



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO 323 OF 2014**

**DIGITAL DEN LIMITED.....PLAINTIFF**

**VERSUS**

**TALEWA ROAD CONTRACTORS LIMITED.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff's Notice of Motion application dated 23<sup>rd</sup> July 2014 and filed on 25<sup>th</sup> July 2014 was brought under the provisions of Order 40 Rules 2, 4, 10 and 11, Order 51 Rule 1 of the Civil Procedure Rules and Sections 3A and Section 63 (c) of the Civil Procedure Act Cap 21. Prayer Nos 1, 2 and 3 were spent. It sought the following remaining orders:-

**1. Spent.**

**2. Spent.**

**3. Spent.**

**4. THAT an interlocutory injunction does issue against the Defendant, its employees, agents/servants, restraining them from interfering with PTR Hamm Pneumatic Roller Numbers 50539 and Asphalt Paver Chassis 1610813 respectively in any way howsoever pending the hearing and determination of the suit.**

**5. THAT the OCS Miritini Police Station does assist in effecting the orders.**

**6. THAT costs hereof be paid for by the Defendant.**

2. When the Plaintiff filed its present application, the court directed that it serve the same upon the Defendant for *inter partes* hearing on 30<sup>th</sup> July 2014 when a related matter **HCCC 3 of 2014 South Shore International Limited vs Talewa Road Contractors Ltd & Kenya National Highways Authority** was scheduled for hearing.

3. Despite being served with the said application as was evidenced by an Affidavit of Service that was

sworn by Alexander Ochwo Alela on 30<sup>th</sup> July 2014 and filed on the same date, the Defendant did not attend court. As the court had reserved rulings in other matters relating to the Defendant herein, the court directed that both the Plaintiff and the Defendants file and serve their respective written submissions and that they attend court on 8<sup>th</sup> October 2014 to confirm compliance and/or for further orders and/ or directions by the court. The Defendant failed to attend court the said date.

4. On being re-served pursuant to the court's directions, the Defendant attended court on 16<sup>th</sup> December 2014 when it was once given an opportunity to file its Replying Affidavit and submissions. Although both parties agreed to attend court on 21<sup>st</sup> January 2015 for further orders and/or directions, the Defendant failed to attend court or to file its documentation. Having been satisfied that the Defendant had been given a fair and reasonable opportunity to present its case but that it had neglected to take advantage of the same, the court reserved the ruling of the Plaintiff's application. For all purposes and intent, the same was unopposed.

### **THE PLAINTIFF'S CASE**

5. The Plaintiff's application was supported by the Affidavit of Simon Muchene, its Managing Director. The same was sworn on 23<sup>rd</sup> July 2014 and filed on 25<sup>th</sup> July 2014. Its written submissions were dated and filed on 14<sup>th</sup> October 2014.

6. The Plaintiff stated that it was the registered owner of PTR Hamm Pneumatic Roller Numbers 50539 and Asphalt Paver Chassis 1610813 (hereinafter referred to as "the Equipment") which it hired out to the Defendant on 17<sup>th</sup> January 2013 and 16<sup>th</sup> December 2012 as the Defendant had been contracted to construct the Mombasa- Miritini Road by Kenya National Highways Authority (KeNHA).

7. However, the said Equipment was impounded by KeNHA on account of a dispute between the said KeNHA and the Defendant herein, which dispute, the Plaintiff was not party to. Despite KeNHA having written to the Defendant to collect the said Equipment, the Defendant failed to facilitate the Plaintiff to do so,

8. The Defendant owed the Plaintiff a sum of Kshs 42,000,000/= on account of the hire of the said Equipment, which sum continued to accrue daily dry rate of Kshs 30,000/= and Kshs 45,000/=. The Plaintiff therefore urged the court to grant it the orders it had sought.

### **LEGAL ANALYSIS**

9. The court was not certain what challenges the Plaintiff had encountered in collecting the said equipment bearing in mind that in its letter of 15<sup>th</sup> April 2014 a copy which was annexed to its Supporting Affidavit and marked as Exhibit "EM 7", KeNHA had clearly stated as follows:-

**"This is to inform you that KeNHA has since advised M/s Talewa Road Contractors Ltd to collect their equipment from the yard.**

**You may therefore pursue the matter with M/s Talewa Road Contractors Ltd since the said equipment hire/lease arrangement was between yourselves and them."**

10. This letter did not seem to suggest that the Defendant was required to facilitate the release of the said Equipment. There was also no evidence to suggest that the Defendant had restrained the Plaintiff from taking the Equipment from the premises of KeNHA making it difficult for the court to really understand what the Plaintiff's concerns were. In the absence of any evidence to the contrary, the court did not find anything that prevented the Plaintiff from collecting its Equipment from KeNHA's premises.

11. Having considered the pleadings, the affidavit evidence and written submissions in respect of the Plaintiff's case, it was the view of the court that the application herein was not necessary. If it was, then the Plaintiff did not set out what its difficulties were in getting its Equipment. There was nowhere in the

letter of 15<sup>th</sup> April 2014 that KeNHA alluded to the fact that it had to be furnished with a court order before it could release the said Equipment or any indication that the Defendant had obstructed the Plaintiff from obtaining the said Equipment.

12. The Equipment belonged to the Plaintiff. It was not in any way affected by the ruling that this court delivered on 11<sup>th</sup> December 2014 in of **HCCC 3 of 2014 South Shore International Limited vs Talewa Road Contractors Ltd & Kenya National Highways Authority**. This court had the following to say:-

**“...in the case of HCCC No 274 of 2013 Talewa Road Contractors Limited vs Kenya National Highways Authority, ...in its ruling of 24<sup>th</sup> September 2014... the court found that the confiscation, selling, disposing of, removal, utilisation or interference with the plant, machinery, equipment, motor vehicles and other items situate at the site are of the nature that can be preserved under Section 7 of the Arbitration Act as they were items that were capable of being dissipated if not preserved. ....The question that arises is whether or not property that did not belong to the 1<sup>st</sup> Defendant formed part of the subject matter that was to be preserved pending the hearing and determination of the intended arbitration? The answer to that question is a resounding “No”...”**

### **DISPOSITION**

13. Prayer No (3) in the Plaintiff’s present application had since been overtaken by events as it had been sought orders pending the *inter partes* hearing of the application herein. The court nonetheless found it necessary to comment on effect of the same.

14. Evidently, the said Prayer was directed at the Defendant herein. However, the Defendant was not in possession of the said Equipment. It was crystal clear from the aforementioned letter of 15<sup>th</sup> April 2014 that the said Equipment was in KeNHA’s premises. Essentially, the Plaintiff was asking the court to grant an order in vain, which it should never do. As the issue was no longer one for determination, the court, will say no more on the said issue.

15. However, as the present application was unopposed, the upshot of this court’s ruling is that the Plaintiff’s Notice of Motion application dated and filed on 12<sup>th</sup> August 2013 granted in terms of Prayer No (4) therein. There was no justification for assistance by the OCS Miritini Police 16. Station in effecting the orders herein. As a result the court hereby declines to grant Prayer No (5) herein.

There shall be no order as to costs as it was the firm view of this court that the application herein was superfluous.

17. It is so ordered.

**DATED and DELIVERED at NAIROBI this 12th day of February 2015**

**J. KAMAU**

**JUDGE**