



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 329 OF 2015

THACHMAANZ LTD.....PLAINTIFF

VERSUS

PRIDE INN LTD.....DEFENDANT

RULING

1. The Application by the Plaintiff for Leave to issue a Third Party Notice against one Anthony Ngunga is resisted by the Defendant. That request for Leave is presented through a Chamber Summons dated 18th April 2016.

2. Through a Plaint filed on 8th July, 2015, the Plaintiff seeks judgement against the Defendant as follows:-

- a. Outstanding invoices of Khs. 2,104,770/=.
- b. Special damages;
 - i. Kshs. 1,000,000/= being the amount used to set up the bar including construction and purchasing compliant machines and equipment
 - ii. Kshs. 648,000/- being salaries paid to staff.
- c. Damages for Loss of business and profits amounting to Ksh. 7,366,695/=
- d. Costs of this suit.
- e. Interest at Court rates on (a) (b) (c) and (d) herein above from the date of filing of this suit until payment in full.

3. Briefly stated, the claim by the Plaintiff is premised on an oral Agreement allegedly entered between it and the Defendant in which the Plaintiff was to supply alcoholic beverages to the Defendant's Hotels within Nairobi. The Plaintiff was also to construct, set up and run a Bar at the Defendant's Hotel on Lantana Road. It is averred by the Plaintiff that pursuant to that contract the Plaintiff set up the Bar at the Defendant's premises and supplied the alcoholic beverages. The Plaintiff alleges that the Defendant

breached the said contract by failing to pay for the goods supplied and consumed by its customers.

4. The Defendant denies the Plaintiff's claim and denies entering into any form of contract with the Plaintiff. And then in paragraph 7 of the Statement of Defence avers;-

“Without prejudice to the foregoing, if the Plaintiff entered into the said contract with Mr. Anthony Ngunga (the then Defendant's Chief Executive Officer), the same does not bind the Defendant in the absence of the requisite authority to act as such and the Defendant shall seek leave to issue third party Notice to the said Mr. Anthony Ngunga to be joined in this suit for indemnity”.

It would be in line with this Defence that the Defendant seeks Leave to issue a Third Party Notice upon Anthony Ngunga (the intended Third Party).

5. An issue that immediately arose was the lateness in bringing the Application. Order 1 Rule 15 of the Civil Procedure Rules requires that an Application for Leave to commence Third Party proceedings be brought within fourteen (14) days after the close of Pleadings. The Statement of Defence was the last pleading filed herein. It was filed on 4th August 2015. Order 2 Rule 13 on close of pleadings provides;-

“The Pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with”.

6. However, in paragraph 26 of the Replying Affidavit of Edward Ahn sworn on 3rd June 2016 on behalf of the Plaintiff he states as follows in respect to the close of the pleadings herein;

‘That I am advised by the Plaintiff's advocates on record, which I rely on , that the Defendant ought to have commenced its third party proceedings, if it had clearly intended, by 14th February 2016 the same being 14 days after close of pleadings’. (my emphasis)

That is not contested by the Defendant and this Court takes the close of pleadings to be 31st January 2016 and the last day for commencing Third Party proceedings to be 14th February 2016.

7. The Plaintiff is of the view that the delay is inordinate and unexplained. The Plaintiff also points out that the Defendants did not indicate to the Court any intention to present this Application at an appearance before the Deputy Registrar on 21st March 2016 when parties agreed to comply with Case Management Rules.

8. It is true that the Defendant does not explain the delay at all and instead offers this apology;-

“the Defendant highly regrets the delay on its part to institute the third Party proceedings and plead with the honourable Court to pardon the same and allow it to institute the said proceedings out of time”.

That apology and plea is in paragraph 12 of the Affidavit of Nicholas Ochieng sworn in support of the Application on 18th April 2016.

9. As correctly pointed out by the Plaintiff the delay is not explained by the Defendant and had it been inordinate then the Court would have outrightly declined to entertain the Application out of time. However because the Application was filed about 60 days late and before the date set for Case Management Conference this Court is of the view that the delay is not inordinate. An explanation of delay is of vital importance when the delay is extensive. The delay here not being extensive, is excused for the sake of considering the Application on merit. Justice may be better served in that way.

10. Why does the Defendant want the Intended Third Party enjoined to these proceedings? Mr Ochieng, the General Manager of the Defendant Company explains that at no point did the Defendant Company have any meeting or pass any resolution to set up and run a Bar at any of its Hotels. Further that the Defendant did not receive any payment on behalf of the Plaintiff in respect to the alleged sale of beverages. Then in paragraph 8 and 9 depones:-

“THAT I verily believe that if the Plaintiff did enter an oral contract with the Defendant’s representative a Mr. Anthony Ngunga (the the Defendant’s Chief Executive Officer), then that was a private agreement that the Company was never privy to and therefore not bound by it.

THAT the Defendant avers that if the Plaintiff is entitled to any monies (which is denied), then the same is recoverable from Mr. Anthony Ngunga”.

11. Mr. Edward Ahn, a Director on the Plaintiff Company swore an Affidavit on 3rd June 2016 giving reasons why the Application for Leave should not be granted. In summary the Plaintiff believes that a contract was made between it and the Defendant and the Defendant’s denial of it is defeated by the Defendants own action in making part payment on the contract.

12. Mr. Ahn makes the argument that as the Plaintiff was dealing with people at the management level of the Defendant Company there was a legal presumption that internal Company Rules had been complied with. He concludes:-

“THAT therefore, the actions of the said management level employees bind the company as long as they are committed in the course and scope of their employment. The Defendant has not denied that both the said contract was entered into while both the Defendant’s former CEO and the Managing Director were in office and therefore the Defendant is bound by the actions of is management”.

13. The Plaintiff thinks that the Application is intended to intimidate and threaten the Intended Third Party who is one of the Plaintiffs witnesses. This, it is argued, is an abuse of Court process.

14. The Application for Leave has been brought under the Provisions of Order 1 Rule 15 of the Civil Procedure Rules which provides:-

“(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 Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit”.

15. It was common ground between the Parties that the following statement in the decision of **YAFESI WALUSIMBI VS. ATTORNEY GENERAL OF UGANDA [1959] EA 223** is true in respect to joinder of Third parties in proceedings:-

“In my opinion two things are clear in Third Party procedure: (1) In order that a Third Party may be legally joined the subject matter of the suit must be the same and (2) the original cause of action must be the same”.

It is however true that in determining whether or not the Court should grant permission to commence Third Party proceedings it must not lose sight of the general purpose of Third Party proceedings. **HAVELOCK J in WILFRED KAMAU GITHUA & ASSOCIATES VS. CITY COUNCIL OF NAIROBI [2013] eKLR** cited two foreign decisions which set out the purpose and benefits to be achieved by allowing third party proceedings as follows:-

“In the Canadian Court of Appeal in Alberta, Justice Keran in **Dilcon Construction Ltd vs. ANC Developers 1994 ABCA 245**, the learned Judge referred to the decision of the Second Circuit Court of Appeal case of **Dery vs. Wyer (1959) Ca2 N.Y., 265 F2d 804**, in which it was held inter alia on the general purpose of third party proceedings:

“...to avoid two actions which should be tried together to save the time and cost of reduplication [sic] of evidence, to obtain consistent results from identical evidence, and to do away with a handicap to a defendant of a time difference between a judgment against him and a judgment in his favour against the third party defendant”.

This opinion was also adopted in the case of **Kaptian v Hardy 1999 CanLII 19088 (AB QB)**, Moore, CJ held:

“The benefits to be achieved by following the third party procedure are summarized in Williston and Rolls, The Law of Civil Procedure, vol. 1, pp.426 and 427 as quoted by Purvis, J., in the Alberta Queen’s Bench decision of Edmonton and Rural Auxiliary Hospital and Nursing Home District No.24 v. Bittof-Holland-Christianson Architects Ltd, Ellis-don and Travelers Indemnity Insurance Co. of Canada (1981), 3A.R.60(Q.B.), at page 62. Briefly they are:

- 1. To avoid a multiplicity of actions;**
- 2. To avoid the possibility that there might otherwise be contrary or inconsistent findings in two different actions on the same facts;**
- 3. To allow the third party to defend the Plaintiff’s claim against the defendant;**
- 4. To save costs; and**
- 5. To enable the Defendant to have the issue against the Third Party decided as soon as possible, in order that the Plaintiff cannot enforce a judgment against him before the third party issue is determined”.**

17. There is no doubt, as argued by Counsel for the Plaintiff, that while the cause of action between the Plaintiff and Defendant is based on Contract, the issues raised by the Defendant against the intended third party involve breach of fiduciary duty. In that sense the two causes of action are different. That said there is a linkage between the two in that they arose in the same subject matter, that is, the alleged oral contract.

18. Of vital importance however is the concern by the Plaintiff that there is a danger that trying the two claims in one cause would be untidy as there is danger that the issues would be muddled up. That would prejudice the Plaintiff. This argument by the Plaintiff while being of some force, is somewhat weakened by the fact that the Plaintiff has already made the participation of the Intended Third party an integral part of its case by listing him as one of its two witnesses.

19. In the Witness Statement of the intended Third Party filed by the Plaintiff on 8th July, 2015, he gives a detailed account of the entry into and implementation of the contract. That account is contained in a 30

paragraph Statement and the impression one gets is that the participation of the Intended Third Party in the controversial transaction was not insignificant. Given that one of the Defendant's line of Defence is that the Intended Third Party's conduct was without its authority, it would be surprising if that issue would not be taken up by the Defendants when the Intended Third Party testifies. The view I take is that, the issue of whether or not the Intended Third Party acted without authority is already part of these proceedings not only because it is raised by the Defence but by the Plaintiff making the Intended Third Party a witness the issue presents itself for discussion during the hearing. This Court cannot see how, then, the Intended Third Party proceedings can clutter the hearing of Plaintiff's claim.

20. The Plaintiff had also made the argument that the Defendants claim, if any, against the Intended Third Party accrues on judgement been entered against it and so no prejudice will be suffered if Leave is not granted. While that may be so, it seems more just to afford the Defendant an opportunity of having its issue against the third party decided as soon as possible and at any rate before the Plaintiff can enforce a judgement against it.

21. As it would now be evident, I am for allowing the Application of 18th April, 2016. But because it was brought out of time the Applicant is undeserving of costs. The Application of 18th April, 2016 is hereby allowed. Each party to bear its own costs.

Dated, Signed and Delivered in Court at Nairobi this 6th day of September ,2016.

F. TUIYOTT

JUDGE

PRESENT;

Okimaru for Plaintiff

Mude for Respondent

Alex - Court clerk