

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
COMMERCIAL & TAX DIVISION
HCCC E316 OF 2024

NANCY MUTHEI
MWEU.....PLAINT
IFF

VERSUS

AIRTEL COMMUNICATIONS KENYA
LIMITED.....DEFENDANT

MINDSHARE KENYA LIMITED.....1ST
PROPOSED THIRD PARTY

MEDIAMAX NETWORK LIMITED...2ND PROPOSED
THIRD PARTY

RULING

- 1.The defendant has sought in a chamber summons dated 22.4.2025 made under **Order 1 Rule 15 (1) of the Civil Procedure Rules**; leave of court to issue third party notices to **Mindshare Kenya Limited** and **Mediamax Network Limited**.
- 2.The application is supported by an affidavit sworn by the defendant's counsel, **Giselle Nekesa** on 22.4.2025 and grounds thereto augmented through written submissions dated 4.6.2025.

3. The gist of the application is to enable liability, if at all, as between the plaintiff, defendant and the proposed third parties to be determined together.
4. In the suit, the plaintiff challenges the defendant's use of her Interactive Voice Response (IVRs) without her consent and/ or payment thereof.
5. The defendant, on the other hand, averred that it acquired the recording through a contract between its media and advertising service provider, **Mindshare Kenya Limited** and **Mediamax Network Limited**. It stated further, it did not have direct contact with the plaintiff for the provision of the recording or the payments. Thus, claimed that any alleged use of the IVR was based on lawful acquisition of rights for the use through the contract and having paid for the agreed consideration. And, that under the contract, the agency agreed to indemnify it against any claims whatsoever occurring.
6. The defendant also claimed that the plaintiff was an employee of **Mediamax Network Limited** and that the general rule is that when an employee creates any works in the course of their

employment, in absence of an agreement to the contrary, the employer becomes the owner of the works. In support of this proposition, it relied on **section 31 of the Copyright Act.**

7.The defendant urged the court to allow its application on a full indemnity basis. It relied on: -

(1) **Judith Achieng Omondi v June Nyaingo Hossel & another [2018] eKLR**

(2) **Wangechi Waweru Mwende v Techno Mobile Limited; Roger Ouma t/a Ojwok Photography [2020] eKLR to argue that the plaintiff did not produce evidence to support the assertion that they own the copyright to the subject image.**

(3) **Hilton Mwakio Juma v Telkom Orange (K) Ltd & 3 Others [2018] eKLR**

(4) **Wokabi & another v Microsoft East Africa Ltd & another (Civil Suit 197 of 2014) [2024] KEHC 819 (KLR) (Civ) (31 January 2024) (Judgment)**

8.The plaintiff opposed the application through a replying affidavit sworn on 28.5.2025 and written submissions dated 15.10.2025. The main

contention is that the defendant has failed to establish that there is a proper question to be tried as to the liability of the proposed third parties to the defendant.

9. The plaintiff opposed the issuance of the third-party notice to **Mediamax Network Limited** as the alleged fraudulent use of the IVRs has nothing to do with her employment contract.

10. The plaintiff also opposed the issuance of the third-party notice to **Mindshare Kenya Limited** as the defendant allegedly began to use her IVRs in 2019 before the alleged contract was signed between the defendant and **Mindshare** on 2.9.2020 and 8.9.2020.

11. The plaintiff urged the court to dismiss the application with costs. She relied on: -

(1) **Pharmacy and Poisons Board & another v Mwiti & 21 others [2021] eKLR**

(2) **Baruthi Bundi v Domitila Obala Ouma & 2 others [2022] KEELC 1805 (KLR)**

(3) **Telkom Kenya Limited v John Ochanda (Suing on His Own Behalf and on Behalf**

Of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR

(4) Raila Odinga v The Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR

(5) Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission and 6 Others [2013] eKLR

(6) Mary Gathoni & another v Frida Ariri Otolo & another [2020] eKLR

(7) Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others [2014] eKLR

Analysis and Determination

12. There are two preliminary issues.

Delay

13. The plaintiff accused the defendant of inordinate delay in filing the application almost one year after the suit was filed on 12.6.2024.

14. Under Order 1 Rule 15, such an application ought to be filed ***within fourteen days after the close of pleadings.***

15.The defence was filed on 27.8.2024. The application ought to have been filed on or before 10.9.2024.

16.The application therefore has been filed outside the statutory timelines.

17.Nonetheless, whilst the plaintiff has complained about the delay, she has not demonstrated the prejudice she may suffer upon the consideration and determination of the application.

18.Courts are required to administer justice without undue regard to procedural technicalities. **(Article 159 (2) (d) of the Constitution).**

19.Thus, the constitutional philosophy of substantive justice suggests that I consider the application on merit despite the delay in filing the application.

Competency of the affidavit

20.The competence of the supporting affidavit has also been challenged by the plaintiff on the basis that it has been deposed by the defendant's legal counsel who she says was not privy to the contract between her and the defendant, and

therefore, not competent to depose to pertinent issues thereto.

21.The defendant did not address this issue.

22.An advocate should not swear an affidavit on contentious matters of evidentiary character or facts. By doing so, ***“the advocate courts an adversarial step down from the privileged position at the Bar into the witness box.”***

Kisya Investment Limited & others v Kenya Finance Corporation Ltd HCCC No 3504 of 1993 (Unreported) cited in Mbugua & 3 others v Turi Gardens Limited (Environment and Land Case Civil Suit E363 of 2024) [2025] KEELC 34 (KLR) (16 January 2025) (Ruling)

23.I agree with the plaintiff that it was not appropriate for the defendant’s counsel to depose to matters of fact relating to the contract between her and the defendant or between the defendant and the proposed third parties.

24.And, the application could be standing on crutches rather than the foot of the owner. To avert collapse of the application, I direct that a

compliant affidavit be filed within 14 days after which the supporting affidavit sworn by the defendant's counsel, **Giselle Nekesa** on 22.4.2025 shall stand struck out and will be expunged from the record.

Conclusion

25. Consequently, determination of the question of leave to issue third party notices to the 1st and 2nd proposed third parties is deferred.

**Dated, signed and delivered at Nairobi through
Microsoft Teams online application this 19th
day of March, 2026**

F. Gikonyo M

Judge

In the presence of: -

Midenga for Plaintiff

Ms. Gichuki for Dr. Ataka for Defendant

CA- Ivan/Aggrey