



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**MISC.CASE NO. 568 OF 2014**

**TEAM CONSTRUCTION LIMITED.....PLAINTIFF/DECREE HOLDER**

**VERSUS**

**MYSPLACE PROPERTIES LIMITED...DEFENDANT/JUDGMENT DEBTOR**

**RULING**

1. This Ruling determines two motions.

2. The motion of 10<sup>th</sup> October, 2016 seeks the following substantive Orders:-

3. THAT the Honourable Court be and is hereby pleased to issue orders for reinstatement of Conditional Stay and Variation thereof directed at the Respondent, restraining it whether by itself, its directors, officers, employees, servants, agents or any person whatsoever representing, authorized and/or directed by it; pending undertaking of a jointly commissioned valuation and the report tendered before the Honourable Court

4. THAT this Honourable Court be pleased to set aside the Decree issued under the seal of the Honourable Court, subsequent to the findings of the valuation report.

3. While the Motion of 17<sup>th</sup> October 2016, by the Claimant is for the following orders:-

3. THAT pending the hearing and determination of this Application and in the interim, the Provincial Criminal Investigations Officer (PCIO) Coast Region, be commended, directed and/or compelled to release and return back the following vehicles presently held or detained at the Mombasa Police Dog Section at Mishomoroni or at any other place by the police, to Evans Mwangi Maabi Auctioneer, trading in the name and style of "Murphy Merchants", to enable him proceed with execution of the Decree issued in this suit including public auction thereof.

KBW 589Z, Nissan pick-up

KBW 097H, Toyota Probox

KBW 890R, Toyota Probox

4. THAT the Divisional Criminal Investigations Officer (DCIO), Kisauni Division, Mombasa or any Police Officer acting under his command or instructions be barred and restrained from in any

way obstructing or interfering with the execution of the Decree issued in this suit by Evans Mwangi Maabi, Auctioneer trading in the name and style of “Murphy Merchants’ and any servants or agents acting under him or to harass or intimidate him in the course of the said execution or to protect or shield the Defendant from the execution of the said Decree including public auction thereof.

5. THAT the Divisional Criminal Investigations Officer (DCIO), Kisauni Division, Mombasa, be summoned to appear in Court to explain his deliberate and illegal acts or those of Police Officers acting under his command and instructions, aimed at obstructing and shielding the Defendant from execution of a lawful Decree of this Court.

6. THAT if no reasonable or acceptable explanation is offered to the Court for the deliberate and illegal acts the Divisional Criminal Investigations Officer (DCIO), Kisauni Division, Mombasa or Police Officers acting under his command and instructions, aimed at obstructing and shielding the Defendant from execution of a lawful Decree of this Court, appropriate penalties and/or punishment be meted out against the said DCIO or any other police Officer(s) found culpable of the said acts.

7. The cost of this Application be borne by the Defendant.

4. The Court will deal with the earlier Application of 10<sup>th</sup> October 2016 first. Team Construction Limited (Team) was contracted by Myspace Properties (k) Limited (Myspace) to develop the property of Myspace on LR. NO.MN/1/11278 Mombasa. The project was christened “**One Twiga Apartments**’.

5. Myspace fell behind on payment of the contract sums and Team referred the issue of non-payment for Arbitration pursuant to the provisions of the Agreement between the parties. The Arbitrator appointed to hear the dispute was Hon. Justice E. Togbor.

6. Through a Deed of Acknowledgement dated 6<sup>th</sup> September, 2014, the Arbitral dispute was compromised. Subsequently, the Arbitrator entered a settlement award on the basis of the said Agreement. The hallmark of the settlement award was that,

“.....the Arbitral Tribunal adopts and incorporates the terms of settlement in the Deed of Acknowledgement of Debt and payment agreement dated 4<sup>th</sup> September 2014 (Annexure J) as an award on agreed terms pursuant to Section 31 and 32 of The Arbitration Act 2009 as Amended”.

7. Through a Chamber Summons dated 13<sup>th</sup> April, 2015, Team sought that the settlement Award be recognized, adopted and enforced as a Decree of the Honourable Court. The request by Team was granted on 15<sup>th</sup> December, 2015 by Kariuki J. Myspace did not settle the Decree and Team, as would want to, proceeded with execution.

8. The motion of 10<sup>th</sup> October 2016 comes after some of the properties of Myspace had been proclaimed. It is supported by grounds on the face of it and the Supporting Affidavit of Mwenda Thurania who describes himself as the Chief Executive Officer of Myspace. The Grounds and the Affidavit in support reveals the basis of the Application which turn out to be 3 broad issues. First it is asserted that the proclaimed goods are the tools of trade in constant and actual use by the Applicant.

9. The second and third are intertwined. Myspace acknowledges the dispute over contract fees. It acknowledges that negotiations were held with Team to resolve the matter amicably and in paragraph 6,7, and 8 of his affidavit Mr. Thurania avers as follows:-

6. THAT the parties relied on the valuation of the work done by the Respondent including other costs and losses as was due to the Respondent culminating to the sum of KES.66,172,872.60: bearing in mind the state of the work as handed of the Applicant.

7. THAT the Applicant and the Respondent further reviewed the payment due under the valuation

presented by the Respondent and agreed that the Applicant pays the Respondent the sum of Kshs. 45,740,000.00 out of which the Applicant had already commenced advancing payments to the Respondent in the sum of Kshs.5,000,000.00/=.

8. THAT on 4<sup>th</sup> September, 2014 the settlement agreement negotiated by the Applicant and the Respondent was adopted as the Arbitral Award.

10. It is however the case of Myspace that circumstances changed when it took over the subject site and realized that Team had vandalized the site office and removed all materials therein which had informed the valuation. Myspace urges for a revolution to be jointly commissioned by the disputants. In effect Myspace's position is that the Award flawed.

11. In opposition, Team filed Grounds of Opposition dated 13<sup>th</sup> October 2016. Although they consist of 11 Grounds, this Court cites only two for reasons that will become apparent presently. First, that the firm of Sichangi & co. which presented the Motion is improperly on record having coming into the matter after Judgement without leave of Court. Second, that the Arbitral Award is final and the High Court can only intervene under the instances set on in Section 35 and 39 of the Arbitration Act (hereinafter referred to as the Act).

12. The Court has understood the Application and arguments advanced by the parties herein.

13. It should not be obscured that the proceedings herein are as a result of a settlement in terms of Section 31 of The Arbitration Act which reads:-

**“31. (1)** If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An arbitral award on agreed terms shall be made in accordance with section 32 and shall state that it is an arbitral award.

(3) An arbitral award on agreed terms has the same status and effect as any other arbitral award on the substance of the dispute.

Fundamentally, an award under settlement has the same status and effect as any other arbitral award.

14. The finality and binding nature of an Arbitral Award is emphasized by Section 32A of The Act which permits very limited recourse as provided by the Act. Section 32A reads:-

“Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act”.

15. Recourse to the High Court against an Arbitral Award is set out in part VI of The Act. It is for setting aside as permitted under the provisions of Section 36. This is of course distinct from the Courts possible intervention on Application or Appeal under the provisions of Section 39 of The Act where the parties have agreed to resort to High Court for determination of any question of law.

16. It is not the case by the Myspace that a question of law has arisen or that there was an agreement that such question be determined by the High court. Clearly, Myspace does not seek this Court's intervention under Section 39 of the Act.

17. The Court however gleans an attempt by Myspace to reopen the award on the basis that part of the settlement was reached on misrepresentation. Indeed the motion is said to be brought, inter alia, under the auspices of section 35 of The Act. In effect Myspace is seeking to set aside part of The Arbitral Award.

18. However that attempt by Myspace runs into headwinds and must succumb to the timelines set out in Section 35(3) which provides a time limit within which a setting aside application must be made. Section 35(3) provides:-

“(3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award”.

19. The settlement Award was made on 4<sup>th</sup> September, 2014. There is evidence that, the Myspace had received the award by at least 8<sup>th</sup> April, 2015 (see the grounds of Opposition filed by Muriu Mungai & Co. Advocates then appearing for Myspace). The present application was filed on 11<sup>th</sup> October 2016. This would be over 18 months out of time. Even if this Court had authority to extend the time limited by the provisions of Section 35(3) (which is doubtful), Myspace has not sought that intervention.

20. The other challenge to the execution was that the goods proclaimed are tools of trade in constant and actual use by the Applicant. However, the Supporting Affidavit of Mr. Thurania does not provide any evidence whatsoever to support the assertion. It is unproved and the matter must end there.

21. That does it for the Motion of 10<sup>th</sup> October, 2016.

22. Evans Mwangi Maabi is a licensed Auctioneer. He was issued with warrants of attachment of the property of Myspace in execution of the Decree herein. There is evidence that he proclaimed the following Motor vehicles belonging to Myspace;

KBW 589 Z Nissan Pickup

KBW 097 H Toyota Probox

KBW 890 R Toyota Probox

Myspace confirms that the Auctioneers indeed attached the vehicles. The vehicles are now in the custody of the Police in Mombasa. How did they get there?

23. Myspace says that on various dated the Auctioneers informed Mr. Thurania that it would release the said motor vehicles if he gave them Ksh.400,000/=. He then made part payment of Kshs.200,000/=. That the Auctioneers made further demands of Kshs. 2,500,000/= so as to entirely abandon the execution. Myspace thought this to be extortion and reported the matter to the police.

24. The Auctioneer has sworn an Affidavit denying these allegations. The truth or otherwise of these allegations will have to be established in Mombasa Criminal case No.1000/2016 REPUBLIC v. (1) CHARLES KAMANDE MWANGI (2) EVANS MAABI MWANGI in which the two are charged with attempting to extort money from MWENDA THURANIRA. The two faces 3 other counts of obtaining money with menaces.

25. Whatever the strength of the allegations made against the Auctioneers one thing is clear. The manner in which the vehicles were proclaimed and attached has not been assailed. The nature of the criminal complaint is that the Auctioneers extorted or attempted to extort money from Mr. Thurania. Stephen Wambua an Officer from the Directorate of Criminal Investigation at Kisauni swore an affidavit on 14<sup>th</sup> November 2016 in which he deponed,

4. THAT the Respondent has never obstructed, interfered with execution of the decree save for the lawful dispensation of justice through investigation where a complaint was raised against the complainant in the Criminal Case, one Mwenda Thurania that Evans Mwangi Maabi and Charles Mwangi Kamande were demanding money by menaces from him despite having impounded his

vehicles:-

- (1) KBW 3892 – Nissan Hardbody
- (2) KBW 890 R – Toyota Probox – SUCCEED
- (3) KBW 097 H – Toyota Probox - SUCCEED

26. That being the nature of the Criminal complaint this Court is not persuaded by the argument taken by the police that the vehicles are exhibits in the criminal case. The issue revolves around the extortion and not the attachment of the vehicles. At any rate this Court has not been shown any witness statements of those who will be testifying in the Criminal proceedings to support the contention that the vehicles are indeed exhibits.

27. Whilst I agree with Counsel for Myspace that Auctioneers are not insulated from the Criminal justice process as they discharge their duties, the manner of proclamation and attachment of the vehicles has not been challenged and is not the subject matter of the Criminal proceedings. Even if found guilty on the charges they face, the execution will not be defeated.

28. Let me make some short comment on a new issue raised by Myspace through Counsels submission. It is alleged that motor vehicles KBW 890R and KBW 097 H are jointly owned by Myspace and National Industrial Credit Bank Limited. While Motor vehicle KBW 589 Z is solely owned by the Director of the Company. The issue cannot be available now as it has not been raised by the Bank or the said Director. These are not objection proceedings.

29. These are the Court ultimate Orders:-

(1) The Motion of 10<sup>th</sup> October, 2016 is hereby dismissed with costs.

(2) The Motion of 17<sup>th</sup> October, 2016 succeeds to the extent that Provincial Criminal Investigator Officer, Coast region is hereby directed to forthwith or at any rate not later than 12 hours after service of this Order to release and return back Motor vehicle Registration KBW 589 Z, KBW 097H, KBW 890R to Evans Mwangi Maabi trading as 'Murphy Merchants' or any other Auctioneer that the Plaintiff may appoint.

(3) Costs of the Application of 17<sup>th</sup> October 2017 to the Plaintiff.

**Dated, Signed and Delivered in Court at Nairobi this 22<sup>nd</sup> day of September,2017.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Wananda for Plaintiff

Wetangula for Defendant

Alex - Court Clerk