



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

CIVIL CASE NO. 1318 OF 2001

BENTLEY TRAVEL LIMITED PLAINTIFF

VERSUS

GLADYS N. WAIGWA 1ST DEFENDANT

WINNIE AKINYI 2ND DEFENDANT

BATES TRAVEL & TOURS LIMITED 3RD DEFENDANT

RULING

The plaintiff is a limited liability company carrying on the business of travel agency. It operates a branch at Naivasha at which the 1st and 2nd defendants were, respectively, the Branch Manager and Accountant both having been employed by the plaintiff and placed in those positions on 2.1.2001 and 23.10.2000 respectively. Their letters of appointment state as follows:-

First defendant:-

STAFF CONFIDENTIAL

LETTER OF OFFER

GILL WAIGWA

I AM PLEASSED TO INFORM YOU THAT YOU HAVE BEEN OFFERED A POSITION WITH BENTLEY TRAVEL LTD EFFECTIVE DATE JANUARY 2 2001.

PARTICULARS OF THE APPOINTMENT

JOB TITLE MANAGER NAIVASHA

SALARY SH .20,000 BASIC JANUARY

SH.25,000 BASIC FEB -MARCH 2001.

SH.30,000 BASIC APRIL & THEREAFTER. 4% OR 5% COMMISSION ON NET PROFITS COMMENCING: JANUARY 2 ND 2001.

REPORTING TO: MANAGING DIRECTOR

CONDITIONS OF ENGAGEMENT:

THIS EMPLOYMENT CONTRACT IS VALID FOR ONE YEAR AND IS NEGOTIABLE ANY TIME UPON DISCUSSION OF OWNERSHIP OF BENTLEY SHARES.

SICK LEAVE A DOCTOR'S LETTER MUST BE PRODUCED
IF ABSENT FROM DUTY FOR ONE DAY OR
MORE.

LEAVE ENTITLEMENT: AFTER ONE YEAR YOU ARE ENTITLED
TO 21 DAYS LEAVE BASED ON A SIX DAY.

LEAVE ALLOWANCE: LEAVE ALLOWANCE WILL BE CLAIMED
ON PETTY CASH VOUCHER WHEN
PROCEEDING ON LEAVE. CHECK STAFF
REGULATION FOR ENTITLEMENT .

MEDICAL: YOUR MEDICAL BENEFITS ARE
NEGOTIABLE UPON CONFIRMATION
OF YOUR TERMS OF EMPLOYMENT. IN
THE MEANTIME REFER TO EMPLOYMENT
REGULATIONS FOR CURRENT BENEFITS .

ACCEPTANCE OF OFFER:

SIGNING THE DECLARATION UNDERNEATH AND RETURNING THE
DUPLICATE COPY TO ME SHOULD MAKE YOUR ACCEPTANCE OF
THIS OFFER OF EMPLOYMENT CONTAINED IN THIS DOCUMENT.
I AGREE TO ACCEPT THE EMPLOYMENT IN ACCORDANCE WITH
THE TERMS AND CONDITIONS STATED WHICH I HAVE READ AND
WHICH I FULLY UNDERSTAND.

SIGNED:

PAULINE FERNANDES
GENERAL MANAGER

SIGNED :

GILL WAIGWA
MANAGER NAIVASHA.

CONDITIONS OF EMPLOYMENT

YOUR EMPLOYMENT WILL BE GOVERNED AT ALL TIMES BY THE

KENYA LABOR LAWS AND EMPLOYMENT REGULATIONS.

WITHOUT PREJUDICE TO ANY OTHER RIGHTS OF TERMINATION OF

THE PARTIES UNDER THIS CONTRACT, ANY PARTY MAY CANCEL

THIS AGREEMENT BY GIVING THE OTHER ONE -MONTH NOTICE IN WRITING.

JOB DESCRIPTION:

As the office manager, it is your responsibility to supervise all operation including the staff. It is your responsibility to maximize revenue (net commission) with strict control on expenses and to checking and approving payments (petty cash). The income, expenses and operation of the car hire and tours is your responsibility.

Debt collection from Naivasha clients is your responsibility and payments banked on or before the 10th of every month for sales of previous month. You are responsible for monthly management meeting contents of which are known to you. In order for Head Office to stay in -touch with Naivasha, you are required to write weekly or Bi -weekly reports. A more detailed job description will follow. Adhoc

TERMS OF EMPLOYMENT

OFFICE HOURS 8.15AM TO 5.15PM Monday to Friday Alternate Satur days.

Second Defendant:-

BENTLEY TRAVEL LTD. BT

STAFF CONFIDENTIAL

LETTER OF OFFER

WINFRED M. AKINYI

I AM PLEASED TO INFORM YOU THAT YOU HAVE BEEN OFFERED A

POSITION WITH BENTLEY TRAVEL LTD EFFECTIVE DATE 23 RD

OCTOBER, 2000.

PARTICULARS OF THE APPOINTMENT

JOB TITLE TRAVEL CONSULTANT

SALARY: SH.22,000.00 NET

COMMENCING: 23RD OCTOBER 2000.

REPORTING TO: GENERAL MANAGER

CONDITIONS OF ENGAGEMENT

THE COMPLETION OF A SATISFACTORY PROBATION

PERIOD OF THREE (3) MONTHS FROM DATE YOUR ENGAGEMENT EXCLUDING

PERIOD OF SICKNESS.

UPON SATISFACTORY CONCLUSION OF THE PROBATION PERIOD,
THERE WILL BE A PERFORMANCE AND OR SALARY REVIEW AND
YOUR APPOINTMENT WILL BE CONFIRMED IN WRITING.

CONDITIONS OF EMPLOYMENT

YOUR EMPLOYMENT WILL BE GOVERNED AT ALL TIMES BY THE KENYA LABOR LAWS AND EMPLOYMENT REGULATIONS. WITHOUT PREJUDICE TO ANY OTHER RIGHTS OF TERMINATION OF THE PARTIES UNDER THIS CONTRACT, ANY PARTY MAY TERMINATE THIS AGREEMENT BY GIVING THE OTHER ONE -MONTH NOTICE DURING THE PROBATIONARY PERIOD. JOB DESCRIPTION: SEE ATTACHED

TERMS OF EMPLOYMENT

: OFFICE HOURS 8.30AM – 5.30PM (MONDAY – FRIDAY) 9.00AM – 1.00PM
(ALTERNATE SATURDAY)

LEAVE ALLOWANCE AFTER ONE YEAR YOU WILL BE

ENTITLED TO 21 DAYS LEAVE BASED

ON A SIX DAY WORKING WEEK.

SICK LEAVE A DOCTOR’S LETTER MUST BE

PRODUCED IF ABSENT FROM DUTY

FOR ONE DAY OR MORE.

MEDICAL YOU ARE ENTITLED TO MEDICAL

BENEFITS ON CONFIRMATION OF

EMPLOYMENT. CHECK STAFF

REGULATION FOR ENTITLEMENT.

ACCEPTANCE OF OFFER

SIGNING THE DECLARATION UNDERNEATH AND RETURNING THE DUPLICATE COPY TO ME SHOULD MAKE YOUR ACCEPTANCE OF THIS OFFER OF EMPLOYMENT CONTAINED IN THIS DOCUMENT.

I AGREE TO ACCEPT THE EMPLOYMENT IN ACCORDANCE WITH THE TERMS AND CONDITIONS STATED WHICH I HAVE READ AND WHICH I FULLY UNDERSTAND.

SIGNED :

PAULINE FERNANDES

GENERAL MANAGER

SIGNED:

WINFRED M. AKINYI

TRAVEL CONSULTANT

On 5.7.2001 and 13.7.2001, the 1st and 2nd defendants respectively resigned from the plaintiff's employment without giving any notice. According to the evidence contained in the affidavit sworn by the plaintiff's managing director which said evidence has not really been denied by the two defendants, on their resignation from the plaintiff's employment, the two immediately joined the third defendant a company carrying on similar business and trade as the plaintiff in Naivasha and competing with the plaintiff in that business i.e. travel agency. The evidence available indicates that the third defendant was incorporated on 19.7.2001 with the 1st defendant and Anthony John Bates as the subscribers to the company's Memorandum of Association. Mr. Bates is the managing director of the 3rd defendant and is alleged to be the husband of the 1st defendant which said allegation he has not denied.

The plaintiff has filed this suit alleging that upon their resignation, the 1st and 2nd defendants have either set up their own business and/or have been offered employment by the 3rd defendant. It is also alleged that the defendant's business is being conducted in the same building in Naivasha where the plaintiff carries on its business.

The actions of the 1st and 2nd defendants are alleged to be contrary to very clear stipulations and/or agreements contained in the terms and conditions of employment governing the employment of the two defendants. These terms and conditions of employment are said to contain the following covenants:-

“(a) That their relationship would basically be governed by the Employment Regulations of BENTLEY GROUP OF COMPANIES 1999 EDITION .

(b) That other individualistic (sic) and/or specific terms of employment were contained in the letter of employment.

16.5 Employees leaving the Employment of the Company may not set up businesses similar to the Company's for a period of 6 months after leaving such service and nor can they seek employment with any Firm conducting similar and/or related Business or trade, or any other company in competitive business with the Company, without the written consent of the Managing Director.

As for the 2nd defendant, it is alleged to have breached an oral agreement entered into on or about February, 2001 between the plaintiff's managing director and the 2nd defendant's managing director whereby it would, through a share purchase agreement, become a shareholder in the plaintiff's business in Naivasha. However considering that this alleged agreement is supposed to have been concluded in February, 2001, some 5 months prior to the incorporation of and therefore the coming into legal existence of the 3rd defendant, I do not see how the 3rd defendant can be held liable for commitments entered into prior to its incorporation and by other parties in connection with agreements it was not privy to. The plaintiff has not tendered any credible evidence regarding the issue.

Be the above what it may, the plaintiff claims that the activities of the three defendants have given the plaintiff a cause of action against them based not only on estoppel and breach of contract but also the doctrine of fair play and unjust enrichment. Accordingly, by this application brought by way of Chamber Summons under O. XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act the plaintiff seeks orders of injunction to restrain:-

(a) the 1st and 2nd defendants from breaching their former terms of Employment and specifically restraining the said defendants from taking up employment and/or venturing into any joint business with the Third defendant or in any way working or offering consultancy service or any service to the Third defendant, or working at BATES TRAVEL & TOURS LTD. or any other Travel agencies or business involved in Air Ticket sales, Car hire business, Tours business or travel Consultancy within the precincts of Naivasha Town for a period of Six months.

(b) the 3rd defendant from trading in the name BATES TRAVEL & TOURS LIMITED and from hiring the first and second defendants, conducting Tours and Travel business

towit Car hires, Tours Bookings, Air Ticket Sales from the same premises, or in the same precincts and vicinity of the Plaintiff's office towit LR No. 144/108 NAIVASHA TOWN or in any way interfering with the Plaintiff's business and/or customers."

A further injunction is sought in mandatory terms that pending the determination of this application and the suit, the defendants' premises and business at LR No. 144/108 Naivasha Town be closed down and the defendants be restrained from operating the said business for a period of 6 months.

All the three defendants have denied the plaintiff's claim. The 1st and 2nd defendants deny that their employment was governed by the Employment Regulations alleged in paragraph 5 of the plaint or at all. They further say that if any such terms as are alleged were in force, then the same were unlawful, in restraint of trade and null and void. As to the list of customers allegedly carried away from the plaintiff's offices by the 1st and 2nd defendants, the 1st and 2nd defendants aver that they are unaware of such a list. They further deny all allegations of fact contained in the plaint.

The leading case on the law on the grant of temporary injunctions in this country is *Giella V. Cassman Brown & Co. Ltd.* (1973) E.A. 358, itself a case on the enforcement of a clause in restraint of trade in a contract of personal service. The case lays down the basic tests which a court should apply when considering issues of the nature arising in this matter. These are:-

(i) an applicant must show a prima facie case with a probability of success;

(ii) an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;

(iii) when the court is in doubt, it will decide the application on the balance of convenience;

(iv) contracts in restraint of trade are generally invalid but a partial restraint in a contract of employment may be valid if it is reasonable in the interests of both parties;

(v) an employer is not entitled to protection against competition;

Applying the above principles to the circumstances of this case, I think it has to be observed right at the outset that a lot of allegations and counter allegations made by the parties herein are obviously exaggerated; at the same time it is also fair to say that there are several basic facts which cannot be challenged by any of the parties herein and which in my view make the resolution of the dispute at this stage at any rate, fairly easy. One of those facts or rather conclusions is that, for the reasons stated above, no prima facie case can be made out against the 3rd defendant because the oral agreement on the basis of which it is sued, the term of which alleged agreement remain vague and largely undisclosed, were admittedly made before the 3rd defendant was incorporated and by parties who could not possibly have been authorised to contract on its behalf. The alleged agreement cannot therefore bind the 3rd defendant.

With regard to the 1st and 2nd defendants the case against them is also not all that clear. The claim against both is allegedly based on a covenant to be found in what the plaintiff refers to as "the Blue Book" which term is the short description of the plaintiff's Employment Regulations otherwise known as the Bentley Group of Companies 1999 Edition. According to the submissions of the plaintiff's advocate (Mr. Kingara) those regulations are incorporated in the 1st and 2nd defendants terms of employment by reference to them in the letter of employment. As far as this case is concerned, the relevant clause is 16.5 which has been quoted above. By virtue of that clause the plaintiff claims that the 1st and 2nd defendants are not entitled to set up businesses similar to the plaintiff's business for a period of 6 months after leaving such service nor were they permitted to seek employment with any firm conducting similar and/or related business or trade for the same period. That is the clause that is alleged to have been breached.

The 1st and 2nd defendants' contention is that the said clause was not part of the contract of service between them and the plaintiff and they were not aware of it. Having gone through the letters of

employment of the two defendants, I must say that I agree with their contention. As for the 1st defendant, I can find no reference to the Blue Book and clearly as far as she is concerned, the plaintiff's contents regarding the existence of the restructure clause are without foundation. However, in the 2nd defendant's documents there is an oblique reference to the Blue Book in her letter of confirmation whereby it is stated:-

"In the meantime, please check "BLUE BOOK" for your entitlements."

In my view however, the reference to the Blue Book however relates to entitlements only. It does not refer to any covenant and clearly not to one limiting the 2nd defendant's rights. A covenant is restraint of trade must in my view be express and specific and cannot be implied from a set of circumstances.

The other factor which must be considered even if I were to find that the plaintiff had established a prima facie case, which as indicated above is far from the position here, is whether the plaintiff might suffer irreparable injury which would not adequately be compensated by an award of damages if the injunction is not granted. In the course of its pleadings the plaintiff has in paragraph 13 and 14 of the plaint stated the extent of loss in terms of money it is likely to sustain if the defendants continue to operate in the manner they are doing their business now. It has not been suggested, except in pleadings and counsel's submissions that the plaintiff will suffer any irreparable loss. In view of that failure, I must find, which I do, that the plaintiff has failed to prove such loss which cannot be compensated by an award of damages.

For all the above reasons, it is my opinion that the plaintiff has failed to satisfy the requirements of the grant of an injunction as set out in the case of Giella (above) and this application must be dismissed with costs. It is so ordered.

Dated at Nairobi this 15th day of October, 2001.

T. MBALUTO

JUDGE