MK Haji Communications Limited v Safaricom PLC Limited (Civil Case E407 of 2020) [2023] KEHC 1256 (KLR) (Commercial and Tax) (28 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1256 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E407 OF 2020

A MABEYA, J

FEBRUARY 28, 2023

BETWEEN

MK HAJI COMMUNICATIONS LIMITED ..... PLAINTIFF

AND

SAFARICOM PLC LIMITED ..... DEFENDANT

RULING

1. Before court is an amended notice of motion dated February 28, 2022. It was brought under section 7 of the *Arbitration Act* No 4 of 1995, sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, order 51 rules 1 and 10 of the *Civil Procedure Rules 2010*.

2. It sought conservation orders directing the respondent to maintain the status quo by preserving the substratum of the dispute pending resolution of the same by arbitration. The application also sought orders to refer the matter to arbitration as per clause 22.2(a)(b)(c) and (d) of the dealer agreement dated October 8, 2019.

3. The grounds for the application were set out on the face of it and on the supporting affidavit of Mohammed Sheikh Kusow sworn on February 28, 2022. It was averred that the applicant was appointed as one of the respondent's dealers by an agreement dated October 8, 2019 where the applicant was given the exclusive rights to distribute products and promote the respondent's services ("dealer agreement").

4. That the respondent purported to terminate the dealer agreement without giving a plausible cause contrary to the dealer agreement. It was contended that the agreement under clause 22.2 (d) provided that disputes between the parties would be settled by arbitration and the parties would continue to perform their obligations to the agreement pending determination of the dispute by arbitration.

That the dispute between the parties is with respect to the termination notice which has exposed the applicant to losses.

5. The respondent opposed the application vide the replying affidavit dated May 13, 2022 sworn by Daniel Mwenja Ndaba. He admitted the existence of the dealer agreement between the parties. That it was a term of the agreement that the applicant was supposed to trade as per the dealer operating standards failure of which the respondent was entitled to terminate the agreement at its discretion upon giving notice to the applicant.

6. That the respondent issued a notice to terminate the agreement from July 31, 2020 as the applicant was operating below the contractual requirement as per their audit and that the applicant failed to comply with the terms and conditions set out in the agreement. The applicant appealed against that decision but *vide* its letter dated October 14, 2020, the respondent upheld its decision to terminate the agreement. That the agreement mandated the parties to settle their disputes by way of arbitration nut no arbitrator had been appointed to date. That there was nothing to reinstate as the agreement stood terminated as at July 31, 2020.

7. It was contended that the respondent would not be prejudiced as the loss suffered, if any, could be compensated by damages.

8. The application was canvassed by written submissions. The applicant submitted that the arbitration would be rendered nugatory if the measure of protection was not granted as the subject matter of the dispute would be nonexistent. Counsel submitted that the applicant was likely to suffer irreparable losses thus the need for the measure of protection. It was submitted that the agreement under clause 22.2 provided for settlement of the dispute by arbitration and the court should refer the matter to arbitration.

9. On its part, the respondent submitted that there was nothing to warrant an order for preservation as the agreement had been long terminated and that there was nothing tangible capable of being preserved. It was further submitted that in granting the orders sought the court would be re writing the contract between the parties by preventing the respondent from terminating the contract.

10. I have considered the application, the response as well as the written submissions. The main issue for determination is whether applicant is entitled to the preservation of the status quo pending the determination of the matter to arbitration.

11. The applicant invoked section 7 of the *Arbitration Act*, 1995 which provides:-

> " 1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.
>
> 2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application."

12. From the foregoing, the court is vested with the power to issue a measure of protection on the subject matter of the arbitration where circumstances permit.

13. In the present case, there is no dispute that the agreement between the parties contained an arbitral clause. It is contended that in terminating the contract, the respondent was exposing the applicant to losses which would be difficult to recover from. It was the applicant's contention that it had to secure

capital of over 30 million shillings as a precondition of the dealership and thus the applicant had not been able to recoup the investment. The applicant urged the court to reinstate the status quo as at October 12, 2020.

14. The respondent in its response observed that there was nothing to reinstate as the contract stood terminated as of July 31, 2020 and that there was no subsisting obligation capable of being performed pending the arbitration.

15. In *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] eKLR, the Court of Appeal outlined the nature of interim protective measures and the factors to be taken into account before an interim order of protection can be granted. The court stated: -

> "Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the court or the tribunal – such interim measures include, measures relating to preservation of evidence, measurers aimed at preserving the status quo, measures intended to provide security for costs and injunctions. Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are: -
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> 1. The existence of an arbitration agreement.
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> 2. Whether the subject matter of arbitration is under threat.
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> 3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application.
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> 4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties."

16. Applying the above principles to this case, it is not in dispute that there is an arbitral clause in the agreement between the parties. What is in contention is whether the subject matter for arbitration is under threat or whether there exists special circumstances to warrant the orders sought for protection.

17. The dispute is with regard to the termination of the dealer agreement where the applicant was tasked with promoting the respondent's various services and distributing products. From the record, the notice of termination was to take effect on July 31, 2020. The applicant seeks a status quo as at October 12, 2020 after the agreement should have terminated.

18. In *Coast Apparel Epz Limited v Mtwapa Epz Limited & another* [2017] eKLR, it was opined that: -

> "In my view, an interim order of protection is meant to protect the subject matter of arbitration. For it to be granted, the court must be satisfied that the parties have already commenced the process for putting in place an arbitral panel or arbitration proceedings have already started. It is not an order issued in a vacuum as it is premised on intended or ongoing arbitration proceedings.
>
> A party to an arbitration agreement cannot come to court, in the manner the plaintiff has done, to seek an order to refer a dispute to arbitration. Inherent in every agreement with an arbitration clause is the requirement for any aggrieved party to refer any dispute to an arbitration forum using the process provided in the agreement."

19. In the present case, there is nothing to show that the applicant ever commenced the process of referring the dispute to arbitration. It would seem that the applicant waited until after the agreement had been terminated before coming to court. The termination was to take effect on July 31, 2020 yet the present application was made on February 28, 2022 way after the termination date was over. In my view, equity aids the diligent and not the indolent.

20. The court would therefore agree with the respondent that there is nothing to reinstate. It is the court's opinion that in the event the arbitration is in favour of the applicant, the best remedy would be breach of contract but not reinstating the agreement. Further, with the delay in seeking preservation orders, there seem to be no special circumstances for the grant of the interim measures of protection.

21. From the foregoing, it is clear that the applicant has not satisfied the condition for grant of interim measures of protection.

22. The next issue is whether the matter should be referred to arbitration. Section 6(1) of the *Arbitration Act* No 4 of 1995 provides: -

> " 1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds—
>
> (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or
>
> (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."

23. Clause 22.2 of the dealership agreement mandated the parties to resolve their disputes by arbitration. The parties have agreed to this fact and there is no dispute regarding the same.

24. In the upshot, the application succeeds only with respect to prayer 5 and I direct that the dispute between the parties be and is hereby referred to arbitration under clause 22.2 of the dealership agreement forthwith. The parties to appoint an arbitrator as provided for under the agreement within 14 days of the date hereof failing of which the arbitral tribunal be appointed in terms of section 12 of the *Arbitration Act*.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2023.

A. MABEYA, FCIArb

JUDGE