



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 152 of 2007**

**JOHN NDUNG’U GIKONYO.....PLAINITFF**

**VERSUS**

**COMPLETE VIDEO LIMITED.....1<sup>ST</sup> DEFENDANT**

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

**SAFARCIOM LIMITED.....3<sup>RD</sup> DEFENDANT**

**MULTICHOICE KENYA LIMITED.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The 2<sup>nd</sup> Defendant’s *ex parte* Chamber Summons application dated 23<sup>rd</sup> January 2013 has been brought under the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, Order 1 Rule 15 (1), Order 51 Rule 6 & of the Civil Procedure Rules 2010 and all other enabling provisions of the law. It sought the following orders **THAT**:-

- a. **This Honourable Court be pleased to enlarge time within which the Applicant could bring the application herein.**
- b. **The Applicant be granted leave to issue Third Party Notice against Dale Carnegie Liselo Trading as Kabeiza.**
- c. **The costs of this application be provided for.**

1. The grounds on which the Plaintiff relied on in support of the application were as follows:-

- a. **THAT the rules limiting the time within which such an application could be brought came into force after this suit was filed.**
- b. **THAT all dealings between the 2<sup>nd</sup> Defendant and the Plaintiff were done through the Proposed Third Party.**
- c. **THAT all payments to the Plaintiff were negotiated, agreed and made through the Proposed Third Party.**
- d. **THAT the 2<sup>nd</sup> Defendant paid to the Proposed Third Party and in full, all amounts that were**

**agreed to be paid to the Plaintiff for the local as well as for the Pan African Air time.**

**e. THAT in the event that the Plaintiff was entitled to any extra payment (which was denied), the same should be paid by the Proposed Third Party.**

1. Margaret M. Kipchumba, the 2<sup>nd</sup> Defendant's Company Secretary, swore the Supporting Affidavit on behalf of the 2<sup>nd</sup> Defendant on 23<sup>rd</sup> January 2013. The 2<sup>nd</sup> Defendant's case was that it had a business relationship with the 3<sup>rd</sup> Defendant as it handled the 3<sup>rd</sup> Defendant's media and advertising work from time to time.
2. Pursuant to an arrangement entered into on or about 2005, the 3<sup>rd</sup> Defendant engaged the 2<sup>nd</sup> Defendant to produce a television commercial that was known as "Safaricom Brand TVC". The 2<sup>nd</sup> Defendant prepared the creative concept of the advertisement. The 1<sup>st</sup> Defendant who shot the film for the commercial engaged the Proposed Third Party to source for models which it did and the Plaintiff was selected as the lead model for the commercial.
3. Sometime in 2006, the 3<sup>rd</sup> Defendant instructed the 2<sup>nd</sup> Defendant to make arrangement to have the said commercial aired in other African countries through DSTV. The 2<sup>nd</sup> Defendant engaged the Proposed Third Party to discuss additional fees for the models for the DSTV airing which came to a sum of Kshs 155,000/=. The 2<sup>nd</sup> Defendant then paid the said sum to the Proposed Third Party as evidenced in the bank statements annexed to the Supporting Affidavit.
4. The 2<sup>nd</sup> Defendant's position was that the Plaintiff ought not to have sued it as together with the 3<sup>rd</sup> Defendant because they discharged their financial obligation to the Plaintiff once the said payment was effected to the Proposed Third Party. Further, the 2<sup>nd</sup> Defendant deposed that it was entitled to indemnity or contribution against the Proposed Third Party.

7. When the said application came up for hearing on 20<sup>th</sup> March 2013, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants indicated to the court that they would not oppose the same. The Plaintiff, however, stated that it would rely on an affidavit sworn by Dale Carnegie Liselo, the Proposed Third Party. The said Proposed Interested Party is not a party to the suit and he would not have ordinarily filed any affidavits. However, he swore his affidavit in his capacity as the Plaintiff's 2<sup>nd</sup> witness and for the reason that the court must be very cautious not to deny parties a fair opportunity to ventilate their cases, I will consider the said Replying Affidavit for the purposes of arriving at a decision in this matter.

1. In the said Affidavit, the Proposed Third Party reiterated the averments in the 2<sup>nd</sup> Defendant's Supporting Affidavit and confirmed that the Plaintiff was paid a sum of Kshs 50,000/= which the Plaintiff acknowledged in the Performance Model Release Form annexed in the 2<sup>nd</sup> Defendant's said affidavit. He also stated that the Plaintiff informed him that the commercial had been aired outside Kenya which was contrary to the contract that had been entered into. Upon the instructions of the Plaintiff, the Proposed Third Party raised an additional invoice for Kshs 50,000/= on condition that the 2<sup>nd</sup> Defendant settled the same immediately. However, the Plaintiff had not been paid the same by the time he filed the suit herein.
2. The deponent further deposed that he was to appear in court as the Plaintiff's witness and that there was no need for him being joined as a third party as the 2<sup>nd</sup> Defendant could have cross-examined him on the documents that would be adduced. It was his case that the 2<sup>nd</sup> Defendant's application was a ploy to delay the proceedings and to lay blame on him whereas the 2<sup>nd</sup> Defendant had not raised the issues in its Defence.
3. None of the parties filed written submissions. This ruling is therefore on the basis of the pleadings before the court.
4. It is not disputed that the contract entered into by the parties was made in 2005. The exact date of when the parties contracted was not given. The 2<sup>nd</sup> Defendant put the date as on or about 2005 while the Proposed Third Party gave a few more details when he stated that the commercial was to run beginning 13<sup>th</sup>

May 2005. The date of when the contract between the Plaintiff, the Defendants and the Proposed Third

Party was entered into was relevant due to the implications of the statutory limitation period for contracts which is six (6) years. The present application was filed in court on 23<sup>rd</sup> January 2013 bringing the cause of action against the Proposed Third Party within the relevant limitation period. This issue is important as the 2<sup>nd</sup> Defendant would have had to justify why leave to issue a third party notice should have been allowed when the statutory period of limitation between it and the Proposed Third Interested Party had lapsed.

1. In the previous Civil Procedure Rules, leave to issue a third party notice was applied for under Order 1 Rule 14 which stipulated as follows:-

**“Where a defendant claims as against any other party not already a party to the suit (hereinafter called the third party)...he may, by leave of the court, 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.”**

1. In the Civil Procedure Rules, 2010, Order 15 (1) requires that a party who wishes to issue a notice to a third party apply to court within fourteen (14) days after the close of the pleadings for leave to do so. It states as follows:-

**“Where a defendant claims as against any other party not already a party to the suit (hereinafter called the third party)...he shall apply to the court within fourteen (14) 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.”**

1. The suit herein was filed in 2007 which was three (3) years before the revised Civil Procedure Rules, 2010 came into force. The 2<sup>nd</sup> Defendant gave that as the explanation why it had not brought the application herein after the suit herein was filed. The 2<sup>nd</sup> Defendant therefore asked this court to invoke the provisions of Order 50(6) of the Civil Procedure Rules, 2010 which provides as follows:-

**“ Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed;**

**Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such an application, unless the court orders otherwise.”**

15. It is correct as the 2<sup>nd</sup> Defendant has argued that the rules for seeking leave to issue a third party notice are now fixed in the Civil Procedure Rules, 2010. It is also correct that the court has powers to enlarge time for a party to do a thing whether or not the period that it was to be done has expired. It is evident from the Supporting Affidavit that the 2<sup>nd</sup> Defendant did not deem it necessary to explain why it took an inordinately long period to seek this leave. The rules were enacted in 2010 and the application brought in almost three (3) years later and about six (6) days before the suit was scheduled for hearing.

16. The Plaintiff intended to call the Proposed Third Party as its witness. The 2<sup>nd</sup> Defendant wanted it to be a party to the suit as it would be seeking indemnity from it. I have looked at the 2<sup>nd</sup> Defendant's Supporting Affidavit and found that its averments are at complete variance with those in the Replying Affidavit by the Proposed Interested Party.

17. The 2<sup>nd</sup> Defendant has a right to fair trial under Article 50 (1) of the Constitution of Kenya, 2010. This court is guided by the principle in Article 159 (2) (a) of the Constitution that justice shall be done to all and that the court must act with the aim of attaining a just determination of the proceedings as

provided for in Section 1B of the Civil Procedure Act Cap 21 ( laws of Kenya).

18. The court should consider whether the Plaintiff will suffer prejudice if the Proposed Third Party is made a party to the proceedings herein. The courts sees no prejudice and none has been demonstrated to it by the Plaintiff. I find that the Proposed Third Party is a necessary and proper party in the proceedings herein in the event the 2<sup>nd</sup> Defendant was to succeed in its case against the Plaintiff and the said Proposed Third Party was found to be liable. I say this because the court cannot enforce orders or decrees against persons who are not parties to the suit.

19. I will therefore exercise my discretion and allow the give the 2<sup>nd</sup> Defendant leave to issue a notice to the Proposed Third Party for the purpose of determining the real question in controversy between the parties herein.

1. I am satisfied that this is a case which merits the exercise of my discretion in favour of the Plaintiff herein and accordingly, I hereby allow the 2<sup>nd</sup> Defendant Chamber Summons application dated 23<sup>rd</sup> January 2013. The 2<sup>nd</sup> Defendant shall issue a notice to the Proposed Third Party within fourteen (14) days from today.

21. As has been seen in the proviso of Order 50 Rule 4 of the Civil Procedure Rules, 2010, a party applying to enlarge time should be condemned to pay costs to the other party. I did observe that the 2<sup>nd</sup> Defendant took an inordinately long period to bring the application herein. The Plaintiff has obviously been inconvenienced by the 2<sup>nd</sup> Defendant's application that was brought in so late in the day but he has a remedy of being compensated by way of costs by the 2<sup>nd</sup> Defendant.

1. I am therefore persuaded that this is a good case in which I should order the 2<sup>nd</sup> Defendant to compensate the Plaintiff by way of costs. I hereby order that the 2<sup>nd</sup> Defendant pays the Plaintiff thrown away costs in the sum of Kshs 10,000/= to be paid within fourteen (14) days from today.
2. Orders accordingly.

**DATED and DELIVERED at NAIROBI this 24<sup>th</sup> day of May 2013**

**J. KAMAU**

**JUDGE**