REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO 689 OF 2012

LIMU INVESTORS LIMITED.....PLAINTIFF

VERSUS

BECO PROPERTIES LIMITED& 2 OTHERS.....DEFENDANTS

RULING

[1] The Notice of Motion dated **30 June 2015** seeks orders that leave be granted to the Plaintiff to amend the Plaint filed herein on **31 October 2012**, and that the Amended Plaint be filed within 14 days from the date of leave. The application is expressed to be brought under **Sections 1A, 1B, 3A** and **63(e) of the Civil Procedure Act** as well as **Order 8 Rule 3** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010** on the grounds that the proposed amendments are necessary for determining the real questions in controversy between the parties and that the Defendant will not be prejudiced in any way if the orders sought are granted.

[2] The application is supported by the affidavit of **Samuel Mwaura**, sworn on **30 June 2015** and was urged by Counsel on the basis of the written submissions filed herein on **20 April 2016**. In those submissions, the Plaintiff reiterated their position that the amendment sought is absolutely necessary for determining the real questions in controversy between the parties, and that the Defendants will not be prejudiced in any way. It was further argued that since the 1st and 3rd Defendants opted to file the Grounds of Opposition dated **19 February 2016**, it was not open for them to rely on any document as they purported to do, and that such evidence could only be brought before the court through an affidavit. The Plaintiff relied on the case of **Alpha Knits Limited vs Kenindia Assurance Company Limited & Another [2007] eKLR** in urging the Court to allow the application for leave to amend the Plaint.

[3] The application was opposed by the 1st and 3rd Defendants on the grounds that the Plaint discloses no cause of action against them; that the suit is premature and should be referred to the management company for mediation or to an arbitrator appointed by the parties; and that it would serve no purpose to amend the plaint since the only issue outstanding is the issue of costs. In their written submissions filed herein on **15 April 2016**, the 1st and 3rd Defendants argued that they have been dragged into these proceedings yet the same do not concern them at all, in the sense that the 1st Defendant has been sued as the lessor of the suit property and holder of reversionary interest, yet the holder of the reversionary interest at the time of filing of this suit was and still is the 2nd Defendant. The 3rd Defendant on the other hand is said to be a company that supplies borehole water to various management companies including the 2nd Defendant, and that there is no nexus between it and the Nairobi Water and Sewerage Company

that is said to have disconnected the Plaintiff's water supply.

[4] The 1st and 3rd Defendants further contended in their submissions that the suit is premature granted that in **Clause 6.10** of the Sub-leases dated **30 April 2010**, it was agreed that any dispute arising out of or in connection with the sub-leases would be referred to the management company for mediation by the Board of Directors, failing which the dispute would be referred to arbitration. It was thus argued by the two Defendants aforementioned that allowing the application would serve no purpose as the suit stands no chance of success. The Court was accordingly urged to dismiss the Notice of Motion dated **30 June 2015** with costs.

[5] It is now trite that amendments of pleadings should be freely allowed unless there is a clear intention on the part of the applicant to overreach or steal a march on the Respondent. This principle was laid down in the case of **Eastern Bakery vs. Castelino [1958] EA 461**thus:

> **"...amendment to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs..."**

The principle was restated by **Kuloba, J** (as he then was) in **Kassam vs. Bank of Baroda (Kenya) Ltd [2002] 1 KLR 294**, thus:

> **" ...Applications for leave to amend, even if necessitated by negligence or carelessness, will be granted so as to enable the right question to go to trial unless the party applying was acting *mala fide* or by his blunder he has done some injury to his opponent which cannot be compensated by costs or otherwise..."**

[6] The amendment sought is merely to delete the words **"...pending referral of the dispute between the Plaintiff and 1st Defendant to Arbitration for hearing and determination"** which words appear in the prayers (a) and (b) on page 4 of the Plaint. Having looked at the Grounds of Opposition and the submissions filed by the Defendants, there is no indication that they will suffer such prejudice for which an award of costs may not be adequate, or that the Plaintiff is not acting in good faith in seeking the amendment. They did however raise the issue that there is no cause of action against them and therefore the Plaint should be struck out altogether. I however do not think that is a plausible response to this application, noting that they are yet to file an appropriate application for striking out of the Plaint. Indeed in the case of **Alpha Knits Limited vs Kenindia Assurance Co. Ltd & Another [2007] eKLR** that was cited by the Plaintiff, the Court expressed the view that:

> **"...At this stage it is immaterial that the defendant may have a water tight answer to the proposed amendments. That is not a consideration at this stage... the third party was entitled to seek the leave of the court to amend its defence and the court will grant leave to amend if the same will not prejudice the defendant beyond what is compensable in costs..."**

[7] It was further the case of the Defendants that at paragraph 22 of their Amended Defence they raised the point that this suit is premature in view of the arbitration clause aforementioned, and that this is a substantive issue. For the same reason stated in paragraph 7 above, this is not a valid ground for declining amendment, for the Defendants would not thereby be deprived of their defence. More importantly, however, is the contention by the Plaintiff's Counsel that the matter is beyond referral to arbitration as the Defendants have already filed appearance and Defence (see **Section 6(1) of the Arbitration Act, Chapter 49 of the Laws of Kenya)**. Hence, the argument by the Defendant that the suit is premature and ought to be referred to arbitration may very well be a non-starter. In any event, it is not a valid ground for opposing the application for amendment.

[8] For the foregoing reasons, I would allow the application dated **30 June 2015** and grant orders in the following terms:

> **[a] Leave is hereby granted to the Plaintiff to amend its plaint as proposed and serve the same**

within 14 days from the date hereof.

[b] The Defendant to have corresponding leave to amend and file an Amended Defence within 14 days of service of Amended Plaint;

[c] Costs of the application to be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2016

OLGA SEWE

JUDGE