

Background:

1. The Applicant is a private limited liability company duly incorporated in Uganda and the owner and operator of several telecommunication masts in Uganda. The 1st and 2nd Respondents through their attorneys
5 KarugabaMarunga, Komukyeka, Kabahuma Maureen and Muhumuza Davis filed Civil Suit No. 06 of 2022 against the Applicant alleging trespass on land comprised in Block 201, Plot 1 LRV 1544 Folio 13, land at Mburara.
2. The Applicant in the written statement of defense to the said suit denied liability and contended that she had been in occupation and use of the said
10 land since 2010 after acquisition of the said mast and the suit land from Eaton Towers Uganda limited. The Applicant also averred that in 2021, Eaton Towers Uganda Limited and the 1st Respondent executed a fifteen years' license to use the suit land.
3. That under the agreement, the 1st Respondent agreed to indemnify Eaton
15 whose rights the Applicant acquired against all claims that could arise and losses suffered as a result of the use of the licensed area since the 1st Respondent made an undertaking under the agreement that he was the owner of the said land. That under the agreement, the Applicant is entitled to indemnity against the 1st Respondent for third party claims which includes
20 the claims by the 2nd and 3rd Respondents in the main suit.

Representation:

This is an exparte application. The Applicant was represented by M/s ENSafrica Advocates who filed written submissions.

Issue:

Whether a third party notice should be issued against the 1st Respondent.

Applicant's submissions:

5 It was submitted for the Applicant:

1. That order 1 rule 14(1) of the Civil Procedure Rules provides that where a defendant claims to be entitled to contribution or indemnity against any person not a party to a suit, he or she may with leave of court issue a third party notice to that effect. That the consideration for such grant was
10 discussed in the case of ***NBS Television Ltd Vs. Uganda Broadcasting Corporation , Misc. Appln No. 421 of 2012*** where Bamwine J (as he then was) held thus: *“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
15 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 from contract express or implied”*
2. That the claim against the Applicant in the main suit is trespass over land comprised in Block 201, Plot 1 LRV 1544 Folio 13 land at Mburara. That it
20 is the same land which the Applicant has been using since 2010 and the subject matter in the contract between Eaton Towers Uganda Limited and the 1st Respondent. That the subject matter between the Applicant and the plaintiffs in Civil Suit No. 06 of 2022 is the same subject matter between the Applicant and the 1st Respondent.

3. That a right to indemnity generally arises from contract. That it exists where the relationship between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify against the other (**Easter Shipping Co. Vs. Quah Beng Kee (1924) AC 177 at 182**).

4. That that by affidavit of Daphine Ampumuza, the Applicant contended that she executed a fifteen years' license agreement with the 1st Respondent. That under the agreement, the 1st Respondent is liable to indemnify the Applicant against all claims and losses suffered as a result of use of the license area for the duration of the license. That as such a third party notice should be issued against the 1st Respondent for such loss which the Applicant is likely to suffer as a result of the claims by the 2nd and 3rd Respondents.

Decision of Court:

Order 1 rule 14 of the Civil Procedure Rules that provides for Notice to third party states as follows:

(1) Where a defendant claims to be entitled to contribution or indemnity over 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.

(2) The leave shall be applied for by summons in chambers ex parte supported by affidavit.

(3) A copy of the notice shall be filed and shall be served on such person according to the rules relating to the service of a summons.

(4) *The notice shall state the nature and grounds of the claim and shall, unless otherwise ordered by the court, be filed within the time limited for filing his or her defence.*

(5) *The notice shall be in or to the effect of Form 23 in Appendix A to these Rules with such variations as circumstances require, and a copy of the*

In **Sango Bay Estates Dresdner Bank (1971) E.A 307** it was observed 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 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 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 evaluates the defendant allegations against the third party*”

In **Semanda Isima Moses Vs. Airtel Uganda Ltd & Anor. Misc. Application No. 996 of 2020** the Hon Justice Duncan Gaswaga laid down the grounds to be proved before a third party can be issued to include:

(a) The Applicant has sufficient grounds to join the Respondent as a third party.

(b) The subject matter between the Applicant and the Respondent is the same as The subject matter between the plaintiff and the defendant and the original cause of action.

- (c) The Applicant claims indemnity or contribution from the Respondent.*
(d) The plaintiff shall not suffer any prejudice if the application is granted.
(e) It is in the interest of justice that the suit is heard on its merits.

5 **Whether Applicant has sufficient grounds to join Respondent as third party.**

In this case, the Applicant contended that there is a subsisting license agreement between her and the 1st Respondent having acquired the interests of Eaton Towers Uganda Limited and that under the license agreement, the 1st Respondent covenanted to indemnify the Applicant against any claims or losses resulting from the use of the licensed area. That the subject matter in Civil Suit No. 006 of 2022 concerns the licensed area. I have reviewed the license agreement attached to the application as annexure C. The said agreement was executed on 22 December 2021 between Eaton Towers Uganda Limited as the **licensee** and Rashid Bitama as the **Licensor**. In the agreement, the licensed area is land measuring 15 meters by 15 meters and the purpose was for tower installations and contiguous land for utilities, cables and access road. The grantor of the license was the 1st Respondent and the grantee is the Applicant having acquired the interests of Eaton Towers Uganda Limited. The duration of the license is 15 years effective from the 25th day of December 2025 with the option to renew after expiry. The Rental fee/consideration is Ugx 4,000,000/= (Four Million Shillings) and the licensor was paid a sum of Ugx 15,750,000/= (Fifteen Million Seven Hundred Fifty Shillings) being rent for the period running from 26th December 2010 to 25th December 2025. Under clause 12, the 1st Respondent covenanted to indemnify the Applicant against all claims and choses in action and possession for the period of the license in respect to the licensed area. The agreement indicates that the 1st Respondent was to indemnify the Applicant having acquired the interest of Eaton Towers Uganda Limited

against any claims as regards to the licensed area. Therefore, the Applicant has presented good grounds for issuance of a third party notice against the 1st Respondent.

5 **Whether the subject matter between the Applicant and the Respondent is the same as the subject matter between the plaintiff and the defendant and the original cause of action.**

It was contended for the Applicant that the suit land/subject matter in Civil Suit No. 06 of 2022 is the same land onto which the 1st Respondent granted her a
10 license. That as such the subject matter between the Applicant and the plaintiffs in the main suit is the same as between the Applicant and the 1st Respondent.

I have looked at the plaint which is attached as annexure A to the plaint. The plaintiffs filed a suit through their attorneys, Denis KarugabaMurunga, Kyomukyeka Grace, Kabahuma Moreen and Muhuimuza David. In paragraph 3 of
15 the plaint, the plaintiffs' claim against the defendant/Applicant is for trespass and several declaratory orders. Further under paragraph 4.2, the plaintiff contended that around 2010, the Applicant's predecessor in title, Airtel Uganda Limited purportedly executed a lease agreement with a one Rashid Bitama purportedly to take a parcel of the suit land and subsequently constructed thereon a
20 telecommunications mast to facilitate the said Airtel Uganda Limited with Telecommunications business and the site is known as "WES587, Kyamutunzi. The plaintiff added under paragraph 4.3, that over years, the telecommunication mast since construction has undergone change of ownership to Eaton Towers and presently to the defendant/Applicant who acquired all previous
25 telecommunications masts and operating masts for its own as well as for the

benefit of Airtel and other Telecommunications companies. Therefore, the trespass alleged by the Applicant is on land over which Eaton had masts and now owned and operated by the Applicant. In the same vein, the Applicant contends that there is an existing license between her and the 1st Respondent and seeks
5 compensation/indemnity for the claims by the plaintiffs over use of the said land.

I my view the subject matter between the plaintiff and the Applicant and between the Applicant and the 1st Respondent is the same being land on which the Applicant has a mast and it is the same subject matter in the original suit that is Civil Suit No. 006 of 2022.

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Whether the Applicant claims indemnity or contribution from the Respondent.

It was submitted for the Applicant that under the license agreement, the Applicant is entitled to compensation from 1st Respondent who under the said agreement made such undertaking.

15 I have made scrutiny of the license agreement attached as annexure C to the application specifically clause 12. **Under clause 12.1** it was agreed that: “*The licensor shall indemnify and hold The Licensee harmless against any claim or liability or loss for personal injury or property damage resulting from or arising out of the use and occupancy of the licensee area by the Licensee, its employees or*
20 *agents, except such claims or damages as may be due or caused by the intentional misconduct or negligent acts of the Licensee, its employees or agents.*” **Under Clause 12.3:** “*The Licensor warrants that he is the rightful and legal owner of the License Area and has all necessary authority to License the Licensed area and there are no other contracts for sale/license, options involving or encumbrances*
25 *affecting the License Area or third party rights attaching thereto or claims/suits in*

respect thereof and in the event of breach of this warranty, the Licensor shall indemnify the Licensee to the full extent of any loss occasioned suffered thereby”

Under Clause 12.4: “The Licensor shall indemnify the Licensee against any suits, claims damages and losses brought by any one as a result of execution of the License and /or payment of the rental to the Licensor.” **Under Clause 12.5:** “The Licensor shall indemnify the Licensee against all claims that may arise and losses suffered as a result of the use of the access roads by the Licensee for the duration of the license”

The above clauses indicate that the 1st Respondent made undertaking to indemnify the Applicant against any claim in relation to the use of the land in issue. The indemnity includes claims by the third parties who may claim interest in the suit land. The plaintiffs in the main suit in my view are third parties who contended that they are the owners of the suit land and seek an order to declare the Applicant a trespasser. It is therefore my view that the Applicant claims indemnity or contribution from the 1st Respondent for any loss, damage or claims by the plaintiffs as regards the suit land and therefore this ground has been proved by the Applicant.

Whether the plaintiff shall not suffer any prejudice if the application is granted and whether it is in the interest if justice that the suit is heard on its merits

It is the finding of this court that the plaintiffs shall not suffer any prejudice if the application is granted. The issuance of a third party notice and addition of the 1st Respondent as a party to the suit will enable the plaintiffs establish their claim better since the Applicant claims to have acquired interest from the 1st Respondent who handed over to her agreements of ownership of the suit land some of which

bear signatures attributed to the plaintiffs. Therefore, it is in the interest of justice that this application is granted and the suit is heard on the merits.

This application therefore succeeds and it is granted with the following orders:

5 **(a) That leave is hereby granted to the Applicant to issue a Third Party Notice to the 1st Respondent (Rashid Bitama) in Civil Suit No. 06 of 2022.**

10 **(b) That the 1st Respondent (Rashid Bitama) shall be added as a defendant to the main suit and the plaintiffs are hereby directed to amend the plaint to include the 1st Respondent as a defendant within 10 days from the date of delivery of this ruling.**

(c) The costs of taking out this application shall be borne by the Applicant.

I so order.

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Vincent Wagona

High Court Judge

Fort-portal

9.1.2023