



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 346 of 2012

LG ELECTRONICS AFRICA LOGISTICS FZE.....PLAINTIFF/APPLICANT

VERSUS

CHARLES KIMARI.....DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion application dated 30th May 2012 and filed in Court on the same day, the Plaintiff/ Applicant seeks the following orders -:

1) *That for reasons to be recorded notice of this application be dispensed with and heard ex-parte in the first instance.*

2) *That pending the hearing and determination of this application, an injunction be issued restraining the Defendant/ respondent from using/ divulging all the confidential information relating to the Plaintiff/Applicant's business within his knowledge whether by himself either as an employee of the Plaintiffs/ Applicant's competitors, by his own agent, servants, or as a consultant, shareholder or through any Plaintiff's competitors , to any person, business or organization, their servants or agents.*

3) *That pending the hearing and determination of this application, an injunction be issued restraining the Defendant/Respondent from setting up or from seeking employment within the Plaintiff's/Applicants Competitors' in the country for a period of 12 months from the date of termination of his employment with the Plaintiff, or setting up business in any nature that will compete with the Plaintiffs/Applicant's business.*

4) *That the costs of this application be provided for.*

2. The application is brought under Order 40 rule 2 (1) and Order 51 of the Civil Procedure Rules and all other enabling provisions of the Law and is supported by an affidavit sworn on the 30th of May 2012 and a further affidavit sworn on 26th May 2012 by Jung Jin Kim, the Plaintiff/ Applicant's General Manager.

3. In opposition to the application, there is a replying affidavit by the Defendant sworn on 14th June 2012 and filed it in court on 15th June 2012.

4. The Plaintiff's case is that by a contract of service between itself and the Defendant, the latter was restrained from being engaged in any business in any competing business whether as an employee, shareholder or director within Kenyan territory upon termination of the contract. On 2nd March 2012, the Defendant resigned from the Plaintiff's company and secured employment with Konica Minolta East Africa Limited, a company dealing with computer printers, which was a business distinct from the

Plaintiff's. However, on or about 30th April 2012, the Plaintiff became aware that the Respondent was employed by Samsung Electronics East Africa Limited, a direct competitor of the Plaintiff within the territory. The Plaintiff avers that by securing such employment, the Defendant breached the contractual covenant not to seek employment with any of the Plaintiff's competitors without its consent for a period of 12 months after termination of employment. The Plaintiff further avers that whilst in its employment, the Defendant became privy to information relating to distributorship, sales and marketing strategies which information the Plaintiff was apprehensive would be used by the Defendant for the benefit of his current employer and to the detriment of the Plaintiff.

5. On his part, the Defendant states that he was neither engaged in the manufacturing of any products of the Plaintiff and neither did his duties in sales and marketing entail any confidential matter that would imperil the Plaintiff's operations. He claims that he was constrained to seek employment elsewhere for reasons of better prospects and also due to open discrimination by the Plaintiff company against local employees. He asserts that he had no option but to sign the one year contract containing the clause in restraint of employment. He contends that the Constitution of Kenya 2010 protects an employee from such a clause and any contract whose effect was to prevent him from earning a living by rendering the services he was trained in was unconstitutional, was contrary to public policy and was therefore unenforceable.

6. At the hearing of the application, Ms. Ajiambo appeared for the applicant while Mr. Masika appeared for the respondents. Both counsel filed written submissions to advance their respective cases.

7. I have considered the application, the supporting affidavit and further affidavit as well as the replying affidavit, and the documents annexed thereto.

8. In my view, the main issue that arises for determination are whether the clause in restraint of trade placed in the contract of services executed between the parties is legal and constitutional.

9. It is common ground that the Respondent had been in the employ of the Applicant Company and that he had terminated his services on 2nd March 2012. He does not deny that the said contract of service contained confidentiality clauses, together with a restraint of trade clause which restrained him upon termination of his contract of service from being engaged in any business within the territory that is in competition with the Applicant- whether as an employee, shareholder or director. He further does not deny that he is now working with a direct competitor of the Applicant, Samsung Electronics East Africa Limited.

10. In the premises, the crucial question that needs to be answered is whether the nature of employment of the Defendant entailed access to confidential information, which, divulged to the Plaintiff's competitors would be injurious to its business.

11. The employment agreement dated 28th May 2008 clearly stipulated the duties of the Respondent as the Marketing Manager. These were enumerated in Article 3 of the said agreement as including conduct of weekly market survey for each product, making monthly reports detailing PSI report, submitting on a daily basis a summary of important news on newspapers to LG Nairobi office and executing any other instruction set by management in the interest of the company. Article 10.2 of the employment agreement defined confidential information as including;

“.....trade secrets, information with respect to customers (past, present and prospective), costs, profits, markets, sales, business projects, plans for future business and other development..... confidential information not generally known to the public and has been developed, acquired, compiled by LGE at its great efforts and expenses”

12. In my view, I do not, prima facie, find the range of duties stipulated in Article 3 of the agreement as going into the range of information that could be construed as confidential information as defined in article 10.2 of the agreement.

13. Whilst it is probable that the Defendant may have acquired additional skill and knowledge in his trade during his employment stint with the Plaintiff, the Applicant in my view has failed to show that any such skills and knowledge drew directly from the realm of confidential information it held separate from the Defendant's stock of knowledge. The Plaintiff merely alleges that the Defendant is currently working for a competitor of which he was restrained to do for a period of 12 months from the termination of his contract of service under Article 24 of the contract. The Plaintiff's fears are therefore speculative in the absence of further particulars of breach of the Defendant's contractual obligation in terms of utilization of confidential information.

14. With regard to the restrictive covenant, contracts in restraint of trade are not necessarily outlawed by Kenyan law. Section 2 of the Contracts of Restraint of Trade Act Cap 24 laws of Kenya provides that any agreement which contains a provision or covenant whereby a party is restrained from exercising lawful profession, trade or business or occupation shall not be void only on the ground that that such provision is or covenant is therein contained in the agreement, provided that the same is appropriately limited as to time, geographical coverage and the scope of activities.

15. The Defendant has raised a challenge as to the constitutionality of a restrictive covenant by citing Article 41 of the Constitution of Kenya, 2010, which provides that provides that every person has a right to fair labour practices. My view however is that a restraint clause would be unconstitutional if that restraint does not meet the limitations imposed under Section 2 of the Contracts of Restraint of Trade Act aforesaid. Article 24 of the Contract fairly captures the elements contemplated in Section 2 of the Act and would, on the face of it not be unconstitutional. Either way, the test that courts have laid down with regard to enforcement of a restrictive covenant is the question whether such clause is reasonable. In the English case of *Esso Petroleum vs. Harpers Garage 1967 All ER Lord Reid* observed:

“Courts will not enforce a restraint which goes further than affording adequate protection to the legitimate interest of a person in whose favour it is granted. This u must think, be because too wide a restraint is against the public interest”

16. Applying the above observation to the context of the present suit, it is factual that the Defendant left employment with the Plaintiff on 2nd March 2012, over seven months ago. The restraint clause sought to be enforced if allowed would effectively seek to keep the Defendant out of employment with a competitor for a period of 5 months only. In my view, enforcing such a clause would not be in the interest of justice for two reasons, namely, the damage, if any, that was bound to be inflicted upon the Plaintiff by the Defendant's employ in a competitor company has by now been substantially suffered as it has been now seven months since the Defendant left employment with the Plaintiff. Secondly, the effect of the restraint would be to remove the Defendant from employment for a period of only 5 months without any guarantee that he will be re-employed once the 12-month contractual hiatus elapses. I think in a country like Kenya where unemployment is soaring every single day, subjecting the Defendant to loss of employment on the basis of the restrictive clause would be unreasonable and not in the interest of either party. Indeed such action would be contrary to public policy as courts should not be seen to be unduly impeding upon a person's right to earn a living.

17. For these reasons, I would be hesitant to find that the Plaintiff/Applicant is entitled to the injunctive orders sought as in my analysis, it has failed to demonstrate a prima facie case for the grant of such orders. I am therefore inclined to dismiss the Notice of Motion application dated 30th May 2012, with costs to the Respondent, as I hereby do.

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER 2012.

J.M MUTAVA

JUDGE