



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 17 OF 2015**

**MOBINET S.A.L.....PLAINTIFF**

**VERSUS**

**SAFARICOM LIMITED.....DEFENDANT**

**RULING**

1. This matter first came before the Court on 16<sup>th</sup> January 2015 under a Certificate of Urgency seeking injunctive relief. On that occasion the evidence before the Court did not justify the making of an ex-parte order under **Order 40 of the Civil Procedure Rules 2010 (CPR)** nor the certification of urgency. On that day directions were given for filing of replies.

2. The substantive Application is brought by a Notice of Motion and is dated 15<sup>th</sup> January 2015. It was filed simultaneously with the Plaint under the Multi-track. The Application is brought under **Order 40 Rule 2. Order 40 Rule 4 of CPR, The Arbitration Act, Section 3A, 1A and I B of the Civil Procedure Act (Cap 21) and All other enabling provisions of the Law.**

3. The Notice of Motion seeks the following Orders:

*(i) That this matter be certified urgent and be heard ex parte in the first instance and directions given on the inter parties hearing (spent).*

*(ii) That the Honorable Court issues a temporary injunction restraining the Respondent from terminating the Contract dated 3<sup>rd</sup> June 2014 on the basis of its letter dated 1<sup>st</sup> September 2014 pending hearing and determination of this application. (Spent)*

*(iii) That this Honourable Court issues a temporary injunction restraining the Respondent from terminating the contract dated 3<sup>rd</sup> June 2014 on the basis of its letter dated 1<sup>st</sup> September 2014 pending reference of the dispute to arbitration and the hearing and determination of the arbitration.*

*(iv) That this Honourable court issues a temporary injunction restraining the Respondent from awarding any third party any contract over the same subject matter of this suit pending the hearing and determination of this application.*

(v) That the Honourable Court issues a temporary injunction restraining the Respondent from awarding any third party any contract over the same subject matter of this suit pending reference of the dispute to arbitration and the hearing and determination of the arbitration.

(vi) That this Honourable Court do to order specific performance of the contract dated 3<sup>rd</sup> June 2014 between the parties pending hearing and determination of this application.

(vii) That this Honourable court does order specific performance of the contract dated 3<sup>rd</sup> June 2014 between the parties pending reference to arbitration and the hearing and determination of the arbitration.

(viii) That the dispute between the parties be referred to arbitration as provided under Clause 24.2.1. of the contract dated 3<sup>rd</sup> June 2014 between the parties.

(ix) That the costs of this application be awarded to the Applicant.

#### 4. The Application relies on the following Grounds:

(1) That the Applicant and the Respondent entered into a contract for a term of 3years on 3<sup>rd</sup> June 2014. It was for the implementation maintenance and support of a performance management network planning configuration inventory and workflow management system. It was renewable for a further term of 2 years.

(2) That through a letter dated 1<sup>st</sup> September 2014, the Respondent terminated the contract dated 3<sup>rd</sup> June 2014.

(3) That the letter dated 1<sup>st</sup> September 2014 alleged, inter alia, that

(a) The Applicant colluded with certain of the Respondent's staff for the purposes of securing the contract and to gain advantage over other interested suppliers;

(b) The Applicant misrepresented and exaggerated costs under the contract.

(4) That the Applicant responded to the notice of termination through a letter dated 7<sup>th</sup> September 2014. In the letter, the Plaintiff denied the allegations contained in the notice of termination of contract and asked for particulars of the allegations of collusive practices and misrepresented and exaggerated costs.

(5) That the Applicant requested for the following particulars:

(a) Times, dates, places and full details of the alleged collusion;

(b) Name of the staf with whom the alleged collusion was alleged to have been committed;

(c) Nature of the undue advantage gained by the Applicant and suffered by the alleged other interested suppliers

(d) The alleged exaggerated costs and details.

(6) That the Applicant issued the Respondent with demand and notice of intention to sue dated 3<sup>rd</sup> October 2014. The Applicant demanded that the Respondent rescind its decision to terminate the contract dated 3<sup>rd</sup> June within 48 hours ending the resolution of the dispute between the Applicant and the Respondent.

(7) That to date the Respondent has not provided the particulars requested in the Plaintiff's letter dated 7<sup>th</sup> September 2014 or substantiated its grave allegations.

(8) That the letter of termination dated 1<sup>st</sup> December 2014 was in breach of the Contract dated 3<sup>rd</sup> June 2014.

(9) That the Applicant has invested resources pursuant to the contract with the Respondent by, inter alia:-

(a) Completed the functional Requirement Specifications/User Requirements Specifications with the Respondent approved and for which the Applicant issued and invoice for

(b) The Applicant purchased and shipped hardware and software worth USdollars 6.2million.

(c) Entering into contractual agreements with external hardware and software solution partners valued at US dollars 5 million.

(d) The applicant incurred substantial internal organizational costs.

(10) That the Applicant will suffer irreparable damage if the Respondent is not restrained by this Honourable Court. The allegations of corrupt practices by the Respondent pose a grave reputation risk to the Applicant. The Applicant provides similar and connected services to a wide network of customers all over the world. The Applicant has suffered, and will continue to suffer, significant loss of current and future business.

(11) That there is a prima facie case for the grant of temporary injunctions.

(12) That the Applicant will suffer irreparable loss should the contract dated 3<sup>rd</sup> June 2014 be terminated on grounds of the unsubstantiated allegations as the Applicant has and will continue to suffer loss of reputation among its customers al over the world and consequent loss of current and future business.

(13) That for instance Vodaphone Limited, a shareholder of the Respondent, has on the basis of the allegations in the letter dated 1<sup>st</sup> September 2014 terminated all future business with the Applicant.

(14) That the decision of the Respondent with the unsubstantiated allegations in the letter dated 1<sup>st</sup> September 2014 has reached well beyond the boundaries of the contract and the borders of Kenya.

(15) That the Applicant stands to suffer irreparable loss if the Court does not intervene to restrain the Respondent through issue of temporary injunctions pending reference of the dispute to arbitration

(16) That accordingly the Application is urgent and ought to be heard immediately or as the Court may deem fit.

5. The Application is supported by the affidavit of Labib Shalak, who describes himself as the Chief Executive Officer of the Applicant (Plaintiff). He says he is competent and well versed in matters pertaining to the Suit and Application. He informs the Court that the allegations made by the Defendant and in particular of Collusion have caused Plaintiff to suffer loss of business globally with further loss likely. The Supporting Affidavit was sworn before a notary public in Tripoli, Lebanon, which suggests that may be where the Plaintiff is based. The Affidavit is almost identical to the Grounds of the Application. The only details added as evidence are limited details of the contract being that it was for the implementation, maintenance and support of a performance management network planning configuration inventory and workflow management system. Reference is made to the Contract which is not exhibited but is included in the Plaintiff's List and Bundle of Documents. The Contract was for a period of 3 years renewable for a further term of two years. It is said that "The Plaintiff will suffer loss of reputation among its customers all over the world and consequent loss of current and future business. It

is also said that “*the Plaintiff has suffered loss of current and future business with other companies. There is a danger of further loss*” (paragraph 14). That loss is neither enumerated nor set out in detail eg setting out the names of lost customers and the dates of those events apart from Vodaphone,( an associate company of the Defendant), which by a Letter of 16<sup>th</sup> October 2014 stated that “Vodaphone will not be able to award any further work to Mobinet. We will therefore be removing Mobinet from our approved suppliers list.”. The reason given is that “[Vodaphone]’s internal investigation has concluded that Mobinet has seriously breached the Vodaphone Code of Conduct.”. There is in fact no reference to the Letter of 7<sup>th</sup> September or indeed the Respondent Company. It is clear from that Letter that the decision was reached after an internal investigation. There is nothing that suggests it was made on the basis of the Respondent’s letter as alleged.

6. The Defendant/Respondent is described in the Complaint only as a limited company. It is in fact a mobile telephone network provider, which is relevant to the underlying dispute. The Defendant/Respondent opposes the Application. It has filed a Replying Affidavit which was filed on 17<sup>th</sup> February 2015. That seems like a long delay, however, the Plaintiff has not filed a Return of Service so it is unclear whether there was a delay. The Application then came before the Court on 24<sup>th</sup> February 2015 for directions.

7. The Replying Affidavit is sworn by James Githinji Maitai who describes himself as “Head of Department Quality and Service Assurance Department of Safaricom Ltd” He says he has been authorised by the Board of Directors to make that affidavit. There is no Letter of Authority nor Minutes exhibited. The Deponent admits there was an agreement. He states that he is familiar with the facts and matters relating to the dispute and that he has read the Application and Supporting Affidavit. He admits that there was an agreement and that it is the one exhibited by the Plaintiff (“the Agreement”). He states that pursuant to the Agreement the Defendant undertook to observe best business practices. He refers the Court to various Clauses of the Agreement, in particular Clause 1.1 which is said to define “Material Breach”, Clause 5.2 which defines Corrupt practices. He says that material breach is not capable of remedy. In fact should the Defendant discover that there has been “corrupt practices” it is under obligation under Clause 5.2(b) to terminate the Agreement. Such termination was done in accordance with Clause 19. The Replying Affidavit states at paragraph 18 that there is no subject matter for the Court to protect as the Plaintiff has failed to show a “threat” the Agreement has already been terminated. Paragraph 21 states that the termination of the agreement has already been effected and that the issue of termination is within the arbitration provided for. The Affidavit sets out the history of the relationship between the Parties. The remainder of the Affidavit is of limited evidential value as a significant part simply repeats legal advice which is opinion, not fact.

8. The Agreement runs from pages 1 to 135 of the Bundle. An in depth analysis would not be appropriate at this stage of the proceedings however, specific clauses are referred to in the Replying Affidavit. Clause 1.1 of the Agreement defines the Code of Conduct as the one attached as Schedule 8. In addition Clause 5.1 requires the Suppliers to warrant that the material provided is true and will remain true. Clause 5.2 defines corrupt practices. Clause 5.2(b) states “*Safaricom...(b) will terminate this Agreement with immediate effect if it determines at any time that representatives of the Supplied engaged in corrupt, fraudulent, collusive or coercive practices. ....*” Clause 19 sets out the Parties’ entitlement to terminate the Agreement . Clause 19.1.1 provides “*Safaricom shall be entitled to terminate this Agreement immediately in the event the grounds set out there are made out, including corrupt practices.* Clause 19.1.2 provides for termination by either Party, and Clause 19.1.3 provides that “*Either party shall be entitled to terminate this Agreement for its sole convenience by giving fourteen (14) days prior written notice to the other Party*”. Clauses 23 and 24 provide for amicable dispute resolution followed by Arbitration. It seems that those processes had not, at the time of filing the suit been undertaken.

9. As stated the Matter came before the Court under a Certificate of Urgency on 16<sup>th</sup> January 2015. In relation to the Certification of Urgency, the Court did not certify the matter as urgent because the Plaintiff/Applicant had waited for a period of five months after the acts complained of had occurred, to bring the Application. That was the alleged breach of contract. As stated above, no substantive orders were made on 16<sup>th</sup> January 2015. The Court gave directions. The Matter came back before the Court on 24<sup>th</sup> February 2015 when further directions for the filing of written submissions were given with the date

for Highlighting being set for 18<sup>th</sup> March 2015.

10. The Parties filed their Written Submissions pursuant to the Court Order of 24<sup>th</sup> February 2015. The Plaintiffs were filed on 6<sup>th</sup> March 2015 and the Defendant's on 17<sup>th</sup> March 2015, which was just a day before it was due to come back to Court for "Highlighting". The Parties have also filed voluminous Lists of Authorities for the Court's consideration. The Written Submissions and Lists of Authorities are on the File and the Court has taken them into account. By way of highlighting the Advocate for the Applicant was urging upon the Court the need for interim relief due to the special circumstances of the case. They were not enumerated. It seems she is referring to the effect of the alleged breach on the Defendant as opposed to any particular complexity relating to the facts of the case.

11. The Plaintiff, in brief, seeks orders restraining termination of the Agreement and Orders for "specific performance of the contract pending arbitration clause or any other form of dispute resolution. The Plaintiff's Written Submissions contain new grounds including that Clause 23 of the Agreement permits the Parties to seek interim relief from the Courts. Seeking interim relief and obtaining it is not the same thing. The Applicant also seeks an order for referral to arbitration.

12. The facts which are not in dispute in this matter are the existence of the Agreement and the termination of that Agreement. The Applicant states that it received the Letter dated 7<sup>th</sup> September 2015, it denied the allegations of collusive practice etc and asked for particulars of the allegations. The Applicant submits that it was only when the Respondent failed to provide those particulars that it instructed Advocates to issue a demand and notice of intention to sue. The Applicant also requested the Plaintiff to rescind its termination. Subsequently, on 16<sup>th</sup> October 2014 Vodaphone informed the Applicant that it would not be on its preferred suppliers list. There was no termination, contrary to what is alleged. That did not trigger this application. The Applicant submits that the termination is a breach of the contract. The Respondent denies that. The Application was made more than 3 months later. The Plaintiff states that it waited to see if the conciliation or arbitration would resolve the dispute. However, there has been no arbitration or conciliation that the Court has been informed of. Therefore, the application for an injunction after 3 months is delayed and on those grounds the urgency was not demonstrated in relation to the alleged breach of contract. In relation to the question of arbitration, there is no evidence to show that the Applicant made any concerted attempts to have the matter referred and the Respondent did not respond and/or obstructed the process. The Plaintiff's Authorities in the main are asking the Court to make a finding of fact on the allegations of collusion. That exercise is premature. By way of Highlighting, the Applicant's Advocate urges upon the Court the need for interim relief due to the special circumstances of the case. By that she seems to be referring to the subjective effect on the Applicant rather than any particular complexity of legal argument or relationship between the Parties.

13. The Application is made under Order 40 Rule 2. That provides:

*2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.*

*(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.*

That brings the analysis to the very well know Authority of ***Giella vs. Cassman Brown 1973 EACA 358*** which sets out the analysis and steps to be taken in particular, the speech of Spry VC at 360D-F. These well accepted principles were set out by the Court of Appeal established that the Court has to consider the following questions before granting injunctive relief: (i) is there a prima facie case with a probability of success? (ii) does the applicant stand to suffer irreparable harm, if relief is denied? (iii) on which side

does the balance of convenience lie?

14. Firstly, has the Plaintiff established a prima facie case. The Plaintiff's case is that termination is a breach of contract. Further, it is argued it should not be permitted because the Plaintiff has invested large sums of money into or due to the Contract. That argument can be dealt with quite simply. Clause 19 allows each Party to terminate the Contract "at its convenience". That means without any reason being given. If the Defendant is wrong in relation to collusion (which is a matter for trial) it can still terminate for no reason at all. Secondly, has the Plaintiff established that it will stand to suffer irreparable harm? The losses the Plaintiff has set out in the Application and Affidavit can be listed and they are:

- a. Loss of investment
- b. Loss of reputation and the ability to contract with other associated companies
- c. Loss of future contracts
- d. Loss of opportunity

Each and every type of loss complained of is a monetary loss therefore can be adequately compensated for by damages.

15. Coming onto the prayer for Specific Performance. The Plaintiff has not established that the contract has a subject matter that means a substitute contract by way of mitigation would not be possible. Alternatively that the subject matter cannot be substituted or other relief is impracticable. There is no evidence of that before the Court. Further, "the remedy of specific performance is based on the existence of a valid, enforceable contract." . The Plaintiff has not established that to the required standard.

16. Should the Court, at this stage refer the matter to arbitration? The Agreement provides for Arbitration only after the Parties have been through a conciliation process. There is no evidence before the Court that such a process was undertaken and failed. The Court has the power to refer a matter to arbitration under **Section 12(5) of the Arbitration Act 1995**. It is trite law that Parties must be held to their Agreements and the Court cannot and should not re-write their contracts. In the circumstances, the Plaintiff must establish firstly, that the parties have complied with Clause 23 and secondly, that the Defendant has failed to comply with Clause 24 before the Court will interfere. It has not done so.

17. For those reasons, the Application is dismissed with Costs.

Order accordingly,

**FARAH S. M. AMIN**

**JUDGE**

Dated: 22<sup>nd</sup> December 2016

**Delivered and Signed at Nairobi this 24<sup>th</sup> day of January 2017.**

In the Presence of:

Naomi –Court Clerk

Mr Kyalo HB for Ms Kilonzo for Plaintiff

Mr Kiche for Defendant