



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. E 027 OF 2018

GLOBECAST AFRICA LIMITED.....PLAINTIFF

VERSUS

WANANCHI GROUP KENYA LIMITED.....1ST DEFENDANT

WANANCHI PROGRAMMING LIMITED.....2ND DEFENDANT

RULING

1. The Chamber Summons of 25th October 2019 seeks the following main prayers:-

i. The 2nd Defendant be granted leave to file the application out of time,

ii. The 2nd Defendant be granted leave to issue and serve a Third Party Notice upon Creative Works Communication Limited as per the annexed draft Third Party Notice,

iii. The question of liability between the 2nd Defendant against the Third Party be tried and determined at the same time as the trial or in such other manner as the court may direct

2. The Plaintiff of 4th May 2018 Globecast Africa Limited (**Globecast**) has sued the Defendants jointly and severally for a sum of USD 118,614.54 and general damages for breach of contract. Globecast avers that it is engaged in the business of, inter alia, provision of live broadcasting, content distribution, production and transmission of news and sporting events worldwide.

3. The two Defendants are affiliates and are both subsidiaries of Wananchi Group Holdings Limited.

4. It is the case for Globecast that it provided the 1st Defendant, through the 1st Defendant's Zuku Brand, Satellite news gathering and capacity services for live transmission of various sporting events and games such as rugby, basketball and volleyball in Kenya and Uganda. It contends that the 1st Defendant failed to settle a sum of USD 118,614.54 due to it for the services rendered in the period between March 2015 to August 2016.

5. One of the Defences of the 2nd Defendant is that the Plaintiff was aware that its invoices with regard to 20 matches would be settled by Creative Works Communication Limited (**Creative**) who the 2nd Defendant engaged vide a production agreement dated 22nd May 2015 for purposes of Creative providing to it produced and broadcast rugby matches. That Creative chose to work with the Plaintiff as the two had a longstanding relationship.

6. The 2nd Defendant contends that upon the production and broadcast of the said 20 rugby matches, Creative invoiced the 2nd Defendant and the 2nd Defendant paid Creative for the production and uplink for 20 match days. The Defendants therefore asserts that the Plaintiff should address its claim to Creative which is the company that the Plaintiff engaged its services for the 20 rugby matches.

7. Those averments are reiterated by the 2nd Defendant in its quest to have Creative Works Communication Limited enjoined as a Third Party herein. These are to be found in the supporting affidavit of Randhirsingh Juddoo.

8. The Plaintiff has opposed this application by way of 23 grounds of opposition. It is needless for this Court to restate them all for reasons that will be apparent shortly.

9. This Court has considered the application and the grounds of opposition and the submissions filed herein.

10. The foundation for Third Party proceedings is Order 1 Rule 15(1) of the Civil Procedure Rules which reads:-

“15. (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.”

11. A Defendant who seeks to join a person not already party to the suit, by way of third proceedings, has to satisfy Court that it has a claim against the intended third party falling in the category set out in the Rule 1 of Order 15 .

12. The 2nd Defendant has averred that it paid Creative Works Communication Limited for the production and broadcast of 20 rugby matches which is the basis of the claim by the Plaintiff against the Defendants. It depones that the Plaintiff was well aware that Creative would settle the Plaintiffs invoices in respect to the 20 matches and that it has in fact received certain payment in that regard from Creative.

13. Annexed to the affidavit of Randhirsingh Juddoo are copies of invoices raised by Creative in respect to the controversial services and evidence of transfer of money from it to Creative in settlement thereof.

14. These allegations and evidence which are to be found in the affidavit of Randhirsingh Juddoo have not been debunked by any evidence on the part of the Plaintiff who instead chose to confront the application by way of grounds of opposition only.

15. On the basis of the material before it, the Court is satisfied that the 3rd Defendant may have a claim in contribution or indemnity from Creative.

16. Yet before the Court can grant the order, this Court must consider the Plaintiffs arguments in respect to the timing of the application before Court. The 2nd Defendant filed its amended Defence on 16th July 2018 but it took him upto 28th October 2018 to file the current application, about 3 months later. The leave application is obviously out of time because it ought to have been filed 14 days after close of pleadings, a date long gone.

17. That said, time can be extended where the circumstances in of favour such indulgence exist. As submitted by the Applicant the decision in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Other** (quoted with approval in **Joseph Kakomo Mbenga v Maingi Charles & another [2018] eKRL**) sets out principles to be considered in exercising the discretion on whether or not to enlarge time. These are:-

i. The explanation if any for the delay;

ii. The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;

iii. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

18. How does the Applicant explain the delay? Reading the Application itself and the affidavit in support, no explanation is proffered. However, in the submission, counsel states that the delay was caused by the 1st Defendant’s initial attempt to enjoin the intended third party as a Defendant through an application dated 30th August 2018.

Counsel further stated that after the determination of the application, there was a breakdown of communication between him and his clients who are based in Mauritius. In respect to this later explanation, this is a matter of evidence which cannot be made from the bar.

19. In the application of 30th August 2018 the 1st Defendant sought to have Creative joined as a co-defendant. The 1st Defendant having amended it’s pleading on 16th July 2018 without need for leave and there being no evidence when the pleading was served on the Plaintiff, pleadings are taken to have closed on or about 30th July 2018(see Order 2 Rule 13).For that reason the application, which turned out to be misguided, was brought without undue delay. On 12th July 2019 the Court declined that prayer after observing:-

There is a second limb of the application. It seeks the joinder of Creative into the proceedings but as is clear from pleadings filed, it is the 2nd Defendant and not Wananchi that introduces the alleged role of Creative in this dispute. The application before Court is not by the 2nd Defendant. It seems logical, and i so hold, that only the 2nd Defendant can mount a plea for that joinder.

20. So it is true that much of time was lost in the misconceived application. Sometimes mistakes on a point of law or on fact are made in the life of litigation but where no undue prejudice is caused then time lost in pursuing the mistaken course can be condoned. In the matter before Court the application to enjoin an intended 3rd party, although way out of time, comes before hearing has commenced, never mind that pre-trials have been settled. I think that any prejudice to be occasioned by a small delay in entertaining the application does not outweigh the need to give each party its full day in Court. That prejudice can be eased, somewhat, by an order of costs in favour of the respondent.

21. In the end, the Court allows prayers 1 and 2 of the Chamber Summons of 25th October 2019 but with costs to the Plaintiff in any event due to the lateness in which the application was brought. Third party directions shall be given at the appropriate time.

Dated, Signed and Delivered in Court at Eldoret this 9th Day of June 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Kimatta for Plaintiff.

No appearance for Defendant.