



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO 3 OF 2014**  
**(FORMERLY HCCC NO 73 OF 2013 MOMBASA)**

SOUTH SHORE INTERNATIONAL LIMITED.....PLAINTIFF

VERSUS

TALEWA ROAD CONTRACTORS LIMITED.....1<sup>ST</sup> DEFENDANT

KENYA NATIONAL HIGHWAYS AUTHORITY.....2<sup>ND</sup> DEFENDANT

**RULING**

**INTRODUCTION**

1. This matter was initially filed in the High Court of Kenya Commercial & Admiralty Division Mombasa before it was transferred to this court. Pursuant to a Notice of Motion application dated and filed on 21<sup>st</sup> June 2013 by the Plaintiff, Muya J gave and issued an *ex parte* order on 28<sup>th</sup> June 2013 in the following terms:-

**“1. THAT the 21 Bitutainers belonging to the applicant be kept in the custody of MISA MOGARAO AUCTIONEERS pending the hearing and determination of this suit.**

**2. THAT the O.C.S. Chagamwe to ensure compliance of this order...**

**3. THAT costs in the cause.”**

2. In a further Notice of Motion application dated and filed on 8<sup>th</sup> July 2013, the Plaintiff applied to have the O.C.S Chagamwe summoned to court to show cause why he had failed to comply with the orders issued by the court on 28<sup>th</sup> June 2013. Upon hearing the said application, Kasango J dismissed the same after finding that the O.C.S. Chagamwe did not fail to execute the aforesaid orders as the role for the police was merely to maintain law and order and not to execute orders on behalf of a party.
3. Subsequently, the 2<sup>nd</sup> Defendant, then a Proposed Interested Party filed a Notice of Motion

- application dated and filed on 6<sup>th</sup> August 2013 in which it sought amongst other orders, to be enjoined in the proceedings herein and for the Bitumen to continue being preserved and stored at the site of works. Kasango J granted an injunction restraining the Plaintiff from removing the said Bitumen from the 2<sup>nd</sup> Defendant's yard pending the hearing of its application on 20<sup>th</sup> August 2013 in terms of Prayer No (e) of the said application.
4. The Plaintiff then filed a Notice of Motion application dated and filed on 12<sup>th</sup> August 2013 seeking to restrain the 2<sup>nd</sup> Defendant from dealing with the said Bitumen pending the hearing and determination of the suit herein. It also amended its Plaint on the same date and enjoined the Proposed Intended Party as the 2<sup>nd</sup> Defendant herein. Kasango J declined to grant the orders sought as the same would have amounted to a reversal of the orders she had issued on 6<sup>th</sup> August 2013. She directed that the said application be mentioned on 20<sup>th</sup> August 2013 when the court would determine which application would be heard first.
  5. However, the matters never proceeded before Kasango J. Following a consent letter dated 20<sup>th</sup> November 2013 that the said learned judge recorded on 27<sup>th</sup> November 2013, the matter was transferred to this court on the ground that it was dealing with a similar matter to wit **HCCC No 274 Talewa Road Contractors Limited vs Kenya National Highways Authority**.
  6. Notably, both Muya J and Kasango J rendered their directions relating to Bitumen, the subject matter of this suit. The 1<sup>st</sup> Defendant's initial Notice of Motion application dated 27<sup>th</sup> June 2013 and filed on 28<sup>th</sup> June 2013 in **HCCC No 274 of 2013 Talewa Road Contractors Limited vs Kenya National Highways Authority** had basically sought an injunction or interim measures of protection to and orders restraining the Defendant from assigning to any person whatsoever or howsoever, the Contract Agreement dated 12<sup>th</sup> January 2012 (hereinafter referred to the "Contract Agreement) for the periodic maintenance of the Mombasa- Miritini (A109) pending the hearing and determination of the intended arbitration.
  7. As was rightly pointed out by counsel for the 2<sup>nd</sup> Defendant on 3<sup>rd</sup> March 2014, on 24<sup>th</sup> September 2014 this court gave orders relating to the 1<sup>st</sup> Defendant's machinery, plant, equipment, motor vehicles and other items on the 2<sup>nd</sup> Defendant's site pending the hearing and determination of the arbitral proceedings between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
  8. The issue of Bitumen had never arisen before this court. As the subject matters were distinct, there was no possibility of there being conflicting decisions by different courts. However, as the matter was transferred to this court by consent of the parties, mistaken as it was, and as was noted in this court's ruling of 24<sup>th</sup> September 2014 that the dispute between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant should ordinarily have been handled by the High Court of Kenya Mombasa in accordance with Section 15 (c) of the Civil Procedure Act, it will deal with the same to avoid further delays in its determination.
  9. On 3<sup>rd</sup> March 2014, parties agreed to have the 2<sup>nd</sup> Defendant's Notice of Motion application dated and filed on 6<sup>th</sup> August 2013 and that of the Plaintiff that was dated and filed on 12<sup>th</sup> August 2013 disposed of by way of written submissions. The 1<sup>st</sup> Defendant was excused from the proceedings herein as it requested. However, it filed a Replying Affidavit on 19<sup>th</sup> August 2013 through John Kihonge Wainaina and Grounds of Opposition dated 25<sup>th</sup> March 2013 and filed on 28<sup>th</sup> March 2014 in opposition to the 2<sup>nd</sup> Defendant's Notice of Motion application.
  10. Although the court gave the parties herein the opportunity to highlight their respective submissions, they waived their right to do so on 30<sup>th</sup> July 2014 and asked the court to deliver its rulings based on written submissions that they had filed. This consolidated ruling herein is therefore based on the said written submissions. The court found it prudent to render one ruling in respect of the said applications as they were related.

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

11. The Plaintiff's Notice of Motion application was brought under the provisions of Order 40 Rules 1,2 and 4, Order 51 of the Civil Procedure Rules and Section 1A, 2A (sic) and 3A of the Civil Procedure Act and all enabling provisions of the law. It sought the following orders:-

1. Spent.
2. Spent.
3. **THAT this Honourable Court be pleased to issue a (sic) order stopping the 2<sup>nd</sup> Respondent its authorized servants, agents and whomsoever from transferring, taking possession of, alienating, wasting, wasting and/or otherwise dealing with the Plaintiff's 21 Bitutainers and bitumen in the 1<sup>st</sup> Respondent's Yard at Jomvu pending hearing and determination of this suit.**
4. **THAT this Honourable Court be pleased to direct that the 2<sup>nd</sup> Respondent to comply with the orders issued by this Honourable Court on 28<sup>th</sup> June 2013 pending the hearing and determination of this suit.**
5. **THAT the O.C.S. Changamwe Police Station do ensure compliance of this order.**
6. **THAT costs of this application be provided for.**

12. Its case was premised on the grounds on the face of its application, the Supporting Affidavit of Simon Muchene that was sworn on 12<sup>th</sup> August 2013, his Replying Affidavit that was sworn in opposition to the 2<sup>nd</sup> Defendant's Notice of Motion application dated and filed on 6<sup>th</sup> August 2013 and his Supplementary Affidavit that was sworn on 11<sup>th</sup> March 2014.

13. It argued that the sum of Kshs 34,079,062.50 that was allegedly paid to the 1<sup>st</sup> Defendant, which was the 2<sup>nd</sup> Defendant's agent, was never paid to it and the 2<sup>nd</sup> Defendant could not acquire proprietary interest or good title over the Bitumen. It was categorical that the 1<sup>st</sup> Defendant refused to pay for the Bitumen or to release the Bitutainers and Bitumen on the basis that the Plaintiff owed it storage for the goods.

14. It was apprehensive that the Bitumen could be vandalised at the 2<sup>nd</sup> Defendant's Yard and therefore urged the court to have the orders of 28<sup>th</sup> June 2013 enforced to allow the court make a determination regarding the extent of the legal obligations therefrom as granting the orders sought by the 2<sup>nd</sup> Defendant would render its suit nugatory.

15. Its written submissions were dated 11<sup>th</sup> March 2014 and filed on 13<sup>th</sup> March 2014.

### **THE 1<sup>ST</sup> DEFENDANT'S CASE**

16. Its Grounds of Opposition were as follows:-

1. **The goods, the subject matter of the present suit, namely Bitumen and the 21 Bitutainers, among other items, are the subject of preservatory (sic) issued in HCCC No 274 of 2013 Talewa Road Contractors Limited vs Kenya National Highways Authority pending an intended Arbitration.**
2. **The relief sought by the applicant herein is in essence a duplicate of the orders already granted in HCCC No 274 of 2013 and may embarrass this Honourable Court.**
3. **There is no danger of the said goods being transferred, damaged, wasted or alienated and the applicant (sic) fears are misguided, misconceived and unwarranted as the said goods and premises are the subject of preservatory orders in the aforesaid suit.**

17. The 1<sup>st</sup> Defendant did not appear to be opposed to both applications as could be seen in Paragraphs (3) and (4) of its Replying Affidavit. It, however, explained that due to a delay in the Plaintiff supplying Bitumen to the site, on or about 24<sup>th</sup> September 2012, it instead purchased Bitumen from Atraco International Limited and paid a sum of Kshs 26,091,648/=. When it informed the Plaintiff that it did not require its Bitumen, the Plaintiff nonetheless delivered its Bitumen to its premises on 14<sup>th</sup> October 2012 purely for storage purposes on the understanding that it would inform and agree with the Plaintiff to purchase the Bitumen or a portion thereof, if the need arose.

18. On terminating the contract between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the 2<sup>nd</sup> Defendant impounded the site, all plant, equipment, machinery and all material stored therein. It pointed out that the payment the 2<sup>nd</sup> Defendant remitted to it was for the Bitumen that was supplied by Atraco International

Limited and was not in respect of the Plaintiff's claim and as a result, the 2<sup>nd</sup> Defendant could not lay claim to the Bitumen that belonged to the Plaintiff herein.  
19. It did not file any written submissions in respect of the two (2) applications.

### **THE 2<sup>ND</sup> DEFENDANT'S CASE**

20. Its Motion was brought pursuant to the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act and Order 40 Rules 5, 7 and 10 and Order 51 of the Civil Procedure Rules. Prayer No (a), (b) and (e) of the said application were spent. It sought the following remaining orders:-

- a. **Spent.**
- b. **Spent.**
- c. **THAT the ruling and Orders both dated 28<sup>th</sup> June 2013 be varied and/or set aside.**
- d. **Spent.**
- e. **Spent.**
- f. **THAT the new contractor be allowed to use the Bitumen stored in the 21 bitutainers the subject matter herein.**
- g. **THAT costs of this application be in the cause.**

21. Its case was that it was the owner of the site of works in which the twenty one (21) Bitutainers were stored as it paid the 1<sup>st</sup> Defendant a sum of Kshs 34,079,062 in accordance with the terms of the aforementioned Contract Agreement. It stated that the Bitumen in the twenty one (21) Bitutainers had not been used and would be damaged if it was removed from the Bitutainers. It contended that the orders that were issued by the court on 28<sup>th</sup> June 2013 had caused a stalemate and a delay in the release of the Bitutainers to the Plaintiff as the new contractor who was awarded the contract after it terminated its contract with the 1<sup>st</sup> Defendant, could not use the Bitumen. It was emphatic that the Plaintiff's claim was against the 1<sup>st</sup> Defendant as it was never a party to the agreement between them.

22. These were facts that were set out in detail in the grounds in the face of the application and in the Supporting Affidavit that was sworn by Dominic Kumina Kirira on 6<sup>th</sup> August 2013 and his Replying Affidavit that was sworn on 19<sup>th</sup> August 2013 in response to the Plaintiff's Notice of Motion application dated and filed on 12<sup>th</sup> August 2013. Its written submissions were dated 20<sup>th</sup> March 2014 and filed on 24<sup>th</sup> March 2014.

### **LEGAL ANALYSIS**

13. Nothing was placed before this court to show that the Plaintiff had an arbitration agreement either with the 1<sup>st</sup> or 2<sup>nd</sup> Defendant. There was, however, an arbitration agreement in the FIDIC (*Federation Internationale Des Ingenieurs- Conseils*) Conditions of Contract between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

14. This was an issue that was addressed in the case of **HCCC No 274 of 2013 Talewa Road Contractors Limited vs Kenya National Highways Authority**, where in its ruling of 24<sup>th</sup> September 2014, this court noted that courts should be cautious not to usurp the role of the arbitral tribunal where parties had opted to have their dispute determined through arbitration and that it could not re-write contracts that had been entered into by parties.

15. In the said ruling, 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 were of the nature that could be preserved under Section 7 of the Arbitration Act as they were items that were capable of being dissipated if not preserved.

16. Neither the 1<sup>st</sup> nor 2<sup>nd</sup> Defendant raised the issue of Bitutainers and Bitumen at the time of the hearing of the 1<sup>st</sup> Defendant's aforesaid application in **HCCC No 274 of 2013 Talewa Road Contractors Limited vs Kenya National Highways Authority**. However, in Paragraph (5) of its

- Replying Affidavit, the 1<sup>st</sup> Defendant insinuated that the Bitutainers and Bitumen were part of the items that it intended to have preserved pending the hearing and determination of the intended arbitration.
17. Notably, it stated in Paragraph 12 of its Replying Affidavit that it obtained its Bitumen from Atraco International Limited and not from the Plaintiff herein. Evidently, it laid no claim to the Bitutainers and Bitumen. In fact it stated in Paragraph (16) of its Replying Affidavit that the Plaintiff had merely stored the same at its Yard.
  18. 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 in **HCCC No 274 of 2013 Talewa Road Contractors Limited vs Kenya National Highways Authority**. The answer to that question is a resounding “No”. The 1<sup>st</sup> Defendant could not purport to advance the interests of the Plaintiff by enlarging the meaning of the court’s ruling given on 24<sup>th</sup> September 2014 by contending that the Bitutainers and Bitumen were part of the items that were referred to in this court’s said ruling when it was clear that the Bitutainers and the Bitumen did not belong to it. The 1<sup>st</sup> Defendant cannot therefore approbate and reprobate.
  19. As the Plaintiff was the supplier of the Bitutainers and the Bitumen it could not be subjected to the terms of the arbitration agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as it was not party to the same and accordingly, this case must therefore be determined on the facts that have been placed before the court.
  20. Exhibit marked “DKK 2” annexed in the Supporting Affidavit of Dominic Kumina Kirira were copies of the Bills of Quantities which showed the quantities of materials on site and Payment Voucher that evidenced payment by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant for a sum of Kshs 34,079,062.50. The documents were clear that the same related to Periodic Maintenance of Mombasa- Miritini A 109 RD.
  21. Perusal of Exhibit marked “JKW 4” on pp 12-14 of the 1<sup>st</sup> Defendant’s Replying Affidavit showed that payments were made to Atraco International Limited. It did not provide the court with any evidence to establish a nexus between the said company and its supply of Bitumen to the 2<sup>nd</sup> Defendant for the Periodic Maintenance of Mombasa- Miritini A 109 RD.
  22. There was also no documentary evidence to demonstrate that the 1<sup>st</sup> Defendant paid Atraco International Limited the sum of Kshs 26,091,648/= before it received the sum of Kshs 34,079,062.50 from the 2<sup>nd</sup> Defendant. Its payment to Atraco International Limited was effected on 1<sup>st</sup> October 2012 while the 2<sup>nd</sup> Defendant paid it on 2<sup>nd</sup> April 2013. However, if it paid Atraco International Limited the said sum, did it reimburse itself from the sum of Kshs 34,079,062.50? If that were so, the 1<sup>st</sup> Defendant proffered no explanation to show how the balance of Kshs 7,987,414/= was utilised.
  23. The only explanation about the Bitumen from Atraco International Limited was contained on pp 5-6 of the 2<sup>nd</sup> Defendant’s written submissions. Such facts cannot be introduced in a matter at the submission stage and ought to have been placed before the court by way of affidavit evidence. While the court noted the same, it did not consider the same as the Plaintiff and the 1<sup>st</sup> Defendant were not given an opportunity to respond to the same in their affidavit evidence.
  24. It is for that reason that the court made inferences from what was presented before it. Bearing the facts of the case in mind, in the absence of any concrete evidence to the contrary, the court was disinclined to accept the 1<sup>st</sup> Defendant’s evidence that the Bitumen it obtained from Atraco International Limited was paid out of the sum of Kshs 34,079,062.50 that the 2<sup>nd</sup> Defendant’s paid it as it had alleged.
  25. The court was also not convinced by the 1<sup>st</sup> Defendant’s version that the Plaintiff merely stored the twenty one (21) Bitutainers and Bitumen as the 1<sup>st</sup> Defendant’s letter dated 2<sup>nd</sup> January 2013 to the Plaintiff contained on page 2 of the Plaintiff’s Supporting Affidavit showed that the 1<sup>st</sup> Defendant had reaffirmed its commitment to make payment for the Bitumen that it was supplied with. The said letter read as follows:-

**“South Shore International**

**P.O. Box 34331-80118**

**Mombasa, Kenya**

**Att: Mr Muchene**

**Following several discussions on the subject matter, we wish to reaffirm our commitment in making payment for the bitumen supplied to our Mombasa yard. We have been experiencing payment delays from Kenya highway authority (sic) and it has confirmed that payments will be received on or before 31<sup>st</sup> January 2013.**

**We highly appreciate your patience in this matter and that you for your continued support.**

**Yours faithfully**

**For Talewa Road Contractors Ltd**

**Ng’ang’a Muiruri**

**Contracts Manager”**

26. In its letter dated 10<sup>th</sup> June 2013 to the Plaintiff contained on pg 3 of the Plaintiff’s Supporting Affidavit, the 1<sup>st</sup> Defendant disowned the said letter. It stated as follows:-

4. **The said letter by Muiruri is purported to have been written by him on 2<sup>nd</sup> January, 2013, a day when we were still on holiday...Myself and my co-director were in Nairobi attending to some family matters.**
5. **I do however, recall that sometime in August last year you approached me and asked me for space to store bitumen and I agreed in good faith because I had some space at my Mombasa Yard.**
6. **You brought bitumen which was in 21 containers and you also brought your own security to guard the containers and I assumed that you would take away anytime you needed...**
7. ..
8. ...
9. **What you are asking us now is to buy the bitumen by force which is totally UNACCEPTABLE...**

**Yours faithfully**

**TALEWA TOAD CONTRACTORS LIMITED**

**JOHN K. WAINAINA**

**MANAGING DIRECTOR”**

27. It was not sufficient for the 1<sup>st</sup> Defendant to have contended that the persons who could sign letters on its behalf were away for holidays. The 1<sup>st</sup> Defendant ought to have provided proof to show that Ng’ang’a Muiruri, its Contract Manager had no authority to sign letters on its behalf that would ultimately bind it. Its attempt to disown the said letter thus falls by the wayside as it was

- bound by the actions of its officers, agents and/or servants. It could not purport to disown a letter that was written by its officer just to escape liability.
28. From the documentation that was presented before this court, the consideration for Bitumen the 2<sup>nd</sup> Defendant obtained from the 1<sup>st</sup> Defendant was for the said sum of 34,079,062.50 as could be seen from Summary of Statement for Payment of Account dated 26<sup>th</sup> March 2013. This figure seems to have been at variance with the sum of Kshs 33,356,528.50 that appears to have been paid vide the payment voucher dated 28<sup>th</sup> March 2013.
29. No explanation was given to the court to show how the variance came about. However, what is evident is that sum of Kshs 33,356,528.50 was paid to the 1<sup>st</sup> Defendant through Co-operative Bank of Kenya Limited Account No 011364537300 in respect of the Periodic Maintenance of Mombasa- Miritini A 109 RD. The 2<sup>nd</sup> Defendant having paid the 1<sup>st</sup> Defendant the aforesaid sum, the 1<sup>st</sup> Defendant became wholly liable to the Plaintiff. If the court were to arrive at a different conclusion, it would amount to unjust enrichment on the part of the 1<sup>st</sup> Defendant.
30. It was not in dispute that there was no privity of contract between the Plaintiff and the 2<sup>nd</sup> Defendant. However, as there is no rule preventing a party from benefitting from another's contract, the general exceptions of privity of contract come into play. Parties are conferred rights and obligations which they must abide by.
31. This distinction between privity of contract and the exceptions to the general rule of privity of contract was correctly set out by the 2<sup>nd</sup> Defendant when it referred the court to the case of **Jonathan Zacharia & 24 Others vs Bulk Warehouse Management & 2 Others [2013]eKLR** and **Halsbury's Laws of England 4<sup>th</sup> Edition Para 748**.
32. The 2<sup>nd</sup> Defendant was the intended recipient of the Bitumen thereby creating horizontal privity between the Plaintiff and the 2<sup>nd</sup> Defendant. In other words, the 2<sup>nd</sup> Defendant could not have taken possession of the Bitumen and refused to pay by hiding the cloak of privity of contract between the Plaintiff and the 1<sup>st</sup> Defendant. The Plaintiff could sue the 2<sup>nd</sup> Defendant to claim monies not paid in respect of the said Bitumen. Similarly, the 2<sup>nd</sup> Defendant could also claim its interest over the Bitumen once it paid the consideration for the same even though there had been no vertical privity of contract between it and the Plaintiff.
33. Evidently, the Plaintiff's contract to sell the Bitumen to the 2<sup>nd</sup> Defendant through the 1<sup>st</sup> Defendant was not conditional. Although the Bitumen was supplied on diverse dates from October 2012 and payment effect on 2<sup>nd</sup> April 2013, it was immaterial that payment was not done at the time of delivery of the Bitumen. - **See Sections 19 (1) and 20 (a) of the Sale of Goods Act Cap 31 (laws of Kenya)**. From the conduct of the parties, it was clear that it was intended that the Bitumen was to be transferred to the 2<sup>nd</sup> Defendant when it was delivered on site in accordance to the FIDIC Conditions of Contract between it and the 1<sup>st</sup> Defendant.
34. Once the 2<sup>nd</sup> Defendant paid the 1<sup>st</sup> Defendant for the Bitumen, the 2<sup>nd</sup> Defendant acquired good title to the same. It became entitled to benefits under the contract between the Plaintiff and the 1<sup>st</sup> Defendant as the 1<sup>st</sup> Defendant was acting as the 2<sup>nd</sup> Defendant's agent in the purchase of the Bitumen. Appreciably, the 2<sup>nd</sup> Defendant was the principal.
35. The cases of **Heribet Maier vs Marie Kersten [2004] eKLR**, **David Munyila Ngatho vs Wilson Ochieng Ogwach [2012] eKLR** and **Symbion East Africa Printers Limited vs Casey J.K. Mbugua & Another [2009] eKLR** relied upon by the Plaintiff, where the common thread was that a buyer with a defective title could not pass a good title to a buyer, would therefore not be applicable herein. The court was thus in agreement with the 2<sup>nd</sup> Defendant's submissions that the Plaintiff's claim was solely against the 1<sup>st</sup> Defendant as it performed its part of the contract when it paid the consideration aforesaid.
36. The 2<sup>nd</sup> Defendant cannot be dragged into the dispute between the Plaintiff and the 1<sup>st</sup> Defendant. It was entitled to utilise the material on site as it deemed or thought proper as could be seen from Clause 63.1 of the FIDIC Conditions of Contract wherein it was stipulated as follows:-

**“The Employer or such other contractor may use such completion so much of the Contractor's Equipment, Temporary Works and materials as he or they may think proper.”**

37. Having said so, the Plaintiff sought an interlocutory injunction pending the hearing and determination of the suit herein while the 2<sup>nd</sup> Defendant sought a mandatory injunction seeking release of the twenty one (21) Bitutainers and Bitumen to enable it proceed with the Periodic maintenance of the Mombasa- Miritini (A109).
38. Mandatory injunctions are only to be granted in special circumstances and only if the court were to arrive at the same conclusion both at an interlocutory stage and after hearing a matter in a full trial.
39. In the celebrated case of **Locabail International Finance Limited vs Agro-Export & Another [1986] 1 All ER**, the court therein stated as follows:-

**“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”**

40. While considering whether or not to grant a mandatory injunction, a court ought to look at the principles set out in the case of **Giella vs Cassman Brown Company Limited [1973] EA 358** which are as follows:-

**“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”**

41. Though the order of 28<sup>th</sup> June 2013 was made by a court of competent and equal jurisdiction and this court cannot purport to sit on appeal and reverse it, this court had power under Order 51 Rule 15 of the Civil Procedure Rules, 2010 to set aside *ex parte* orders. Indeed, in his order of 28<sup>th</sup> June 2013, Muya J made the orders that he did after hearing the Plaintiff only and could not be faulted. This court therefore came to a different conclusion after hearing all the parties.
42. It does appear from the documentation that was presented before this court that the 2<sup>nd</sup> Defendant effected payment of the Bitumen. The court would not make any other finding if this matter was to proceed in court. The court was thus satisfied that the 2<sup>nd</sup> Defendant would suffer irreparable injury that would not be adequately compensated by way of damages if it was stopped from utilising Bitumen to construct a public road and when it had paid for the same.
43. Having considered the pleadings, affidavits and written submissions by the respective parties, the court was satisfied that it would be just, equitable, proper and fair to grant a mandatory injunction in favour of the 2<sup>nd</sup> Defendant as preserving the Bitutainers and Bitumen in the custody of Misa Mogaro Auctioneers as had been directed by Muya J would merely escalate the demurrage costs and serve no benefit to either the Plaintiff or the 2<sup>nd</sup> Defendant.
44. However, the Plaintiff cannot also be left high and dry particularly after it supplied the Bitumen for the 2<sup>nd</sup> Defendant's use. It stated that its claim for Bitumen was Kshs 48,048,000/= and the twenty one (21) Bitutainers were valued at approximately Kshs 21,000,000/=. It did not, however, give a computation of how the sum for the Bitumen was arrived at. On its part, the 2<sup>nd</sup> Defendant submitted that it paid the 1<sup>st</sup> Defendant a sum of Kshs 34,048,800/= being 75% of the amounts due to the “applicant” which this court assumes to have been for the Plaintiff's benefit.
45. It was not clear from the documentation that was presented before this court what exactly was the value of the Bitumen making it difficult for it to make a conclusive determination of this issue. Both the Plaintiff and the 2<sup>nd</sup> Defendant omitted to adduce sufficient and concrete affidavit

evidence leading the court to arrive at decisions that were only based on documents before it and proceeded on certain suppositions. Parties ought to be keen in presenting the full extent of their cases.

46. Whilst this is a commercial matter that ought to be determined decisively, the court found it prudent to grant the 2<sup>nd</sup> Defendant's application based on the evidence that was placed before it. It, however, had to balance the interests of both the Plaintiff and the 2<sup>nd</sup> Defendant who appeared to have met their part of the bargains.
47. The court wishes to observe that the contentions by the 1<sup>st</sup> Defendant in this matter left a lot to be desired. Its Grounds of Opposition were unmeritorious and completely misrepresented the ruling of this court that was delivered on 24<sup>th</sup> September 2014. The said Grounds of Opposition found no favour with this court. The Plaintiff is at liberty to move the court appropriately to pursue the 1<sup>st</sup> Defendant who was paid for the Bitumen it supplied the 2<sup>nd</sup> Defendant through the 1<sup>st</sup> Defendant.

### **DISPOSITION**

48. Accordingly, 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 was not merited and the same is hereby dismissed with costs to the 2<sup>nd</sup> Defendant.
49. Prayer Nos (c) and (f) of the 2<sup>nd</sup> Defendant's Notice of Motion application dated and filed on 6<sup>th</sup> August 2013 were hereby allowed in the following terms:-
- a. **The new contractor be and is hereby allowed to use the Bitumen stored in the Bitutainers to the value of Kshs 33,356,528/= only which shall be determined after the taking of an inventory between the Plaintiff and the 2<sup>nd</sup> Defendant which shall in any event not be more than seven (7) days from the date of this ruling.**
  - b. **In the event, the value of the Bitumen shall exceed the sum of Kshs 33,356,528/=, the excess Bitumen and the Bitutainers shall be released to the Plaintiff forthwith on the day the aforesaid inventory is concluded.**
  - c. **The 2<sup>nd</sup> Defendant shall be responsible for the payment of the demurrage charges on the Bitutainers it shall have retained from the date of the aforesaid inventory until the date it returns the same to the Plaintiff.**
  - d. **Costs of this application will be in the cause.**
50. It is so ordered.

**DATED and DELIVERED at NAIROBI this 11TH day of DECEMBER, 2014**

**J. KAMAU**

**JUDGE**