



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 147 of 2009

IYS AND TEES LIMITEDPLAINTIFF

VERSUS

EVERLYNE MADEGWA..... 1ST DEFENDANT

OGOHA VINCENT ODHIAMBO OTIENO &

ABUYA TOM OTIENO *t/a* VINTOM SOLUTIONS.....2ND DEFENDANT

R U L I N G

The plaintiff has sued the 2 defendants who had been in employment relationship with the plaintiff company. The first defendant is said to have executed an employment contract on 1/9/2002 with the plaintiff which was revised on 1/10/2008. The said contracts provided expressly Clause for confidentiality, non competition, non solicitation in addition to the common law duties of employment well within the first defendant's knowledge.

By Chamber Summons dated 4/3/2009 the plaintiff seeks orders to restrain the 1st and 2nd defendants *t/a* VINTOM SOLUTIONS from distribution, sale, marketing, installing and support or dealing in any way with any Bitdefender SRL Products pending the hearing and determination of this suit.

Further order that the defendants do appear before this court to show cause why they should not produce and place at the disposal of the court for purposes of attachment the sum of USD 6000 obtained fraudulently and held by them being security sufficient to satisfy part of the decree that may be passed against the defendants and an order that the said sum USD 6000 be deposited into court/or in a fixed deposit account in joint names of all parties or their agents pending the hearing and final determination of this suit.

It is shown that the first defendant left employment on 10/2/2009. She was employed in position of a corporate sales lead with the authority to negotiate a distribution agency with a company known as Bitdefender SRL. In course of her employment, acting as an agent of 2nd defendant, she used her advantaged position as plaintiff's lead negotiator with Bitdefender SRL to ensure that BD Distributorship Agency held by the plaintiffs is awarded to the 2nd defendant after which she resigned her employment with plaintiff.

She withheld or destroyed information meant for her employer and passed it to 2nd defendants thereby using her position, the plaintiff's staff, materials and resources whilst in plaintiff's employment to secure the said distribution agent to 2nd defendant. She also disclosed confidential information to solicit

plaintiff's clients and to compete with the plaintiff. She invoiced clients of the plaintiff in the name of 2nd defendant and received monies on works done by the plaintiff.

The plaintiff has lost money earned in January and February 1009 and is apprehensive that there will be loss if there will be continuation in the sales of BD products by defendants in perpetuation of a contract obtained by fraud and deceit and gain amounts to unjust enrichment.

The application is supported by affidavit of Gilbert Kanjama and Vincent Gitobu. The law involved in a matter such as this is the law of breach of confidence relating to employer and employee relationship. The duty an employee owes to his employer may be expressly stated in the contract of employment and in any case will be implied by law. An employee always has a duty to act in employer's best interest in good faith including a duty not to divulge confidential information about his employer's business to others without the consent of employer. This duty is owed by a present employee.

In this case the defendants deny that there was a signed contract of employment. The first defendant swears that he never executed standard employment contract with plaintiff because she says the terms were unacceptable and therefore the agreement cannot be said to be binding on her. She also swears that she could not solicit USD 6000 without plaintiff knowing.

On the whole first defendant denies the plaintiff's statement in the affidavit. The first defendant raises issues of breach of constitutional rights under Section 76 thereof and issue of special damages claims. Let it be said that these are issues that require canvassing at a full trial not at an interlocutory stage of proceedings. However, the issue of arrest before judgment, the plaintiff/applicant has invoked Order 38 Civil Procedure Code which provides for attachment before judgment.

The plaintiff has not complied with requirements of the Order namely:-

“(38) (5) that the defendant with intent to obstruct or delay the execution of any decree that may be passed against him:-

(a) is about to dispose of the whole or any part of his property;

(b) is about to remove the whole or any part of his property from local limits of jurisdiction of the court.”

The court may not make orders.

The co-proprietors of Vintom Solutions named Abuya Tom Otieno has sworn a replying affidavit denying the facts deponed to by the plaintiff in supporting affidavit. He denies exposing plaintiff to contempt, ridicule, scandal and public odium or that he has suffered loss and damages. He admits that Bitdefender entered into agreement with his company on 10/2/2009. Parties have filed list of authorities and written submissions.

The plaintiff submits the first defendant committed breach of employment contract on confidentiality and non competition and non solicitation, penalty of which is provided. The first defendant is also guilty of defamation. The second defendants are liable for all acts of 1st defendant as agent/employee for which the plaintiff suffered specified for USD 6000 and anticipated loss of USD 61,800.

The plaintiff relies on the case of Hivac Ltd. vs. Park Royal Scientific Instruments Ltd. where it was held:-

“That it is a necessary implication which must be engrafted of such a contract (of service) that servant undertakes to service his master with good faith and fidelity.”

In Thomas Marshall (Exports) Ltd. vs. Guinle where the employee entered into a contract with clear provisions of non disclosure of confidential information and not to engage in any other business other

than the companies. The court granted an injunction as the defendant was in gross breach of the obligation of fidelity and good faith.

The plaintiff also refers to the case of Giella vs. Cassman Brown & Co. Ltd. a Kenyan case an interim injunction was granted court to stop the appellant competing with the respondent his former employer on the basis of a covenant by him not to engage in similar undertaking in any of the major towns of East Africa. It was also held that a contract in restraint of trade are generally invalid but a partial restraint may be valid in a contract of employment may be valid if it is reasonable in the interest of both parties and an employer is not entitled to protection against competition by employees.

The other authority relied on is Kenya Hotels Ltd. vs. Kenya Commercial Bank where it was held that an interlocutory mandatory injunction would be granted sparingly and only in exceptional circumstances such as where the applicant's case was very strong and straight forward.

For the defendants, first defendant admits that she was employed about 1/9/2002 but insists she never signed agreement but worked until 20/1/2009. It is about the time Bitdefender started dealing with 2nd defendants who were trading under the VINTOM SOLUTIONS and it is at that time 1st defendant joined the 2nd defendant firm.

There is evidence that plaintiff had mandated the first defendant to negotiate the Agency of Bitdefender for the plaintiff.

The defendants rely on Giella vs. Cassman Brown also on the requirements to justify granting of an injunction. In the case of Muriithi vs. City Council of Nairobi – C.A. No.5 of 1979 it was said the object of interlocutory injunction is to protect the plaintiff against injury by violation of his right for this he cannot be adequately compensated in damages if uncertainty were resolved in his favour at the trial. An injunction may not be granted where damages would be an adequate remedy.

I have considered the authorities cited by both parties. I note that the Bitdefenders has an interest in the subject matter of this suit are not made parties so the orders are sought in their absence. The other consideration is that orders sought under Order 38 Rule 5 are not supported by any evidence and therefore no orders for attachment before judgment may be granted. However, there is need to stop further use of confidential information acquired by first defendant and to ensure knowledge acquired fraudulently is not used to the advantage of defendants at the expense of the plaintiff.

I am satisfied that the plaintiff has demonstrated a *prima facie* case in terms of prayer 4 only namely that temporary injunction is hereby issued to restrain the first defendant herself, servant or agents from distribution, sale, marketing, installation and support or dealing any other way with any Bitdefender SRL pending the hearing and determination of this suit.

The costs of this application shall be in the cause.

DATED, SIGNED and DELIVERED at Nairobi this 23rd day of October 2009.

JOYCE N. KHAMINWA

JUDGE