REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC. APPLICATION NO. 535 OF 2018

TALEWA ROAD CONSTRACTORS..................................APPLICANT

-VERSUS-

KENYA NATIONAL HIGHWAYS AUTHORITY...........RESPONDENT

DIGITAL DEN LIMITED...........................PROPOSED RESPONDENT

RULING

APPLICANT'S CASE:

The Applicant through Chamber Summons Application dated 5th March 2019 and filed on 6th March 2019 sought for the following orders:

> **a. That the Court enjoins the proposed Respondent herein as a Respondent in Miscellaneous Application No. 535 of 2018 in the High Court at Milimani, Nairobi;**
>
> **b. That Court issues orders to deposit the arbitral award dated 22nd March 2018 to a joint account of Digital Den Limited and Talewa Road Contractors.**

The Chamber Summons application is based on the following grounds as per the supporting affidavit by **Mr John Munyua:-**

> a. **Pursuant to invitation to tender by the Kenya National Highway Authority for the periodic maintenance of Mombasa Miritini (A 109) road under reference KeNHA/RD/625/2012, Talewa Road Contractors Limited submitted its bid for Kshs 341, 180,245 which was accepted by KeNHA vide a letter dated 7th December 2011 and the contract was later signed by the parties;**
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> **b. Talewa Road Contractors Limited in lease agreement dated 16th December 2012 and 17th January 2013 hired Asphalt paver chassis 1610813 and ptr Hamm pneumatic roller numbers 50539 respectively from the Applicant herein referred to as 'the equipment' to be used in the periodic maintenance of Mombasa Miritini (A 109) road at a daily rate of Kshs 45,000 and Kshs 30,000 respectively until return of the machinery;**
>
> **c. However, the said equipment was impounded by KeNHA on account of a dispute between the said KeNHA and Talewa Road Contractors which dispute the Applicant was not party to. Despite KeNHA having written to Talewa Road Contractors on 15th April 2014 to facilitate the Applicant to collect the said equipment Talewa Road Contractors failed to do so;**
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> **d. In a ruling dated 24th September 2014 in *HCCC No. 274 of 2013 Talewa Road Contractors Limited –vs- KeNHA* the court** issued **orders restraining the confiscation, disposal, removal, utilization or interference with the plant machinery, equipment, motor vehicles and other items situated at the site pending the hearing and determination of the arbitration;**
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> **e. The Applicant in a notice of motion dated 23rd July 2014 in HCC Civil Suit 323 of 2014 sought mandatory injunctions against Talewa to release its equipment but the court upheld the previous Ruling in HCCC No. 274 of 2013 where it issued conservatory orders pending determination of the arbitral proceedings;**

f. The Arbitrator in the matter of dispute for the contract for periodic maintenance of Mombasa – Miritini (A 109) road gave an award of Ksh 115,131,449 and VAT of Kshs 18,421,032 dated 22nd March 2018;

g. Talewa Contractors Limited owes the Applicant Kshs 154, 644, 400 in respect of the above contract in terms of work done without pay since 30th November 2012 and destruction of the machinery at a casualty fee of 250,000 USD per machine as agreed in the lease agreements dated 16th December 2012 and 17th January 2013.

Therefore, the Applicant in the instant application sought that in the best interest of justice to enjoin the Applicant **Digital Den Limited** as Respondent and order the arbitral award amount to be deposited in a joint account of Talewa Contractors and Digital Den Limited. This is to safeguard the Applicant's equipment confiscated by the 1st Respondent to date and payment of Ksh 154,644,400/- due to the Applicant; Talewa Contractors from the Applicant in the arbitration proceedings.

RESPONDENT'S CASE

The Application is opposed vide a Replying Affidavit dated 4th April 2019, sworn by Mr.John Wainaina, Managing Director of the Talewa Roads Contractors Limited. He stated that the dispute between **Talewa Road Contractors Limited** and the Respondent, **Kenya National High ways Authority (KeNHA)** arose from the contract of 12th January 2012, which was for periodic maintenance of Mombasa –Miritini (A109) Road.

That the said parties Talewa and KeNHA, executed the said contract after Talewa participated in an open tender and it was consequently declared the successful Tenderer leading to it being awarded the tender for construction of **Mombasa- Miritini (A 109**) Road. That the Proposed Respondent, Digital Den Limited was not privy to the said contract.

That a dispute arose between Talewa and KeNHA after KeNHA irregularly and maliciously terminated the said contract and they consequently declared a dispute in line with the terms of the contract. The Respondent in the instant application also filed a suit ***HCCC No. 274 of 2013, Talewa Road Contractors Limited –vs- Kenya National Highways Authority,*** wherein they were seeking interlocutory orders pending reference of the dispute to arbitration.

That the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) consequently appointed **Engineer Paul Thang'a Gichuhi** as the sole Arbitrator. Thereafter, an award was published on 22nd March 2015. The Arbitrator heard the dispute without involvement of any other parties and thereafter an award published on 22nd March 2018.

That the proposed intended 2nd Respondent did not participate in the Arbitral Tribunal at any stage, neither was it enjoined, as it was not privy to the contract which was subject to the dispute therein.

That on 5th October 2018 the afore stated suit, ***HCCC No. 274 of 2013*,** was marked as closed by consent of the parties therein as the Arbitral award had been published and that KeNHA has not challenged the validity of the afore stated award and there has been no application for setting aside filed to-date.

That the Proposed Respondent has come to this Court of Equity with unclean hands as it has failed to disclose material facts which it ought to have disclosed at the first instance, as deponed hereunder.

That the proposed Respondent filed a separate suit against Talewa in ***HCCC No. 323 of 2014, Digital Den Limited –vs- Talewa Road Contractors Limited & Kenya National Highways Authority***, wherein KeNHA was later enjoined as a third party. In this suit the Proposed Respondent was seeking injunctive orders which application was opposed by Talewa and consequently a ruling was delivered on 15th January 2016 wherein the court held that there was a nexus between the claim by the Proposed Respondent and the claim before the Arbitral Tribunal which was then ongoing before the Arbitral Tribunal.

That the afore said ruling of 15th January 2016 was served upon the sole Arbitrator during the proceeding before him and prior to publication of the arbitral award and that the Proposed Respondent did not apply to be enjoined as a party in the Arbitral Tribunal even after the said ruling of 15th January 2016.

The Sole Arbitrator determined the issue relating to the equipment hired from **Digital Den**, as issue **Number 14** in the award, and consequently held that the claim relating to said equipment should be pursued in court.

That the said ***HCCC No. 323 of 2014***, is still pending determination at the High Court and the Proposed Respondent has not made efforts to prosecute the said suit after the award was published.

That on 6th March 2019 the Proposed Respondent filed another suit after the aforestated award was published, being ***Constitutional Petition No. 86 of 2019, Digital Den Limited –vs- Talewa Road Contractors Limited & Kenya National Highways Authority***, but to my knowledge it has not taken any steps towards prosecution of the said petition since the date it was filed.

That ***Constitutional Petition No. 86 of 2019*** was seeking review of the arbitral award and also an order similar to prayer (c) in the application dated 5th March 2019, among other orders.

That the application by the Proposed Respondent lacks in merit, it's an abuse of the Court process and its also fatally defective for the following reasons;

a. The Proposed Respondent was not privy to the contract which gave rise to the dispute leading to the subject arbitral award;

b. The proposed Respondent did not exercise its right, if any, to be enjoined as a party in the Arbitral proceedings before the sole Arbitrator even after the orders issued on 16th January 2016 in HCCC No. 323 of 2014;

c. The award was published on 22nd March 2018 and to-date KeNHA has not filed any application seeking to set aside of the said award;

d. The proposed Respondent has come to these courts of Equity with unclean hands and hence undeserving the exercise of this honourable court's discretion in its favour;

e. There are other suit pending at the High Court, being HCCC No. 323 of 2014, relating to the claim by the Proposed Respondent and it consequently filed constitutional Petition No. 86 of 2019;

f. The claim by the Proposed Respondent has not been proved to warrant the orders sought.

APPLICANT'S SUBMISSIONS

The issue is whether there can be joinder of a Respondent to an application for recognition and enforcement of an arbitral award who was not privy to the subject contract or the dispute before the Arbitrator.

The primary subject before this Honourable Curt relates to an application for enforcement and recognition of an **Arbitral Award** as provided by **Section 36 and 37 of The Arbitration Act** and reiterated in various judicial decisions and we submit that the governing statute is the Arbitration Act. The cardinal principle espoused under the said section is the finality of an Arbitral Award and consequently the primary issue for determination is whether this Honourable Court can allow a party who was not privy to the contract which gave rise to the dispute leading to the subject Award and neither was it a party to the proceedings before the Arbitral Tribunal can be enjoined as a Respondent, while considering the aforestated principle.

The Award published on 18th March 2018 related to a dispute primarily between Talewa and KeNHA and the Award directed KeNHA, being the Respondent, to make payment of **Ksh 115,131,449/-** within a period of 45 days. The orders are expressly against KeNHA, as the Respondent.

That the pending application by Talewa for recognition and enforcement is premised on the provisions of **section 36 (1)** of the Arbitration Act provides as follows:

> **"A domestic Arbitral Award shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37."**

Section 37 on the other hand provides for grounds for refusal of recognition or enforcement of an Arbitral Award

In *Civil Appeal No. 104 of 1984, Agricultural Finance Corporation –vs- Lengetia Limited & Another*, the Court of Appeal held***, inter alia* that:**

> **"The joinder of parties under Rule 3 of Rule 7 of order 1 presupposes a genuine liability of one or both of the proposed defendants ... The AFC derived no benefit from the contract at all."**

In *Misc. Application No. 129 of 2014, Kenya Tea Development Agency Limited & 7 Others –vs- savings Tea Brokers Limited*, the Court adopted the holding in the AFC case and further held *inter alia* that:

> **"As a general rule a contract affects only the parties to it and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract sum stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."**

In ***Petition No. 134 of 2018, Okiya Omtatah Okoiti & Another –vs- KEMRI Board of Management & Others*,** it was held *inter alia* that:

> **"lis alibi pendens means dispute elsewhere pending. The philosophy being that a Court should not assume jurisdiction *on a dispute on the same case of action when such a dispute is pending before another competent Court. It is not difficult to find the legal rationale for the doctrine. It is to avoid inconsistent decisions which potentially will embarrass the arbiter or prejudice a Respondent."***

In ***Succession Cause No. 346 of 2013, Adil Abdulkarim Chatur Popat & Others –vs- Azim Abdulkarim Chatur Popat*,** it was held *inter alia* that:

"It is settled law that a person who approaches the Court or Tribunal for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all material facts/important facts/documents which have a bearing on the adjudication of the issues raised in the case. In other words, he/she owes a duty to the Court or Tribunal to bring out all facts and refrain from concealing/suppressing any material facts within his/her knowledge or which he/she could have known by exercising diligence expected of a person of ordinary prudence, if he/she is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the Court not only has the right but a duty to deny relief to such a person."

PROPOSED 2ND RESPONDENT'S SUBMISSIONS

a. Who may be joined as plaintiffs [Order 1 rule 1]

All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.

b. Who may be joined as defendants [Order 1, rule 3]

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise.

The test to apply when determining whether a party should be joined to a suit or not is that joinder of parties is permitted by law and it can be done at any stage of the proceedings... is unnecessary or will just occasion unnecessary delay or costs on the parties in the suit.... the determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties.

In the celebrated case of ***Kensalt Limited –vs- Water Resources Management Authority [2018]eKLR,*** the court has this to say regarding joinder of parties;

"One must move the Court by way of a formal application. Enjoinment is not as of right, but at the discretion of the Court; hence, sufficient grounds must be laid before the court, on the basis of the following elements:

i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral;

ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrate to the satisfaction of the Court. It must also be clearly outlined, and not something remote;

iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court.

In **Central Kenya Ltd –vs- Trust Bank & 4 Others CA No. 222 of 1998;** the Court opined this way;

"Having thus set out the law applicable to the circumstances of this case, we stress that power of the court to add a party to proceedings can be exercised at any stage of the proceedings including at the appellate stage. Indeed, a party can be joined even without applying. We also bear in mind the principle that no suit shall be defeated by reason only of the misjoinder or non-joinder of a party; and that the Court may proceed to determine the matter in controversy so far as the rights and interests of the parties actually before it are concerned.

In our view, the circumstances must justify the joinder, in that the claim and defence before the court must raise a doubt as to which of the parties is liable in the final outcome of the dispute. In this regard, it is clear that KEBS knowingly and intentionally left out the applicant from the arbitral and High Court proceedings. Again, it must be demonstrated that it would be desirable to add the applicant as a new party and that his presence would enable court to resolve all the matter in the dispute.

Another important consideration is whether the joinder is intended to vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings. It cannot therefore fall from the lips of the applicant to say that it would ***protect and promote public interest in this dispute. The issue of interest or liability between the parties can be sufficiently and conclusively determined without any to the applicant."***

In ***Kenya Medical Laboratory Technicians and Technologists Board & 6 Others –vs- Attorney General & 4 Others [2017] eKLR*****.** On this one the Court was guided **by Rule 2 of the Constitution of Kenya (protection of Rights and fundamental Freedoms) Practice and Procedure Rules, 2013** which defines an interested party as follows;

"interested party" means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation ."

DETERMINATION

The Court considered the submissions by the parties and the issues for determination are;

a. **on enjoining the Applicant as Respondent to the instant proceedings;**

b. order the arbitral award amount to be deposited in a joint account of Talewa Contractors and Digital Den Limited.

Order 1 Rule 10 (2) of the Civil Procedure Rules provides for a party to be enjoined in a suit as a necessary party as follows:

> **"The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."**

In the case of ***Joseph Njau Kingori v Robert Maina Chege & 3 Others[2002] eKLR*** it set out the guiding principles for a party to be enjoined as an interested party as:

1. The proposed interested party must be a necessary party and a proper party;

2. In the case of a defendant there must be a relief flowing from that defendant to the plaintiff.

3. The ultimate order or decree cannot be enforced without his presence in the matter.

4. His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.

In the instant matter, the Applicant; Talewa Road Contractors Limited entered into a contract with KeNHA after the Respondent sought bids and the Applicant won the tender. During performance of the contract a dispute arose and the Respondent terminated the said contract. The Applicant filed suit in **HCCC 274 of 2013** and obtained interlocutory orders and the dispute was referred to arbitration.

The Arbitral proceedings culminated with the Arbitral award of 22nd March 2018, the Applicant was awarded **Ksh 115,131,449/- and VAT Ksh.18.421.032/-** the subject of the Applicant's application filed on 21st December 2019 for recognition and enforcement of the award.

From the above chronology, the dispute referred to the Arbitration Tribunal was/is between Talewa Road Contractors Limited and Kenya National Highways Authority (KeNHA). The proceedings culminating with the Arbitral award that are housed in Applicant's Chamber Summons confirm that they related to the 2 parties only. In proceedings paragraph 14 reference was made to machinery and equipment but the intended 2nd Respondent did not participate in the proceedings. The resultant Arbitral award is final and binding to parties to the dispute and Arbitration proceedings. The intended 2nd Respondent was/is not privy to the contract between the Applicant and Respondent; the intended Respondent was not party to the underlying contract that gave rise to the dispute heard and determined by the Arbitration Tribunal and was not party to these proceedings. At no point during the Arbitral proceedings did the intended 2nd Respondent apply to the Arbitral Tribunal to be joined to the proceedings.

Principles of Commercial Law by Kibaya Imaana Laibuta at Pg 61 defines privity of contract thus;

> **"The relationship that exists between people as a result of their participation in some transaction or event. The legal relationship that exists between the parties to the contract is based on obligations imposed by and rights and benefits accruing from their relationship. These do not affect 3rd Parties not privy to the contract."**

The intended 2nd Respondent admitted/confirmed that it entered into lease Agreements with the Applicant Company on 16th December, 2012 and 17th January 2013 to hire equipment from them and was not privy to the contract between the Applicant and Respondent.

In the case of ***George Kyaka & 5 Others vs Harrison Chege & 2 Others ELC 179 of 2018*****;** the Applicants filed Miscellaneous application under **Section 7 of Arbitration Act** seeking interim orders pending Arbitration proceedings. The Court held that the suit was between the Plaintiff and 1st Defendant. The Respondents were not parties to the suit. The application under **Section 7** could only be brought by either party to the dispute only.

Secondly, the intended 2nd Respondent has a separate/specific claim against the Applicant herein. The said claim is not heard and determined and/or settled. It is the subject of ***HCCC 323 of 2014 Digital Den Ltd vs Talewa Road Contractors & Later KeNHA*** was joined as 3rd Party.

The Intended 2nd Respondent also filed ***Constitutional Petition 86 of 2019 Digital Den Ltd vs Talewa Road Contractors KeNHA*** with regard to its claim against the Applicant herein.

Both matters/suits relate to the claim of the intended 2nd Respondent against the Applicant. Until and unless the claim is heard and

determined the intended 2nd Respondent cannot legally and successfully claim **Ksh 154, 644,400**/- in the instant/current proceedings.

Thirdly, the intended 2nd Respondent cannot be joined as Respondent in these proceedings because the Applicant has no claim or interest or right against the 2nd intended Respondent. In fact from facts deposed by the intended 2nd Respondent it is the other way round that the intended 2nd Respondent has a claim against the Applicant. To grant/allow joinder to these proceedings as Respondent would be a misjoinder.

From the above evidence, this Court finds that the intended 2nd Respondent is not a necessary party and a proper party to the proceedings, there is no relief flowing from the Respondent to the Applicant. The ultimate order or decree in this case the Arbitral award can be enforced without the intended 2nd Respondent as party to instant proceedings. The intended 2nd Respondent's presence is not necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in these proceedings.

DISPOSITION

1. The intended 2nd Respondent's application to be joined to these proceedings is dismissed with costs.

2. The intended 2nd Respondent to pursue claim against Applicant herein in HCCC 323 of 2014 and/or Constitutional Petition 86 of 2019.

3. The parties to instant proceedings through Counsel shall take a mention date before DR Commercial Division to inform the Court how/when the Chamber Summons application shall proceed.

DELIVERED SIGNED & DATED IN OPEN COURT ON 17TH JUNE 2019.

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. OMOLLO FOR RESPONDENT

MR. OKEYO HOLDING BRIEF MR. MUYA FOR APPLICANT

COURT ASSISTANT - JASMINE