



Naipa Supermarket Limited v New Co-operative Creameries Limited (Civil Case E006 of 2025) [2025] KEHC 15999 (KLR) (28 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15999 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CIVIL CASE E006 OF 2025
PJO OTIENO, J
OCTOBER 28, 2025**

BETWEEN

NAIPA SUPERMARKET LIMITED PLAINTIFF

AND

NEW CO-OPERATIVE CREAMERIES LIMITED DEFENDANT

RULING

1. When the plaint herein was lodged, there was a contemporaneous lodgement of a Notice of motion seeking, in the main, that; the matter be referred to arbitration pursuant to clause 18(b) of the agreement dated 1/1/2022 and that pending that reference, orders of injunction do issue to restrain the Defendant/Respondent from terminating, purporting to appoint another distributor, withholding, denying or reducing the supply of agreed products for the agreed market together with a mandatory order of injunction commanding and directing the Respondent to continue supplying the agreed products pursuant to the distribution agreement as amended by the addendum dated 1/1/2024. The applicant equally urged the court to issue any such further orders and direction as it deems fit in the circumstances together with a provision for costs of the application.
2. It is of note that in the plaint filed, the substantive prayer is that for reference to arbitration and injunctions pending the conclusion of the arbitration proceedings.
3. When the matte, filed under certificate, of urgency was placed before the court on 25/9/2025 the court certified same urgent and granted interim temporary injunction in terms of prayer 2 and 3 of the motion and set the matter for hearing inter-partes on the 6/10/2025.
4. When served, the Respondent, in observance of the requirements of section 6 of the *Arbitration Act*, never entered appearance, filed a defence nor response to the application, but instead filed a Notice of Motion dated 2/10/2025, also under certificate of urgency, seeking essentially that the proceedings



herein be stayed pursuant to section 6 of the Arbitration Act and the dispute referred for determination by way of arbitration in accordance with clause 18(b) of the Distribution contract dated 1/1/2020.

5. The court appreciated both sides to agree on the fact that there is an arbitration clause, 18(b), in the Distribution agreement between the parties, hence when the counsel appeared on 6/10/2025 it was agreed that the reference be made consensually and that the only determination to be made by the court is whether or not to issue orders of injunction pending conclusion of the arbitration proceedings.
6. Because it is contractual and both want the matter referred to arbitration, the court must respect the principle of party of autonomy in choice of forum and make an order that the dispute be referred to arbitration by a single arbitrator appointed in accordance with the provisions of the arbitration Act. Because the parties have not agreed on a detailed manner on how to effect the appointment, the court invokes section 12 (2) (c) and directs that the two parties agree and appoint the arbitrator within 30 days from today.
7. In the event that there shall be lack of cooperation or a stalemate on such appointment at the end of the 30 days, by the 28th of November, 2025 the appointment shall be effected by the Chief Executive Officer of the Nairobi Centre for International Arbitration, not later than the 28.12.2025.
8. On whether or not to grant interim measures of protection pending the arbitration proceedings, the guiding light is found in section 7(1) of the Act. The law mandates that it is not incompatible with an arbitration agreement for a party to request for the High Court before or during arbitration proceedings, an interim measure of protection. It is equally not incongruent with the general norms of Arbitration for the court to grant such measures.
9. On this point, both parties have addressed the count in the filed submissions and taken quite rival positions. For the plaintiff the position taken is that it having established a case for reference, it has equally established that it deserves an interim measure of protection in the nature of injunction to keep the substratum of the dispute alive so that the Distribution contract is not terminated it awarded to another party thereby injuring its investment on the contract.
10. In urging so, the applicant cites the decision in Kenya Alliance Insurance – vs – Annabel Muthoki Muteti [2020]KEHC (KLR and Mukula – vs Mukula & 3 others [2014]KEHC 2693 [KLR] for the proposition that a request for interim measure of protection must be grounded upon a suit and that it is the suit to be stayed as the application for such orders is considered on the merits.
11. The decisions in Power Parts Keya Ltd –vs – Keya parts Authority [2025] KEHC 4006 [KLR] and Pelyphace Systems Ltd – vs – Staring & Wilson Solar Ltd [2021]eKLR were equally cited for the proposition of the case that one of the permitted interventions by the court is the interim measure of protection under section 7 of the Act.
12. On the factors to be considered by the court before granting interim measures of protection the plaintiff cited to court Seven Twenty Investments Ltd – vs – Sundhoe Investments Kenya Ltd [2013] KEHC 7038 to the effect that the consideration is whether these is a valid arbitration agreement and if indeed the subject matter is in danger of dissipation and thus deserving preservation.
13. On its part, the defendant takes the view and deposits that the court lacks jurisdiction to handle the matter because parties had chosen their forum for dispute resolution away from the court. In that regard, it cites Alison Jean Louis – vs – Rama Homes Ltd[2020]eKLR for the law that where parties exercise autonomy in choice of forum and process of dispute resolution, the court must down its tools and permit parties to pursue the preferred dispute Resolution mechanism.



14. To bolster the same point of party autonomy, the respondent cites UAP Provincial Insurance Co. Ltd – vs – Michael John Beckeh [2013]eKLR, County Government of Kirinyanga – vs – African Banking Corporation [2020]eKLR as well as the Supreme Court Decision in Nyutu Agrovet Ltd – vs – Airtel Networks Kenya Ltd [2019] eKLR, all to the effect that pursuant to article 159 (2) c of *the constitution*, when read with section 6 (1) of the *Arbitration Act*, the courts are obliged to respect the parties choice of forum and cannot insist on entertaining the matter the parties have opted not to litigate upon.
15. On whether interim measure of protection are merited under section 7 of the *Arbitration Act*, the respondent concede that there is indeed a limited jurisdiction to interfere, cites and relies on the decision in Inforcard Holdings Ltd – vs – AG & 2 others [2014]eKLR and CMC Holdings Ltd – vs – Jaguar lad Power Expert Ltd[2013]eKLR for the proposition that section 7 does not give the court the liberty to interrogate the merits agreement and dispute generally so as to interfere with the mandate of arbitral Tribunal but only to ensure that the subject matter remains in the same state as at the time of commencement or during the arbitration proceedings.
16. It is emphasised that in the instant case there is no threat to the Distribution agreement hence no need for the interim measure of protection. It is added that the third party named has been in the business more than one year and to grant the orders sought would be to confer upon the plaintiff exclusive distribution rights that do not exist in the subject agreement. To the defendant, to grant the order sought could be to alter the status quo rather than preserve it.
17. The decision in Portlink Ltd – vs – Kenya Railways Corporation [2015] eKLR was cited to limit the consideration by the court before grant of interim measure of protection to whether the subject of arbitration is under threats and not to grant final orders. It is contended that the interim orders sought are as well available for grant by the arbitral Tribunal when appointed under section 18(1) of the Act, hence the court should just down its tools and allow the parties to go before their chosen forum.
18. Safaricom Ltd – vs – Ocean View Beach Hotel Ltd & 2 others was cited for the preposition that limited courts power to intervene under section 7 is to safeguard against arbitral futility and not a substitute for arbitration by conferring upon a party substantive rights that would prejudice arbitration.
19. The threshold for grant of temporary injunction were then underscored and the court urged not to grant the orders sought but to dismiss the request for interim conservatory orders.
20. Having anxiously read and digested the parties’ submissions and the law cited, the court proceeds from the standpoint that when parties exercise the undoubted autonomy on choice of forum for dispute resolution, there intention must remain to have a just, substantive and fair adjudication of the dispute by the forum devoid of any trickery or jockeying. That demands that the substratum of the dispute to be subjected to arbitration be preserved.
21. When it is agreed that there is an agreement whose performance has led to a dispute, that agreement and its terms must be preserved so that the agreed arbitral process is not rendered into futility by either being fundamentally altered or spirited away and shielded from real and effective adjudication by arbitration.
22. Section 6 and 7 of the *Arbitration Act*, when read together yield the legislative intention to have been to give the court jurisdiction to intervene for purposes of respecting and protecting the party anatomy and also preservation of the status quo pending arbitration.
23. It is well noted that the respondent asserts that the agreement is intact and that it has no intention to terminate or interfere on the agreed terms. It is however not disclosed what prejudice would visit it if the orders interim orders are issued.



24. On the other hand, the applicant has expressed fear that the Respondent may in fact, be in breach by termination or frustration of the terms by withholding supplies or reducing quantities and areas of operation thereof.
25. On the face of such rival positions, the court is persuaded that the best interest of justice would be served by grant of interim measures of protection of the agreement and its terms by an order of injunction.
26. The court thus grants to the applicant interim temporary orders of injunction, both prohibitory and mandatory, as follows:
 - a. That pending hearing and determination of the intended Arbitration proceedings between the Plaintiff/Applicant and the Defendant/Respondent, the Defendant/Respondent, its agents, servants, employees and/or any other person whomsoever and howsoever acting on its instructions be and are hereby restrained by a temporary injunction from withholding, denying supply or reducing the supply of the agreed volumes processed milk, milk powder, butter, ghee and any other products agreed between the Plaintiff/Applicant and the Defendant/Respondent which the Plaintiff/Applicant is dealing with for the market of Kapenguria town all the way to Lodwar town, Lokichogio and all the towns thereafter to the border of Kenya and South Sudan pursuant to the agreement dated 1st January, 2022 and the Addendum dated 1st January, 2024 between the Plaintiff/Applicant and the Defendant/Respondent
 - b. That pending the hearing and determination of the intended Arbitration proceedings between the Plaintiff/applicant and Defendant/Respondent, an order of injunction be and is hereby issued restraining the Defendant/Respondent, whether by itself, its agents, servants and/or any other person acting on its behalf, from terminating, interfering with or in any way appointing any other additional distributor within the Kapenguria, Lodwar Market which represents Kapenguria town, Lokichogio and all other towns to the boarder of Kenya and South Sudan.
 - c. That pending the hearing and determination of the intended Arbitration proceedings between the Plaintiff/Applicant and the Defendant/respondent an order be and is hereby issued directing the Respondent to continue supplying the Plaintiff/Applicant with dairy products, processed milk, milk powder, butter and ghee and others as agreed in accordance with the terms of the Distribution Agreement dated 1st January, 2022 as amended by the Addendum dated 1st January, 2024.
 - d. The costs of the application are ordered to be in the cause and shall abide the outcome of arbitration proceedings.
 - e. This file shall be mentioned on 5th February, 2026 to confirm progress made before the arbitral tribunal.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF OCTOBER, 2025.

PATRICK J O OTIENO

JUDGE

