



Mutua & 9 others v Steel Makers Limited; Realmax HR International Limited (Third party) (Cause 1906 of 2017) [2023] KEELRC 248 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEELRC 248 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1906 OF 2017
L NDOLO, J
FEBRUARY 2, 2023**

BETWEEN

- SIMON IVITA MUTUA 1ST CLAIMANT**
- KALUKU MULI 2ND CLAIMANT**
- JOSEPH KYALO NDAMBUKI 3RD CLAIMANT**
- HILLARY KIBET KIRUI 4TH CLAIMANT**
- NASHON MANDELA MBETA 5TH CLAIMANT**
- PETER KASIM MUTHIANI 6TH CLAIMANT**
- JONES KENNEDY KALUNGU 7TH CLAIMANT**
- ALEX MUTINDA KALUNGU 8TH CLAIMANT**
- ALEXANDER MULI 9TH CLAIMANT**
- CHARLES KIBET CHEPKWONY 10TH CLAIMANT**

AND

STEEL MAKERS LIMITED RESPONDENT

AND

REALMAX HR INTERNATIONAL LIMITED THIRD PARTY

RULING

1. By its chamber summons dated April 25, 2022, the 3rd Party, Realmax HR International Limited, asks the Court to release it from these proceedings.



2. The application is supported by an affidavit sworn by the 3rd Party's Director, Fredrick Ondienga and is based on the following grounds:
 - a. That on November 23, 2021, the Court directed that the 3rd Party be served with a third party notice dated October 7, 2021;
 - b. That by virtue of the third party notice and subsequent proceedings, the 3rd Party was served and granted time to enter appearance and file its pleadings;
 - c. That joinder of the 3rd Party to the proceedings was improper and it is in the interest of justice that the 3rd Party be removed from the proceedings;
 - d. That the 3rd Party is a limited liability company, which was contracted by the Respondent on October 1, 2016, to provide human resource services;
 - e. That the 3rd Party was not privy to the contracts between the Claimants and the Respondent and therefore the Respondent cannot seek indemnity on the basis of the said contracts;
 - f. That the claimants' claim against the respondent is as a result of a contractual relationship between the respondent and the Claimants arising from the year 2000 to 2015, way before the 3rd Party came into existence;
 - g. That moreover, it was a requirement of the contract between the 3rd Party and the Respondent that the 3rd Party would provide its own employees who would carry out general labour duties in the Respondent's premises;
 - h. That consequently, the claimants are strangers to the 3rd Party and the 3rd Party is not in any way indebted to the Respondent in the manner alleged;
 - i. That the Respondent's basis for enjoining the 3rd Party is erroneous and unsubstantiated and it is in the interest of justice that the 3rd Party be removed from these proceedings;
 - j. That the 3rd Party is apprehensive that if the orders sought are not granted, it will be greatly prejudiced and will suffer irreparable loss and damage.
3. The Respondent opposes the application by a replying affidavit sworn by its General Manager-Administration, James Murigi on June 10, 2022.
4. Murigi depones that the relationship between the respondent as client and the 3rd Party as contractor is rooted in a service contract dated October 1, 2016, which spelt out the scope of services to be performed by the contractor, together with the rights and duties of the contractor's employees.
5. Murigi adds that it was a material terms of the contract at clause 8 that the 3rd Party would be responsible for all deductions and statutory contributions on behalf of its employees in addition to determining its employees' working conditions including wages payable, working hours and leave days.
6. Murigi points out that a perusal of the claim dated 25th September 2017 reveals that all the Claimants allege that their employment was unlawfully terminated on January 3, 2017. He adds that the service contract between the Respondent and the 3rd Party took effect on October 1, 2016 and was in force on January 3, 2017, when the Claimants allege that their services were unlawfully terminated.
7. The Respondent's case is that with the exception of management, it had outsourced its entire operation to the 3rd Party meaning that the 3rd Party had effective control and management of the Claimants during the material period.



8. The Respondent maintains that the 3rd Party is a necessary party in these proceedings.
9. The issue for determination in this application is whether the 3rd Party is properly enjoined in these proceedings. The joinder was pursuant to a 3rd party notice which was duly served on the 3rd Party, who chose not to respond. It was the action of enjoining the 3rd Party that triggered the present application.
10. As held in *Interactive Advertising Limited & another v Equity Bank Limited & 2 others* [2016] eKLR in order to enjoin a 3rd party, the subject between the 3rd party and the defendant must conform to the original cause of action.
11. In this case, it is not in contest that there was a valid service contract between the Respondent and the 3rd Party by which the 3rd Party was to provide labour services to the Respondent. What is in dispute is the extent to which the service contract impacted the Claimants' employment contracts and the termination of these contracts. This is a matter that cannot be determined at this stage but will require inquiry at a full trial.
12. For this reason, I have reached the conclusion that the 3rd Party is a necessary party in these proceedings. Its application dated April 25, 2022 is therefore declined with costs in the cause.
13. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF FEBRUARY 2023

LINNET NDOLO

JUDGE

Appearance:

Ms. Alividza h/b for Mr. Namada for the Claimants

Ms. Kirisiet h/b for Ms. Morara for the 3rd Party/Applicant

Mr. Owino for the Respondent

