



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NO. 56 OF 2014**

**BRIDGE INTERNATIONAL**

**ACADEMIES LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**ROBERT KIMANI KIARIE.....DEFENDANT/RESPONDENT**

**RULING**

1. The Defendant was employed by the plaintiff as an Academy Manager. In the Employment Contract dated the 18<sup>th</sup> December 2012 and executed by both parties, there existed a non-compete restriction clause, and for purposes of this Ruling will mention the relevant parts, that the defendant upon termination of employment with the plaintiff would not:

- a. Within a period of two years be employed in, for or carry for his own account or for other person directly or indirectly in any business which is or is in competition with the plaintiff's business-

that the employee was concerned or connected with the business at any time during the last twelve(12) months of his service without consent and approval of the company.

- b. That during the two(2) years period, he would not solicit, canvass directly or indirectly with or for competition with the company the custom of any person who at anytime during the last 12 months of his service with the company was a pupil or a parent of the company.
- c. Would not directly or indirectly entice or try to entice way from the company a pupil teacher, or employee of the company.....
- d. would not join a school established by a competing company or enterprise.
- e. Operate or run a school.

2. By its application dated 30<sup>th</sup> June 2014 the plaintiff seeks orders to restrain the defendant by himself or his employees from operating an academy known as Patient Heart Academy within 2 kilometres radius from the plaintiff's Academy known as Mai-Mahiu Academy or any of the academies two kilometres from its schools – pending the hearing and determination of this suit.

The application is premised on grounds as appear on the face of the application, and specifically that the defendant, in breach of the non-compete clauses in the employment contract, has established, and operates a school in Mai-Mahiu under the name Patient Heart Academy 100 metres from the Plaintiff's academy, and is engaged in soliciting pupils and parents of the pupils to

join his school. The plaintiff states that if not stopped by a court order of injunction, the plaintiff will suffer irreparable loss not compensatable by damages.

The Application is brought under the provision **Order 40 rule 2, 4(1) of the Civil Procedure Code**. In support of the application, the plaintiffs Legal Officer Antony Wilbur Mugodo swore an affidavit on the 30<sup>th</sup> July 2014.

3. The application is opposed. In his Replying Affidavit sworn on the 16<sup>th</sup> March 2015 and filed on even date, the Respondent/Defendant denies being in breach of the non-compete agreement with the plaintiff. He states that he has not opened nor operates any school as alleged but is involved in Environmental conservation with a youth Group called Frepine Environmental Youth Group in Maai-Mahiu and that has nothing to do with the Applicants academies. He has annexed a certificate to confirm the entity he operates as registered under the Ministry of Gender, Sports and Social Services. He urges the court to dismiss the application as it is based on falsehoods, half truths and misrepresentations.

4. It is not in dispute that the Respondent/Defendant was in the employment of the plaintiff up to the 30<sup>th</sup> November 2013 and that he executed the employment contract including the non-compete clauses.

I have considered the orders sought, the supporting affidavit and grounds upon which the application is based, and submissions by both counsel.

In his submissions, the plaintiff/applicant has not substantiated its allegations that the Respondent has indeed established and is running and operating a school in competition within Mai-Mahiu. Indeed it was submitted that the alleged school-Patient Heart Academy is not registered with the Ministry of Education and that during the hearing of the suit, it will bring evidence to confirm the allegations.

It was stated that the Respondent is using the plaintiff's teaching methodology and has stolen the system, yet no evidence of such allegations was produced. No evidence of enticing pupils and parents of the plaintiff Academies was tendered. No numbers or names of the plaintiffs Academy pupils have been given and proved to have been enticed to join the alleged Respondents school, and much less any suffering, loss or damage demonstrated that the plaintiff has suffered or likely to suffer that cannot be compensated with an award of damages.

5. Counsel for the Plaintiff/Applicant urged the court to grant the injunction and based his arguments on **Giella -vs- Cassman Brown (1973) EA 358, IYS and Tees Ltd -vs- Everlyne Madegwa & Another (2009) e KLR and Faulu Kenya Deposit Microfinance Ltd -vs- Safaricom Limited (2013) KLR**.

The court has considered, the above cases. The Applicants therein were able to demonstrate to the court that indeed the Respondents had breached the restrictive covenants, had breached their duty of confidentiality, non-solicitation non-competition and thus had exposed the applicants to loss and damage. The plaintiff/applicants demonstrated that there existed *prima facie* cases that had chances of success.

6. The circumstances of this present case are different. As I have stated above, other than mere allegations, no effort was put in by plaintiff/applicant to demonstrate, even remotely, that indeed the Respondent/Defendant had breached any of the non-compete causes in the employment contract.

In the case **Kenya Hotels -vs- Kenya Commercial Bank**, the court held that interlocutory mandatory injunction would be granted very sparingly and only in clear and exceptional circumstances where the applicants case was very strong and straight forward.

The Respondent having denied all the allegations and the Applicant not been able to prove any of them, it follows that an order of interlocutory injunction does not lie.

7. In **Giella -vs- Cassman Brown** (Supra) the conditions for the grant of a temporary injunction are now settled;

That, an applicant must show a *prima facie* case with a probability of success. That an interlocutory injunction will not be granted unless the applicant must otherwise suffer irreparable loss or injury that would not be adequately compensated by an award of damages, and that if the court is in doubt, it will decide the application on a balance of convenience.

8. Contracts in restraint of trade are generally invalid. However partial restraint may be valid in a contract of employment if reasonable in the interest of both parties. At this interlocutory stage, the court is not persuaded that the orders sought are in the interest of both parties.

In its totality, the plaintiff/applicant has failed to satisfy any of the above conditions. It stated that it will bring evidence of its allegations during the hearing of the suit. That is what it ought to do.

Consequently, this court finds no merit in the application. It is dismissed with costs to the Respondent.

It is so ordered.

**Dated, signed and delivered in open court this 30<sup>th</sup> day of July 2015**

**JANET MULWA**

**JUDGE**

**In the presence of:**

Chege Peter holding brief for Kamau - for the Respondent

No appearance - for the applicant

Court clerk - Linah.