



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO.13 OF 2015

BRIDGE INTERNATIONAL ACADEMIES.....PLAINTIFF/APPLICANT

VERSUS

BONFACE NYANUMBA OMBATI.....DEFENDANT/RESPONDENT

RULING

1. On 3rd June 2015, the Plaintiff sued the Defendant herein with whom it had been in an employment relationship. It is the Plaintiff's case that its employment contract with the Defendant contained *inter alia* express surviving clauses on non-compete and confidentiality in the event of a termination of the said employment agreement.

2. By a Notice of Motion application dated 29th May 2015, the Plaintiff/Applicant seeks orders as follows:

1. That this application be certified urgent and be heard ex-parte in the first instance and service thereof be dispensed with.

2. That the Defendant whether by himself his partners, employees servants and/or agents be restrained by an injunction until the hearing and determination of this application or further orders of this Honourable Court restraining them from (*further*) operating the school operating by the name of St. Marks Academy located within Jogoo area in Kisii County, within the contracted two kilometer radius from the Plaintiff's academy known as Bridge Jogoo Academy.

3. That the Defendant whether by himself his partners, employees servants and/or agents be restrained by an injunction until the hearing and determination of this application or further orders of this Honourable court restraining them from (*further*) soliciting the staff, parents and or pupils/children previously and or currently admitted at the Plaintiff's 'Bridge Jogoo Academy' located within Jogoo area in Kisii County, within the contracted two years management period.

4. That the Defendant whether by himself his partners, employees servants and/or agents be restrained by an injunction until the hearing and determination of this suit or further orders of this Honourable Court restraining them from (*further*) operating the school operating by the name of St. Marks Academy located within Jogoo area in Kisii County, within the contracted two kilometer radius from the Plaintiff's academy known as Bridge Jogoo Academy.

5. That the Defendant whether by himself his partners, employees servants and/or agents be restrained by an injunction until the hearing and determination of this suit or further orders of this Honourable court restraining them from (*further*) soliciting the staff, parents and or pupils/children previously and or currently admitted at the Plaintiff's 'Bridge Jogoo Academy' located within Jogoo area in Kisii County, within the contracted two years management period.

6. That pending the hearing of this application interparties an interim relief be granted in terms of prayer 2 and 3 hereinabove.

7. That the costs of this application be provided for.

3. The application is brought under **Order 40 Rule 2, 4(1)** of the **Civil Procedure Rules**. The application is supported by the detailed affidavit of ANTONY MUGODO, a Senior Legal Counsel of the applicant's academies, dated 29th May 2015. The main gist of the Applicant's affidavit is that by a written and signed employment contract dated 15th August 2013 the Defendant/Respondent was employed by the Applicant the manager of their school known as **Jogoo Bridge Academy** situate within Jogoo area in Kisii County. The Applicant stated that the said employment contract had a surviving non-compete clause that prohibited the Respondent from operating a school within 5 kilometers radius from any of the applicant's schools for a period of 2 years from the date of termination of their employment contract.

4. The Applicant further averred that, in outright breach of the said surviving clauses of their said contract with the Respondent, no sooner had the Respondent's employment been terminated on 4th May 2015, than the Respondent set up a school known as **St. Marks Academy** within Jogoo area in Kisii County which school was within the agreed 5 kilometers radius from the Applicant's school as was as such, in direct competition with the Applicant.

5. The applicant further deponed that the Respondent had embarked on soliciting its customers, to wit; students, whose numbers had reduced drastically from the time the Respondent set up the rival school. It was the applicant's contention that the respondent passed off his new school as a branch of the applicant's school.

6. On 3rd June, 2015, the Applicant's instant application was heard *ex parte* and temporary orders issued to restrain the Respondent by way of an injunction from (*further*) soliciting staff, parents and/or pupils previously and currently admitted at the Plaintiff's school pending the hearing and determination of this application inter parties.

7. The Defendant filed his Memorandum of Appearance on 10th June 2015 but had not filed any defence or replying affidavit to the applicant's current application as at 21st September 2015 when the said application came up for hearing.

8. In effect therefore, the Applicant's instant application stands unopposed by the Respondent who did not turn up for the hearing despite having been served with the Hearing Notice on 25th August 2015.

9. Despite the Respondent's failure to defend the suit and to respond to the application, this court is still enjoined to consider the merits of the application before it.

10. Mr. Mungai, counsel for the Applicant, submitted at the hearing of this application that the Respondent's action of starting a rival school, less than a stone throw away from the Applicant's school and further, soliciting the Applicant's students and parents through deceit and misrepresentation of facts amounted to breach of their contract on confidentiality, non-compete and non solicitation. The Applicant's counsel relied on the authorities contained in the list of authorities filed on 9th June 2015. The said authorities include: **1Ys and Tees Ltd –vs- Everlyne Madegwa & Another [2009] eKLR, Faulu Kenya Deposit Taking Microfinance Ltd –vs- Safaricom Ltd [2013] eKLR and Supa Brite Ltd –vs- Pakad Enterprises Ltd HCCC. Case No.287 of 2001.**

11. I have considered the applicant's application in its entirety and the authorities cited. It is not in dispute and indeed it has not been denied that the Respondent was an employee of the Plaintiff/Applicant up until 4th May 2015 when the said contract was terminated.

12. I am satisfied that the Applicant has demonstrated that there exists a prima facie case against the Respondent with high chances of success. The Respondent has not rebutted any of the allegations put forth by the Applicant. It therefore follows that an order of interlocutory injunction may be granted in order to safeguard the Applicant's interests pending the hearing and determination of this suit. The conditions for the grant of temporary injunctions were well spelt out in the celebrated case of **Giella vs Cassman Brown(1973) EA 358.**

13. An Applicant must show a prima facie case with a probability of success. That an interlocutory injunction will not be granted unless the Applicant will 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.

14. In the case of **Giella vs Cassman Brown** (*supra*) the court in granting a temporary injunction held that, a contract in restraint of trade is generally invalid but a partial restraint may be valid in a contract of employment if it is reasonable in the interest of both parties.

15. Similarly, in this present case, I find that partial restraint on the Respondent would be reasonable in order to forestall any further loss that the Applicant may incur in terms of loss of business following the Respondent's interference with its school. An injunction in terms of prayer 4 of the application would not be tenable in view of the fact that the Respondent's school is already operating going by the Applicant's own averments contained in the affidavit in support of the application.

16. Consequently, I grant the orders sought in prayers 5 of the application only and for clarity purposes; this court orders that the Defendant herein, whether by himself, his partners, employees, servants and/or agents are restrained by an injunction until the hearing and determination of this suit, or further orders of this court from (*further*) soliciting the staff, parents and or pupils/children previously and or currently admitted at the plaintiff's '**Bridge Jogoo Academy**' located within Jogoo area in Kisii County, within the contracted two years management period.

17. The applicant is also granted the costs of this application.

Dated, signed and delivered in open court this 30th day of November, 2015

HON. W. OKWANY

JUDGE

In the presence of:

- No appearance for the Applicant/Plaintiff
- Miss Sagwa for Ombati for the Respondent/Defendant in the absence of plaintiff's counsel.
- Njoroge: Court clerk.