



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 568 OF 2014

IN THE MATTER OF THE ARBITRATION ACT (NO.4 OF 1995)

BETWEEN

TEAM CONSTRUCTION LTD.....PLAINTIFF/DECREE HOLDER

VERSUS

MYSAPCE PROPERTIES (K) LTD..DEFENDANT/JUDGMENT DEBTOR

RULING

1. This Court has to deal with two Applications.

2. I start with the Notice of Motion dated 7th March 2016 which seeks two substantive prayers:-

2. THAT in addition to any other mode of execution available, the Plaintiff-Decree holder be permitted, allowed and/or authorized to also execute against one Mwenda Thurania, a Director of the Defendant-Judgement Debtor and its Chief Executive Officer, (in his personal capacity) the Decree issued herein, in enforcement of the Deed of Guarantee & Indemnity dated the 18th day of September 2014 executed in favour of the Plaintiff by the said Mwenda Thurania.

3.THAT pending the inter-parties hearing and determination of this Application, a temporary prohibitory order be granted prohibiting the said Mwenda Thurania, from transferring any of his movable properties to any third party.

3. A Consent Arbitral Award dated 4th September 2014 was recognized and adopted by this Court on 15th September 2014 for enforcement as a Decree of this Court. Clauses (viii) of that Decree read as follows:-

“To secure the said payments, the Defendant shall within 14 days of 4th September 2014, deposit with the Advocates for the Plaintiff as security and for safe keeping, a personal Guarantee and Indemnity to be issued by Mwenda Thurania (hereafter referred to as “the Director”) a Director of the Defendant undertaking to indemnify the Plaintiff in respect of the debt herein in the sum of Khs.40,740,000/= or such other terms as shall be outstanding from the Defendant”.

4. In compliance with the term of that clause Mwenda Thurania (Thurania) executed a Guarantee and Indemnity in favour of Team Construction on 18th September 2014.

5. It is common ground that the Myspace has not paid the Decree and the Motion seeks to enforce the terms of the Guarantee and Indemnity. The promise made by Thurania in the Guarantee and Indemnity set out in Clause 1 as follows:-

“The Guarantor will pay to the Contractor on demand all money and discharge all obligations and liabilities, whether actual or contingent, now or hereafter due, owing or incurred to the Contractor by the Principal Debtor in whatever currency denominated whether on any current or other account or otherwise in any manner whatsoever (whether alone or jointly and in whatever style, name or form and whether as principal or surety) including all liabilities whatsoever from time to time entered into by the Contractor for or at the request of the principal Debtor together with interest (as well after as before any demand or judgement) to date of payment at such rates and upon such terms as may from time to time be payable by the Principal Debtor (or which would have been so payable but for the death, bankruptcy liquidation or other incapacity of the Principal Debtor), on a full indemnity basis, all legal and other costs and expenses which the Contractor may incur in enforcing this guarantee or in enforcing or obtaining payment from the Principal Debtor or the Guarantor attempting to do

so.”

The amount recoverable from Thuraira under the Guarantee is Khs.40,740,000/- or the equivalent in whatever currency denominated.

6. Thuraira has opposed the Motion and argues that Team Construction has not demonstrated that the Principal Debtor is unable to satisfy the Decree and that the Team Construction is infact seeking to execute the Decree against the Principal Debtor in various ways. One of which is the Motion of 8th March 2017 which this Court shall be considering shortly.

7. In addition it is submitted that there is a contestation as to the computation of the Decretal sum and execution should not be allowed to proceed before a definitive ascertainment of the Decretal sum.

8. It is not in dispute that the Decretal sum herein remains unpaid and outstanding and whilst the Judgement Debtor alleges that there is a contestation as to the exact amount due, a case that there is a serious contest as to what is outstanding is yet to be made out. At least not yet. Whether or not this Court should allow the enforcement of the Guarantee and Indemnity must turn on whether the event upon which the promise to pay made by Thuraira has occurred. In this regard the terms of the Guarantee resolve this straightforward question.

9. The promise, if it need to be restated is as follows:-

“The Guarantor will pay to the Contractor on demand all money and discharge all obligations and liabilities, whether actual or contingent, now or hereafter due, owing or incurred to the Contractor by the Principal Debtor in whatever currency denominated whether on any current or other account or otherwise in any manner whatsoever (whether alone or jointly and in whatever style, name or form and whether as principal or surety) including all liabilities whatsoever from time to time entered into by the Contractor for or at the request of the principal Debtor together with interest (as well after as before any demand or judgement) to date of payment at such rates and upon such terms as may from time to time be payable by the Principal Debtor (or which would have been so payable but for the death, bankruptcy liquidation or other incapacity of the Principal Debtor), on a full indemnity basis, all legal and other costs and expenses which the Contractor may incur in enforcing this guarantee or in enforcing or obtaining payment from the Principal Debtor or the Guarantor attempting to do so”.

The promise by the Guarantor was to pay to Team Construction on demand all money due to it from the Principal Debtor to a limit of Khs.40,740,000/=. That money is due to the Team Construction from Myspace is acknowledged and accepted.

10. The promise was not predicated upon Team Construction first executing the Decree against Myspace. It would not matter that Team Construction is also attempting to obtain money from the Principal Debtor. The obligation of the Guarantor crystallized upon default by the Principal Debtor and subsequent demand to pay being made . That has happened and the Motion has merit.

11. The Motion of 8th March 2017 is equally uninvolving. The pending prayers are:-

“2. THAT in addition to any other mode of execution available, leave be granted to the Plaintiff/Decree Holder to attach and sell the Defendant’s/Judgement Debtor’s shares held at the Company known as One Twiga Road Limited in execution of the Decree herein.

5. THAT the Defendant/Judgement Debtor be prohibited from selling or transferring the shares registered and standing in its name in the Company known as One Twiga Road Limited save in a sale and transfer made in execution of the Decree herein.

6. THAT the company known as One Twiga Road Limited be prohibited from transferring the shares currently registered in the name of the Defendant/Judgement Debtor in its register of members to any person or party in any transaction save in a sale and transfer made in execution of the Decree herein”.

12. A Search carried out at the Registrar of Companies on 24th January 2017 shows that Myspace owns one (1) share in a Company known as One Twiga Road Limited. That share is an asset of Myspace which is indebted to Team Construction on the Decree herein. Just like any asset of the Company, the Decree holder can execute against the Share that Myspace holds in One Twiga Road Limited. There is no reason for treating this asset differently. The request is merited and this Court will allow it.

13. The upshot.

13.1 Prayer 2 of the Notice of Motion dated 7th March 2016 is hereby allowed with costs.

13.2 Prayers 2,5 and 6 of the Notice of Motion dated 8th March 2017 is hereby allowed with costs.

Dated, Signed and Delivered in Court at Nairobi this 21st day of September, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Ohonge for Wananda for Plaintiff

Wafula for Wetangula for Defendant

Nixon - Court Assistant