



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 219 OF 2014

INTERACTIVE ADVERTISING LIMITED ::::::::::::::: 1ST PLAINTIFF

GEORGE RAGUI KARANJA ::::::::::::::: 2ND PLAINTIFF

VERSUS

EQUITY BANK LIMITED ::::::::::::::: DEFENDANT

EDITH NJERI KIMANI ::::::::::::::: 1ST PROPOSED THIRD PARTY

DIANA KANYI WAMBUGU ::::::::::::::: 2ND PROPOSED THIRD PARTY

R U L I N G

1. By a **Chamber Summons**, application dated **6th May 2015** and filed herein on 7th May 2015 the Defendant seeks the leave of this court to issue Third Party Notice to Edith Njeri Kimani and Diana Kanyi Wambugu, the 1st and 2nd Third Party's herein. The application is premised on ten grounds set out in the application, mainly that the subject matter between the Defendant and the Third Parties is the same as the subject matter between the Plaintiffs and the Defendant and that the original cause of action is also the same. The Defendant's case is that it is entitled to relief or remedy relating to or connected with the original subject matter of the suit and substantially the same as the relief or remedy claimed by the Plaintiff. It is the Defendant's case that they seek indemnity and or contribution from the Third Parties herein against any orders that may be made against the Defendant in this suit, and that it is necessary that the question of the Defendant's claim against the Third Parties for indemnity and or contribution be heard and determined within the trial of this suit for convenience prosecution of this suit. The application is supported by the affidavits of Ambrose Makariga Ngari sworn on 6th May 2015. The said affidavit contains annexures including bank account opening instructions forms. Forms allegedly completed by the 1st Plaintiff and the Third Parties.
2. The application is opposed vide the Replying affidavit of **George Ragui Karanja** sworn on **26th May 2015**. In the replying affidavit, Mr. Karanja mainly relies on allegations that the Applicant is trying to delay the finalisation of this matter through this application. The deponent also states that the Applicant has failed to demonstrate the liability of the proposed Third Parties to it in the application, or to lay any basis for its claim of indemnity or contribution by the Third Parties. The Respondent submitted that whether or not leave should be granted for issuance of Third Party Notices to the proposed Third Parties is a matter for discretion of the court, and not a right to be acquired upon an application being made by the Defendant ex parte. Before the court can exercise

its discretion to issue Third Party Notices, it has to evaluate the Plaintiffs' allegations in terms of their claim to the reliefs sought, vis-à-vis the Defendant's allegations against the proposed Third Parties, and be satisfied that the substance of each claim is the same and that there is a linkage between all the claims before issuing the Notices. The Respondent's case is that the Applicant has not demonstrated any cause of action or claim against the Proposed Third Parties either by its Statement of Defence or the present application. In order to join a Third Party, the subject matter between the Third Party and the Defendant must be the same as the subject matter between the Plaintiff and the Defendant, and the original cause of action must be the same. The Respondent's case is that whereas the Plaintiffs' suit is founded on fraud and negligence, the Defendant/Applicant has failed to show any claim against the proposed Third Parties. Instead, the Defendant/Applicant has labored to shield the proposed Third Parties from any liability either to the Defendant or the Plaintiffs; and no congruence of causes of action or subject matters has been demonstrated as required before leave to issue Third Party Notices can be granted, since none exists. The Respondent's case is that the Proposed Third Parties are neither necessary nor proper parties to the Plaintiffs' suit. The Respondent pointed out that where a Defendant claims as against any other person not already a party to the suit that he is entitled to contribution or indemnity, such a Defendant shall apply to court within 14 days after the close of pleadings for leave of the court to issue a Third Party Notice to that effect, and such leave shall be applied for ex-parte by Summons in chambers. The Respondent pointed out that the Defendant does not seek any contribution or indemnity against the proposed Third Parties, and that it is entitled to none. A party who proceeds to take out Third Party proceedings looks up to the Third Party for indemnity or contribution.

3. However, the Applicant's case is that it is not contested that the account number 0010293196441 subject of the dispute herein was opened jointly by Edith Njeri Kimani and Diana Kanyi Wambugu, the proposed Third Parties herein. The said Bank account was opened by the proposed Third Parties as the directors of the Interactive Advertising Limited, the 1st Plaintiff. Indeed the Bank was operated by the proposed Third Parties for a period of six (6) years from 19th November, 2008 until the Defendant received a letter from the Plaintiffs' advocates indicating that the same was opened fraudulently. The proposed Third Parties in opening the said account furnished the Bank with the documents *inter alia*; board resolution of the 1st Plaintiff signed by the proposed Third Parties herein as well as copy of the Memorandum and Articles of Association of the 1st Plaintiff signed by the proposed third parties as the only directors. The Plaintiffs contend that the said resolution or authority to open the account was fraudulent or fraudulently procured. The 1st Defendant/Applicant has pointed out that the Plaintiffs in their suit allege that the Defendant in collusion with the 2nd Plaintiffs co-director, Edith Njeri Kimani, the 1st proposed third party herein, opened the said bank account to fraudulently divert the 1st Plaintiff's incomes. The Plaintiffs also contend that the Defendant collected the sum of Kshs. 19,197,200.00 due to the Defendant's alleged fraudulent actions and negligence. The Applicant's case is that the Plaintiffs cause of action against the Defendant is based on alleged fraudulent actions and negligence.
4. Parties filed submission to the application which I have considered. the issuance of leave to issue Third Party Notice is discretionary on the part of the court, and therefore the only issue I wish to raise is whether this court can exercise its discretion in favour of the Applicant. The legal foundation on Third Party Notice is to be found under Order 1 Rule 15 of the Civil Procedure Rules, 2010 (**'the Rules'**) which provides thus:-

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.

5. Turning to the legal issues, it is clear from Order 1 Rule 15 (1) of the Rules, that an application for leave to issue third party notice must be made *ex-parte*. It is clear from the face of the Application that the same was made *ex-parte*, inadvertently the said Application was served on the Plaintiffs before the leave was granted. The Plaintiffs have thus filed a replying affidavit opposing the said Application. This court will however consider the application as opposed by the Respondents.
6. The Courts have had occasion to consider an application for leave to issue third party notices or joinder of third parties in proceedings. In **Yafesi Walusimbi -vs- Attorney General of Uganda (1959) EA 223**, the Court was emphatic as hereunder;

In order to join a third party the subject between the third party and the defendant must be the same as the subject matter between the plaintiff and the defendant and the original cause of action must be the same.

7. Under Order 1 Rule 15 (1) (c) of the Rules, for a Defendant to apply for leave to issue third party notice, it is important to show 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.
8. It is clear to me that the issue or question relating or connected with the opening and operation of the Account Number 0010293196441, the subject matter herein between the Plaintiffs and the Defendant is substantially the same question or issue between the Defendant and the proposed Third Parties or between any or either of them. Since the Plaintiffs allege that the account subject of the dispute was opened by the Defendant in collusion with the 2nd Plaintiff's co-director, Edith Njeri Kimani, the question of alleged collusion should properly be determined not only as between the Plaintiffs and the Defendant but as between the Plaintiffs and Defendant and the proposed Third Parties. From the summary of facts of this dispute, there is a common linkage between the cause of action, issue or question between the Plaintiffs and the Defendant and the claim between the Defendant and the proposed third parties. In **EK Kagwa vs. Costa (1963) EA 213 & Sango Bay Ltd vs. Dresdner Bank Ltd (1971) EA 307**, the Court stated 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.

9. It is important to highlight the overriding objective of the Civil Procedure Act, Chapter 21 of the Laws of Kenya ('**the Act**') at Section 1A as hereunder;

The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

10. The rationale of Third Party Notice and proceedings is to avoid multiplicity of suits and the costs arising from the suits. In **Transami (U) Ltd Transocean (U) Ltd Kamapala High Court Civil suit number 145 of 1987 (1994) 1 KAR 175**, the court held thus;

On the facts and the evidence, in order to avoid a multiplicity of legal proceedings arising out of the alleged sale of the first plaintiff to the defendant by the Government, it is necessary that the Attorney General be joined as a third party so that the court can settle

as far as possible all matters in controversy between the parties to the suit.

11. The Plaintiffs have made serious allegations against the proposed Third Parties herein including acts of forgery and fraud. The Plaintiffs specifically at paragraph 15 (b), (d), (e) and (i) whilst enumerating the particulars of fraud against the Defendant plead as follows;

- b. Opening a secret account in the name of the 1st Plaintiff using forged documents and/ or fraudulent and inadequate information;***
- c. Permitting a director of the 1st Plaintiff's Company to unilaterally and secretly operate the account herein;***
- d. Permitting a stranger to be a signatory to the 1st Plaintiff's bank account;***
- e. Conspiring with fraudsters to defraud the 1st Plaintiff of its money.***

12. This court notes that the Defendant vide application dated 24th June, 2014 sought to strike out the suit herein in its entirety for want of resolution to sue and also lack of leave of the court to file derivative action. The application was however dismissed vide ruling delivered on 18th November, 2014. It is noteworthy the submissions of the 2nd Plaintiff in respect of the application as summarized by the Court at page 5;

“If the Defendant alleges participation of his co-director then it should pursue her for contribution in a separate suit and that in any event, it was not possible for the said co-director who is involved in the fraud with the Defendant and a potential Defendant in this suit to consent to its institution...”

13. It is important to note the contents of the witness statement of George Ragui Karanja filed together with the suit as follows;

“As a result of the foregoing fraudulent conducts of both Edith Njeri Kimani and Diana Kanyi Wambugu; and connivance, acquiescence, negligence and lack of due diligence by Equity Bank, the Company and I have suffered huge financial losses. The businesses and incomes of the company have also been greatly hampered.”

14. From the foregoing, I am satisfied that despite this application being brought after a long delay, it nonetheless raises serious meritorious factors which this court deems necessary for the leave to issue. The end of justice demands that the serious allegations of fraud and conspiracy between the Defendant and 1st Third Party be determined in the same forum. Besides, the Plaintiff has nothing to lose if either the Defendant or the Third Parties or both the Defendant and the third Parties are found liability justice will still be served.

15. For the foregoing reasons, I allow the application as prayed. Parties to bear their own costs of the application.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 12TH DAY OF NOVEMBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

M/S Maundu holding brief for Miyare for the 1st and 2nd Plaintiff

No appearance for the Defendant

No appearance for 1st and 2nd Proposed Third Party

Teresia – Court Clerk