied with the strict provisions of order 1 rule 15(1) of the [Civil Procedure Rules](#). The *ex parte* chamber summons application was not filed within fourteen (14) days of closure of pleadings as contemplated under order 1 rule 15 of the [Civil Procedure Rules](#). Further, the intended third party responded to the said *ex parte* chamber summons application.
22. Ordinarily, the proceedings seeking leave to enjoin a third party are *ex parte*. An intended third party is not required to respond to the said application as it only responds to the third party notice issued to it once leave had been granted. It is for that reason that the 2<sup>nd</sup> defendant and the third party found themselves delving into the merits or otherwise of their respective cases.



23. This court noted that the 2<sup>nd</sup> defendant and the intended third party raised issues that touched on the merits of their cases. It restrained itself from analysing the facts they had set out in their affidavits and written submissions as that was within the realm of the trial court. At this juncture, what was of concern to this court was whether or not the 2<sup>nd</sup> defendant had demonstrated that it ought to be granted leave to issue a third party notice to enjoin the intended third party in the proceedings herein.
24. As the court is mandated to administer justice without undue regard to procedural technicalities as provided in article 159(2)(d) of the Constitution of Kenya, it reverted to what it was required to do when an *ex parte* chamber summons application is filed.
25. Having carefully considered the affidavit evidence herein and the written submissions by the respective parties, this court was persuaded to find and hold that the dispute between the plaintiff and the 2<sup>nd</sup> defendant ought to be properly determined not only as between them but also as between the intended third party or between any or either of them as stipulated in order 1 rule 15. It was necessary that the question of liability between the 2<sup>nd</sup> defendant and the intended third party be heard and determined by the trial court.
26. Indeed, it was apparent to this court that there were several contracts which appeared to be intertwined. The question of disclosed principal, agency and/or privity of contract were issues that are to be determined during trial.
27. If at the conclusion of the case it will be found that the intended third party notice was not a necessary party in the proceedings herein, it will be compensated by way of costs.
28. The 2<sup>nd</sup> defendant is hereby required to comply with the provisions of order 1 rule 15 (2) and (3) of the Civil Procedure Rules that provides that:-
  2. A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons.
  3. The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court, be filed and served within fourteen days of leave, and shall be in or to the effect of Form No 1 of Appendix A with such variations as circumstances require and a copy of the plaint shall be served therewith.

### **Disposition**

29. For the foregoing reasons, the upshot of this court's decision was that the 2<sup>nd</sup> defendant's *ex parte* chamber summons application dated October 8, 2021 and filed on March 15, 2022 was merited and the same be and is hereby allowed. Costs of the application will be in the cause.
30. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF JANUARY 2023**

**J KAMAU**

**JUDGE**

