

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]

M.A No. 996 of 2020

(Arising out of HCCS No. 812 of 2020)

SEMANDA ISIMA
MOSES:.....PLAINTIFF

VERSUS

AIRTEL UGANDA
LIMITED:.....APPLICANT/DEFENDANT

AND

BLU FLAMINGO
LIMITED:.....RESPONDENT/THIRD PARTY

BEFORE: HON. JUSTICE DUNCAN GASWAGA

RULING

- [1] This is an application brought under Order 1 rule 14 CPR for orders that; *leave be granted to the applicant to issue a third party notice together with a copy of the plaint upon the respondent and for costs of the application.*
- [2] The grounds of the application were stated in the affidavit of **Hudson Andrew Katumba** in support of the application and these are that; *the plaintiff filed Civil Suit No. 812 of 2020 against the applicant company for a declaration that the applicant's acts of using his image in its adverts for the Kabaka Birthday Run event of 2019 without his authorization and or consent amounts to infringement of his image rights, constitutional right to privacy and unjust enrichment; an order*

for an account of the proceeds of the said event; 10% royalties from the proceeds of the said event; general and aggravated damages and interest thereto at a rate of 24% per annum and costs of the suit; that the applicant company subsequently filed its defence thereto wherein it contends that on 30/08/2017 it contracted the respondent to provide digital marketing services including the designing of adverts and promotion of its calendar events on various social media platforms; that under the said contract, the respondent handles the applicant company's branding and design work including the update and promotion of calendar events such as the Kabaka's Birthday Run on the various social media platforms; that at all material times the applicant has never contracted the plaintiff but the respondent to provide such design and promotional services and the applicant fully paid for the said services including the impugned adverts in which the plaintiff featured; that under clause 9 of the said agreement, the respondent undertook to fully indemnify and hold the applicant harmless against any and all claims, proceedings, damages, costs, expenses and losses of whatever nature that may arise out of any negligent or wilful act or omission in the provision of the services envisaged therein and as such the applicant is entitled to indemnity against the respondent for all claims brought by the plaintiff for the infringement of his image rights and that it is just and equitable in the circumstances that this application be granted.

- [3] The applicant relied on the authorities of **Sango Bay Estates Dresdner Bank [1971] EA 307** and **NBS Television Ltd Vs. Uganda Broadcasting Corporation M.A No. 421 of 2012.** On sufficient grounds to join the respondent as a third party the applicant stated that

in the agreement signed with the respondent they agreed to indemnify the applicant against any third party claims, losses or damage caused by the agency, its employees or agents in the performance of the agreement and that the impugned advert in which the plaintiff's picture appeared falls directly into the scope of work sought to be indemnified. Further, that the subject of the main suit is the advertisements done for the Kabaka Birthday Run, also the subject of the agreement entered by the applicant and the respondent as such the subject matter between the applicant and the respondent is the same as that between the plaintiff and the defendant and the original cause of action, that the plaintiff will not be prejudiced if this application is granted and that it is in the interest of justice that this suit is heard on its merits.

[4] Order 1 rule 14 CPR provides that;

"Where a defendant claims to be entitled to contribution or indemnity against any person not a party to the suit, he or she may, by leave of the court, issue a notice (hereafter called a "third party notice") to that effect."

[5] In the case of **NBS Television Ltd Vs. Uganda Broadcasting Corporation, M.A No. 421 of 2012** the court interpreted Order 1 rule 14 CPR in the following terms:

"Quite clearly, Order 1 rule 14(1) and (2) CPR is confined to cases where a defendant claims indemnity or contribution from a third party that would otherwise be a stranger to the suit. It is trite law that for a third party to be legally joined to a suit, the subject matter as between the defendant and the third party must be the same as that between the defendant and the plaintiff, and

similarly the cause of action between the defendant and the third party must be the same as the original cause of action.”

- [6] This subject was also discussed in detail by the court in the **Sango Bay Estates** case (supra) that

“the general scope of a third party procedure is to deal with cases in which all disputes arising out of the transaction as between the plaintiff and the defendant and the third party can be tried and settled in the same action. This means that in order for a third party to be lawfully joined, the subject matter between the third party and the defendant must be the same as the subject matter between the plaintiff and the defendant and the original cause of action must be the same. In addition, court can only exercise its discretion to issue a third party notice upon evaluation of the allegations of the plaintiff in terms of his or her claim and the orders sought from court, it is also imperative that Court evaluate the defendant allegations against the third party.

- [7] In **M/S Panyahululu Co. Ltd Vs M/S New Ocean Transporters Co. Ltd & Others, HCCS No. 523 of 2006** the court, (per Bamwine, J as he then was), referred to **D.S.S Motors Ltd Vs Afri Tours and Travel Ltd, HCCS No. 12 of 2003** while discussing the above position of the law relating to third party notice and stated that:

“...I understand the law to be that in order that a third party be lawfully joined, the subject matter between the third party and the defendant must be the same as the subject matter between the plaintiff and the defendant and the original cause of action must be the same. In other words, the defendant should have a direct right to indemnity as such, which right should have, generally, if not always, arisen from contract express or implied”

[8] The following principles derived from these authorities have to be satisfied by the applicant if the application (*for leave to issue a third party notice*) is to be granted:

(i) *the applicant has sufficient grounds to join the respondent as a third party,*

(ii) *the subject matter between the applicant and respondent is the same as the subject matter between the plaintiff and the defendant and the original cause of action*

(iii) *the applicant claims indemnity or contribution from the respondent*

(iv) *the plaintiff will not suffer any prejudice if the application is granted*

(v) *it is in the interest of justice that the suit be heard on its merits.*

[9] **Principle one: That the applicant has sufficient grounds to join the respondent as a third party.** In the application before this court, the applicant seeks to add the respondent as a third party to **Civil Suit No. 812 of 2020**. Paragraph 2 of the supporting affidavit shows that the plaintiff sued the defendant company for among others that the applicant's act of using his image in adverts for the 'Kabaka birthday run' event in 2019 without his authorization and or consent amounts to infringement of his personality/ image rights, constitutional right to privacy and unjust enrichment as well as an order for 10% royalties from the proceeds of the said event. As indicated in paragraphs 3 and 4 of the supporting affidavit the applicant company filed a defence in which it contends to have contracted the respondent company to provide digital marketing services involving the designing of adverts and promotions of its calendar events including the Kabaka birthday

run on various social media platforms. Under clause 9 of the agreement the respondent undertook to offer full indemnity to the applicant. The provision was couched thus:

9. Indemnity

9.1. Without prejudice to any of the foregoing provisions, the agency agrees to full indemnity and to hold the client, its directions, agents and employees harmless against any and all claims, proceedings, damages, costs, expenses and losses of whatever nature that may arise out of any negligent or willful act or omission or commission on the part of the Agency, its servants and/ or agents in the provision of the services under this agreement.

9.2 By signing this agreement, the agency undertakes to indemnify the client against any third party claims, losses, or damage caused by the Agency, its employees or agents in the performance of this agreement.

[10] From the grounds advanced so far by the applicant it is clear that the impugned advert that featured the plaintiff's image as alleged in **Civil Suit No.812 of 2020** falls perfectly well within the scope of work as envisaged in the above service contract between the applicant and the respondent. Further, it's clear that the subject matter between the applicant and respondent is the same as the subject matter between the plaintiff and the defendant and the original cause of action. Moreover, the applicant's case is that the respondent was responsible for any such breaches since it was legally contracted to handle all the adverts and promotions of the applicant, including those of the 'Kabaka birthday run' event. This court is therefore satisfied that the applicant has fulfilled the first two above principles

[11] **Principle 3: The defendant claims indemnity from the respondent.**

According to **Black's Law Dictionary** (2nd Edition) 'indemnity' is defined as "*a collateral contract or assurance, by which one person engages to secure another against an anticipated loss or to prevent him from being damnified by the legal consequences of an act or forbearance on the part of one of the parties or of some third person*". Clouse 9 of the above service contract is instructive on the matter at hand. There was an express undertaking by the respondent to indemnify the applicant against any and all claims, proceedings, damages, costs, expenses and losses of whatever nature that may arise out of any negligent or willful act or omission or commission on the part of the agency, its servants and or agents in the provision of the services under this agreement. Moreover, paragraph 6 of the supporting affidavit indicates that the applicant has already fully paid the respondent for all the work and services rendered to it, including the impugned adverts in which the plaintiff in the main suit featured. These averments demonstrate that the applicant is entitled to indemnity from the respondent company against such third party claims levied against it in **Civil Suit No.812 of 2020**. The third principle too is satisfied.

[12] A perusal of the pleadings clearly indicates that the application herein was filed well within time, and with the knowledge of the plaintiff, the intention of which is to bring all concerned parties in this transaction before court and have the question regarding liability determined at once. This I believe is done in the interest of justice and will not prejudice the plaintiff or any other party. Principles 4 and 5 are also satisfied.

[13] Resultantly, the application is found to be meritorious and allowed. The defendant has a direct right to indemnity which expressly arises from contract. I am therefore convinced that this is a proper case where a third party notice should issue. **Accordingly, leave to issue a Third Party Notice together with a copy of the plaint upon the respondent is hereby granted and same should be effected within fourteen (14) days from the date hereof. Costs shall be in the cause.**

I so order

Dated, signed and delivered at Kampala this ^{19th} ~~16th~~ day of August 2021


Duncan Gaswaga

JUDGE