



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

**Civil Case 329 of 2007**

**STEEL STRUCTURES LIMITED .....PLAINTIFF**

**V E R S U S**

**1. DAVID ENGINEERING LTD**

**2. DAVID NJOROGE MUIRURI .....DEFENDANTS**

**R U L I N G**

The Plaintiff herein, by its plaint dated 11<sup>th</sup> April, 2007, has sought the following main reliefs from the Defendants, jointly and severally:-

- (a) General damages.
- (b) Special damages.
- (c) A permanent injunction to restrain the 1<sup>st</sup> Defendant from **“inducing and/or procuring the Plaintiff’s employees to breach their employment contracts”**.
- (d) An injunction to restrain the 2<sup>nd</sup> Defendant from working for the 1<sup>st</sup> Defendant and/or any other party which is engaged in business that is in competition with the Plaintiff’s business.
- (e) .....
- (f) .....

Together with the plaint the Plaintiff filed an application by chamber summons dated 11<sup>th</sup> April, 2007 seeking the following main orders:-

1. (a).....
- (b).....
- (c).....
- (d) A temporary injunction to restrain the 2<sup>nd</sup> Defendant from taking up employment with the 1<sup>st</sup> Defendant or any other individual, company or organisation that is engaged in competitive business with the Plaintiff **“in violation of the contract dated 28<sup>th</sup> February 2006”** pending hearing and determination of the suit.

(e).....

(f).....

2. A mandatory injunction against the 1<sup>st</sup> Defendant to **“forthwith cease engaging the 2<sup>nd</sup> Defendant and to forthwith release (him) to the 2<sup>nd</sup> Defendant”**.

3. A temporary injunction to restrain the 1<sup>st</sup> Defendant from **“enticing, inducing and/or prodding the employees of the Plaintiff to breach their contracts of employment”**, presumably pending disposal of the suit.

The application is essentially brought under Order 39, rules 1, 2 and 3 of the Civil Procedure Rules (the Rules) and under section 3A of the Civil Procedure Act (the Act). It is premised upon grounds (stated on the face thereof) that the Plaintiff has entered into contracts with its employees to train them, at great expense, specifically on its operations, and that as a term of these contracts there is a restrictive agreement with the employees for a particular period not to seek employment with a competitor; that the 1<sup>st</sup> Defendant has targeted these specially trained employees for purpose of their breaching their contracts with the aim of paralyzing the Plaintiff's operations; that the 2<sup>nd</sup> Defendant has breached his contract with the Plaintiff; and that the Plaintiff has the right, under its contract with the 2<sup>nd</sup> Defendant, to restrict him from offering the same services to the 1<sup>st</sup> Defendant.

There is a supporting affidavit sworn by one FRANCIS KABIRU NJENGA, the human resources manager of the Plaintiff. There is a further affidavit sworn by the same person in response to the Defendants' replying affidavits.

The Defendants' two replying affidavits were filed on 30<sup>th</sup> April, 2007. There is a supplementary affidavit of the 1<sup>st</sup> Defendant filed on 14<sup>th</sup> June, 2007. The grounds of opposition emerging from these three affidavits are, *inter alia*:-

1. That the 1<sup>st</sup> Defendant never solicited the services of the 2<sup>nd</sup> Defendant. He was employed on a competitive basis from the open market.
2. That the 1<sup>st</sup> Defendant never induced any of the Plaintiff's employees from their employment; those that were employed by the 1<sup>st</sup> Defendant were so employed on a competitive basis on diverse dates whenever a vacancy arose.
3. That the 1<sup>st</sup> Defendant is not, and has never been, privy to the contract of employment between the Plaintiff and the 2<sup>nd</sup> Defendant, and the suit against it is therefore frivolous, vexatious and scandalous.
4. That at the time the suit was filed the 2<sup>nd</sup> Defendant was already employed by the 1<sup>st</sup> Defendant; an order to restrain the 1<sup>st</sup> Defendant from employing the 2<sup>nd</sup> Defendant would thus be in vain.
5. That there is nothing wrong in law for the 1<sup>st</sup> Defendant to engage in any lawful business that has competitors; this suit is meant to stifle healthy and lawful business competition.
6. That the 2<sup>nd</sup> Defendant lawfully terminated his employment with the Plaintiff.
7. That the contract in restraint of trade between the Plaintiff and the 2<sup>nd</sup> Defendant was unreasonable, against public policy and an infringement of the 2<sup>nd</sup> Defendant's personal liberties.
8. That in any event any damages that the Plaintiff may suffer can be ascertained.

The arguments of the learned counsels were along the above-stated positions taken by their respective clients. I have considered those arguments, along with the authorities cited by them.

The restraining temporary injunctions are of course sought under Order 39, rules 1, 2 and 3 of the Rules while the mandatory temporary injunction is sought under the inherent powers of the court. It is now well-settled that an applicant for temporary injunction must demonstrate a *prima facie* case with a probability of success. He must also show that he stands to suffer irreparable loss unless the order sought is granted. For a mandatory temporary injunction, it is also now well-settled, the applicant must further demonstrate that there are special circumstances warranting the grant of interlocutory mandatory injunction. Special circumstances will depend on the facts of each case. Interlocutory mandatory injunction will be granted only in the clearest of cases.

Temporary restraining injunction is sought against the 1<sup>st</sup> Defendant to restrain it, pending disposal of the suit, from “**enticing, inducing and/or prodding the employees of the Plaintiff to breach their contracts of employment**”. To begin with, the 1<sup>st</sup> Defendant is not privy to the contracts of employment between the Plaintiff and any of its employees. No evidence has been placed before the court tending to show that the 1<sup>st</sup> Defendant has “**enticed, induced, and/or prodded**” any of the Plaintiff’s employees to breach their contracts of employment. The fact, *per se*, that the 1<sup>st</sup> Defendant has employed, at various times, former employees of the Plaintiff, including the 2<sup>nd</sup> Defendant, is not necessarily such evidence. The 2<sup>nd</sup> Defendant was employed by the 1<sup>st</sup> Defendant by letter of appointment dated 8<sup>th</sup> December, 2006, the employment to take effect on 15<sup>th</sup> January, 2007. It appears that the 2<sup>nd</sup> Defendant had left the Plaintiff’s employment on 30<sup>th</sup> June, 2006, that is six (6) months before. That is not consistent with the 1<sup>st</sup> Defendant having “**enticed, induced, or prodded**” him to leave the Plaintiff’s employment. The 1<sup>st</sup> Defendant says that it recruited the 2<sup>nd</sup> Defendant and other former employees of the Plaintiff from a competitive open market favouring employers. There is nothing before the court to indicate otherwise. I am not satisfied, upon the material now before the court, that the Plaintiff has demonstrated against the 1<sup>st</sup> Defendant a *prima facie* case with a probability of success.

The Plaintiff has contended that as a consequence of the 1<sup>st</sup> Defendant’s actions and the 2<sup>nd</sup> Defendant joining employment of the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant has infringed the Plaintiff’s proprietary right to a certain industrial design. But, that alleged infringement is the subject of a separate suit, **Milimani HCCC No. 189 of 2007**. In the present suit it has not been demonstrated what irreparable loss the Plaintiff might suffer.

A mandatory temporary injunction is also sought against the 1<sup>st</sup> Defendant to forthwith cease engaging the 2<sup>nd</sup> Defendant and to forthwith release to the Plaintiff the 2<sup>nd</sup> Defendant. In other words, the Plaintiff seeks a temporary order to compel the 1<sup>st</sup> Defendant to terminate the 2<sup>nd</sup> Defendant’s employment with it. Are there any special circumstances to warrant this obviously drastic course of action? I think not. As already seen, the 1<sup>st</sup> Defendant employed the 2<sup>nd</sup> Defendant six months after the latter had terminated his employment with the Plaintiff. It appears that in terminating that employment the 2<sup>nd</sup> Defendant acted in accordance with the contract between him and the Plaintiff. There is now, obviously, a binding contract of employment between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Is it desirable and in the interests of justice that the same be terminated at this interlocutory stage? I think not. As a general rule, it is against public policy for any employee to be restricted from seeking greener pastures. Contracts in restraint of trade are, as a general rule, against public policy. That is, however, not to say that they are all necessarily illegal. Section 2 of the Contracts in Restraint of Trade Act, Cap. 24, provides in the material part:-

**“2. Any agreement or contract which contains a provision or covenant whereby a party thereto is restrained from exercising any lawful profession, trade, business or occupation shall not be void only on the ground that the provision or covenant is therein contained:-**

**Provided that:-**

**(i) the High Court shall have power to declare the provision or covenant to be void where the court is satisfied that, having regard to the nature of the profession, trade, business or occupation concerned, and the period of time and the area within which it is expressed to apply, and to all the circumstances of the case, the provision or covenant is not reasonable either in the interests of the parties, in as much as it affords more than adequate protection of the party in whose favour it is imposed against something against which he is entitled to be protected, or in the interests of the public, inasmuch as the provision or covenant is injurious to the public interest”.**

It would not be desirable to make any such declaration at this interlocutory stage. It will suffice to say that, upon the material now before the court, it would not be in the interests of justice to compel the 1<sup>st</sup> Defendant to terminate the 2<sup>nd</sup> Defendant’s employment.

The second limb of the prayer for temporary mandatory injunction against the 1<sup>st</sup> Defendant is for the 1<sup>st</sup> Defendant to forthwith release the 2<sup>nd</sup> Defendant to the Plaintiff. In this day and age, I do not see how the 1<sup>st</sup> Defendant can be compelled to release to the Plaintiff the 2<sup>nd</sup> Defendant, an adult of sound mind and therefore a free agent enjoying certain fundamental rights under the Constitution, or how such an order can be enforced. If the order sought is meant to compel the 2<sup>nd</sup> Defendant to return to the Plaintiff’s employment, granting such an order would raise certain serious issues, including the issue of servitude.

After considering all matters placed before the court, I would dismiss the application as against the 1<sup>st</sup> Defendant. What about the 2<sup>nd</sup> Defendant? A temporary injunction is sought to restrain him from taking up employment with the 1<sup>st</sup> Defendant or any other individual, company or organisation that is engaged in competitive business with the Plaintiff in violation of the contract between him and the Plaintiff. As far as employment with the 1<sup>st</sup> Defendant is concerned, it is a *fait accompli*. The 2<sup>nd</sup> Defendant took up that employment on 15<sup>th</sup> January, 2007, about three months before the suit and application were filed. The court cannot restrain that which has already been done. What about employment with other individuals, companies or organisations? On account of the comments I have already made regarding the 2<sup>nd</sup> Defendant’s right to seek greener pastures and the undesirability of holding him to employment with the Plaintiff, I would not grant this temporary injunction. Besides, it appears to me that the Plaintiff’s main complaint is that the 2<sup>nd</sup> Defendant has moved over to the 1<sup>st</sup> Defendant with the Plaintiff’s industrial secrets. That issue is already the subject-matter of the other suit already mentioned. Whatever loss the Plaintiff may have suffered thereby will be taken care of in that suit.

In the circumstances, and for the reasons appearing above, I must refuse the Plaintiff’s application by chamber summons dated 11<sup>th</sup> April, 2007. It is hereby dismissed with costs to the Defendants. It is so ordered.

**DATED AT NAIROBI THIS 13<sup>TH</sup> DAY OF DECEMBER, 2007**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 14<sup>TH</sup> DAY OF DECEMBER, 2007**