REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 310 OF 2017

HIGH CHEM EAST AFRICA LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

DAVID NJAU WAMBUGU.....1ST DEFENDANT/APPLICANT

POLYCHEM EAST AFRICA LIMITED.....2ND DEFENDANT/APPLICANT

EAGLE CHEMICALS EL-SHARK

COMPANY FOR TRADE & INDUSTRY.....3RD DEFENDANT/APPLICANT

EAGLE SPECIALITY CHEMICALS LTD.....4TH DEFENDANT/APPLICANT

DAES HOLDING LIMITED.....5TH DEFENDANT/APPLICANT

RULING

1. The moving parties of the **Notice of Motion** dated **26th February 2020** is the defendants. That application is brought under the provisions of Article 25 (c), 31, 40 and 50 of the Constitution; Section 35 of the Evidence Act; and Section 83W of the Kenya Information and Communication Act. The crux of the matter in the application is the defendants' objection to some documents which are in the plaintiff's trial bundle of documents. The defendants seek that those documents be expunged and excluded from the trial bundle and from the court record. The defendants seek that order on the basis that the impugned documents were either obtained illegally or are inadmissible.

2. The defendants argue that some documents are inadmissible because neither of the plaintiff's witnesses were makers of those documents or that some documents were privileged by reason of them having been written on **"without prejudice"** basis.

3. The plaintiff's response in that respect, was that the letters of **Kenya Revenue Authority** (KRA) to **Highchem Speciality Chemicals Limited** (HSCL) (another entity not a party in this case), the content thereof, related to a tax period when the plaintiff and the defendants were in a joint venture. Further that the address used by KRA in those correspondences was, and is today, an address that belonged to the plaintiff. Further that that letters of KRA were hand delivered by KRA to the plaintiff's office. That that was the official physical office/address of HSCL during that tax period, the subject of KRA audit. The plaintiff's case is that at all material time, which KRA audit period referred to was at the time when the joint venture between the plaintiff and the 2nd defendant was in place. It therefore submitted that it was entitled to possession of the documents, of that KRA audit, which are the documents the defendants seek to expunge.

4. The defendants also seek the expunging from the plaintiff's trial bundle emails which the defendants allege were obtained by hacking of the defendants' emails.

ANALYSIS AND DETERMINATION

5. Before embarking on the discussion of the application, which is before me, I wish to state that the defendant breached the Practice Direction on Case Management of the Commercial Division, in particular Rule 15 of the Practice Directions. On 28th November 2019 this case was certified as ready for trial which accordingly closed the door to further applications being filed. Indeed, the presentation of this application by the defendant's frustrated the trial of this case which was slated to be on 1st April 2020. On that ground alone the application will fails. It will also fail because the defendants having filed the application so late in the day, they are guilty of latches.

6. Since however the parties fully argue the application I will, notwithstanding my finding above, proceed to consider the application on its

merit.

7. The impugned documents are letters, draft agreement and emails. These documents, according to the plaintiff, they show that the defendants committed fraudulent acts against the plaintiff. The defendants argue that some of those letters and documents relate to a period when the plaintiff was not a shareholder of HSCL and accordingly that the plaintiff's witness cannot produce documents for which they are not makers of.

8. That particular argument of the defendants is based on the grounds that the plaintiff is not the makers of those documents. The documents the defendant objects to are letters written by KRA giving notice of audit of HSCL and subsequently communication culminating with the settlement of the tax dispute. The plaintiff stated that they were at the time of the audit in the joint venture with the defendants and it was closely involved in the process of the audit and subsequent settlement of the tax dispute.

9. Bearing the fact that the plaintiff was in joint venture with the defendants and the fact the plaintiff was very involved in the discussions on the tax dispute, the subject of the letters in question, I find and I hold that they are admissible under the exception of Section 33 (b) of the Evidence act Cap 80. That section provides:

> *1. Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—*
>
> ***(a) .....***
>
> ***(b)made in the course of business***
>
> ***when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;***

10. There is no doubt that the letters were made in the course of business of KRA and to insist that it is only the writer of those letters, the KRA officer, who can produce them in evidence would be too odious and unreasonable. The very reason Section 33 was enacted was to ensure where the calling of witnesses would entail expenses and delay their presence would be dispensed with. Having that in mind the letters of KRA are admissible in evidence. To insist that KRA officer be called to testify would in my view be unreasonable.

11. It is important to note that the authenticity of those letters is not denied by the defendants and to insist on calling the KRA officer would result in that officer attending court to confirm that he/she wrote those letters. It also needs to be noted that it is not in dispute that there was an audit by KRA. As I understand it the plaintiff's wish to produce those letters to prove the activities of the defendants, which is the very basis of this case. For that reason, I reject the objection raised.

12. The defendants also object to the production of the plaintiff's advocates letter dated 8th February 201, page 578A of the plaintiff's trial bundle, on the ground it is written on without prejudice basis.

13. My first response to that argument is that it's obvious that it is the plaintiff, on whose behalf the letter was written, that has waived the right to object to the production of that letter. The plaintiff is perfectly entitled to do so.

14. My second response is that the objection raised to the production of that letter, written on without prejudice basis, is that the production of such a letter is not absolutely barred. See the case **Rush & Tompkins Ltd. -v- Greater London Council (1989) AC 1280** where the court stated:

> ***"The*** *"without prejudice"* ***rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver L.J. in Cutts v. Head [1984] Ch. 290, 306:***
>
> ***"That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J. in Scott Paper Co. v. Drayton Paper Works Ltd. (1927) 44 R.P.C. 151, 156, be encouraged fully and frankly to put their cards on the table.... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."***
>
> ***The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. .....***
>
> ***Nearly all the cases in which the scope of the "without prejudice" rule has been considered concern the admissibility of evidence at trial after negotiations have failed. In such circumstances no question of discovery arises because the parties are well aware of***

what passed between them in the negotiations. These cases show that the rule is not absolute and resort may be had to the "without prejudice" material for a variety of reasons when the justice of the case requires it."

15. The learned author **Cross & Tapper on Evidence** 8th Edition has this to say on exception of use of without prejudice documents:

> *"Use of the phrase 'without prejudice' is inefficacious if the statement is not made as part of a genuine attempt to negotiate a settlement. Thus evidence of letter written by a debtor to his creditor declaring his inability to pay was admissible in bankruptcy proceedings as an act of bankruptcy, despite having been headed 'without prejudice'……Another difficult situation arises in relation to a simple statement of a legal claim so headed. If the document contains no other hint of any intention to negotiate it will be insufficient, but the court will be astute to detect such an intention, and it is certain not the case that a letter first intimating dispute can never be made without prejudice."*

16. The letter which the defendants seek to be expunged from the plaintiff's bundle clearly shows that the plaintiff approached the defendants seeking to settle the matter which seems to have been rebuffed by the defendant. That letter therefore though headed without prejudice is admissible and the defendants' prayer thereof, for its exclusion, is rejected.

17. The defendants also object to the production of emails, written by the defendants to third parties or written by third parties to the defendants. The defendants allege that those emails were obtained by means of hacking the defendants' email. The defendants referred to various provisions of the Constitution in support of their prayer. They also referred and relied on Article 25, 31 (d), 40, and 50(4) of the Constitution. Article 31 (d) provides:

> ***31. Every person has the right to privacy, which includes the right not to have—***
>
> ***(a) .....;***
>
> ***(b) .....;***
>
> ***(c) .....; or***
>
> ***(d) the privacy of their communications infringed.***

18. The plaintiff has provided a certificate of production of electronic evidence. By that certificate the plaintiff has certified that the emails in its bundle were retrieved from the server of the plaintiff, HP Proliant ML 370 G 6 Serial number CZ150071Q. It follows that the emails were not obtained by illegal means of hacking as the defendants alleges,

19. Article 50 of the Constitution forbids the use of evidence which was obtained by violating the right or fundamental freedoms of Bill of Rights. What is forbidden is, however, qualified in Article 50 (4). The qualification is that which is unfair or would be detrimental to the administration of justice. The defendants failed to show how the reliance on that evidence would render the trial unfair or would be detrimental to the administration of justice.

20. On the whole there is no basis of upholding the objections raised by the defendants. There is also no evidence, as the defendants argue, which shows that reliance of the documents before court will render the trial unconstitutional.

21. The application dated **26th February 2020** is devoid of merit and is **dismissed with costs**.

22. This case is confirmed for full hearing on 2nd and 3rd June 2020.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **6th** day of **MAY,** 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **6th** day of **May, 2020.**

MARY KASANGO

JUDGE