



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 323 OF 2014

DIGITAL DEN LIMITED.....PLAINTIFF

VERSUS

TALEWA ROAD CONTRACTORS LIMITED.....DEFENDANT

RULING

1. This Ruling is in respect of the Notice of Motion dated **2nd March, 2015**. That application was filed pursuant to Order 51 Rule 1 of the Civil Procedure Rules as well as Sections 3A and 63 (e) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya. It seeks the following orders:-

1. **That the application be certified as urgent and service of summons be dispensed with in the first instance. (*spent*)**
2. **That this application be heard *ex parte* in the first instance (*spent*)**
3. **That a mandatory injunction be issued against the Defendant, its employees, agents/servants, ordering them to release, deliver or deposit PTR Hamm Pneumatic Roller Numbers 50539 and Asphalt Paver Chassis 1610813, respectively, pending the hearing and determination of this suit.**
4. **That the OCS, Miritini Police Station be directed to assist in effecting the orders.**
5. **That the costs hereof be paid for by the Defendant.**

2. The application, which is supported by the Affidavit of **Edward Munyua** annexed thereto, is based on the following grounds:

- a. **That the Plaintiff is the registered owner of the 2 machines.**
- b. **That the Plaintiff is suffering irreparably by the continued detention by the Defendants of the machines.**
- c. **That the Defendant shall continue to retain possession of the said equipment (for which it is not paying the Plaintiff the daily charges and) unless otherwise directed by the Court.**

3. In his affidavit sworn on **2nd March, 2015**, **Mr. Edward Munyua**, the Plaintiff/Applicant's Managing Director deponed that the Plaintiff is the owner of the PTR Hamm Pneumatic Roller Number 50539 and Asphalt Paver Chassis No. 1610813, respectively, (herein after referred to as **"the equipment"**). In proof of the Applicants' ownership of the equipment, copies of the Log Book and Bill of Lading were exhibited as attachments to the Supporting Affidavit.

4. It was further deponed that the Kenya National Highways Authority (the Authority) informed the Plaintiff/Applicant vide a letter dated 15th April, 2014 to liaise with the Defendant for the release of the equipment but that the Defendant had refused to facilitate the collection by the Plaintiff/Applicant of the said equipment, hence this suit and the instant application. The letter under reference as well as the Court order adverted to were also annexed as exhibits to the Supporting Affidavit.
5. Upon service of the Application on the Defendant, it filed a Replying Affidavit sworn by **John Wainaina** on the 16th March, 2015 contending that the equipment were impounded by the Kenya National Highway Authority, and that in spite of persistent requests to allow for an inventory to be prepared, the Authority insisted on keeping the Defendant out of the site. It was thus the Defendant/Respondent's case that since 18th June, 2013, the Authority has had possession of the Miritini Site to the exclusion of the Defendant. It further evinced, in that Replying Affidavit, its intention to apply for the joinder of the Authority as a Third Party herein.
6. The Defendant/Applicant did file a Third Party Notice dated 20th March, 2015 with the leave of the Court and proceeded to cause the Authority to be enjoined to this suit as a Third Party. In respect of the instant application Counsel for the Third Party opted, on 18th November, 2015 to rely on the Replying Affidavit sworn on 5th May, 2015 by **Eng. MutiiKivoto**, the Manager of the Third Party, in which it was deponed that the Defendant filed **Nairobi HCCC NO. 274 OF 2013: Talewa Road Contractors Limited Vs KeNHA** disputing the termination of the contracts entered into between it and the Third party for the repair and renovation of the Mombasa–Miritini Road, and that in that suit the Defendant had also sought for preservatory orders pending arbitration. It was further deponed on behalf of the Third Party that the Court, in a Ruling dated 24th September, 2014, ordered that all the equipment and materials be preserved on the site pending reference of the dispute to arbitration.
7. It is therefore the Third Party's case that it has no interest in the equipment and that aside from the Court order aforementioned, it has no objection to the said equipment being released to the Plaintiff/Applicant and that this position had been conveyed vide the letters dated 23rd July, 2014 and 24th July, 2014, copies of which were annexed to the Replying Affidavit.
8. A Supplementary Affidavit filed on 12th October, 2015 by the Defendant/Respondent and sworn by John Wainaina, was to the effect that the issue of the Plaintiff/Applicant's equipment are also the subject of ongoing arbitral proceedings and therefore that their release cannot be determined in isolation. To that affidavit were annexed copies of the documentation evidencing the ongoing arbitral proceedings before **Engineer Paul T. Gichuhi**.
9. What emerges from the foregoing is that a Court of competent jurisdiction has already issued orders in **HCCC NO. 274 OF 2013** restraining the confiscation, disposal, removal, utilization of interference with the plant machinery, equipment, motor vehicles and other items situated at the site pending the hearing and determination of the intended arbitration. In the premises, I would agree with the Defendant/Respondent that for good order, that edict remains in force and must be respected and obeyed until varied or set aside. This being a fundamental principal of the rule of law, must be observed by all and sundry to ensure its full tenor and effect. This point was emphasized in **Awadh Vs Murumbu (No. 2) No. 53 of 2004 [2004] KLR 458**, thus:

“ It must be remembered that Court orders must be obeyed at all times in order to maintain the rule of law and good order.”
10. Accordingly, although it is apparent that there is no dispute as to the Plaintiff/Applicant's ownership of the subject equipment, and although both the Defendant and Third Party are in favour of release, I take the view that it would be improper do so through a mandatory injunction in a separate and distinct suit, as has been sought herein. The only way and the procedural way is for the orders sought to be obtained by way of variation of the preservatory order issued in **HCCC NO. 274 OF 2013**.
11. It is further noted that the equipment are also the subject of the arbitral proceedings. In the prayers set out at page 25 of the statement of claim (marked JW1 to the Supplementary Affidavit) the Defendant herein sought for:

“An award directing the Third Party to pay a sum of USD 250,000 being costs of the PTR Hamm Pneumatic Roller No. 50539 and Asphalt Paver Chassis 1610813. In the alternative ,...an award directing the Respondent to pay daily cost for hiring the PTR Hamm Pneumatic Roller Number 50539 and Asphalt Paver Chassis 1610813 of Kshs. 22.500/= per day from 19th June, 2013 until return of the said machinery.”

- 12.The Defendant also sought for an award of Kshs 252,296,000/- being compensation for idle machinery, equipment and items and Kshs 278,485,440/- being compensation for confiscated machinery, equipment materials and items that were within the Miritini Site. In respect of **HCCC NO. 274 OF 2003** and the instant suit, the Defendant sought an award against the Third Party for indemnity.
- 13.In the premises, it is apparent, as was posited by Counsel for the Defendant, that there is indeed a nexus between this case and the ongoing arbitral proceedings in respect of which restraining orders were issued against the Defendant.
- 14.In his submissions, Counsel for the Defendant/Respondent drew the Court’s attention to pages 78-81 of the Supplementary Affidavit to demonstrate that the issue of release of the subject equipment was raised in the arbitral proceedings on 3rd July, 2015. It is evident therefore that the Arbitrator is already seized of the matter that is the subject of this application and it would only be logical that the same be pursued to its conclusion, or in the alternative, and as has been pointed hereinabove, a variation of the injunctive order issued in **HCCC NO. 274 OF 2013** be sought.
- 15.The foregoing being my view of the matter, I find it superfluous to get into a consideration of whether a case for grant of a mandatory injunction has been made by the Plaintiff/Applicant.
- 16.In the result, I would, for the foregoing reasons, dismiss the application dated 2nd March, 2015 with an order that the costs thereof be in the cause.

It is so ordered.

OLGA SEWE

JUDGE

DATED, SIGNED and DELIVERED at NAIROBI this 15th day of January 2016

FRED OCHIENG

JUDGE