



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 266 OF 2013**

**EQUITY BANK LIMITED ..... PLAINTIFF**

**VERSUS**

**NAROK COUNTRY GOVERNMENT ..... DEFENDANT**

**RULING**

**1. Introduction**

The Masai Mara National Reserve (“the Reserve”) was established as a game sanctuary in 1961 and vested in the former Narok County Council but as a result of the devolution of Government, the same is now vested in the Defendant. The Reserve is without doubt the pearl in the ocean of Game Reserves in Kenya and as regards the tourist circuit, it is a must for every foreign visitor to these shores. Access to the Reserve is by road or air and a major problem experienced by the former Narok County Council was in the collection of revenue in the form of entrance fees and other collectables from the wide array of lodges and tented camps situate both within and outside the Reserve. Throughout its 52 years in existence, the Reserve has been the subject of much discussion and debate as to the collection of revenue that its natural wonders generate. Undoubtedly, it was as a result of these collection problems that the said Narok County Council entered into a Pre-paid Smart Card System Agreement (“the Agreement”) for the collection of entrance fees into the Reserve, with the Plaintiff dated 19th April 2011.

**2. The Agreement**

As emphasised by both counsel for the Plaintiff and the Defendant, the Agreement is the basic document detailing the relationship between the parties hereto. As notified to Court by the counsel for the Defendant as per clause 16.5, the Agreement does not envisage an employer/employee relationship, nor is it a joint-venture and it is not a partnership. As per the Preamble to the Agreement, the same covers a smartcard payment system to enhance revenue collection. The term of the agreement was for a period of 10 years as per the Contract Period as defined in clause 1.1.2 from the Effective Date which, in turn, was defined as the date of the Agreement. The Plaintiff’s obligations thereunder were detailed under clause 4 of the Agreement while the Defendant’s obligations were spelt out in clause 5. At clause 8 were the various warranties and representations relative to the contract between the parties. At clause 13, the Agreement spelt out limitations of liability and indemnity more particularly as to the Plaintiff not being responsible for any loss arising under contract, tort, misrepresentation, strict liability or breach of contract. Clause 14 dealt with the determination of the Agreement and the consequences thereof. Of particular note was clause 17 .2 which provided for resolution of disputes as between the parties by ADR more particularly to

mediation and in event of such not being successful, by arbitration to an arbitrator to be appointed by the Chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitrators of the United Kingdom.

### **3. The Plaintiff's claim and Chamber Summons dated 26<sup>th</sup> of June 2013**

The Orders sought by the Plaintiff are 9 in number but basically amounted to the principle object of preventing the Defendant from interfering with the pre-paid Smart Card System ("the System") instituted and operated by the Defendant pursuant to the Agreement. In other words, the Plaintiff wanted this Court to put it back in the position of operating the System pending not only its Application before Court but also the arbitration which it intended to call for, in due course. The Application was supported on the following grounds:

- "a. This suit has been filed for purposes of instituting an application under Section 7 (1) of the Arbitration Act 1995, for interim measures of protection pending the hearing and determination of the dispute between the parties herein by arbitration.**
- b. The Plaintiff has a dispute with the Defendant.**
- c. The dispute arises from The Card System Agreement.**
- d. The dispute is whether there has been a fundamental breach of The Card System Agreement by the Plaintiff, on account of alleged total collapse of the smart card service given under the agreement, and if there is such a breach, the consequences of the breach.**
- e. The Defendant has purported to end the Card System Agreement, yet the smart card system is working.**
- f. As a result, the Defendant has put in peril, the colossal investment made by the Plaintiff pursuant to the Card System Agreement.**
- g. The Plaintiff intends to refer the dispute to arbitration under the Arbitration Clause in the Card System Agreement.**
- h. The Defendant's action is unlawful and is a breach of the Card System Agreement.**
- i. Unless the orders sought are granted, the Plaintiff will suffer substantial and irreparable loss that would be incapable of being adequately remedied by an award for damages.**
- j. The balance of convenience is in favour of granting the orders sought.**
- k. It is only just and fair that this honourable court protects the Plaintiff by way of an injunction pending the hearing and determination of the arbitral proceedings".**

The Supporting Affidavit as regards the Plaintiff's Application was sworn by **John Njenga** on 26<sup>th</sup> of June 2013, its General Manager-Legal Services Manager. The Affidavit gave details as to how the Agreement had come about as well as saying that the Plaintiff had invested Shs. 179,763,925.15 to execute its obligations thereunder. The deponent attached a schedule at pages 93-95 to the exhibits to the said Affidavit but, try as I may, I was unable to identify the above figure therefrom. However, what was of import, was that the deponent drew attention to Clause 4.1. 8 of the Agreement which imposed an obligation on the Plaintiff to provide maintenance and support services as per schedule C

thereof. That schedule details the obligations of the parties in relation to the resolution of defects and the provision of user support services by the Plaintiff. The deponent maintained that the Plaintiff was obliged to resolve defects that arose in the System and that are notified in terms of the Agreement, within certain specific timelines. In return, the Defendant was obliged to provide certain specific information upon reporting a defect and, further, to give adequate information and access to the System to enable the Plaintiff to investigate, identify and verify the reported support issue. Under Clause 4.2 of the Agreement, faults in the service that resulted in inconvenience to the Defendant were contemplated and the Plaintiff was to use commercially reasonable efforts to respond to defects. Mr. Njenga complained that the Defendant had made haphazard complaints from different quarters and had then blocked the Plaintiff from dealing with the same.

The deponent recounted that on 29 April 2013, the Defendant's advocates had written to the Plaintiff alleging a breach of the Agreement on account of the alleged failure of the System. The letter maintained that the System had completely malfunctioned for a period of 2 weeks at all the Reserve's entry points. He further noted that the Plaintiff had responded thereto having addressed all the issues raised by the Defendant and that the System was repaired and functioning normally. Then on 6 June 2013, the Defendant sent another letter notifying the Plaintiff that there was a fault in the System and that 706 smartcards were not working. On 7 June 2013, the deponent stated that a letter had been sent to the Defendant which had acknowledged a shortage of stock of the new Reserve smart cards and suggested a workaround solution as the Plaintiff attempted to resolve the problem. This did not involve a system upgrade but a change in the base smart cards for new batches of such cards that were now being supplied. The deponent explained that there was a change over from SDA (Static Data Authentication) and the new cards which were DDA (Dynamic Data Authentication). The deponent attempted to explain that the change in cards meant an internal system change which took longer than expected. Consequently, the Plaintiff had contacted 2 officers of the Defendant, one being David Ole Letuati, had explained the problem and agreed a workaround solution, which was to provide letters to visitors to the Reserve with comprehensive and verifiable details so as to avert interruption of business.

Mr. Njenga then explained that the said Mr. Letuati, on 14 June 2013, had called the Branch Manager of the Plaintiff's branch in Narok directing that the Plaintiff's staff be withdrawn from the Reserve. Such was confirmed in writing and it had come to the knowledge of the Plaintiff that Smart Cardholders were turned away from the Reserve access points with effect from 15 June 2013. Further, the Defendant had issued a circular to the Kenya Association of Tour Operators stating that it would only allow visitors to access the Reserve with original deposit slips and letters from the Plaintiff.

At paragraph 40 of the Supporting Affidavit, Mr. Njenga stated that the Plaintiff's technical team together with others off-shore had rectified the problem and by 19 June 2013 had resumed the issuance of the Smart Cards. However, the Defendant had purported to terminate the Agreement even though the System was working. The Plaintiff contended that it had addressed all the issues that have arisen in respect of the System and that there was no defects notified, in accordance with the Agreement, that had not been dealt with.

#### **4. The Defendant's Replying Affidavit**

The County Administrator of the Defendant, **David Naisho** swore a Replying Affidavit on 27 June 2013. The deponent related the history of the Agreement from the point of view of the Defendant and outlined the following provisions which he considered important to the Application. Such included Recital E and F as well as clauses 2.2, 4.1, 7.1, 7.2, 8.4, 8.5 and 13.2 of the Agreement. Such covered what the deponent considered were the services that the Defendant had bought, to be provided by the Plaintiff. The deponent then went on to set out in full the provisions of clause 14 of the Agreement covering "Termination and Consequences of Termination". As part of the buildup to the action on the part of the Defendant in terminating the Agreement, Mr. Naisho noted that problems with the System had emerged since 20 April 2013 and he attached a report from the Defendant's Internal Auditor dated 25 April 2013 noting that 12 Smart Cards had been declined at the Point of Sale at 10 stations in the Reserve. In his opinion, the failure of the System constituted a serious violation of the Plaintiff's

obligations under sub-clauses 4.1.1 and 4.1.10 of the Agreement. The deponent stated that the Plaintiff had not only failed to reply to the Defendant's concerns as raised but when it did, he felt that the explanation was, to use his expression "shifty", ranging from the malfunctioning of the System to an error embedded in the Smart Cards. The Defendant had thereafter instructed its advocates to issue a formal demand which is contained in the advocates' said letter dated 29 April 2013. The relevant paragraph in that letter is paragraph 4 which reads as follows:

**"Our instructions are that contrary to the above understanding, the Bank has not been operating the System in the manner agreed upon. Currently, the System has completely malfunctioned for over two (2) weeks from the date herein at all the Mara entry points. This is not only causing inordinate delays in processing entry to the visitors but it is also inconveniencing the tourists with the result that there is infinite prejudice on the overall quality of the Mara as a preferred destination. Needless to state, the collapse of the said electronic devices defeats the very objective of the County of Narok in adopting the system which was to enhance revenue collection. Currently, as matters stand, the malfunctioning of the Smart card machines at the entry points, makes it impossible to verify how much fees is being collected by the Bank on behalf of the County has no print outs to verify the same can be obtained."**

The advocates' said letter was basically a demand made to the Plaintiff for the following to be accomplished:

- "a) Immediate payment into the Escrow Account of all the money collected by the Bank on behalf of the County of Narok for the period of the malfunction.**
- b) Immediate provision to the County of Narok of the Operational Reports including and especially financial reports showing proper and transparent accounts of the money collected on behalf of the County of Narok by the Bank during the malfunction period.**
- c) Immediate undertaking by the Bank to facilitate and co-operate with a professional audit firm appointed by the County to verify the Operational Reports including and especially financial reports as well as all accounts of the money collected under the Agreement on behalf of the County of Narok thus far.**
- d) Immediate repair of the System malfunction and a written confirmation that all the System machines at the Mara entry points and all other System machines, whether location at the Mara or elsewhere are properly functioning.**
- e) To indemnify the Country of Narok for the harm that the inefficiency at the entry points has done to the reputation of the Mara, in accordance with clause 8.5 and 13.2 in the Agreement".**

The Plaintiff had responded by letter dated 13 May 2013. In response to the demands as made in the Defendant's advocates' said letter of 29 April 2013, the Plaintiff detailed:

- "a) The escrow account contemplated in the agreement was never opened and hence all moneys received are credited in your client's account directly. Further, all funds collected are all material times held within your client's accounts.**
- b) The Bank statements relating to the account and showing proper and transparent financial records for the monies collected have already been**

**availed to your clients. The bank is agreeable to availing any operational, card and accommodation reports for any relevant period at your instance.**

**c) The bank is available to offer any information that your client requires as well as support as contemplated in the contract with us to enable your client verify the reports of the monies collected under the agreement.**

**d) We confirm the system was repaired in a timely manner and is currently running efficiently in a sound modus.**

**e) With regards to the issue of indemnifying your client, as stated herein, no circumstances exist to suggest that the bank was at any interval in breach of its fundamental obligations under the agreement and as such the issue of indemnity does not arise”.**

According to the Defendant, by 6 June 2013 the System had degenerated from bad to worse. By that date, the Defendant had collected over 700 Smart Cards which could not be read in the System. The said David Letuati, the Defendant's Chief Revenue Officer accordingly wrote to the manager of the Defendant bank at Narok raising 6 questions ranging from the Defendant giving no notice of the intention to upgrade the System, the fate of 706 Smart Cards and that the amounts thereof had been credited to the Defendant's accounts, as well as to stop any recycling thereof. It also enquired as to why the Defendant had failed to rectify the machines at six entry points and just how long the problem would continue before being fully addressed. The deponent then went on to say that the Plaintiff, for unexplained reasons, abandoned the System altogether on 7 June 2013 and, instead, resorted to issuing letters purporting to allow the holders thereof to enter the Reserve. The matter had received some attention in the media and a report in the Daily Nation of 10th June 2013 was annexed to the Replying Affidavit.

Mr. Naisho then related, that as a result of the above, the Defendant was left with no alternative but to invoke the provisions of clause 14.1 of the Agreement and issued a 14 day Notice of Termination through its advocates. Further attempts were then made by the Plaintiff to remedy the System but it was still apparent that the newly generated Smart Cards issued to users could not be read on the System. This was reflected in an audit report by the Defendant's Internal Auditor dated 18 June 2013 in relation to card users having their Smart Cards rejected on 16th & 17th June 2013.

Paragraph 18 of the Replying Affidavit brought home to me just what this dispute is all about. Mr. Naisho deponed to the fact that the Defendant had discovered more fundamental breaches of the Agreement on the part of the Plaintiff. He noted that there had been unauthorised and non-contractual utilisation of multiple suspense accounts used as collection accounts by the Defendant bank. Such included Suspense Salary Processing, Suspense Salary Processing USD, Maasai Mara Collection Accounts etc. He maintained that the Defendant had never been informed of these accounts and neither had it been furnished with any transaction reports in respect of the entries therein which included cash withdrawals. He pointed out that the only agreed account under the Agreement was the Escrow Account which was the account to be maintained by the Defendant for the purposes of crediting all revenue collected through the System as required by clause 7.1 of the same. The other salient point raised by the deponent was as regards the inability of the Plaintiff to provide the Pre-Paid Smart Card Service. Such went to the essence of the Agreement and it was maintained that by midnight on 24th June 2013, the Agreement stood terminated for breach as the Plaintiff did not remedy same within the 14 day window effectively bringing to an end the contractual rights and obligations thereunder.

## **5. Submissions of the Plaintiff**

Mr. Ogunde, learned counsel for the Plaintiff, noted the Agreement entered into between the parties to supply a revenue collection system to enhance entrance to the Reserve. He maintained that the Defendant contended that there had been a fundamental breach of the Agreement on the basis that the

System had completely failed. As a result, the Defendant had purported to terminate the Agreement and had issued a notice to that effect. He pointed out that there was a detailed dispute resolution clause contained in the Agreement and that his clients intended to refer the dispute to arbitration and, in fact, had written to the Defendant's advocates suggesting the name of 3 potential arbitrators. It was the Plaintiff's decision that under section 7 of the Arbitration Act, the Plaintiff was entitled to apply for an interim measure of protection prior to arbitration proceedings commencing as between the parties. He submitted that the guiding principle as to the granting of such interim measure was well expressed on the authority of **Giella v Cassman Brown**. The second limb of that authority was whether the Plaintiff could be compensated in damages. Counsel maintained that the courts have considered that principle and had held that there were occasions where an interlocutory injunction may be allowed even where damages could compensate. He maintained that it could not be the policy of the court that anybody can be allowed to do anything because they say that they can pay. The Defendant could not be allowed to act unlawfully without bearing the pain. He referred to the Ruling of my learned brother **Azangalala J.** in the case of **Raki Investments Company Ltd & 3 Ors. v Cooperative Bank of Kenya Ltd (2006) eKLR** where the learned Judge had found:

**“With regard to whether the plaintiffs might suffer irreparable injury which would not adequately be compensated by an award of damages, I am persuaded that they would. In my view to sell the securities pursuant to charges that are said to be invalid and where the plaintiffs allege not only that the loan sums have been settled but that they have been overpaid would amount to irreparable injury. The plaintiffs have come to a court of equity. It is not enough for the defendant to say that despite the plaintiffs' complaints it can pay any damages that may be awarded should the injunction be refused at this stage and the plaintiff succeed at the trial. In any event as I have held before and so have other Judges of this court, the rule that interlocutory injunctions will not normally be granted unless it is shown that the applicant would otherwise suffer an irreparable injury which could not adequately be compensated in damages is not cast in stone. The use of the word “normally” suggests that there are occasions when even where damages would be an adequate remedy the interlocutory injunction will still issue to serve the ends of justice”.**

Mr. Ogunde went on to say that the Plaintiff's argument was that with regard to the establishment of a *prima facie* case, such would be decided in the arbitration proceedings. However if the Court was to find that there was sufficient provision of damages then the Plaintiff felt that there was nothing to stop the Court from declaring that the Defendant had acted unlawfully. He noted that the estimate of the damages today would be close to Shs. 1.2 billion. He commented that he had reason to remind of the Court of the difficulty that the Plaintiff could experience in claiming that sort of money back from the Defendant, a public body. However, the key question was whether access to the Reserve had collapsed and whether the Plaintiff had provided the service provisions to which it was contracted. Counsel noted that the Defendant had annexed a copy of the Agreement to the Replying Affidavit but had not attached a copy of Schedule C which provided for the parties obligations on maintenance. That Schedule details where maintenance arose and how the System is to be authorised. The Defendant would appear to have ignored it. This was despite the Plaintiff's putting the Defendant on notice in terms of its obligations under Clause 1.4.8 and Schedule C of the Agreement which disclosed a reporting obligation on the part of the Defendant. If it had been shown that the Defendant had raised no issues under these requirements, how could there be any default on the part of the Plaintiff? However, counsel acknowledged that there had been default on the part of the Plaintiff but such had been brought to the Defendant's attention. With reference to the notice issued by the Defendant purporting to terminate the Agreement, counsel noted that the Plaintiff's officers had been sent to the Reserve to resolve the issues. They were not only prevented in attending to those issues but were arrested. Further, counsel pointed to items in the Replying Affidavit which demonstrated that the System had not completely failed. Eight days after the termination notice had been given by the Defendant, the so-called internal audit on smart cards was carried out and the results thereof not brought to the attention of the Plaintiff. The Defendant had asked for an audit to be carried out by an external firm of accountants but had then gone ahead and conducted its own internal audit so as to declare the System as a failure. The Plaintiff having received non-specific complaints, it had attended

to them but their Officers' efforts were shot down and they were threatened with arrest.

Turning to his list of authorities, Mr. Ogunde referred to my Ruling in the case of **Roaring Success Ltd v Airtel Networks Kenya Ltd & Anor HCCC No. 302 of 2011** where I had found that with reference to the **Cetelem SA v Roust Holdings Ltd** case at (2005) 4 ALLER that with orders for the preservation of assets, such were not confined to tangible assets but could include, for example, choses in action. Further, in the **Santac Enterprises Ltd v Kenya Building Society Ltd (2007) eKLR** case, **Warsame J.** had allowed 60 days preservation of the status quo pending arbitration proceedings.

Further, counsel noted that in prayer 2 of the Plaintiff's Application, leave was sought to allow the Plaintiff access to the System and the equipment on the ground as well as being allowed to continue operations. He maintained that in cases like this, it was conceivable that prior to the dispute being resolved in arbitration, facts could be altered. The whole case was about an alleged failure in technology and how did someone verify facts where one party does not allow access to the other. Finally, Mr. Ogunde spent some time submitting that the Defendant was maintaining that this Court had no jurisdiction to make an interim order of protection as the matter had not as yet been referred to arbitration. However, I did not understand Mr. Kemboy taking up that point in his submissions.

## **6. The Defendant's Submissions**

Mr. Kemboy, learned counsel for the Defendant, commenced his submissions by taking the Court through the various clauses in the Agreement as between the parties, which I have covered as above. More particularly, counsel referred to clause 14.1 covering termination where there is a breach of the Agreement. He noted that the innocent party, where there was a breach of the Agreement capable of remedy, could issue a 14 day notice to the other party requiring it to remedy the same. However where the breach could not be remedied, the 14 day notice did not apply. Clause 14.3 covered the issue of a notice of termination where remedy was not forthcoming in 14 days. Counsel maintained that the real problem came at clause 14.8 as to the compensation payable to the Plaintiff should the Agreement be terminated by the Defendant. Damages had already been assessed as per that clause and the Agreement stated that the Plaintiff would be compensated. It was the Defendant's case that the Plaintiff had violated the conditions of the Agreement and that the Defendant had lawfully terminated the same. He noted that the Plaintiff had not been contracted to provide any other service other than what was contained in clause 2.4 of the Agreement. Clause 5 of the Agreement, being the obligations of the Defendant, provided for an undertaking from the Defendant that it would have to abide by the pre-paid smart card service and that no other ticketing system would be applicable.

The instance of the default of the Plaintiff was covered by clause 6 of the Agreement. The letters issued by the Plaintiff commencing on 7 June 2013 showed how it had moved away from the relevant clause of the Agreement and had started issuing letters to visitors to the Reserve. The Plaintiff was acting outside the provisions of the Agreement and was not providing the service that it was contracted to do. As a result, the Defendant had issued the 14 day notice of termination.

Counsel noted that the Plaintiff had admitted that there were issues with the System and that it was attempting to rectify the same. Further, the inconvenience suffered by the card users was very clear and there had been endless complaints from visitors and tour operators as to the conduct of the Plaintiff.

As far as damages was concerned, Mr. Kemboy pointed to the provisions of Schedule D of the Agreement as regards investment costs. Such fell upon the Defendant and were now fully paid. This is what the Court, according to counsel, had to balance out – the investment costs on the one hand and the compensation payable under the Agreement, on the other.

Counsel further noted that the Defendant had been undertaking and assuming the responsibility for revenue collection for the last 4 days. There was no basis for the Court to grant an interim measure of protection for, in doing so, it would reverse the fact that the Agreement had been terminated. In the

Defendant's view, the Plaintiff had shown by its own acts, that it was incapable of performing its obligations.

As regards the Defendant's authorities, Mr. Kemboy drew the Court's attention to the finding of **Ransley J.** in the case of **Mugoya Construction & Engineering Ltd v National Social Security Fund Board of Trustees & Anor.** (2005) eKLR as well as **Nyamu JA's** Ruling in the case of **Safaricom Ltd v Oceanview Beach Hotel Ltd & 2 Ors Civil Application No. NAI 327 of 2009** in which the learned judge had referred to the finding of the English Court of Appeal in **Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd** (1992) All ER Vol. 2 609.

#### 7. **The Plaintiff's submissions in reply**

Mr. Ogunde pointed out that the circumstances in the **Mugoya Construction** case, as above, were very different from the matter before Court. The Applicant therein had behaved very differently, resisting arbitration and concealing information.

Counsel submitted that the Defendant's position was that the Plaintiff had contracted to supply smart cards but had issued letters to visitors to the Reserve instead. He pointed to paragraphs 30-33 and 39 of the Supporting Affidavit which gave full details as to the problems experienced with the smart cards. The part of the Agreement which was relevant was Schedule C which provided for a workaround solution where problems were experienced with the System. He noted that specific officers of the Defendant were informed of the position by the Plaintiff and had agreed to the workaround solution suggested. The System was working on 19 June 2013 and that had not been contested. The Defendant had not detailed how many complaints had been received, one or a hundred. In the Replying Affidavit, it had only referred to a single complaint from a Mr. James Robertson.

#### 8. **The Court's findings**

As both counsel have pointed out, this matter revolves around the interpretation of the Agreement which is a most comprehensive document. Even the dispute resolution clause being clause 17.2 clearly spells out what the parties should be doing in the event of a dispute between them. Firstly, they should be using their best efforts to amicably settle any such dispute. However, if that doesn't work, then the parties should refer the dispute to a mediator agreed between them. Again, should the mediation process not be invoked or not be successful, then the matter should be referred to arbitration. From the recent correspondence exchanged between the advocates for the parties, it is quite clear to this Court that amicable settlement of the dispute is not possible and further, that the Defendant has unilaterally rejected any suggestion of mediation. In fact, by its letter dated 25<sup>th</sup> June 2013, the firm of Walker Kontos for the Plaintiff has, to my mind, invoked the arbitration process by nominating three alternative names, for the consideration of the Defendant, as to who should arbitrate the dispute between the parties.

The Plaintiff's Chamber Summons dated 26 June 2013 is brought under the provisions of **section 7 (1)** of the *Arbitration Act* and **Rule 2** of the *Arbitration Rules, 1997*. **Section 7 (1)** of the Act reads:

**"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."** (Underlining mine).

I have no doubt that arbitration is the way forward for these parties to resolve their dispute and I am of the firm opinion that I have the jurisdiction to order interim measures of protection such as requested in the Plaintiff's Application before this Court.

As the parties have chosen the forum of arbitration for settlement of disputes between them, this Court only has jurisdiction with regard to the requested interim measure of protection. It does not have to determine and indeed does not have the jurisdiction to determine whether the Defendant has properly terminated the Agreement or otherwise. That is for the arbitrator to determine in due course. I am

supported in that thinking by the finding of **Nyamu JA** in the **Safaricom** case (supra) and his reference to the **Channel Tunnel** case (also supra) as follows:

**“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 any 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 ... If the court now itself orders an interlocutory mandatory injunction, there will be very little left for the arbitrators to decide”.**

What does the Plaintiff’s Application for interim measures of protection amount to? It seeks an Order from this Court to reinstate it as regards the operation of the System by which revenue is collected on behalf on the Defendant. It seeks further Orders to restrain the Defendant from interfering with the System or indeed procuring such automated or manual payment system for entry/exit procedures in the Reserve, from any third party. Further, it seeks Orders that the Plaintiff’s officials should be allowed to access the equipment supplied to support the System or indeed to operate the System. To my mind, all these Orders amount to the seeking of an interlocutory mandatory injunction. As defined in the case to which the Court was referred in the **Roaring Success** case above being **Cetelem SA v Roust Holdings Ltd (2005 1 WLR 3555**:

**“a mandatory injunction” is one which requires the party against whom it is granted to take some positive step, as opposed to the usual form of injunction which requires the defendant to refrain from doing something”.**

In this matter, the Plaintiff seeks the Court’s assistance to be put back in the driving seat in relation to the operation of the System and the collection of revenue on behalf of the Defendant. In my view, this requires a positive step to be taken by the Defendant. The **Mugoya Construction** case, as cited to Court, involved the termination of a building contract and an application by the Plaintiff to remain on the suit premises pending arbitration. Those circumstances are not entirely dissimilar to the matter before this Court and I note that **Ransley J** found:

**“In order to succeed the Applicant must show it has a prima facie case with a probability of success to remain on the suit premises pending the adoption and completion of the arbitration proceedings. To allow the Applicants to remain on the suit premises would cause grave injustice to the Respondents, as not only is no work going on, but the work done would deteriorate and depreciate in value.”**

With respect to counsel for the Defendant, the extract from **Tom Grace’s** volume on **The Termination of Contracts for Breach** is best laid before the arbitrator in due course as it will be his decision as to whether there was a terminable breach of contract on the part of the Plaintiff and as to whether the Defendant was right or wrong in terminating the Agreement as it did. The said extract was of little or no assistance to this Court on the question of whether it should grant interim measures of protection. However, the Court did receive assistance again from **Nyamu JA** in the **Safaricom** case (supra) as follows:

**“By determining the matter on the basis of the GEILLA principles the superior court**

failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of an arbitration.

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. In the case of Kenya, the Arbitration Act is modeled on the Model Law and the UNCITRAL Rules and this is the reason they are known as “interim measures of protection” under Section 7 of the Arbitration Act. On the other hand, in the English version of the ICC Rules for example, they are known as “interim conservatory measures”. Whatever their description however, they are intended in principle to operate as “holding” orders, pending the outcome of the arbitral proceedings. The making of interim measures was never intended to anticipate litigation”.

The Court receive the most assistance from the extract from **Russell on Arbitration 23rd Edition** at **page 436, paragraph 7-195** as regards injunctions in support of arbitral proceedings. Of course the learned authors were referring to the provisions of the *English Arbitration Act, 1996*, similar to our own Act in this connection. The passage detailed:

“The court has power under s.44 (2) (e) to grant interim injunctions in respect of arbitration proceedings. A broad range of interim injunctions are available under s.44 of the Act. The power certainly extends to the granting of a freezing injunction with a view to preserving assets in appropriate cases. The court also has power to grant a freezing order *quia timet* but the court will be astute to ensure that the order is used ‘properly and without abuse’. However, the Court of Appeal in *Cetelem* was not prepared to limit the power to grant interim mandatory injunctions to freezing injunctions or search orders (formerly Mareva and Anton Pillar injunctions), but accepted that a broader class of orders could fall within s.44 (2) (e) including, in certain cases, an order for delivery up of documents required to satisfy a condition precedent in a share purchase transaction (the injunctions sought in *Cetelem*) and an order for the vendor to deliver to the seller a share certificate in the case of imminent completion of a share purchase transaction. The court will therefore on occasions extend the power to include the grant of an interim mandatory injunction, although this power must be exercised ‘very sparingly’. The power does not however extend to granting final injunction or to making a final determination of the rights of the parties, even if it may incidentally involve the initial determination of an issue which the parties have agreed to submit to arbitration.”

The learned authors of **Russell** (supra) also identified the situation in the case of **Engineered Medical Systems v Bregas AB (2003) EWHC 3287** where one party would continue to supply a particular component part to the other on an interim basis for six months (not automatically for the whole period of the arbitration).

The Plaintiff also provided to Court an extract from **Mulla’s The Code of Civil Procedure 16th Edition** in relation to Temporary Injunctions and Interlocutory Orders. Under the heading: **Ad Interim Mandatory Injunction** the learned author had this to say:

“The relief of interlocutory mandatory injunctions are granted generally to preserve or restore status quo of the last non-contested status which preceded the pending controversy until the final hearing, when full relief could be granted, or to compel the undoing of those acts that have been illegally done, or the restoration of that which was wrongfully taken from the complaining party. A mandatory injunction could be passed even at the interlocutory stage. The court can, in exceptional cases, grant a mandatory injunction on an interlocutory application. In a Calcutta case, the tenant

**was in peaceful possession, but had been wrongfully thrown out. His possession was restored on an interlocutory application.**

**A mandatory injunction can be granted on an interlocutory application, after notice to the defendant and after hearing the parties.**

**It is only in rare cases that a mandatory injunction is issued in an interlocutory application and that is only for maintaining the status quo. A temporary mandatory injunction can be issued only in case of extreme hardship and compelling circumstances, and mostly in those case when status quo existing on the date of the institution of the suit is to be restored”.**

## **9. Conclusion**

To my mind, what comes over very clearly from the contents of the Replying Affidavit is that one way or another the Defendant herein was determined to terminate the Agreement. Whether it was so justified is not for determination in this forum. However, this Court’s task simply put, is whether the Plaintiff is deserving of the Orders that it seeks in its Application before Court. I tend to agree with Mr. Ogunde, that the question of whether the Plaintiff has a *prima facie* case or otherwise lies to be decided by the arbitral tribunal. Learned counsel for the Defendant pointed to the provisions of clause 14.5 of the Agreement which, in my view, is worth setting out as below:

**“14.5 Upon a termination notice becoming effective (howsoever terminated), the Bank shall be entitled to immediately suspend the operation of the Pre-paid Smart Card Service and shall effect no further transactions in relation to the Pre-paid Smart Card Service but shall be entitled to deduct from the Escrow Account all monies owed to it prior to the termination of this Agreement or as a consequence of the termination. The Bank shall prepare a final statement of account and the party found to be owing the other after the final statement of account is prepared shall make payment of the amount owed within fourteen (14) days of the date when the statement of account is finalized”.**

That clause details as to what should happen when the termination notice becomes effective in terms of the immediate suspension of the operation of the System. The termination notice has become effective as from 25th June 2013 and the Defendant has taken over the collection of the Reserve’s revenue from that date. Obviously such an event was anticipated, otherwise I cannot believe that the parties would have included clause 14.8 in the Agreement. That clause spells out the damages to which the Plaintiff will be entitled should the Agreement be terminated before the expiry of the eighth anniversary of the Go-Live Date which is defined in clause 1.1.5 of the Agreement as the date when the System was activated.

In my opinion, this is where the Plaintiff has been tripped up in respect of its Application before this Court. It executed the Agreement and I do not think it has shown to the satisfaction of this Court that damages would be an inadequate remedy. The Agreement speaks for itself in this connection. I do not consider that this is a special case in which to exercise my discretion in the granting of a mandatory interlocutory injunction.

Accordingly, but with some reluctance, I dismiss the Plaintiff’s Chamber Summons dated 26th June 2013, with costs to the Defendant.

**DATED and delivered at Nairobi this 2<sup>nd</sup> day of July, 2013.**

**J. B. HAVELOCK**

**JUDGE**

