



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 132 OF 2011**

**G M M .....PLAINTIFF**

**VERSUS**

**THE NAIROBI STAR LIMITED.....DEFENDANT/RESPONDENT**

**BERNARD ONDORO.....THIRD PARTY/APPLICANT**

**RULING**

1. The application dated 28<sup>th</sup> July, 2017 seeks orders that this Honourable court do strike out the Third Party from these proceedings.
2. The application is predicated on the grounds stated therein and is supported by the affidavit sworn by the Applicant, Bernard Ondoro, who is the Third Party herein. It is stated that by the time the Defendant filed the application to enjoin the Third Party herein, the application was time barred. That the application for the issuance of the Third Party Notice was filed five years after the close of the pleadings and that Third Party was not served with the rest of the pleadings and the order granting leave for issuance of the Third Party Notice.
3. The application is opposed. It is stated in the replying affidavit sworn by the Defendant’s Chief Executive Officer, William Pike, that the delay in filing the application to enjoin the Third Party Notice was due to the discovery of the identity of the Third Party after the pleadings had been closed. That the Defendant had to make two applications to compel Safaricom Ltd to disclose the identity of the holder of the telephone like No. 0722 \*\*\*\*\* which is registered in the name of the Third Party and is the subject of the suit herein.
4. According to the Respondent, the delay was not deliberate or excessive and has not occasioned any prejudice on the Third Party. It is further stated that the Third Party is integral to the resolution of the dispute herein.
5. I have considered the application, the response to the same and the submissions of the respective counsels for the parties herein.
6. The background facts to the application are as follows. The Plaintiff, G M M filed this suit against the Defendant, **The Nairobi Star Ltd**, vide a plaint dated 8<sup>th</sup> April, 2011. In the said plaint, the Plaintiff alleges that the Defendant published a defamatory advertisement concerning him as follows:

**”RELATIONSHIP”**

**.... “I am G seeking a handsome boy between 18**

**and 33. Money is not a problem call or sms 0722\*\*\*\*\*.”**

7. The Defendant filed a statement of defence on 30<sup>th</sup> June, 2011. A reply to the defence was filed on 6<sup>th</sup> July, 2011. A pre-trial questionnaire was filed on 23<sup>rd</sup> February, 2012. By 11<sup>th</sup> May, 2015 when the Defendant filed the application dated 7<sup>th</sup> May, 2015 to enjoin Safaricom Ltd as an Interested Party, the pre-trial procedures had not been completed. The application to enjoin Safaricom Ltd was allowed during the pre-trial stage.
8. On 12<sup>th</sup> June, 2015 the Defendant filed another application dated 7<sup>th</sup> June, 2015 seeking orders that Safaricom Ltd do provide the identity details of the holder of telephone line No. 0722 \*\*\*\*\* which application was allowed as prayed.
9. On 20<sup>th</sup> April, 2016 the court was informed by the Defendant’s counsel that Safaricom Ltd had not supplied the identity of the telephone

number in question. However, on 15<sup>th</sup> June, 2016 the Defendant filed the application dated 14<sup>th</sup> June, 2016 seeking to enjoin the Third Party and to strike out Safaricom Ltd as an Interested Party herein. The application was allowed on 30<sup>th</sup> August, 2016. Subsequently the application at hand was filed before the suit was certified ready to proceed to hearing.

10. As is evident from the foregoing chronology of events, the Defendant was actively trying to unearth the identity of the holder of telephone line No. 0722 \*\*\*\*\*. The two applications filed to bring on board Safaricom Ltd and to have the identity of the holder of the telephone line attest to that position. It took time to resolve the two applications. The Defendant has also exhibited a letter dated 1<sup>st</sup> July, 2016 written by the DCIO Kilimani to the Defendant which letter confirms that the investigations alluded to by the Defendant were indeed carried out.

11. From the foregoing, it is clear that the Defendant did not deliberately delay the matter. On the other hand, the Third Party has not shown any prejudice that he is likely to suffer if this suit proceeds on merits. I agree with the averments by the Defendant that the Third Party is a necessary party in the resolution of the dispute herein.

12. I have considered the fact that the application to enjoin the Third party was filed on 31<sup>st</sup> July, 2017 almost 7 years from the date of the publication of the alleged defamatory statement on 1<sup>st</sup> May, 2010 and long after the close of the pleadings. However, the circumstances of this case are rather exception. As stated by the Court of Appeal in case of **James Ochieng Oduol T/a Ochieng Oduol & Co Advocates v Richard Kuloba [2008] eKLR:**

**“It is quite clear from decided cases that a trial court has power to allow amendments of a plaint disclosing no cause of action (see *Motokov v Auto Garage Limited and Another* [1971] EA 353) In special circumstances amendment of a plaint may be allowed notwithstanding that the effect will be to defeat a defence of limitation (*Barclays Bank D.C.O v Sharmsudin* (1973) EA 451). However, such amendments can only be allowed where peculiar circumstances are present.”**

13. With the foregoing, I dismiss the application with costs.

**Dated, signed and delivered at Nairobi this 30<sup>th</sup> day of May, 2018**

**B.THURANIRA JADEN**

**JUDGE**