

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
MISC. APPLICATION NO. E954 OF 2025

BETWEEN

CHECHE TELECOMMUNICATIONS LIMITED..

.....**APPLICANT**

AND

SAFARICOM PLC.....

RESPONDENT

RULING

Introduction and Background

1. By an application dated 18th September 2025, the Applicant seeks interim measures of protection to stay the implementation of the Respondent's Official Notice dated 29th August 2025 concerning the new zoning for fibre internet in Nairobi. It further seeks to restrain the Respondent from restricting the Applicant's operations in the Nairobi CBD Downtown Area and from blocking its access to the Respondent's Dealer Portal. These orders are sought pending the hearing and determination of the intended arbitration and the Applicant thus seeks an order directing that the dispute be referred

to arbitration in accordance with Clause 7 of their Framework Agreement dated 16th April 2025.

2. This application is supported by grounds on its face and the affidavits of the Applicant's director, Kennedy Orangi Ondieki, sworn on 22nd September 2025, 14th November 2025 and 1st December 2025. It is opposed by the Respondent through the Grounds of Opposition dated 23rd October 2025 and the replying affidavit of its Legal Counsel, Cerere Kihoro sworn on 11th November 2025.
3. After the filing of the application, the court granted the Applicant *ex parte* interim orders on 23rd September 2025 pending the hearing of the application. The Respondent seeks to set aside and/or discharge these orders through the application dated 13th November 2025 that has been responded to by the Applicant through the replying affidavit of Kennedy Ondieki Orangi sworn on 18th November 2025. The applications have been canvassed by way of written submissions which are on record and which together with the pleadings I have considered and I will be making relevant references to in my analysis and determination below.

Analysis and Determination

4. From the parties' submissions, the court is being called to determine the following issues:

- 1) *Whether the court has jurisdiction to grant the orders sought in the Applicant's application.*
- 2) *Whether the court should issue the interim measures of protection sought by the Applicant pending the hearing and determination of the intended arbitration.*
- 3) *Whether the court should order that this matter be referred to arbitration.*
- 4) *Whether the court should set aside the ex parte interim orders of 23rd September 2025.*

Jurisdiction of the court to grant the orders sought by the Applicant

5. The Respondent argues and submits that the Court lacks jurisdiction to grant the orders sought under **section 7** of the **Arbitration Act** for reasons that the genuine, executed Agreement between the parties does not contain an arbitration clause and that arbitration is a creature of contract, and without a mutual agreement in writing, the Court cannot refer the matter to arbitration or issue interim protection. The Respondent asserts the Applicant relied on an unexecuted, materially altered version of the Agreement that falsely included an arbitration clause, that the

Chartered Institute of Arbitrators already rejected the Applicant's request to appoint an arbitrator because the contract only provides for negotiation and mediation.

6. On its part, the Applicant maintains that a binding arbitration agreement exists despite the Respondent's denials and that while the original draft may have differed, the Applicant submits that an arbitration clause was incorporated into the contract via a Dealer Bulletin dated 29th March 2024. That Clause 7.1.2 of the Framework Agreement states that "Partner bulletins" issued by the Respondent automatically form part of the agreement and the Applicant asserts this meeting the "in writing" requirement of **section 4** of the ***Arbitration Act***, as it was recorded via email and subsequently signed.
7. The Applicant submits that the Court has clear jurisdiction to intervene as under **section 7** of the ***Arbitration Act***, the Court is empowered to grant interim measures of protection before or during arbitral proceedings. Thus, the Applicant contends that the Court must intervene to preserve the subject matter so that future arbitration proceedings are not rendered nugatory.
8. **Section 4** of the ***Arbitration Act*** provides as follows:

4. Form of arbitration agreement

(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;

(b) an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement; or

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

(4) The reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

9. The Applicant has provided meeting minutes showing that on 13th February 2024, the parties discussed and agreed to consolidate the dispute resolution clauses to allow parties to adopt the mechanism they wanted, including arbitration. Critically, on 29th March 2024, the Respondent formalized this agreement by issuing Dealer Bulletin No. 1-2024 where Item 7 of this bulletin explicitly states that the new Clause 19 would allow parties to seek legal remedies, "*whether arbitration or litigating in a court of competent*

jurisdiction." It also states, "*Nothing in this Agreement shall prevent or delay a party from referring any dispute to arbitration.*"

This bulletin was sent via email from the Respondent's official address to its partners and in my view, this constitutes an "*exchange of letters... electronic mail or other means of telecommunications which provide a record of the agreement*" under **section 4(3)(b)** above. The record clearly shows the Respondent communicating the terms of the arbitration agreement to the Applicant.

10. Furthermore, Clause 7.1.2 of the main Framework Agreement states that "*Partner Bulletins*" issued by the Respondent "*...will automatically form part of the Agreement.*" Therefore, the Dealer Bulletin of 29th March 2024, which contains the arbitration clause, was automatically incorporated into the Agreement by reference. I find that even if the base Agreement signed on 16th April 2024 did not physically contain the arbitration clause, the binding terms of that contract explicitly imported the Bulletin and its arbitration clause into the Agreement. The Applicant argued that the parties' contract is a composite of several documents. It deponed that it signed every page of the full contract on 16th April 2024 and returned it to the Respondent. The fact that the Respondent's counterpart signature was to be applied electronically as permitted

by Clause 21 does not invalidate the Applicant's signed acceptance of the terms, which included the incorporated Bulletin.

11. I find that the Applicant has provided a plausible, documented, and chronologically consistent narrative that it negotiated for an arbitration clause, the Respondent agreed and communicated this agreement via an official Bulletin which the Agreement itself says forms part of the contract and it then signed the contract based on those terms.

12. The Respondent argued that the version of the Agreement it has, which it claims is the authentic one, contains no arbitration clause as Clause 23 only provides for negotiation and mediation. It implicitly argues that a bulletin cannot override the explicit signed terms of the main agreement and further points out that even if an arbitration clause exists, Clause 23 of the agreement requires the parties to first attempt negotiation and then mediation before any arbitration. It states that the Applicant failed to do this before approaching the court and the Chartered Institute of Arbitrators, rendering the attempt to invoke arbitration premature. In my view, the Respondent's narrative relies on the court accepting that the version of the contract it has presented is the sole, complete, and authentic Agreement, and that the bulletin, meeting minutes, and the Applicant's consistent course of conduct are either irrelevant or

misrepresent the facts. This cannot be the case because the Dealer Bulletin is a written record from the Respondent itself, sent to the Applicant, that clearly sets out an agreement to allow arbitration. Because the main Agreement at Clause 7.1.2 specifically incorporates such Bulletins, the arbitration clause became a part of the binding contract between the parties. The Applicant's subsequent signing of the agreement affirms their acceptance of the contract as a whole, including the incorporated terms from the Bulletin. This demonstrates that an arbitration agreement exists

13. The Respondent's argument regarding the failure to follow pre-arbitration steps of negotiation and mediation is a separate issue concerning the procedural admissibility of the arbitration claim, not the existence of the arbitration agreement itself. The short of it all is that there is a valid arbitration agreement between the parties that is binding upon the Respondent and that the court has jurisdiction to grant the orders sought by the Applicant and refer the matter to arbitration.

Interim orders of protection

14. As submitted by the parties, **section 7** of the ***Arbitration Act*** grants the court the power and jurisdiction to provide interim measures of protection in arbitration proceedings as follows:

7. Interim measures by court

(1) 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.

(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

15. One of the leading cases that outlined the principles governing the grant of interim measures of protection is **Safaricom Limited v Ocean View Beach Hotel Limited, Salim Sultan Moloo & Alsai (K) Limited [2010] KECA 346 (KLR)** by the Court of Appeal where Nyamu JA., observed as follows:-

By determining the matters on the basis of the [GIELLA] 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.

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An interim measure of protection such as that sought in the matter before us is supposed to be issued by the court under section 7 in support of the arbitral process not because it satisfies the civil procedure requirements for the grant of injunctions as the High Court purported to do in this matter.

To illustrate the point Article 26-3 of the UNICTRAL Arbitration rules states:-

“A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of the agreement.”

Section 7 of the Arbitration Act is modeled on this. However, in the matter before us and with due respect, the Commercial Court (Koome, J.) contravened the above principles by firstly either declining to issue any measure of protection or granting such a measure. The Court also failed to correctly address the principles for the issue of

any such measures and worse still, the supreme court took over the subject matter altogether and ruled on the merits of the subject matter of the arbitration thereby prejudicing the outcome of the arbitration. This explains why in the special circumstances of this matter, this Court must take extraordinary measures to rectify an extraordinary illegality. Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the Court or the tribunal - such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo measures intended to provide security for costs and injunctions. 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.*
- [Emphasis mine]

16. I have already found that there exists an arbitration agreement between the parties. The next issue is to determine whether the subject matter of arbitration is under threat. The entire dispute revolves around the Respondent's decision to implement a new zoning system that would effectively transfer the Applicant's established customer base and operational territory in Nairobi CBD to another dealer. The subject matter of the intended arbitration is quite literally, the Applicant's business in that zone and its customer relationships. In my view, this "threat" is not hypothetical; it is imminent and specific. The Respondent's notice of 28th November 2025, which the Applicant has attached in its latest deposition, confirms the threat by temporarily suspending the zoning restrictions. This action by the Respondent is a double-edged sword as it is an admission that the threat is real and that it has the power to implement it and I am in agreement with the Applicant that its temporary nature appears to be crafted in a manner that allows the Respondent to reinstate the zoning restrictions immediately after these proceedings are withdrawn and proves that the subject matter remains under imminent threat the moment these proceedings conclude or if the court does not act.

17. I find that the appropriate measure is precisely what the Applicant has sought which is an order maintaining the status quo. The special circumstances here are that the Respondent has already demonstrated its intention to change the status quo by issuing the zoning notice and has the immediate power to do so as confirmed by its own temporary suspension. It is not lost to me that an assessment of the merits at this stage is not about finally deciding the dispute as to whether the zoning is a breach of contract, but about whether the Applicant's case has sufficient substance to warrant protection. I find that the Applicant has presented a strong prima facie case of significant investment, a successfully built business, and a contractual relationship that is now threatened by a unilateral decision it argues is unfair and opaque.

18. My findings above dispose of the other issues that this matter is now ripe for referral to arbitration and that the interim orders in place are now confirmed with the consequence that the Respondent's application dated 13th November 2025 is dismissed.

Conclusion & Disposition

19. In the foregoing, I allow the Applicant's application dated 18th September 2025 and issue the following dispositive orders:-

1) An interim measure of protection be and is hereby issued staying the implementation and operation of

the Respondent's Official Notice dated 29th August 2025 concerning the Nairobi Region Zoning for Internet Acquisition on Fibre (FTTX).

- 2) Consequent to order 1) above, the Respondent, whether by itself, its employees, agents, or any persons claiming through it, be and is hereby restrained from restricting the Applicant's operations within the Nairobi CBD Downtown Area and from blocking or restricting the Applicant's access to its Safaricom Dealer Portal pending the hearing and determination of the intended arbitration, or until further orders of the court or the arbitral tribunal**
- 3) The dispute between the parties is hereby referred to arbitration in accordance with the arbitration clause contained in the parties' Channel Partner Framework Agreement dated 16th April 2024, as read together with Dealer Bulletin No. 1-2024 dated 29th March 2024.**
- 4) For the expeditious conclusion of the dispute, the parties are hereby directed to agree on the appointment of an arbitrator within 21 days from the date hereof. In the event of a failure to agree within that period, either party is at liberty to make an application to the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) for the nomination of an arbitrator in accordance with the terms of the Agreement.**

5) Given the nature of the proceedings and the relationship between the parties, each party shall bear its own costs for their respective applications.

DATED SIGNED and DELIVERED virtually at NAIROBI this 19TH DAY OF MARCH 2026

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Ms. Ooga for the Applicant.
2. Ms. Ngonde for the Defendant/ Respondent.
3. Amos- Court Assistant

ORIGINAL