



**Minet Kenya Insurance Brokers Limited v G4S Data Solutions
Limited & another (Commercial Civil Suit E823 of 2021)
[2022] KEHC 10329 (KLR) (Commercial and Tax) (27 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10329 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL SUIT E823 OF 2021**

A MSHILA, J

MAY 27, 2022

BETWEEN

MINET KENYA INSURANCE BROKERS LIMITED APPLICANT

AND

G4S DATA SOLUTIONS LIMITED 1ST RESPONDENT

METROFILE RECORDS MANAGEMENT (K) LIMITED 2ND RESPONDENT

RULING

1. The 1st Application is an Amended Notice of Motion dated November 25, 2021 was brought under Section 7 of the *Arbitration Act*, Sections IA, 1B 3A and 95 of the *Civil Procedure Act* Cap 21 Laws of Kenya, Order 50, Rules 4 & 6 and Order 40, Rules 1, 4 and 10 of the *Civil Procedure Rules*. The Application was supported by the grounds on the face of it and by the sworn Affidavit of Rachel Mwenda. The Applicant sought the following orders;
 - a. Pending the hearing and determination of this Application inter partes an Interim Protection Measure do issue by way of an interlocutory order compelling the Respondents, its officers, agents or otherwise to return to the Applicant and / or ensure that the Applicant can retrieve and / or have access to inspect and make copies or scans the following specific Stored Pension files:



596616	577825	595682
711742	577826	595738
764318	577836	595740
684679	577822	595721
711742	577824	595722
764318	584635	595724
684679	598039	595725
1418663	598044	
883420	599410	
593523	71 1639	
684910	684449	
2992308	690794	
883419	685526	
5143800	1289965	
593424	711796	
597674	596629	
883417	595679	
597582	596566	
597593	595683	

- b. Pending the hearing and determination of the dispute between the Applicant and the Respondent herein by way of Arbitration an Interim Protection Measure by way of an Interlocutory Order do issue compelling the Respondents, its officers, agents or otherwise to return to the Applicant and / or ensure that the Applicant can retrieve and/or have access to inspect and make copies or scans the following specific Stored Pension files:



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684679	598039	595725
1418663	598044	
883420	599410	
593523	711639	
684910	684449	
2992308	690794	
883419	685526	
5143800	1289965	
593424	711796	
597674	596629	
883417	595679	
597582	596566	
597593	595683	

- c. Pending the hearing and determination of the dispute between the Applicant and the Respondent herein by way of Arbitration an Interim Protection Measure by way of an interlocutory order do issue compelling the Respondents, its officers, agents or otherwise, to return to the Applicant and /or ensure that the Applicant can retrieve all stored records.
- d. The Police Commander in charge of Nairobi County be ordered to ensure compliance of the Orders issued herein with such necessary force as is needed.
- e. The Court to make any such further other Orders that it may deem fit and proper in the interests of justice.



2. The second Application is the Notice of Motion dated October 5, 2021 brought under Section 6(1) of the *Arbitration Act*; The Application was supported by the grounds on the face of it and by the sworn Affidavit of James Jalango who is seeking for orders that;
 - a. All further proceedings herein be stayed and this matter referred to arbitration for hearing and determination.
3. The parties were directed to canvass the applications by filing and exchanging written submissions; the parties were thereafter invited to high light their respective submissions. Hereunder is a summation of the rival submissions;

Applicant's Case

4. The applicant stated that it would be relying on the Amended Notice of Motion dated November 25, 2011; which was supported by an Affidavit and Further Affidavit dated December 20, 2021 both made by Rachel Mwenda. The Applicant would also be relying on the Bundle of Documents and List of Authorities and its written submissions.
5. The facts in contention relate to a Written Service Agreement for services for a fixed contract period of two (2) years which was from the January 1, 2017 to the December 31, 2018; and on the November 13, 2018 the Applicant vide a letter of even date informed the Respondent that it would not be renewing the contract.
6. The frustration that arose was in the retrieval of documents stored with the Respondent; it indicated that a Notice of six (6) months ought to have been served; and from its various letters stated that it was not practical for the files to be retrieved and that it needed six (6) months;
7. The Respondent also demanded to be paid a sum of Kshs 10,000,000/- before the release of the documents which it had a 'lien' over in lieu of payment for its services.
8. The amount outstanding is disputed and the applicant contends that any sums where an invoice had been raised had been duly paid and produced records in the form of Bank Transfer from NCBA in support of payment; whereas the Respondent did not produce any document to controvert this payment having not been received;
9. The Applicant submitted that it needs access to the documents to answer Pension Queries and due to the respondent holding onto the documents the Applicant is unable to render services to pensioners; due to it being to render services the applicant stands a great risk of being fined by the Regulator;
10. The Applicant stated that it was not seeking final mandatory orders nor was it seeking the release of all the files in the Respondents possession; all that it was requesting was access to the files set out in this application; and prayed that the application be allowed.

Respondent's Case

11. The Respondent submitted that the Amended Application is expressed to have been brought under the provisions of Section 7 of the *Arbitration Act*, and, perhaps as a buffer, the often-cited sections 1A & 3A and section 95 of the *Civil Procedure Act* as well as Order 50, Rules 4 & 6; 40 Rules 1, 4 & 10 of the Civil Procedure Rules 2010.
12. It was the Respondent's argument that there is no provision of law which gives the Court powers to grant, at an interlocutory stage, the truly extraordinary permanent kind of mandatory orders sought by the Applicant in the Amended Application. The reliefs sought in the Amended Application are



not interim measures of protections as contemplated under Section 7 of the [Arbitration Act](#) or at all. The real reason, sections 1A, 3A & 95 of the [Civil Procedure Act](#) and Order 40 Rules 1, 4, & 10 have been cited, despite the clear terms of Section 10 of the [Arbitration Act](#), is a desperate, but ultimately self-defeating, effort to find some, if any, legal anchor, for reliefs which the Applicant knows, or ought to have known, are not available as a matter of law.

13. The provisions cited in the face of the Amended Application shows quite definitively that none of them grants the Court jurisdiction to grant the extra-ordinary mandatory reliefs being sought by the Applicant at an interlocutory stage and more so pending referral of a dispute to Arbitration. It follows that the Amended Application falls flat at the very first hurdle and should summarily be dismissed with costs.
14. The power of the Court to grant an injunction or other interim measure of protection pending arbitration is contained under Section 7(1) of the [Arbitration Act](#). The essential factors which the Court must consider before issuing an interim measure of protection were succinctly stated by the Court of Appeal in celebrated case of [Safaricom Limited v Ocean View Beach Hotel Limited & 2 others \[2010\] eKLR](#).
15. It is common ground that an arbitration agreement does exist in this case and indeed the Applicant has not opposed an application to stay all further proceedings and refer the matter to arbitration on the basis of such agreement. However, the arbitration proceedings are yet to commence neither has a Tribunal been appointed.
16. It was the Respondent's submission that the Court cannot grant interim measures that have the effect of preventing the Respondent from exercising its contractual right of lien. Further, the Applicant has failed to demonstrate, through evidence or otherwise, that the subject matter of the arbitration is under threat particularly in the present circumstances where the subject records and files have been stored by the Respondent in safe condition for over three (3) years since the dispute arose.
17. There is no iota of evidence that the subject matter of the intended Arbitration may go to waste or be beyond the reach of the arbitral tribunal during or at the end of the intended arbitral proceedings which should be the sole focus of the Court in an application brought under Section 7 of the [Arbitration Act](#).
18. The Applicant seeks access to all stored material pending the hearing and determination of the dispute between the parties vide arbitration. However, as can be gleaned from the Affidavits filed in respect to the Amended Application, the dispute between the parties relates to the money demanded by the Respondent as a condition for granting access to the Applicant and the manner of retrieval and release of the Applicant's files and records that are held by the Respondent pursuant to the Service Agreement. Granting the orders of release of the very documents forming the subject of the dispute between the parties, as sought by the Applicant, would be encroaching on the arbitral tribunal's decision-making power. This would therefore prejudice the arbitral proceedings.
19. In view of the fact that the mandatory relief is being sought pending referral of the dispute to Arbitration, caution must be exercised by the court to ensure that the Court does not encroach on arbitral tribunal's powers. In the circumstances, the Respondent submitted that this is not a proper case for granting interim order of protection as prayed for.
20. It is unlawful, improper, and an abuse of the process of the Court, for the Applicant to seek for the utilization of the police in a civil action for the purpose of effecting or aiding enforcements of court orders. Involvement of the police in this purely civil matter can only be for the ulterior and improper purpose of applying maximum pressure, duress, and intimidation upon the Respondents. This conduct must be deprecated upon by the Court.



21. The Respondent in its application stated that the parties under the Service Agreement Clause 16.2 agreed to resolve all disputes by way of arbitration and prayed that further proceedings in this matter be stayed.

Issues For Determination

22. The Court has considered the Applications, the responses therewith and the oral and written submissions and has framed the following issues for determination;
- a. Whether an interim measure of protection should issue pending arbitration proceedings;
 - b. Whether the matter should be referred to arbitration and further proceedings be stayed;

Analysis

Whether an interim measure of protection should issue pending arbitration proceedings;

23. The Applicant has approached the Court for interim measure of protection as provided under Section 7 of the [Arbitration Act](#) which provides;

' It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during the arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.'

24. On the principles applicable for the grant of an order of protection under Section 7 of the [Arbitration Act](#) the decision in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* (supra) provides a comprehensive guide: -

' 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: - 1. The existence of an arbitration agreement. 2. Whether the subject matter of arbitration is under threat. 3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application 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.

In the matter before us, the court went on to make orders which undermined the arbitration and the outcome of the arbitration contrary to section 17 of the [Arbitration Act](#). A court of law when asked to issue interim measures of protection must always be reluctant to make a decision that would risk prejudicing the outcome of the arbitration. This point came up in the famous English arbitration case of *Channel Tunnel Group Limited Vs Balfour Beatty Construction Ltd* (1993) AC 334 where the English Court rendered itself as follows:- 'There is always a tension when the court is asked to order, by way of interim relief in support of an arbitration a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other the duty of the court to respect the choice of tribunal which both parties have made and not to take out of the hands of the arbitrators (or other decision makers) a power of decision which the parties have entrusted to them alone. In the present instance I consider that the latter considerations must prevail.'



25. In Safaricom Limited (Supra) the Court of Appeal further opined that: -

' It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names. Whatever their description however, they are intended in principle to operate as 'holding" orders, pending the outcome of the arbitral proceedings.'

26. The existence of an arbitration clause - It is not disputed that the parties herein have an Arbitration Clause 16.2 of the Service Agreement of January 1, 2017 where the parties agreed that any disputes arising from the service agreement would be referred to arbitration and that the arbitration proceedings are yet to commence.

27. Whether the subject matter of arbitration is under threat – The Applicant's business is at a risk of irreparable damage if it cannot account for the pension files to the pension schemers who are the third parties to the said agreement. The said third parties need access to their data and they will be highly prejudiced if Respondent continues to deny the Applicant access to the said documents.

28. The parties herein must be conscious of the fact that the dispute to be referred to arbitration is over payment of an outstanding amount and the Respondent can continue holding the original documents in lien over the outstanding payment.

29. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application. It is this Court's considered view that the appropriate interim measure of protection is for the Respondents to avail copies of the documents to enable the third parties to have access to the data. The Respondent holds the original documents in lien over the awaited and disputed payments and shall continue to do so until the matter is referred to arbitration and the Arbitrator gives the appropriate orders and directions to the parties. Thus, the Respondent herein will not be prejudiced in any way.

30. 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. The interim measure directed by the court shall last until the matter is fully heard by the Arbitrator.

31. It was the Respondent's argument that there is no provision of law which gives the Court powers to grant, at an interlocutory stage, the truly extraordinary permanent kind of mandatory orders sought by the Applicant in the Amended Application and contends that the reliefs sought in the Amended Application are not interim measures of protections as contemplated under Section 7 of the [Arbitration Act](#).

32. The Court in exercise of its discretion, takes the general position as was articulated in the case of [Kenya Breweries Limited & another v Washington O Okeyo \[2002\] eKLR](#) wherein the Court of Appeal stated:

' The test whether to grant mandatory injunction or not is correctly stated in Halsbury Laws of England 4th Edition paragraph 948 that:

'A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary out, which can be easily remedied, or if the defendant



attempted to break a contract on the plaintiffs, a mandatory injunction will be granted on an interlocutory application.'

33. The special circumstances of this case are that the documents that have been withheld by the Respondent affect the Applicant's business and more so third parties who rely on and need access to the said documents. The third parties herein are not part of the Service Agreement and should not be affected by the dispute between the parties herein.
34. From the material placed before it, this court is satisfied that this is a suitable case for it to exercise its inherent discretionary powers and make such orders necessary for the ends of justice to be met. It therefore is satisfied that the application seeking to compel the Respondent to avail copies of the documents to the Applicant pending the hearing and determination of the arbitration has merit. Thus, the Application partly succeeds to the extent that the Applicant be allowed access to the copies of the documents.

Whether the matter should be referred to arbitration and further proceedings be stayed;

35. It is not disputed that the parties herein have an Arbitration Clause 16.2 of the Service Agreement of January 1, 2017 where the parties agreed that any disputes arising from the service agreement would be referred to arbitration and that the arbitration proceedings are yet to commence.
36. It was not also disputed by the Respondent to this 2nd application that the matter would be proceeding to arbitration.
37. There being no opposition, the 2nd Application is allowed on terms that the dispute between the parties be referred to arbitration in accordance with the Clause 16.2 of the Service Agreement and there be stay of any further proceedings.

Findings And Determination

38. For the forgoing reasons this court makes the following findings and determinations;
 - i. The 1st application is found to be meritorious and it is hereby allowed;
 - ii. Pending the hearing and determination of the dispute between the Applicant and the Respondent herein by way of Arbitration an Interim Protection Measure by way of an Interlocutory Order do hereby issue compelling the Respondents, its officers, agents or otherwise to ensure that the Applicant can have access to inspect and make copies or scan the following specific Stored Pension files:



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597674	596629	
883417	595679	
597582	596566	
597593	595683	

iii. The 2nd Application is found to have merit and it is hereby allowed. The dispute between the parties is hereby referred to arbitration for hearing and determination in accordance with the Clause 16.2 of the Service Agreement; and all further proceedings herein be and are hereby stayed;

iv. The sum of Kenya Shillings Nine Million (Kshs 9,000,000/-) paid into court by the Applicant be held thereat pending the hearing and determination of the arbitration proceedings; and to abide by the outcome;

v. Each party to bear their own costs.

Orders Accordingly.



**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 27TH DAY OF
MAY, 2022.**

HON. A. MSHILA

JUDGE

In the presence of;

Murithi holding brief for Marete for the Applicant

Mbaluto & Miss Mutua for the Respondent

Lucy-----Court Assistant

