

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**INSOLVENCY PETITION NO. E003 OF 2022**

**AND**

**IN THE MATTER OF MYSPACE PROPERTIES(KENYA) LIMITED**

**AND**

**IN THE MATTER OF THE INSOLVENCY ACT(CHAPTER 53 OF THE  
LAWS OF KENYA)**

**BETWEEN**

**TEAM CONSTRUCTION LIMITED.....**

**.....PETITIONER**

**AND**

**MYSPACE PROPERTIES(KENYA) LIMITED.....**

**RESPONDENT**

**JUDGMENT**

**Introduction & Background**

1. The Petitioner was hired by the Respondent to carry out construction work within the Respondent's property known as LR No. MN/1/11278 situated off Links Road, Nyali Mombasa in a project otherwise known as "One Twiga Apartments". A dispute arose over the performance of the construction contract which resulted in arbitration proceedings and a Consent Arbitration

Award on 4<sup>th</sup> September 2014 where the Petitioner was awarded Kshs.40,740,000.00/= as per the parties' Deed and Acknowledgement of Debt and Payment Agreement of even date. This award was adopted as an order and decree of the court on 15<sup>th</sup> December 2015.

2. By a petition dated 2<sup>nd</sup> February 2022, the Petitioner now seeks inter alia a liquidation order against the Respondent and that the court appoints the Official Receiver as the Provisional Liquidator for reasons that the Respondent is insolvent and unable to pay its debts and has obstructed lawful execution of the decretal sum of Kshs.110,758,663.00/= as at 15<sup>th</sup> September 2021. The Petitioner states that despite the Decree, the Respondent has failed to pay the debt and that the Petitioner attempted multiple execution methods including attachment of movable property and shares in *One Twiga Road Limited*, enforcement of a Personal Guarantee by its director MWENDA THURANIRA but these efforts were frustrated by the Respondent. The Petitioner accuses the Respondent of hiding/relocating assets, involving police to obstruct auctioneers and transferring ownership of assets to third parties.
3. The Petitioner states that a Statutory Demand was served on 7<sup>th</sup> October 2021 and that the 21-day period lapsed without payment or settlement. The Respondent has responded to the petition

through the replying affidavit of its director/shareholder, MWENDA MUNENE THURANIRA, sworn on 14<sup>th</sup> May 2025. It depones that the petition is fundamentally misconceived, bad in law, and an abuse of court process as the Petitioner is improperly using insolvency proceedings to enforce an arbitral award, which should be pursued through

normal execution methods under the ***Civil Procedure Rules***.

4. The Respondent argues that the claim is time-barred under **section 4(1)(c)** of the ***Limitations of Actions Act***, which provides that enforcement of an award must be brought within six years from the date the cause of action accrued. That the Decree was issued on 15<sup>th</sup> December 2015, meaning the limitation period expired on 15<sup>th</sup> December 2021 and the Petition was filed on 2<sup>nd</sup> February 2022, 49 days after the limitation period lapsed. Therefore, that the Petition is overtaken by events and is both substantively and procedurally improper.
5. The Respondent argues that serving a Statutory Demand is not equivalent to commencing insolvency proceedings and that insolvency proceedings only begin upon filing of the Liquidation Petition, which in this case was filed out of time. The Respondent denies the Petitioner's allegations of obstructing execution of the decree stating that these are baseless, sensational

allegations made without evidence, intended to cover the Petitioner's own "indolent and lackluster conduct."

6. The Respondent invokes the legal maxim "equity does not aid the indolent" and urges the petition to be dismissed with costs for being incurably defective in law, filed out of time and an abuse of court process.
7. The parties have also supplemented their arguments by filing written submissions which I have considered and I will be making relevant references to the same in my analysis and determination below.

### **Analysis and Determination**

8. From the parties' submissions, two issues fall for the court's determination: (1)*whether the decree is time-barred* and if not, (2)*whether the Respondent should be liquidated*. On the issue of limitations, it is common ground that under **section 4(1)(c)** of the ***Limitation of Actions Act***, actions to enforce an award may not be brought after the end of six years from the date on which the cause of action accrued. However, the Petitioner has argued that the limitation period in this case is found under **section 4(4)** of the ***Limitation of Actions Act*** which provides that "*An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or*

*(where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due."*

9. I am in agreement with the Petitioner's submission that the Court of Appeal, in **Patel v Transworld Safaris Limited [2022] KECA 871 (KLR)** agreed with this court's position on which provision applies in situations such as the present as follows:

*13. The appellant contests the learned Judge's application of 12 years' limitation period under section 4(4) of the Limitation of Actions Act, to the enforcement of the arbitral award arguing that the time applicable is the 6-year limitation period under section 4(1)(c) of the same Act. In the result he urges that the arbitral award delivered on 14th February, 2002 was time barred. We note that the learned Judge while analysing this contention observed that pursuant to section 36(1) of the Arbitration Act domestic arbitral awards were only recognisable and enforceable, upon application to the High Court. Hence to the learned Judge, the award having been adopted as a judgment of the court and leave granted to the respondent to enforce it on*

30th October, 2006, time started running from that date.

The Judge held;

“Execution begins after issuance of the decree by the Court from the judgment of the Court. Time for execution of decree is provided under Section 4 (4) of the Limitation of Actions Act.

[...]

The award was adopted as the judgment of this Court on 30th October 2006. The Plaintiff filed Notice to Show Cause against the 2nd Defendant on 16th August 2017. The application was filed within the 12-year period for execution of a decree for judgment. Execution against the 2nd Defendant is not therefore time barred”.

14. We find the learned Judge’s reasoning cogent and there is no reason for us to disturb it.

10. In essence, the appellate court fortified that once an arbitral award is recognized and adopted by the Court as a judgment and decree under **section 36** of the **Arbitration Act**, it ceases to be merely an award for limitation purposes but a decree of the court, enforceable as a judgment. Therefore, I agree with the Petitioner that the 12-year limitation period under **section 4(4)** applies from the date the court issues the decree which was 15<sup>th</sup> December 2015 meaning the limitation expires on 15<sup>th</sup> December 2027. This petition was filed on 2<sup>nd</sup> February 2022 which is well

within the 12 years' limitation period and the Respondent's objection fails.

11. Turning to whether the Respondent should be liquidated, section **425** of the **Insolvency Act** allows creditors, among others, to apply to the court for a liquidation order when a company is unable to pay its debts or meets other grounds specified under **section 424** of the **Act**. Further, **section 384** of the **Act** outlines the circumstances under which a company is considered unable to pay its debts including when a creditor, to whom the company owes Kshs.100,000.00/= or more, serves a written demand for payment at the company's registered office, and the company fails to pay, secure, or compound for the debt to the creditor's reasonable satisfaction within 21 days.
12. In the present case, there is not much dispute that the debt owed is Kshs. 110,758,663.00, far exceeding the Kshs.100,000.00/= threshold. The Statutory Demand is admittedly properly served and the 21-day period expired without payment, security, or compromise by the Respondent to the Petitioner's satisfaction. The Respondent's attempt to set aside the Statutory Demand was thwarted by the court in its ruling of 13<sup>th</sup> May 2024 and since the Respondent has failed to comply with the demand then, a presumption of insolvency arises under **section 384** of the **Act**.

Court records and rulings from Tuiyott J., (as he was then) in **HCCOMM Misc Civil case No. 568 of 2014** also show the Respondent repeatedly obstructed lawful execution by hiding/relocating assets such as vehicles, involving police to frustrate auctioneers and transferring assets to third parties. This conduct implies insolvency and bad faith.

13. Furthermore, the Respondent has no substantive defence on the merits of the petition as its response relies solely on the limitations argument, which as I have found, fails. There is no dispute as to the existence or quantum of the debt, no evidence of ability to pay or bona fide offer to settle and the Respondent's Director's MWENDA THURANIRA Personal Guarantee of 18<sup>th</sup> September 2014 remains unhonoured as despite demand, no payment has been made under the guarantee, reinforcing the Respondent's inability to pay hence liquidation has crystallized (see **PrideInn Hotels & Investments Limited v Tropicana Hotels Limited [2018] KECA 651 (KLR)**)
14. In the upshot, I find that there is sufficient proof that the Respondent is indebted to the Petitioner and that it is unable to pay its debts. I am also satisfied that the Respondent was served with the statutory demand and that it was given ample time to respond to the same but it failed or neglected to do so. I find no

reason why the Respondent should not be liquidated and I make this decision cognizant of the fact that liquidation is one of the options under the ***Insolvency Act*** which a creditor such as the Petitioner, could pursue to secure payment of a debt, especially a debt that remains unpaid and that the Respondent's conduct here of frustrating execution while ignoring a clear debt is precisely the scenario the ***Insolvency Act*** seeks to address.

**Conclusion and Disposition**

15. In the foregoing, I now issue the following final orders:

- 1) The petition dated 2<sup>nd</sup> February 2022 is allowed.**
- 2) A Liquidation Order is hereby issued against the Respondent, MYSPACE PROPERTIES(KENYA) LIMITED.**
- 3) The Official Receiver is hereby appointed the Interim Liquidator of the Respondent, MYSPACE PROPERTIES(KENYA) LIMITED.**
- 4) The costs of the petition shall be costs in the liquidation.**

**DATED SIGNED and DELIVERED virtually this 12<sup>TH</sup> DAY OF  
FEBRUARY 2026**

.....  
**J.W.W. MONGARE**  
**JUDGE**

**IN THE PRESENCE OF:-**

1. Ms. Oloo holding brief for Ms. Akelo for the Petitioner.
2. Ms. Musembi holding brief for Mr. Kaimenyi for the Respondent.
3. Amos - Court Assistant

ORIGINAL