Safaricom Plc v Popote Innovations Limited (Commercial Arbitration Cause E005 of 2015) [2025] KEHC 16225 (KLR) (Commercial and Tax) (6 November 2025) (Ruling)

Neutral citation: [2025] KEHC 16225 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL ARBITRATION CAUSE E005 OF 2015

PM MULWA, J

NOVEMBER 6, 2025

BETWEEN

SAFARICOM PLC ..... APPLICANT

AND

POPOTE INNOVATIONS LIMITED ..... RESPONDENT

RULING

1. This is a ruling in respect of two applications. The first is the Notice of Motion dated 20th January 2025 by the Applicant, Safaricom PLC, brought under Sections 7 and 35 of the *Arbitration Act*, 1995 and Rule 7 of the Arbitration Rules, 1997. The Applicant seeks to set aside the Arbitral Award dated and published on 29th November 2024 by Mr. Paul Ngothi, HSC, FCIArb, the Sole Arbitrator, on grounds that the award dealt with disputes not referred to arbitration, was in conflict with public policy, and addressed issues not contemplated by the parties.

2. The second is the Chamber Summons application dated 26th February 2025 by the Respondent, Popote Innovations Limited ("PIL"), brought under Section 36(1) of the *Arbitration Act* and Rules 4(1), 5 and 9 of the Arbitration Rules. The Respondent seeks that the Final Award dated 29th November 2024 be recognized and adopted as a judgment of this Court and that a decree issue in its terms.

3. The Applicant's case is supported by the affidavit of Daniel Mwenja Ndaba, Senior Legal Manager, Litigation. It is contended that the central issue before the Arbitrator concerned whether the Applicant was obligated to pay a "revenue share" arising from a proposed Partnership Agreement of 2018 between the parties.

4. According to the Applicant, the Partnership Agreement had an effective date dependent on execution by both parties. Since the Applicant never executed the agreement, it never came into force. Following

a change of business strategy, the Applicant decided not to proceed with the project but compensated the Respondent for its development costs in full as per clause 4.2 of a Settlement Agreement executed on 11th September 2020. That payment, made on 15th October 2020, allegedly extinguished all further obligations.

5. The Applicant avers that the Respondent later made an unjustified demand for Kshs. 46,323,789.60 and subsequently claimed a monthly "revenue share" of Kshs. 46,176,196.60 over 15 months. The Applicant launched its own M-Pesa Consumer and Business Super Applications independently, which the Respondent wrongly alleged to resemble the jointly conceptualized solution.

6. The Applicant contends that since the proposed Partnership Agreement was never executed, the arbitration clause contained therein was not binding. Consequently, the Arbitrator erred in assuming jurisdiction and in finding that the Agreement was valid and binding. It is further argued that the award, based on speculative financial projections and extended to 24 months, exceeded the reference and was contrary to public policy.

7. The Respondent, through the affidavit of its Director, Samuel Gathungu Wanjohi, sworn on 18th February 2025, contends that the Partnership Agreement was in fact executed in April 2018, confirmed by the Applicant's email of 3rd May 2018. The Respondent delivered the customized "Popote Pay Solution" on 8th May 2018, thereby fulfilling its contractual obligations. The Applicant, however, breached the Agreement by unilaterally abandoning the launch.

8. The Respondent maintains that the Partnership Agreement was binding and automatically renewable unless properly terminated. The Settlement Agreement of September 2020 merely addressed reimbursement of development costs under Clause 4.2 and did not discharge Safaricom from its performance obligations.

9. The Respondent submits that when the Applicant launched its "M-Pesa Super App" and "M-Pesa Business App" in June 2021, incorporating features from the jointly developed solution, it became liable for breach of the Partnership Agreement. The dispute was properly referred to arbitration under the arbitration clause contained in the Agreement.

10. The Respondent further contends that the Applicant's jurisdictional challenge was dismissed in a detailed Jurisdictional Challenge Award dated 23rd May 2023, which the Applicant never sought to set aside under Section 35 within the prescribed time. Consequently, the Tribunal's jurisdiction was conclusively established.

11. The Respondent asserts that the Arbitrator acted within the scope of reference, found the Applicant in breach, and awarded conservative damages equivalent to one year of projected revenue, rejecting specific performance as impractical. The Respondent urges that the present application is a disguised appeal and an abuse of process.

Analysis and determination

12. I have considered the rival positions by the parties herein. The issues for determination are:a. Whether the arbitral award is liable to be set aside

Whether the award should be recognized and enforced under Section 36 of the Act.

13. On whether the award should be set aside, the law governing arbitral awards is settled. Section 32A of the *Arbitration Act* provides that an arbitral award is final and binding upon the parties and can only be set aside on the narrow grounds stipulated under Section 35. The Court is not permitted to sit

on appeal or review the merits of the award. (See Christ for All Nations v Apollo Insurance Co. Ltd [2002] 2 EA 366 and Synergy Industrial Credit Ltd v Cape Holdings Ltd [2020] eKLR).

14. The foregoing position is an amplification of Section 10 of the *Arbitration Act*, which provides as follows:

> " Except as provided in this Act, no Court shall intervene in matters governed by this Act."

15. The Applicant invokes section 35 of the *Arbitration Act*, which uses deliberate and carefully chosen words and allows the setting aside of an award where Section 35(2) (a) (iv) thereof provides thus:

> " ...the arbitral award deals with a dispute not contemplated by or falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration; provided that the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside."

16. The Applicant's contention is that the Arbitrator exceeded his jurisdiction by determining disputes under an agreement that was never executed and therefore inoperative.

17. Section 4 of the *Arbitration Act* defines what constitutes a valid arbitration agreement. It provides:

    1. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

    2. An arbitration agreement shall be in writing.

    3. An arbitration agreement is in writing if it is contained in -

        (a) a document signed by the parties; or

        (b) an exchange of letters, telex, telegrams or other means of communication which provide a record of the agreement; or

        (c) an exchange of statements of claim and defence in which the existence of an arbitration agreement is alleged by one party and not denied by the other.

18. Arbitration is a consensual process. Without mutual assent, there can be no valid arbitration agreement. This was emphasized in Niazsons (K) Ltd v China Road & Bridge Corporation (Kenya) [2001] eKLR, where the Court of Appeal held:

> " An arbitration agreement is founded on consent. It is not the form but the mutual assent in writing that confers jurisdiction on the arbitral tribunal."

19. The evidence before this Court shows that the alleged Partnership Agreement was never executed by Safaricom. Nor is there any exchange of correspondence or other written instrument evidencing an intention by Safaricom to submit disputes to arbitration. The alleged email of 3rd May 2018, produced by the Respondent, merely acknowledged receipt of the draft agreement but did not signify execution or assent. Execution by both parties was an express precondition to its effectiveness.

20. Despite this, the Arbitrator found that the Agreement was binding by implication through conduct and correspondence. That finding, however, disregards the mandatory provisions of Section 4 and the express contractual term conditioning effectiveness on execution by both parties.

21. Accordingly, the Court finds that the arbitration agreement was not validly concluded within the meaning of Section 4(3). Without such an agreement, the Arbitrator lacked jurisdiction to entertain the dispute. The jurisdiction of an arbitral tribunal is derived exclusively from the arbitration agreement. This principle was restated by the Court of Appeal in Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR, where it held that a tribunal cannot arrogate to itself jurisdiction that the parties never conferred.

22. In Grain Limited v TSS Grain Millers Limited [2002] eKLR, it was held that:

> " A contract or arbitral award will be against public policy of Kenya if it is immoral or illegal or that it would violate in clear unacceptable manner the basic legal and/or moral principles or values in the Kenyan society. It has been held that the word illegal here would hold a wider meaning than just "against the law". It would include contracts or contractual acts or award which would offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive."

23. Since the arbitration clause was not binding upon the Applicant, any reference made pursuant to it was without jurisdiction. Consequently, the proceedings and the resulting award are a nullity, ab initio.

24. Further, the Arbitrator's award introduced a claim for 24 months' revenue share despite the pleadings limiting the claim to 15 months, thereby exceeding the scope of reference.

25. The principles articulated by Mustill and Boyd in their book, Commercial Arbitration, 2nd Edition - at page 554 are that:

> " An award will be entirely void if the parties never made a binding arbitration agreement; if the matters in dispute fell outside the scope of the agreement; if the arbitrator was not validly appointed, or lacked the necessary qualifications; or if the whole of the relief granted lay outside the powers of the arbitrator. The award will be partially void if the relief granted related to a matter which was not referred or if for some other reason it was outside the jurisdiction of the arbitrator. In all these situations, the primary active remedy is for the Court to declare that the award is void, in whole or in part."

26. In Christ for All Nations v Apollo Insurance Co. Ltd [2002] 2 EA 366, the Court dwelt on the parameters of public policy in the following terms:

> " ...I take the view that although public policy is a most broad concept incapable of precise definition, ... an award will be set aside under section 35(2) (b) (ii) of the *Arbitration Act* as being inconsistent with the Public Policy of Kenya if it was shown that it was either (a) inconsistent with *the constitution* or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality. The first category is clear enough..."

27. While the Court recognizes the high threshold set in the above case, an award founded on an invalid arbitration agreement and speculative financial assumptions would indeed offend the public policy of Kenya by undermining the sanctity of consent in contractual relations.

28. The award, based on speculative financial assumptions and an unsigned agreement, equally offends public policy as contemplated in Christ for All Nations v Apollo Insurance (supra).

29. The Tribunal's conclusion that the Applicant's subsequent mobile applications, M-Pesa Super App and M-Pesa Business App, were "similar" to the envisaged Popote Pay project was unsupported by expert or factual evidence. It was a speculative assumption forming the basis of a hypothetical damages computation, which fails the reasonableness test under public policy principles.

30. The Court finds that the arbitrator's award, predicated on an unsigned and inoperative contract, and containing speculative damages unrelated to the evidence, offends the principles of contractual certainty, legality, and fairness thereby conflicting with the public policy of Kenya.

31. The Respondent's argument on finality under Section 32A cannot override express statutory grounds for setting aside under Section 35. Party autonomy does not immunize an award rendered outside jurisdiction or based on non-existent contractual obligations.

32. This Court is therefore persuaded that the arbitral award dated 29th November 2024 was made in excess of jurisdiction and is inconsistent with the public policy of Kenya.

33. In light of the foregoing, I find that the Applicant's Notice of Motion dated 20th January 2025 has merit and is hereby allowed. The Final Arbitral Award dated 29th November 2024 and published by Mr. Paul Ngothi, HSC, FCIArb is hereby set aside in its entirety.

34. Consequently, the Respondent's Chamber Summons dated 26th February 2025 seeking recognition and enforcement of the said award under Section 36 of the Act is dismissed.

35. Each party shall bear its own costs.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF NOVEMBER 2025.

P.M. MULWA

JUDGE

In the presence of:

Mr. Ngatia, SC for Applicant (Safaricom PLC)

Mr. Mabachi for Respondent (Popote Innovations Limited)

Court Assistant: Carlos