



**Adrian Kenya Limited v Kemnet Technologies Limited & 2 others (Civil Suit E206 of 2019)
[2022] KEHC 13083 (KLR) (Commercial and Tax) (26 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 13083 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E206 OF 2019
A MABEYA, J
AUGUST 26, 2022**

BETWEEN

ADRIAN KENYA LIMITED PLAINTIFF

AND

KEMNET TECHNOLOGIES LIMITED 1ST DEFENDANT

MILLENNIA LIMITED 2ND DEFENDANT

GREATWALL GARDENS MANAGEMENT CO. LTD 3RD DEFENDANT

RULING

1. The application before Court is a Motion on Notice by the 3rd defendant dated 23/2/2021. It was brought in te ralia under Order 1, Rule 10(2) and Order 1, Rule 14 of the Civil Procedure Rules 2010 and sought for the striking out of these proceedings.
2. The grounds for the application were that; at no time did the 3rd defendant place an order, purchase, install and/or deliver assorted ICT goods while passing off or holding out and/or purporting the same as if it were the plaintiff's property/services. That all these allegations were levelled against the 1st and 2nd defendant and not the 3rd defendant.
3. That at no time did the 3rd defendant enter into any contract with the plaintiff for the purchase and/or installation of the plaintiff's ICT Cabling accessories gadgets/cables/tools/telecommunications accessories and/or appliances. That as such, it cannot be held liable for any alleged actions of other parties. That it only engaged the 1st defendant as an independent contractor and hence cannot be held vicariously liable for any alleged wrongful and/or unlawful actions on the part of the 1st and 2nd defendants.



4. The 3rd defendant argued that the striking out of the suit against it would not in any way prejudice the proper, fair and lawful trial/conduct of the suit herein.
5. The plaintiff opposed the subject application vide a replying affidavit sworn by its Chief Executive Officer on 26/5/2021. He averred that the suit herein is in the nature of a tortious action for inter alia, the wrongs committed by the defendants jointly in passing off of the plaintiff's property. That since the cause of action is largely founded on tort, there is no requirement for a contract between the 3rd defendant and the plaintiff for there to be a claim against the 3rd defendant.
6. Further, that since the 1st and 3rd defendant had a contract, there was an apparent principal-agency relationship which established a basis for the defendants to be found liable for each of the other defendant's actions in relation to the contract between the defendants.
7. Further, the plaintiff argued that in its amended plaint the defendants are joint tort-feasors and the reliefs sought therein are in the form of a declaration them jointly and severally. That this is a question of fact which can only be interrogated during a full trial. That in any event, the application was filed too late in the day as the 3rd defendant had already filed a defence on 19/2/2020.
8. Order 1 Rule 3 of the [Civil Procedure Rules](#) provides: -

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”
9. The amended plaint dated 20/1/2021 shows that the plaintiff's suit is in the nature of a tortious action against all the three defendants jointly for passing off the plaintiff's property as if it belonged to them.
10. The prayers in the amended plaint are also sought against the 3rd defendant.
11. Although there is no contract between the plaintiff and the 3rd defendant, the cause of action is a tortious one in which the plaintiff accuses the three defendants of passing off its property as if it belonged to them. Therefore, a contract between them is not a prerequisite.
12. Further the court opines that whether or not the 3rd defendant is jointly liable with the other defendants is an issue that can only be determined during the trial.
13. In [Zephir Holdings Limited v Mimosa Plantations Limited, Jeremiah Matagaro & Ezekiel Misango Mutisya](#) [2014] eKLR, the court held: -

“A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties.”
14. The foregoing resonates with the Court. In the present case, the presence of the 3rd defendant seems necessary to enable the court to effectively adjudicate upon the plaintiff's claims in its amended plaint.



15. Besides, if it is established during the hearing of this suit that the 3rd defendant in no way jointly caused a liability upon the plaintiff, it can easily be compensated by way of costs.
16. In view of the foregoing, I find the application dated 23/2/2021 to be without merit and dismiss the same with costs to the plaintiff.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF AUGUST, 2022.

A. MABEYA, FCIArb

JUDGE

