REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 482 OF 2017

EMERGE DEVELOPMENT LIMITED.....APPLICANT/PLAINTIFF

VERSUS

CHESTNUT UGANDA LIMITED.....1ST RESPONDENT/DEFENDANT

STANLIB AFRICA DIRECT PROPERTY

DEVELOPMENT FUND LIMITED .....2ND RESPONDENT/2ND DEFENDANT

RULING

1. Through the plaint dated 27th November 2017, the plaintiff/applicant herein, Emerge Developments Limited, sued the defendants alleging breach of contract arising from a Development Management Agreement (DMA) and sought the following orders:

> **a. The sum of United States Dollars Three Hundred and Thirty Seven Thousand Three Hundred and Thirty Nine and Thirty Three Cents (USD 337,339.33) plus interest at commercial rates from the date the payment fell due until payment in full;**
>
> **b. Costs if the suit plus interest at commercial rates from the time the amount fell due until payment in full; and**
>
> **c. Any other or further relief that this Honourable court may deem fit to grant.**

2. The defendants filed separate statements of defence on 17th January 2018. On 11th September 2018, the plaintiff filed the application dated 9th August 2018 that is the subject of this ruling. In the said application, the applicant seeks orders to enjoin, one **James Daniel Hoddell** to the suit as a co-plaintiff and for leave to amend the plaint filed on 1st December 2017 and further to file reviewed witness statement(s).

3. The application is supported by the affidavit of the plaintiff's Chief Executive Officer and Director, **Mr. James Daniel Hoddell** and is premised on the grounds:

> **1. That joinder of the proposed 2nd plaintiff is necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in this suit and obviate duplication of suits.**
>
> **2. That joinder of a 2nd plaintiff will not occasion prejudice or injustice to the existing parties.**
>
> **3. That proposed amendments will clarify the claim against the defendant and help in determining the real questions in controversy between the parties.**

4. The applicant's deponent avers that through a DMA dated 6th September 2013 and a Head of Terms (HOT) Agreements between the defendants and a company called Mentor Management Ltd (MML Ltd), MML Ltd was contracted by the 1st defendant to provide development and project management services in the construction of the 1st defendant's retail centre/mall in Kampala whilst the 2nd defendant financed the project. (See exhibit **"JDH1"**).

5. He avers that through a letter dated 17th March 2015, (Exhibit JDH2"), the defendants terminated the services of MML Ltd with effect from 5th March 2015. That through a deed of Termination and Settlement Agreement dated 8th April 2016, the applicant's deponent resigned as MML's Chief Executive Officer and that as part of the settlement, he entered into a Business Collaboration and Assignment Agreement (BCAA) on the same date (exhibit **"JDH3")** pursuant to which Mentor Management Ltd transferred and signed to him and the company the responsibility, risk, fees and claims of MML against the 1st defendant arising from the construction project.

6. He avers that pursuant to the BCAA, the applicant's deponent, elected to use one PH Business Solutions Ltd (PHBS) as a vehicle to receive the transfer and assignment envisaged by it and that PHBS later changed its name to Emerge Developments Ltd, the plaintiff herein.

7. He attached annexure **"JDH4"** to the supporting affidavit, being a copy of a certificate of change of name. He states that because the defendants have contested the transfer or assignment to the plaintiff of MML's cause of action or claims arising from the DMA, it will be necessary and in the interest of justice to enjoin him to the case so as to enable the court to effectually and completely adjudicate upon and settle all the questions arising in the suit.

8. The respondents opposed the application through Grounds of Opposition filed on 19th March 2019 in which they set out the following grounds:

> **1. The court lacks jurisdiction to hear and determine the main suit in as much as the same is based on an agreement that should be referred to arbitration; which position is not cured by the proposed amendments.**
>
> **2. The applicant/plaintiff lacks locus standi to institute the main suit and consequently the application to amend the plaint.**
>
> **3. The proposed amendments to the plaint are in breach of the Civil Procedure Rule, 2010 in that they introduce a new cause of action against the respondents/defendants which is inconsistent with prior pleadings.**
>
> **4. The application offends Order 1 Rule 10(3) Civil Procedure Rules,2010.**
>
> **5. The proposed joinder of a 2nd plaintiff would be a misjoinder in that no cause of action has been disclosed against the defendants by the proposed 2nd plaintiff.**
>
> **6. The application is frivolous, vexatious and an abuse of the court process.**

9. Parties canvassed the application by way of written submissions which I have carefully considered. The main issue for determination is whether the applicant has made out a case for the granting of the prayer to amend the plaint. Underlying the main issue are the following issues.

> **a. Whether this court has the jurisdiction to hear and determine the application.**
>
> **b. Whether the plaintiff has the locus standi to file the main suit and the application.**
>
> **c. Whether the proposed amendments contravene the provisions of the Civil Procedure Rules.**

Jurisdiction/locus standi

10. The respondents argued that this court lacks the jurisdiction to hear and determine this suit and by extension, the instant application on the basis that there exists and arbitration clause in the DMA and that the plaintiff/applicant was not a party to the DMA that is the subject of the suit. It was the respondents' position that the applicant lacks the locus standi to institute the suit and that the issue of locus standi raises a point of law that touches on the court's jurisdiction.

11. To buttress this argument the respondent cited the decision ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others*** [2014] eKLR and argued that even though the DMA provided for an arbitration clause as an avenue for dispute resolution, the 1st respondent could not not comply with the provisions of Section 6(1) of the Arbitration Act in view of the fact that plaintiff is not a party to the DMA.

12. On its part, the applicant argued that it has had the locus standi to institute these proceedings as they relate to the DMA and HOT Agreement between MML and the 1st respondent and the subsequent BCAA between Mentor Management Ltd and the proposed 2nd plaintiff wherein the said MML agreed to transfer its development management business to the 2nd plaintiff's new company that was yet to be incorporated.

13. In his affidavit in support of the application, the proposed 2nd plaintiff explained that he subsequently incorporated a company known as PHBS Ltd which in turn changed its name to Emerge Developments Ltd, plaintiff/applicant herein. It was the applicant's case that by virtue of the BCAA, the 2nd plaintiff acquired all the rights that were due to MML including the payments due to MML that is at the centre of the dispute between the parties herein. In this regard, the applicant relied on the Legal Environment Business Law: Master of Accountancy Edition at page 337 wherein it is stated that:

> **"An assignment of rights effectively makes the assignee stand in the shoes of the assignor. He gains all the rights against the obligor that the assignor had, but no more. An obligor who could avoid the assignor's attempt to enforce the rights could**

avoid a similar attempt by the assignee."

14. On the argument that the court lacks the jurisdiction to hear and determine the suit on the basis of the alleged existence of the arbitration clause, the applicant argued that under Section 6(1) of the Arbitration Act, a party seeking to have the dispute referred to arbitration is expected to seek referral to arbitration no later than the time when that party enters appearance and that such a party is not expected to file a defence to the claim. For this argument counsel cited the case of ***Onsomu Onchonga v Forty Place Ltd*** [2019] eKLR wherein it was held:

> **"16. The tenor and import of Article 159(2) (c) of the Constitution as read together with Section 6(1) of the Arbitration Act is that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement. Secondly, where a party elects to come to court and the other party to the arbitration agreement seeks to invoke the arbitration agreement, the party seeking to invoke the agreement is obligated to do so not later than the time of entering appearance. Indeed a myriad of decisions abound on this legal stand point. The Court of Appeal held in Mt Kenya University –Vs- Step up Holding (K) Limited [2010] e KLR upheld the ruling of W Ouko J. where he dismissed the appellants' application for stay of proceedings pending Arbitration. The appellant in this particular case entered appearance and responded to the respondent's application for injunction before filing the application seeking an order for reference to arbitration. The court considered Section 6(21) of the Arbitration Act and held that even if the conditions set out in paragraphs (a) and (b) are satisfied, the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application is not made prior to or at the time of entering appearance or if the application is made after filing of the defence."**

The Honourable court went on further to hold that,

> **"17. Similarly, in Eunice Soko Mlagui V Sursh Parmar & 4 Others[2011] e KLR, Kamau J had dismissed an application by the appellant for stay of proceedings sand referral of the dispute between the parties to arbitration in HCC No. 304 of 2010. The Court of Appeal, guided by the decision in Charles Njogu Lofty V Bedain Enterprises Limited CA Number 253 of 2003, held that the court would still be entitled to reject an application for stay of proceedings and referral to arbitration if the application to do so is not make within the time frame set out in Section 6(1) of the Act."**

15. Blacks Law Dictionary 10th Edition defines Locus Standi as ***"Place of standing". The right to bring an action or to be heard in a given forum. STANDING."***

16. In the instant case, I find that the applicant herein has explained, at great length and demonstrated through various annexures, the nexus between the plaintiff, the 2nd plaintiff and MML which had a DMA with the 1st defendant.

17. I note that the averments made by the plaintiff regarding the sequence of events that led to the incorporation of the plaintiff company in which the proposed 2nd plaintiff is a Director and its connection with the 1st defendant over the Development MMA were not controverted by the respondents. I am therefore satisfied that the plaintiff has established that is has the locus standi to institute the instant case.

18. Turning to the respondent's argument on the existence of the arbitration clause in the DMA as a basis for holding that this court lacks jurisdiction. I find that Section 6(1) of the Arbitration Act is very clear on the issue of the referral of cases to arbitration. The section stipulates as follows:

> **"A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party to applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds-**
>
> **a. That the arbitration agreement is null and void, inoperative or incapable of being performed; or**
>
> **b. That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."**

19. In the instant case, the respondents had not only not refer the dispute to arbitration as at the time that they entered appearance but that they also went ahead to file their respective defences thereby waiving their right to have the matter referred to arbitration. I therefore find that the subject of referral to arbitration has been overtaken by events and cannot be raised by the respondents in this application as the basis for the claim that the court lacks jurisdiction in the matter.

20. I further find that the respondents argument that they could not comply with Section 6(1) of the Arbitration Act because the plaintiff was not a party to the DMA to be self-defeating and contradictory as the respondent is on one hand saying that the matter ought to have been referred to arbitration and in the same breath arguing that the plaintiff was not a party to the DMA that contains the arbitration clause.

Civil Procedure Rules

21. The respondents argued that the proposed amendments contravene the provisions of the Civil Procedure Rules as they seek to introduce a new cause of action and are also inconsistent with the previous pleadings. In this regard counsel cited the provisions Order 2 Rule 6(1) (2) and Order 1 Rule 10(3) of the Civil Procedure Rules which stipulate as follows:

> Order 2 Rule 6

1. No party may in any pleading make an allegation of fact, or raise new ground of claim, inconsistent with a previous pleading of his in the same suit.

2. Sub- rule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative.

Order 1 Rule 19

3. No person shall be added as plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.

22. On its part, the applicant argued that the proposed amendment does not introduce a new cause of action and contended that the Section 100 of the Civil Procedure Act allows the court to allow amendments of pleadings at any time during the proceedings for the purposes of determining the real questions in dispute.

23. The applicant relied on the decision in ***AAT Holdings Ltd v Diamond Shields International Ltd*** [2014] eKLR in which the court laid down the principles governing amendment of pleadings as follows:

i. The proposed amendment is necessary for determining the real question in controversy. It is not immaterial or useless or merely technical.

ii. There has been no undue delay in making the application.

iii. The amendments does not introduce a new or inconsistent cause of action which would change the action into one of a substantially different character, which can only be more conveniently made the subject of a fresh action. The documents which support the amendment of the impugned averments in the plaint, clarifies the mix-up, are part of the record and rerate to the same facts on which the cause of action is based.

iv. There is no vested interest or accrued legal rights which will be affected; and

v. The amendment does not occasion prejudice or injustice to the other side which cannot be properly compensated in costs.

24. I have perused the pleadings filed by the parties herein and the proposed/draft amended plaint. I note that the defendant raised the issue of the plaintiff's locus standi to initiate the proceedings on the basis that it was not privy to the DMA and HOT Agreement that the 1st defendant had with MML. I note that in the affidavit in support of the application for amendment, the applicant has explained at length, the sequence of events that led to the incorporation of the plaintiff herein and its nexus with the MML in order to justify the plaintiff's interest in the subject matter of the suit. The plaintiff has similarly explained the proposed 2nd plaintiff's involvement in the transactions around the DMA, HOT Agreement and the BCAA thereby necessitating his being enjoined in the suit.

25. Considering the circumstances of this case and the role played by the proposed 2nd plaintiff in the dealings between the 1st defendant and MML, I find that the proposed amendments do not introduce a new cause of action or change the character of the case, but arise from the same set of fact's and are necessary so as to provide clarity of issues that will enable the court to conclusively determine all the issues between the parties to the suit.

26. The power given to court to grant or refuse leave to amend pleading is discretionary and like all discretionary powers, must be exercised so as to do what is just in the particular case. In ***Bosire Ogero v Royal Media Services*** [2015] eKLR, it was held:

"In Bullen Leak and Jacobs Precedents of Pleadings, 12th Edition page 127 titled " amendment with leave –time to amend " it is stated that the power to grant or refuse leave to amend a pleading is discretionary and it to be exercised so as to do what justice may require in the particular case, as to costs or otherwise. The power may be exercised at any stage of the proceedings and accordingly amendment may be allowed before or at the trial or after trial or even after judgment or an appeal. As a general rule, however, the amendment is sought to be made, it should be allowed if it is made in good faith and if it will not do the opposite party any harm, injury or prejudice him in some way that cannot be compensated by costs or otherwise." [Emphasis ours]

27. The respondents also opposed the proposed amendment on the basis that the written and signed consent of the proposed 2nd plaintiff was not filed in court in compliance with the provisions of Order 1 Rule 10(3) that I have already highlighted in this ruling. I note that the proposed 2nd plaintiff is the deponent of the affidavit in support of the instant application wherein he explained the reasons why his presence in the suit will be necessary. I find that the said supporting affidavit can be deemed to be consent in writing by the proposed 2nd plaintiff as he has expressly indicated his request to be enjoined in the suit. My finding is that the said affidavit satisfies the requirements of Order 1 Rule 10(3) of the Civil Procedure Rules.

28. Having regard to the findings and observations that I have made in this ruling, I find that the application dated 9th August 2018 is merited and I therefore allow it in the following terms.

a. The plaintiff/applicant is granted leave to amend the plaint filed on 1st December 2017 together with reviewed witness statement(s) and enjoin the 2nd plaintiff to the suit.

b. The amended plaint to be filed and served on the respondents within 7 days from the date of this ruling.

c. The respondents are granted corresponding leave to amend the defence and serve their amended defences within 14 days from the date of service with the amended plaint.

d. The costs of this application shall abide the outcome of the main suit.

Dated, signed and delivered in open court at Nairobi this 6th day of February 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Onyancha for the plaintiff/applicant

Mr. Omulo for the respondent

Court Assistant – Sylvia