Mobile One to One Ltd v Safaricom Limited (Miscellaneous Civil Application E703 of 2024) [2025] KEHC 7637 (KLR) (Commercial and Tax) (30 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7637 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS CIVIL APPLICATION E703 OF 2024

RC RUTTO, J

MAY 30, 2025

BETWEEN

MOBILE ONE TO ONE LTD .... APPLICANT

AND

SAFARICOM LIMITED .... RESPONDENT

RULING

1. Before this court for determination is a notice of motion application dated 29/08/2024 seeking the following reliefs:

   a. Spent

   b. Spent

   c. That this Honourable Court be pleased to grant an interim measure of protection in the nature of a stay of the impugned notice issued by the Respondent on 26/08/2024 pending the hearing and determination of this application, inter parties.

   d. That this Honourable court be pleased to grant an interim measure of protection in the nature of a stay of the impugned notice issued by the respondent on 26/08/2024 pending the hearing and determination of arbitration.

   e. That this Honourable Court be pleased to grant an interim measure of protection in the nature of a stay of the impugned notice issued by the respondent on 26/08/2024 and preserve the express contractual intention of the parties for continuity of contractual obligations in terms of clause 22.2 (c) and (d) of the Dealer Agreement dated 09/02/2021 pending the resolution of the dispute between the parties through arbitration.

f. That this Honourable Court be pleased to grant an interim measure of protection in the nature of stay of the impugned notice issued by the respondent on 26/08/2024 and preserve the express contractual intention of the parties for continuity of contractual obligations in terms of clause 22.2 (c) and (d) of the Dealer Agreement dated 30/09/2019 pending the hearing and determination of this Application inter parties.

g. That this Honourable Court be pleased to direct that the dispute between the parties be referred to arbitration in accordance with clause 22.2 (a) – (e) of the Agreement dated 09/02/2021.

2. The application is supported by the sworn affidavit of Feisal Ahmed, a director of the respondent who averred that the respondent has illegally and irregularly issued the notice dated 26/08/2024, purporting not to renew the enterprise dealership agreement with effect from 01/09/2024. The effect of the impugned notice is that it's business shall permanently shut down and the applicant shall be in breach of its contractual and financial obligations to third parties. It outlines tenders with various institutions such as Communications Authority of Kenya, USAID, Kenya Prisons Project and Posta Kenya which it states the respondent has been fully aware of.

3. The applicant states that it has made massive investments to the tune of Kshs.50,000,000.00 in running the enterprise dealership which investments include but is not limited to:

a. Obtaining funding through bank loans, personal savings, profit plough backs and borrowings.

b. Huge capital investments towards setting up the infrastructure to facilitate efficient servicing of the enterprise dealership with the respondent.

c. Leasing of premises, rentals for the businesses.

d. Engaging numerous employees and agents to run the business.

4. The applicant also avers that it has tried to amicably resolve the matter in vain and has initiated the arbitration process vide a letter dated 27/08/2024 requesting for an appointment of an arbitrator. The applicant further states that it is ready and willing to have the dispute referred to arbitration for full and final determination as contractually envisaged in the agreement.

5. The applicant invokes Clause 22.2 (a) of the Enterprise Dealer Agreement titled Dispute Resolution which states that; 'That Parties shall use their best efforts to settle amicably, any disputes arising from or in connection with this agreement or the interpretation thereof'. Clause 22.2 (a) of the enterprise dealer agreement stipulates that any disputes arising between the parties that cannot be amicably settled shall be referred to arbitration. The applicant also invokes the provisions of clause 22 (d) which provides that pending final settlement or determination of a dispute by arbitration, the parties shall continue to perform their subsisting obligations under the Agreement.

6. The Respondent opposed the application vide replying affidavit dated 1st October 2024 sworn by Daniel Mwenja Ndaba, the senior manager in the litigation Department within the corporate Affairs Division of the Respondent. The Respondent concedes that indeed it entered into a distribution enterprise agreement with the respondent and that the agreement provides an arbitration clause and terms to the effect that a party can seek an urgent injunctive relief from a court having jurisdiction, and that during the pendency of the dispute parties would still continue to perform their subsisting obligations.

7. The respondent however states that the parties ought to be guided by the privity of contracts and as such the court cannot rewrite the terms of the contract between the parties. The respondent specifically

avers that on the strength of Clause 19 of the Agreement on 26th June 2024 it issued a 30-day notice on the non-renewal of the dealership agreement; which notice can be issued by either party seeking to terminate the contractual relationship.

8. The respondent denies being aware of the businesses the applicant is involved in and maintains that the decision not to renew the dealership agreement was informed by the applicant's failure to trade as per the dealer operating standards; which failure entitled it to terminate the agreement at its discretion upon giving notice to the applicant. Further, that the applicant is aware that its operations were below the contractual agreement pursuant to internal audits and the failure to comply with the terms and conditions set out in the agreement.

9. The respondent maintains that the provisions of clause 22 (d) of the dealership agreement meant that parties under the agreement shall continue discharging their obligations pending the hearing and determination of the dispute. The instant application is thus inherently an abuse of the court process and therefore should be dismissed. As to the operational costs of Kshs.50,000,000.00 incurred by the applicant, the respondent states that it is a stranger to the said sums and relies on the import of clause 17 of the Dealership agreement that states that the respondent shall be excluded from any liability to the dealer or any other person because of any failure on the part of the dealer to any contract entered into with third parties.

10. The respondent stated that it shall continue to suffer prejudice since the granting of the orders will expose the respondent to economic losses duly noting that the alluded to subject matter is in no need of any imminent protection by dint of clauses 22 (d) of the Dealership Agreement dated 9th February 2021.

11. The respondent also filed a supplementary affidavit dated 6th November 2024 Sworn by Daniel Mwenja Ndaba wherein he reiterated that the contract renewal was dependent of the performance of the applicant which in this instance has been dwindling. That the notice of non-renewal was issued following unsuccessful negotiations between the parties, the appeal has also been wholly declined. The respondent denied lack of good faith on its part and restated that it continues incurring losses stemming from its contractual relationship between itself and the applicant.

12. In response to the respondent assertions, the applicant filed a further affidavit dated 31st October 2024 sworn by Feisal Ahmed wherein he averred that the following the issuance of the notice of non-renewal of the contract it appealed the notice vide a letter dated 13th June 2024. He reiterated that its livelihood is directly tied to the successful operation of the dealership agreement. The non-renewal of such an agreement poses a threat of permanent loss and business shutdown of the applicant. The applicant denies to participating in undercuts deals as alleged by the respondent and further notes that the respondent is the controller of the dealer portal and thus has access to data and information pertaining to the applicant's business. The applicant also states that as per clause 5.2 of the dealership agreement the it will be denied access of the dealer's portal, if the orders sought herein are not granted. The applicant states that he has complied with the terms of the agreement and has recently received a response from the Chartered Institute of Arbitration vide a letter dated 5th September 2024 on the appointment of an arbitrator in relation with the dispute.

13. The application was canvased by way of submissions. The applicant filed submissions dated 15th October 2024 listing two issues for determination namely (i) Whether the Honourable Court should grant conservatory orders (ii) Whether the matter should be referred to arbitration.

14. On whether this court should grant conservatory orders, the applicant submits that a conservatory order will preserve the status quo and allow for the arbitration proceedings to unfold effectively and

would also be in compliance with Clause 22.2 (d) which allows parties to continue trading pending the final settlement of a dispute, granting this measure will not only protect the applicant's interests but also uphold the integrity of the arbitration proceedings. The applicant also submits that it is not urging the court to rewrite the terms of the contract but seeking the enforcement of its terms. In this regard the applicant relies in the decisions in Safari Plaza Ltd vs. Total (K) Ltd (2018) (eKLR), Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others [2010] eKLR, Seventy Twenty Investments Limited vs Sandhoe Investments Kenya Limited, (2013) eKLR and CMC Holdings Ltd & Another vs Jaguar Land Rover Exports Ltd (2013) eKLR which provide a comprehensive guide for the court to consider before issuing interim measures of protection.

15. On whether the matter should be referred to arbitration the applicant relies on clause 22.2 of the agreement and the decision in Titus Kitonga & another v Total Kenya Limited & another [2018] eKLR to submit that the dispute is within the ambit of arbitration as provided in the dealership agreement dated 09/02/2021.

16. The Respondents filed submissions dated 17th October 2024 setting out three issues for determination namely; (i) Whether the applicant has met the requisite threshold for the grant of an interim stay of the impugned notice issued on 26th August 2024 and or an interim measure of protection pending the hearing and determination of the arbitration process (ii) Whether the matter should be referred to arbitration and (iii) Who shall bear the costs of the application.

17. On whether the applicant has met the requisite threshold for the grant of an interim stay of the impugned notice issued on 26th August 2024 and or an interim measure of protection pending the hearing and determination of the arbitration process the respondent submits that the import of clause 22.2 (d) is clear that parties to the dealership agreement will continue to perform their obligations awaiting the outcome of the settlement and determination of the declared dispute. There is no urgency in seeking the interim relief sought and hence no need for the invocation of Section 7 of the *Arbitration Act*. The respondent opines that the status quo obtaining prior to the date of the termination of the agreement, still subsists by dint of clause 22.2 (d) of the dealership Agreement.

18. The Respondent relied on the decisions in Mukuha v Mukuha & 3 Others (Civil Suit E267 of 2023) [2024] KEHC 2693 (KLR) (Commercial and Tax) (15 March 2024) (Ruling) and Coast Apparel EPZ Limited v Mtwapa Epz Limited & another [2017] eKLR to urge that the interim measures cannot be issued in a vacuum; the orders are not automatic and ought to be issued when parties have commenced the process for putting in place an arbitral panel or arbitration proceedings have already started.

19. On whether the matter should be referred to arbitration the respondent submits that there exists no dispute to be determined by way of arbitration, given the fundamental principal of freedom of contract. However, in the most unlikely event that the Court finds that there is a dispute, then the matter be referred to arbitration subject to strict timelines. The rely on the decision in James & Catherine Holdings Ltd v Thika Greens Ltd & another (Environment & Land Case E003 of 2024) [2024] KEELC 1690 (KLR) (20 March 2024) (Ruling) to infer party autonomy and the need for courts to have no business remaking parties' contracts.

Analysis and Determination

20. The applicant and respondent entered into an Enterprise Dealer Agreement on 9th February 2021 with the respondent appointing the applicant as a distributor of its telecommunications and mobile money products and services for, corporates, the small medium enterprises (SME's) and single office, home office users (SOHO's) target market. It is not in dispute that the applicant received a notice of non-

renewal of contract dated 26/08/2024 wherein the respondent seeks to terminate the enterprise dealer agreement.

21. The respondent has urged this Court to find that no dispute exists between the parties and to invoke the provisions of Section 6(a) of the *Arbitration Act* by determining that the arbitration agreement is incapable of being performed. It asserts that the termination of the agreement was undertaken in accordance with due process as contemplated in the contract. Conversely, the applicant contends that the termination was unilateral, unjustified, and effected without reasonable cause. The applicant further alleges that the respondent intends to usurp the tender agreements it had entered into with third parties, thereby undermining its status as a duly appointed dealer.

22. The dispute between the parties center around the termination of a dealership agreement, with both parties interpreting Clause 22.2 (d) in relation to continued obligations during the arbitration process. The issue is whether the applicant is deserving an interim measure of protection in the nature of a stay of the impugned notice issued by the respondent on 26/08/2024 pending the hearing and determination of arbitration.

23. The jurisdiction of this Court to interim measures is provided under Section 7 of the *Arbitration Act* which provides as follows:

    (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.

24. The Court in Safaricom Limited vs Ocean View Beach Limited & 2 Others [2010] eKLR laid out the guiding principles a court should consider in issuing interim measures of protection pending Arbitration proceedings when it held as follows;

> " 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:-
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> 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?"

25. The first issue for determination is whether an arbitration agreement exists between the parties. In accordance with Section 4 of the *Arbitration Act*, an arbitration agreement may be contained in a separate document or incorporated within the terms of a broader contract. It is trite law that an arbitration agreement need not be in a stand-alone instrument; it may be a clause embedded in a substantive contract. Additionally, parties to a contract that does not expressly provide for arbitration may, by mutual consent, submit their dispute to arbitration.

26. In this instance Clause 22.2 (a) of the Enterprise dealer Agreement provides as follows:

    a. If the dispute has not been settled pursuant to the amicable settlement process in clause 22.1 within 30 days or such longer period as the parties may agree then, a party may elect to commence arbitration. Such arbitration shall be referred to arbitration by a single arbitrator to be appointed by agreement between the Parties or in default of such agreement within 14 days of notification of a dispute, the arbitrator shall be appointed upon the application of either party, by the chairman for the time being of the Kenya branch of the Chartered Institute of Arbitrators.

27. The presence of an arbitration clause in the Enterprise Dealer Agreement dated 9th February 2021 clearly stipulates the parties' intention to resolve disputes arising from or in connection with the agreement through arbitration. This clause constitutes a binding arbitration agreement as envisaged under the law.

28. The next issue is whether the subject matter of arbitration is under threat. The respondent contends that the provisions of clause 22.2 (d) provides enough protective measures to the applicant hence there is no need for this court to issue an injunctive remedy as a protective measure. The applicant on his part contends that upon the termination of the contract by the respondent there is reasonable fear that he will be denied access of the dealer's portal as per clause 5.2 of the parties' agreement.

29. Clause 22 (d) of the agreement of the parties provides that pending final settlement of a dispute, the parties shall continue to perform their subsisting obligations hereunder. Clause 22 (e) also provides that nothing in this agreement shall prevent or delay a party seeking urgent injunctive or interlocutory relied in a court having jurisdiction. The provisions of clause 5.2 relates to the dealer portal, assignment of personnel and their responsibilities. The section provides as follows:

    a. in addition to the Dealer's obligations under clause 5.1. the dealer shall provide Safaricom with a list of persons who are authorized to place dealer orders through the dealer portal ("Authorised Personnel"). The authorized personnel are expected to comply with the Code of Conduct.

    b. It shall be the responsibility of the dealer to:

        i. comply with any password security policies or instructions issued by Safaricom to the dealer in respect to the dealer portal;

        ii. maintain the security and confidentiality of passwords and the credentials used to access the dealer portal;

        iii. put in place appropriate measures to prevent unauthorized access to the dealer portal

    c. Except where the dealer has notified Safaricom in writing of changes to authorized personnel or where the dealer has requested Safaricom to disable the Dealer's access to the Dealer portal, all instructions carried out on the dealer portal through the use of the dealers credentials (user

names and passwords) shall be deemed to be done with the authority of the Dealer and the Dealer shall be liable for all such transactions.

30. A reading and interpretation of these provisions does not reveal an imminent risk that the applicant's access to the dealer portal will be unilaterally disabled following the notice of non-renewal or during the pendency of arbitration proceedings. To the contrary, Clause 22(d) safeguards the continuity of contractual obligations—including access to and use of the dealer portal—pending the outcome of arbitration. It is thus apparent that the subject matter of the dispute is not in immediate jeopardy and is protected by the contractual framework mutually agreed upon by the parties.

31. The remaining issue is whether, in the specific circumstances of this case, an injunctive remedy ought to issue. The applicant submits that failure to grant injunctive relief will render the arbitration proceedings nugatory and occasion irreparable loss, particularly due to ongoing obligations to third parties. However, a careful reading of the agreement demonstrates that once a dispute is formally raised and referred to arbitration—as has occurred in this case—the contractual status quo is to be maintained. This includes the continued performance of subsisting obligations, thereby preserving the applicant's operational capacity. The court is therefore persuaded that the need for an injunctive remedy has not been sufficiently established, as the risk of prejudice has been adequately mitigated through the agreement's own dispute resolution mechanism clause.

32. Both parties have invited this Court to determine whether the dispute should be referred to arbitration. The applicant claims a breach of contract by the respondent who has sought to terminate the agreement between the parties. It is evident that the applicant has taken substantive steps in pursuit of arbitration, including initiating the process for the appointment of an arbitrator through the Chartered Institute of Arbitrators. Clause 22.2 of the Enterprise Dealer Agreement expressly provides that disputes arising under the contract which are not capable of amicable resolution shall be referred to arbitration. The existence of an arbitration agreement and the procedural steps undertaken by the applicant reinforce the appropriateness of referring the matter to arbitration in accordance with the parties' contractual obligations.

33. In the premises, the Court is satisfied that a competent and justiciable dispute exists between the parties, which properly falls within the ambit of the arbitration agreement. Consequently, and in keeping with the principle of party autonomy and the policy of minimal judicial interference in arbitral matters, the dispute shall be referred to arbitration. The Court further finds that the agreement provides adequate interim protections under Clause 22.2(d), ensuring that the status quo is preserved pending the resolution of the dispute. Accordingly, the Notice of Motion dated 29th August 2024 is partially succeeds. Each party to bear their own costs of the Application.

34. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 30TH DAY OF MAY, 2025

RHODA RUTTO

JUDGE

In the presence of;

....Applicant

....Respondent

Sam Court Assistant