



Dias & another v Afkoluck Investments Limited t/a Lucky & Casino; Addisalem Belachew Demisse (Proposed Third Party) (Cause E527 of 2021) [2023] KEELRC 3211 (KLR) (7 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3211 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E527 OF 2021
L NDOLO, J
DECEMBER 7, 2023**

BETWEEN

MICHAEL DIAS 1ST CLAIMANT

SERGIO BOSCO ANTAO 2ND CLAIMANT

AND

AFKOLUCK INVESTMENTS LIMITED T/A LUCKY & CASINO RESPONDENT

AND

ADDISALEM BELACHEW DEMISSE PROPOSED THIRD PARTY

RULING

1. By a Chamber Summons dated 28th September 2022, the Respondent seeks leave to issue a Third-Party Notice to the Proposed Third Party.
2. The application is supported by an affidavit sworn by the Respondent’s Chief Executive Officer, Nilesh Dingoo Kriplani and is founded on the following grounds:
 - a. The Proposed Third Party was an employee of the Respondent in the rank of General Manager, with the mandate of running the day to day activities of the business;
 - b. During the 2019 festive season, the Proposed Third Party closed down the Respondent’s business without any authority from the directors and disappeared with the keys for weeks on end;
 - c. The said closure caused the Respondent’s business to suffer astronomical losses since the festive season is the most lucrative period;



- d. The Proposed Third Party carried away documents, records and computers from the casino's cash office, accountant's computer, keys to the entire casino, keys to two safes and keys to the strong room, making it impossible for the business to run;
 - e. The Proposed Third Party failed to avail back the aforementioned business items and/or report back to work and was also unavailable via availed contacts, making it impossible for the Respondent to contact her;
 - f. Ramesh Shah, a former director of the Respondent reported the matter at Kilimani Police Station and was issued with an Occurrence Book Number 75/24/2019;
 - g. In view of the foregoing, the Respondent was forced to send its employees on leave for a while as it looked for means to continue with the business in the absence of the equipment in possession of the Proposed Third Party and/or access the business premises;
 - h. In the upshot, the Respondent instituted a suit against the Proposed Third Party being, CMCC No E5678/2020: Afkoluck Investment Limited v Addisalem Belachew Demisse and through an application, sought and obtained an order directing the Proposed Third Party to return the items but the Proposed Third Party did not comply;
 - i. The Respondent managed to get more equipment and access the business premises and thereafter contacted all employees, including the Claimants, to report back to work;
 - j. The Claimants failed to avail themselves and/or make any contact with the Respondent for months on end, prompting the Respondent to get other employees in the Claimants' place, to salvage the business;
 - k. The Respondent had no option but to terminate the Claimants' employment, which was well within the Respondent's right as an employer;
 - l. The Respondent believes that the Proposed Third Party is responsible for any actions and/or inactions steering to the termination of the Claimants' employment;
 - m. It is only fair and in the interest of justice that the application be allowed.
3. The Claimants oppose the application by their replying affidavits sworn on 18th October 2023.
 4. The Claimants state that they are not privy to information concerning the employment relationship between the Respondent and the Proposed Third Party. They maintain that the Respondent's application has no legal basis.
 5. According to the Claimants, the alleged closure of the Respondent's business during the festive season in 2019, carrying away of documents, records, computers and keys to the business premises has nothing to do with the unlawful termination of their employment.
 6. The Claimants accuse the Respondent of failing to inform them of the re-opening of the business, when the other employees were recalled back to work.
 7. The Claimants depone that while the Respondent may have a legitimate claim against the Proposed Third Party, any such claim is completely unrelated to the Claimants' claims against the Respondent. The Claimants add that the actions by the Proposed Third Party are not a proximate cause of the termination of their employment.



8. The Claimants further depone that the Respondent has not demonstrated that the question of unlawful termination should properly be determined not only between the Respondent and the Claimants but also between the Claimants and the Proposed Third Party.
9. The Claimants' case is that the Proposed Third Party is not a necessary party in these proceedings. They aver that the Respondent has not set out the interest at stake on the part of the Proposed Third Party.
10. The Claimants conclude that this application is an afterthought and an attempt to delay the determination of their claims.
11. The Respondent's application is based on order 1 rule 15(1) 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 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.
12. In Interactive Advertising Limited & another v Equity Bank Limited & 2 others [2016] eKLR it was held:

“Before the court can exercise its discretion to issue a third party notice it has to evaluate the allegations of the Plaintiff in terms of his legal claim to the relief he is seeking. The court also has to evaluate the Defendant's allegations against the third party and has to be satisfied that the substance of each claim is the same and that there is a linkage between all the claims before issuing the notice.”
13. Joinder of a Third Party cannot therefore be merited unless the dispute between the Third Party and the Respondent aligns with the original cause of action.
14. In this case, the Respondent attempts to create a nexus between its claim against its former General Manager and the Claimants' claims of unlawful termination of employment.
15. Of significance is the fact there is a separate suit filed by the Respondent against the Intended Third Party. Further, the Claimants' claims stem from the alleged failure by the Respondent to recall them back to work after re-opening of the business.
16. The Court does not see even a remote proximity between the alleged infractions by the Intended Third Party and the Claimants' claims against the Respondent. On the contrary, the Court takes the view that joinder of the Intended Third Party will unnecessarily convolute the issues in this case.



17. In the result, the Respondent's application dated 28th September 2022, is disallowed with costs to the Claimants.

18. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF DECEMBER 2023

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JUDGE

Appearance:

Mr. Lenkidi h/b Ms. Lumalas for the Claimants

Ms. Macharia h/b for Mr. Kago for the Respondent

