



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 226 OF 2019

HASS PETROLEUM (K) LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

IOTA ENGINEERING AND CONSTRUCTION LIMITED

(Formerly IOTA Excavations and Rentals Ltd).....DEFENDANT/APPLICANT

WHITE LOTUS PROJECTS LIMITED.....INTENDED 3RD PARTY

RULING

BACKGROUND

The Applicant vide a Chamber Summons Application brought through a certificate of urgency dated 25th November, 2019 sought for orders;

1. Spent
2. This court allows the Defendant file this Application out of time
3. That this court grants leave to the Defendant to issue a third party notice to one WHITE LOTUS PROJECTS LIMITED, the party which made a deduction of **Kshs. 38,419,345.00/-** (Kenya Shillings Thirty-Eight Million, four hundred and nineteen thousand, three hundred and forty five) from the Defendants' pay and remitted the same to the Plaintiff herein
4. That due to the nature and contents of this Application this Court orders that this application be heard and determined prior to the Application dated 18th October 2019
5. That upon grant of prayer (3) above, the court to fix the time within which to serve such Third Party Notice
6. That the costs of this Application be in the cause

The Application is premised under **Article 159 of the Constitution, Sections 1A, 1B & 3A of the Civil Procedure Act, Order 1 Rule 15 of the Civil Procedure Rules**, and all other enabling provisions of law.

The Application is based on the following grounds as per the supporting affidavit of CECILIA MWERU, the Managing Director of the Defendant/Applicant

1. On 17th October, 2019, the Defendant, through is Advocates informed the firm of Sagana Biriq & company Advocates of the suit filed by the Plaintiff and inter alia requested them to engage White Lotus Project Limited on the outstanding amount claimed by the Plaintiff in-order to pre-empt a litigation process and consequently have this matter resolved between White Lotus Project Limited and Hass Petroleum (K) Limited and would revert as soon as possible.
2. On 28th October 2019 the afore stated firm responded to the letter dated 17th October, 2019 stating that they were taking instructions from their client
3. Due to the lack of substantive response from Sagana Biriq & company Advocates in good time, the Defendant is hereby seeking

this Court's leave to file this Application out of time

4. The Claim involves a colossal amount of money, amounting to Kshs. 38,419,345.00 which monies were retained by the intended third party, White Lotus Projects and paid to the Plaintiff

5. The Plaintiff, the Defendant and White Lotus Projects Limited entered into an unequivocal agreement wherein the Plaintiff was to supply the Defendant with Petroleum products for purposes of executing its tasks at the Pinnacle Project. White Lotus Projects Limited on the other hand would deduct the sum owed, being value of the products supplied, from the Defendant/Applicant's pay and that it would remit the same to the Plaintiff

6. Pursuant to the aforesaid agreement and upon conclusion of the said project, White Lotus Projects Limited deducted from the Defendant's account Kshs. 38,419,345.00/- and remitted it to the Plaintiff herein in satisfaction of the value of the products it supplied to the Defendant.

7. It is in the interest of justice that leave be granted to the Defendant to issue a third party notice to White Lotus Projects Limited.

8. The Plaintiff has now filed an Application dated 18th October 2019 seeking *inter alia* summary judgment on grounds that the Defendant herein has no Defence and that the same is scheduled for hearing on 5th December 2019.

9. Unless the Applicant is granted leave to enjoin the intended third party herein, then the Plaintiff will unjustly receive double payment of the amount claimed in the suit since it was already paid by the intended Third Party on behalf of the Defendant/Applicant.

10. If the instant Application is not heard on priority basis and the prayers sought herein granted, the Defendant/ Applicant will suffer prejudice by being compelled to defend itself in a suit that ought to be determined between the Plaintiff and the Intended Third Party.

11. The Application is brought in good faith and as such it is in the interest of justice that it is allowed.

PLAINTIFF/RESPONDENT'S CASE

The Respondent's case is that on or about March, 2015, the Plaintiff/Respondent and the Defendant/Applicant entered into an agreement for the supply of petroleum products to the Defendant/ Applicant. It was a term of the agreement that the Plaintiff/Respondent supplies petroleum products against the Defendant/Applicant's Purchase Orders on 30 days' credit term payable of on or before the 15th day of every month payable by the Defendant/Applicant on receipt of the Plaintiff's invoices. The Plaintiff honored the purchase orders, supplied the products and issued invoices to the Defendant but the Defendant would occasionally make partial payments to the Plaintiff always leaving an outstanding debt but still kept issuing purchase orders against which the Plaintiff would deliver and issue invoices.

The Plaintiff/Respondent with regard to the Application for issuance of Third Party Notice has averred that the Applicant has not established basis for issuance of a third party notice to the intended Third Party and that the presence of the Third Party in this proceeding is not necessary. That the Applicant has admitted the debt and is only trying to delay the finalization of the matter through this Application.

SUBMISSIONS

DEFENDANT/APPLICANT'S SUBMISSIONS

The Applicant's counsel has submitted that the threshold for grant of a third party notice has been met. The Applicant relied on the case of **Interactive Advertising Limited & Another V Equity Bank Limited & 2 Others (2016)eKLR** where the court relied on **Yafesi Walusimbi vs Attorney General of Uganda (1959) EA 223** where the court stated:

“ in order to join a third party the subject between the third party and the Defendant and the original cause of action must be the same.”

The Applicant submitted that there was a connection between the parties since the intended third party deducted funds from the Applicant directly and remitted to the Respondent. That a separation agreement between the intended third party and the Applicant was signed on the strength that there were no arrears between the Applicant and the Respondent.

The Applicant has submitted that the intended third party will be in a good position to demonstrate to the Honorable court how the funds were remitted to the Plaintiff/ Respondent hence saving the court's time since the overriding objective is to see that a case is dealt with expeditiously.

The Applicant has also submitted that the Plaintiff knew the agreement which was in place between the parties. They knew the intended third party deducted funds from the Applicant's account and remitted to them. Thus the Plaintiff and the intended third party are the authors of the circumstances that have led to this litigation and they should both bear the costs of the application herein.

PLAINTIFF/ RESPONDENT'S SUBMISSIONS

The Respondent's counsel submitted that the Applicant did not establish basis for the issuance of third party notice. The Applicant is neither seeking any contribution or indemnity against the proposed third party in its application therefore the presence of the third party proceeding is not necessary in the circumstance. That the Applicant has failed to prove that the amount claimed was remitted by the intended third party to the Respondent.

The Respondent also relied on Interactive Advertising Limited & Another V Equity Bank Limited & 2 Others where it cited with approval the cases of Kagwa vs Costa (1963) EA 213, and Sango Bay Ltd vs. Dresdner Bank Ltd (1971) EA 307 as follows;

“Before the court can exercise its discretion to issue third party notice it has to evaluate the allegations of the Plaintiff in terms of his legal claim to the relief he is seeking. The court also has to evaluate the Defendant’s allegations against the third party and has to be satisfied that the substance of each claim is the same and that there is a linkage between all the claims before issuing the notice.”

The Respondent submitted that the Applicant had not demonstrated any cause of action to warranting the presence of the proposed third party in these proceedings. The Respondent submitted that the Applicant is not a party to the separation agreement.

Therefore, the Respondent's counsel submits that since the Applicant has not demonstrated any cause of action against the intended third party to warrant issuance of a third party notice, the Applicant should bear the costs of the Application upon its dismissal.

ANALYSIS

I have carefully examined the Application and the submissions herein and one issue comes out for determination. The issue is **whether this Honourable court should issue third party notice to the intended third party.**

Order 1 Rule 15 (1) of the Civil Procedure Rules stipulates that:

“ (1) 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...”

The court considered the pleadings and finds there is a triable issue between the defendant and third party as to the liability of the third party. There is also establishment of the nexus between Plaintiff, Defendant and 3rd Party, the manner in which the dispute between the defendant and the 3rd party is to be tried that necessitates the court to hear from all 3 parties in full and final determination of the dispute.

In Oceanfreight (EA) Ltd vs Technomatic Ltd & Another (supra), the Court held that:-

“It is, in my opinion professionally expedient that the defendant should seek to enjoin the applicant herein, as a third party. This is because of the perceived connection between the applicant’s role in the said contract and the cause of action.”

Court further stated “from the several authorities canvassed by counsel on both sides, it emerges, contrary to the applicant’s contentions, that joinder of third parties as may be prayed by defendants, is not conceptually linked to contract as such; such joinder may be sought in connection with different causes of action was that, provided only that there exists a basis of liability of the third party to the defendant; and such a basis of liability can arise by operation of the law, in the light of the applicable facts and circumstances.”

The Court of Appeal decision in Gachago v. Attorney-General [1981] KLR 232, demonstrated that third-party proceedings are not dependent on there being a contract binding the intended third party, nor on there not being a different case pending before the Court or before a Court of equal jurisdiction. (emphasis supplied)

The principle emerging from the Gachago case is that the judicial approach to third-party proceedings is a liberal one, that accords the parties an opportunity to prove their claim, and is less preoccupied with striking out; and that privity of contract is not the sole consideration in determining whether third-party proceedings may be filed and sustained.

Kenya Commercial Bank vs Suntra Investment Bank Ltd (2015) eKLR, was cited where the Court held that;

“In law, a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under Order 1 rule

15 – 22 of the Civil Procedure Rules. And, liability between the Defendant and the third party is determined between the Defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the Defendant, and has given directions under Order 1 rule 22 of the Civil Procedure Rules.

In the instant case, I find legal basis for allowing the Application. First, the Defendant's Application is not an afterthought. The issues raised in the Third Party Application were raised in the Defence. The Defendant pleaded in the Defence that the dealings between itself and the Plaintiff arose when the intended third party who is connected to the Plaintiff, contracted the Defendant for excavation works.

The Defendant/Applicant has provided a document annexed to the Supporting Affidavit of the Application marked as "CM-4B" which is an agreement between the Plaintiff and the intended third party. The paragraph before clause 1 provides;

"we are pleased to confirm herewith your appointment for the execution of the bulk excavation and site preparation works for the proposed "HASS Towers by WL" at upperhill Road....."

There is a document marked "CM-8" which is a separation agreement between the Applicant and the intended third party where the intended third party in tabulating the amount payable to the Applicant, deducted the payment due to the Plaintiff/Respondent and retained it for further transmission to the Respondent. **Item '6'** of that tabulation shows "**Reduction of payment to Hass Petroleum**"

The Plaintiff/ Respondent argued that the intended third party is not privy to the contract between the Plaintiff and the Defendant. The Plaintiff is also not privy to the contract between the intended third party and the Defendant. The above court precedents present that the grant of third party notice orders should not be dependent on the privity of contracts between the parties involved. The fact that the intended third party deducted payment due to the Defendant for onward transmission to the Plaintiff means that there was a connection between the intended third party and the Plaintiff, otherwise why would the intended third party retain funds for a company it has no dealings or connections with?

From this evidence, I am persuaded that indeed there is a triable issue between the Defendant/Applicant and the intended Third Party on the deduction and remittance made and will inform the Defendant's outstanding debt to the Plaintiff. Also, the Applicant's submission to uphold the overriding objective under CPA, the third party notice shall issue because if not issued, judgment will be entered against the Defendant/Applicant who in turn will file another suit against the intended third party to claim the subject amount.

It is therefore conclusive that the third party notice should issue against the intended third party "White Lotus Projects Limited", to enable the Court to determine the issues in question conclusively and effectively as such the intended 3rd Party is crucial to the hearing and determination of the Plaintiff's claim against the Defendant.

DISPOSITION

- 1. The Defendant's/Applicant's application of 29th November 2019 to join intended 3rd Party White Lotus Projects Limited is granted.**
- 2. The 3rd party shall be served with pleadings and shall file and serve response(s) within the next 30days.**
- 3. The matter shall be mentioned in the New Term for Further Directions on the Way Forward.**
- 4. Each Party to bear own costs.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 17TH DECEMBER 2020 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MS MWEWA H/B MR. WATHUTA FOR DEFENDANT/APPLICANT

OGLE SHEIKH SHARIFF ADVOCATES FOR PLAINTIFF RESPONDENT – N/A

COURT ASSISTANT – TUPET

19TH JANUARY 2021

COURT: Read the Ruling to Mr. Muhamud who was not present on 17th December 2020.

Mr. Muhamud for the Defendant/Applicant – We have an application of summary Judgment and we seek directions.

Court:

1. The 3rd party was granted 30 days to be served and to file response
2. The court Ruling shall be released today as from 17th December 2020 the court was on recess until yesterday.
3. The matter shall be mentioned within 30 days to allow the Parties/Counsel seek directions on the pending application.

Mr. Muhamud: I am a student and will be away from 15th February 2021.

Court: Further mention 11th February 2021, serve the other party with mention date.

M.W. MUIGAI

JUDGE

19TH JANUARY 2021