

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB-REGISTRY)**

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 3441 OF 2024

(Arising from Civil Case No. 114 of 2022)

VODACOM TANZANIA PLC APPLICANT

VERSUS

AGGREY AND CLIFFORD LIMITED1ST RESPONDENT

HADIJA BAKARI MWETA 2ND RESPONDENT

RULING

03^d & 08th April, 2024

BWEGOGGE, J.

The applicant herein above named instituted an ex parte application in this court praying for grant of leave to present a third-party notice to one Aggrey and Clifford Limited, the co-defendant in Civil Case No.114 of 2024 pending in this court. The application herein is brought under Oder XLIII, rule 2 and Order 1, rule 23 (a) and (b) of the Civil Procedure Code [Cap. 33 R.E. 2019]

and supported by the affidavit of one Joseph Tungaraza, the applicant's senior legal specialist.

On the date scheduled for the exparte hearing, the applicant was represented by Mr. Libent Rwazo, learned advocate, who made oral submission in support of the application herein.

In elaborating the matters deponed in the affidavit, Mr. Rwazo, submitted that the applicant herein is the core defendant in the Civil Case No. 114 of 2022 commenced by the 2nd respondent whereas the 1st respondent herein is the co-defendant. That under paragraphs 3 and 4 of the supporting affidavit, the applicant established the relationship between her and the 1st respondent herein. That their relationship is governed by the master procurement agreement (MPA) and statement of work to master procurement agreement which were attached as the annexures VTPLC2 and VTPLC1 to the affidavit.

Further, the counsel submitted that under paragraph 5 of the affidavit supporting the application herein, the applicant deposed that under the master procurement agreement, specifically clause 17.9, the 1st respondent herein agreed to indemnify the applicant in case of any loss or damages

resulting from any services supplied or procured by or on behalf of the applicant from the 1st respondent herein. That in the main case, the 2nd respondent is claiming for reliefs mentioned under paragraph 6 of the affidavit whereas the nature of the claim by the 2nd respondent falls under the issues which the 1st respondent agreed to indemnify the applicant in case they happen. Hence this application.

The counsel opined that this court be guided by the Court of Appeal decision in the case of January **Nshimba vs. The Registered Trustees of May Immaculata and Collaborators** (Civil Appeal No. 127 of 2018) [2022] TZCA 225 at pg 10, 14 and 15.

The counsel concluded by enlightening this court in that they are forced to present this application based on the conduct of the 1st applicant herein who is acting as the plaintiff in the main suit to the detriment of the applicant. Likewise, the counsel enlightened this court that the rights and liability of the intended third party will be determined by the trial judge in the main suit. Hence, the decision of this court won't prejudice the same.

Based on the above premises, the counsel prayed this application to be granted as prayed.

The issue for determination before this court is whether the application herein is has substance.

Primarily, I find it pertinent to revisit the relevant provision providing for procedure to join the co-defendant in a suit as a third party. Order I, rule 23 of the CPC provides as hereunder:

"23: Where in any suit a defendant claims against another defendant in the same suit (hereinafter referred to as "the co-defendant");-

(a) any contribution or indemnity;

(b) any relief or remedy relating to or connected with any subject matter of the suit and substantially the same as a relief or remedy claimed by the plaintiff against the defendant,

such defendant may present a third-party notice against the co-defendant in the same manner and subject to the same conditions as if the co-defendant were a third party and the same procedure shall be adopted for the determination of the claims made against the co-defendant as if the co-defendant were a third party. "

The essence of the third-party procedure is appositely restated by the Apex Court in the case of **January Nshimba vs. The Registered Trustees of Daughters of Mary Immaculata & Collaborators** (*supra*) whereas it was held:

"...the third-party procedure is based on the principle of contribution and/or indemnity upon the defendant being

found liable to the plaintiff. We also agree with him that what is material is not the plaintiff, but the right of the defendant to indemnity from the third party. We further agree that under such circumstance, the third party is not supposed to be treated as a defendant in the suit, but essentially as a third party and no-party to the suit..." [Emphasis mine].

Further, adopting the quotation from Mulla, Code of Civil Procedure, Vol. II, 15th Edn., page 1303 concerning the policy behind the third-party procedure, the Court restated:

"The policy behind this rule is that the defendant who has got a claim against a third party need not be driven to a fresh suit against the third party to put the indemnity in his favour into operation or to establish his entitlement to contribution from the third party. The claim and rights interse of the defendant and the third party have to be decided in the third-party proceedings." We reaffirm the above policy."

In the same vein, in the case of **Metropolitan Tanzania Insurance Co. Ltd vs. Frank Hamadi Pilla** (Civil Appeal No. 191 of 2018) (2019) TZCA 281 the Court held:

"...the third-party procedure is based on the principle of contribution and/or indemnity upon the defendant being found liable to the

plaintiff. We also agree with him that what is material is not the plaintiff, but the right of the defendant to indemnity from the third party."

Now, at this juncture, I am bent on testing the facts deposed in the affidavit supporting the application herein and attached documents thereto to find whether the same pass the scales of justice to warrant grant of relief sought herein.

It is deposed in the affidavit supporting the application herein, specifically under paragraphs 3, 4, 5 and 6 of the same, that the applicant herein and the company namely, Aggrey and Clifford Limited (1st respondent) entered into a Master Procurement Agreement for Provision of Services ("MPA") and the Statement of Work to Master Procurement Agreement for Provision of Creative Agency Services ("SOW"). In the discharge of its obligation under the agreement with the applicant, Aggrey and Clifford Limited (1st respondent) procured for the applicant the service of the 2nd respondent herein for its Red Relax Campaign TVC. The service involved the use of the respondent's likeness, image, appearance, and performance for the campaign. The service was procured through the contract executed between the applicant and the 1st respondent herein, in which it was agreed that the

1st respondent shall indemnify the applicant in case of any loss or damages resulting from any service supplied or procured by or on behalf of the applicant by the 1st respondent and for all costs, claims and liabilities associated with such allegations.

Likewise, it is deponed that the 2nd respondent has sued the applicant and the 1st respondent herein in Civil Case No.114 of 2022 alleging violation of her right to personality and privacy for the applicant's commercial gain. The 2nd respondent herein claims, among others, for payment of Tanzania shillings one billion (TZS. 1,000,000,000/=) being compensation for injuries and damages as a result of the defendants' breach of the contract.

The deponent concluded that, based on the agreement between the applicant and the 1st respondent, the applicant seeks and is entitled to indemnity against the 1st respondent in the event that the respondent's claim against the applicant in the main suit succeeds.

Further, I have scrutinized the master procurement agreement (annexture VTPLC2) executed by the applicant and 1st respondent herein. Clauses 17.9 (1) and (2) of the same provide that:

"1. The provider hereby indemnifies Vodacom and agrees to hold it harmless against any loss, liability, damage or expense suffered or incurred as a result of, among others; -

2. any person alleging that the use of proprietary material and/or the provider material by Vodacom result in an infringement of such person's right."

The same provision is reiterated under clause 19 whereas the indemnity is extended to any breach, by the 1st respondent, of any terms of the contract and, or wrongful act or omission occasioned during the discharge of the agreement which would cause liability to the applicant.

Based on the factual matrix above, it goes without saying that the 1st respondent, in the discharge of the "MPA" agreement, procured the service of the 2nd respondent for the applicant for its "**red relax campaign TVC**". The service involved the use of the 2nd applicant's likeness, image, appearance and performance for the said campaign. Now, the 2nd respondent alleges in the main suit that the 2nd respondent violated her right to personality and privacy for the applicant's commercial gain and claims compensation. The foreseeable liability likely to befall the applicant herein is covered by the indemnity guaranteed by the 2nd respondent under clauses 17 and 19 of the "MPA" agreement of which the details have been explained

in extenso herein above. Thus, the applicant validly seeks indemnity against the 1st respondent in case the 2nd respondent's suit against her succeeds.

Hence, being guided by the above-revisited provision of the law and deposed facts of this case, as well as the agreement entered between the applicant and 1st respondent, I am of the settled opinion that the applicant has a bonafide claim of indemnity against the intended third-party, the 1st applicant herein.

In view of the foregoing, I find the application herein with substance. The applicant is hereby granted leave to present a third-party notice to one Aggrey and Clifford Limited, the 1st respondent herein and the co-defendant in Civil Case No.114 of 2024 pending in this court. The costs shall be in the cause.

Order accordingly.

DATED at **DAR ES SALAAM** this 08th April, 2024.



O. F. BWEGOG
JUDGE