



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HCC. NO. 4 OF 2016

(CORAM: J. A. MAKAU – J.)

BRIDGE INTERNATIONAL ACADEMIES.....PLAINTIFF

VS

NELLY ATIENO OMONDI.....1ST DEFENDANT

ANNE OBARE ODHIAMBO.....2ND DEFENDANT

LENOX OTIENO OCHIENG.....3RD DEFENDANT

DISMAS OMONDI OOKO.....4TH DEFENDANT

VALENTINE OTIENO OCHIENG.....5TH DEFENDANT

MICHAEL ODUOR OWINO.....6TH DEFENDANT

JUDGMENT

1. The Plaintiff M/s **BRIDGE INTERNATIONAL ACADEMIES** through a Plaint dated 20th December 2016 sued the six (6) defendants namely: -

- (a) *Nelly Atieno Omondi* - 1st Defendant
- (b) *Anne Obare Odhiambo* - 2nd Defendant
- (c) *Lenox Otieno Ochieng* - 3rd Defendant
- (d) *Dismas Omondi Ooko* - 4th Defendant
- (e) *Valentine Otieno Ochieng* - 5th Defendant
- (f) *Michael Oduor Owino* - 6th Defendant

Seeking the following orders: -

(a) *An injunction restricting the Defendants by themselves, their agents, employees and/or proxies from operating the school known as Bright Angles Academy within a two (2) kilometres radius from the Plaintiff's Sigomre Bridge Academy, or within two (2) kilometres radius from any of the Plaintiff's academies, and from soliciting the Plaintiff's staff, pupils and parents to Sigomre Bridge Academy and from passing off Bright Angels Academy as being affiliated to the Plaintiff.*

(b) *An injunction restricting the Defendants by themselves, their agents, employees and/or proxies from trespassing onto the Plaintiff's Sigomre Bridge Academy, from causing any disturbance and or interruption to activities at the Plaintiff's academies within.*

(c) General and aggravated damages for passing off, for damage to goodwill and for loss of business as this prayer was not proved.

(d) Cost of this suit.

(e) Interest on (3) and (4) above at Court rates.

2. By Affidavit of Service dated 31st December 2016, the Defendants were served with the notice of motion dated 20/12/2016, for hearing on 4/1/2017, plaint and hearing notice on 28/12/2016 who accepted service by signing at the reverse of the hearing notice. The affidavit of service was filed on 4/1/2017.

3. On 4/1/2017, the Defendant/Respondents though duly served did not appear, consequently Mr. Kimani Mungai, Learned Advocate for the Plaintiffs moved the court to grant the prayers sought in the application dated 20th December 2016. The application being unopposed was granted.

4. The suit was subsequently set down for formal proof as the defendants failed to appear and file defence, after interlocutory judgment had been entered by the Deputy Registrar on 14/6/2017.

5. At the hearing, the Plaintiff called one witness. PW1 Alice Matika Ngolo who testified that she used to work for the Plaintiff school as Academy Improvement Manager, Siaya Region. She urged that she knows the school is registered as a company, identifying the certificate of incorporation attached to the affidavit dated 20/12/2016 marked "AM1" and further referred to a copy of incorporation of the Plaintiff's Sigomere Bridge Academy dated 30/10/2015 ("AMI 3") attached to the affidavit dated 30/12/2016. She also referred to lease agreement dated 30/11/2014 (marked "AM2"). She testified that she knows the Defendants, mentioning the 1st Defendant, Nelly Otieno Omondi as the Manager of the Academy; while Anne Obare Odhiambo, Lenox Otieno Ochieng, Dusmas Omondi Ooko, Valentine Otieno Ochieng and Michael Oduor Owino were teachers at the Academy, relying on the copies of employment documents as per list of bundle no. 4 from pages 1 – 61.

6. PW1 averred that the case is about, the 1st Defendant, who absconded from duty and opened her own school, a stone throw away from the Academy urging that she does not know the distance from the school to the academy but urging that it is near Sigomere and the agreement barred them from opening a school, referring to **non-Compete Clause** in the employment of all employees, referring to pages 3, 11, 22, 32, 42, 53 of the document. She urged the defendants opened school in breach of the **Non-Compete Clause**, urging the prohibited area means a radius of 5 kilometres from any of the academy for time being operated by the company as of the termination date. The clause restricted period of 2 years, commencing termination date.

7. PW1 further stated on 28/10/2016 while at Sigomere as a Guest of Honour and when the function ended, she was informed the defendants were circulating fliers to parents marketing a school referred to as Bright Angel Academy (AM8) giving the telephone no. 0701418180 of the 1st defendant. That in November 2016, she went to the school and as 1st Defendant had not reported on duty, she found the 1st Defendant had gone to her own school at Bright Angels Academy, where she saw the banner, took photographs of the banner (AM8); entered the school and found many of their furniture in use, took photos (AM8), that the furniture though made by and/or for Plaintiff's school, they did not have any special mark; that she even found school books bearing the school stamp and collected them. That she reported the matter to the police. She noted students from Bridge International Academy at Bright Angels Academy by seeing their faces as some of the students were known to her and some were in Plaintiff's school uniform. She did not find the 1st Defendant at the school, she called her but she did not respond.

8. The Plaintiff closed her case and on 1/2/2018 had submissions filed.

9. In this case, the defendants did not appear nor challenged the Plaintiff's case. The Plaintiff relies on employment agreement entered between itself and each of the six defendants and more specifically not **Non-Compete Clause** which provides: -

- **“Non-Compete: For the purposes of Section: -**
 - o **Prohibited Area “means a radius of five (5) kilometres from any of the academics for the time being operated by the Company as at the Termination Date.**
 - o **“Management Restricted Period” means the period of two (2) years commencing on the Termination Date howsoever the Agreement is terminated.**
 - o **“Restricted period for Voluntary Termination” means the period of one (1) year commencing on the Termination Date if the Employment Contract is terminated by the employee.**
 - o **“Restricted period for Involuntary Termination” means the period of six (6) months commencing on the Termination Date if the Agreement is terminated by the Company.**
 - o **“Restricted periods” means any and all of the restricted periods, including “Management Restricted Period”.**
 - o **“Restricted Period for Voluntary Termination” and “Restricted Period for Involuntary Termination”**

- o **“Termination Date” means the date on which the Employee’s employment is terminated for whatsoever reason.**
- **You are likely to obtain Confidential Information during the course of employment. To protect these interest of the Company, you (on your behalf and on behalf of all persons controlled by you) that you will be bound by the following covenants: -**
 - o **During the Management Restricted Period and within the Prohibited Area, you will not be employed in or be a consultant for, or carry on for your own account or for any other person, whether directly or indirectly, (or be a director of any company engaged in) in the capacity of management (as Head Teacher, Headmaster/Head Mistress, School Manager, or any other management role) any business which is or is about to be in competition with any business of the Company being carried on by the Company as the Termination Dare provided you were concerned or connected with that business at any time during the last twelve (12) months of your service with the company without the prior written approval of the Company;**
 - o **During the Restricted Period for Voluntary Termination and the Restricted period for Involuntary Termination and within the Prohibited Area you will not be employed in or be a consultant for, whether directly or indirectly, in the capacity of a teacher, any business which is or is about to be in competition with any business of the company being carried on by the Company at the Termination Date provided you were concerned or connected with that business at any time during the last twelve (12) months of your service with the Company, without the prior written approval of the Company.”**

10. In the instant case, the prohibited area is a radius of 5 kilometres from any of the academies for the time being operated by the company, and period being 2 years commencing from the termination date. PW1 in her evidence stated the school purportedly opened by the defendants is near but did not know the distance. Nearby is ambiguous and cannot be said to be either within the 5 kilometres distance or beyond nor can the distance be said to be certain. The defendants as per the Plaintiff’s plaint and PW1’s evidence left their employment sometimes in October/November 2016, and two years are yet to lapse. The Plaintiff in its evidence failed to prove that the Bright Angels Academy is owned by any of the defendants, they failed to prove the distance from the Plaintiff’s school to the school in question and that the structures in the school were poached from their Academy. I find the evidence adduced insufficient to prove that the Non-Competition Clause in the employment agreement with the defendants was breached by the defendants, since the Defendants terminated their services from the Plaintiff School.

11. I however find that as the period agreed between the Plaintiff’s school and the Defendants is still in force and still binds the parties; the orders sought ought to be granted as the Plaintiff have established a *prima facie* case with a high probability of success and that an order of damages will not be sufficient if injunction is denied. I also find the balance of convenience tilts in favour of the Plaintiff; to justify granting of the prayers sought.

12. The Upshot is that the Plaintiff’s suit succeeds to the following extent: -

(a) An injunction restricting the Defendants by themselves, their agents, employees and/or proxies from operating the school known as Bright Angles Academy within a five kilometres radius from the Plaintiff’s Sigomre Bridge Academy, or within five kilometres radius from any of the Plaintiff’s academies, and from soliciting the Plaintiff’s staff, pupils and parents to Sigomre Bridge Academy and from passing off Bright Angels Academy as being affiliated to the Plaintiff is granted for the remainder period of 2 years.

(b) An injunction restricting the Defendants by themselves, their agents, employees and/or proxies from trespassing into the Plaintiff’s Sigomre Bridge Academy, from causing any disturbance and or interruption to activities at the Plaintiff’s academies within is granted.

(c) No award for General and aggravated damages for passing off, or for damage to goodwill and for loss of business as this prayer was not proved.

(d) No order as to costs.

DATED AND SIGNED AT SIAYA THIS 12TH DAY OF APRIL 2018.

HON. J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

Mr. Mungai Victor Kimani, Advocate: for the Applicant

N/A: for Defendants

HON. J.A. MAKAU

JUDGE