



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. E054 OF 2021

NISHA HOLDINGS LIMITED..... PLAINTIFF

VERSUS

MAYANK NIKHILBHAI PATEL...1ST DEFENDANT

KUM KUM DISTRICTORS.....2ND DEFENDANT

RULING

1. This is a ruling on the plaintiff's application dated 25/1/2021. It was brought under *Articles 50(1) and 25 (c) of the Constitution of Kenya 2010, Sections 1A, 1B, 3, 3A and 63 of the Civil Procedure Act, CAP 21 Laws of Kenya and Order 40 rule 2, 4 (1), Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 7 of the Arbitration Act.*

2. The applicant sought an interim order of injunction, pending referral of the dispute to arbitration, to restrain the 1st respondent from further contacting or soliciting on behalf of the 2nd defendant, the plaintiff's clients in terms of a shareholder's agreement dated 20/2/2019 within a radius of 200 kilometers of the applicant at Ruiru and Limuru ("the location").

3. There was also a prayer for an order to restrain the 1st respondent from disclosing the plaintiff's confidential information and trade secrets to the 2nd defendant or any other direct competitor of the plaintiff within a radius of 200 kilometers of the location.

4. The application was supported by the affidavit of **Savan Kunjbi Hari Desai** sworn on 25/1/2021. The plaintiff's case was that, by a shareholder's agreement entered on 20/2/2019, the directors and shareholders of the plaintiff agreed on certain terms of engagement as directors and shareholders. These included certain restraint of trade clauses in respect to non-compete, non-solicitation and confidentiality at causes 14.9, 22.2, 22.3 and 22.4 thereof.

5. That following an Annual General Meeting of the plaintiff held on 11/1/2020, the 1st respondent ceased to be a shareholder and resigned from the plaintiff. That in contravention of the agreement, he engaged in the promotion of, work for, circumvent clients for, lure clients for, manage, accept payments from, deal with, buy and sell merchandise for and on behalf of the 2nd defendant who is a competitor of the plaintiff.

6. That while in the plaintiff, the 1st defendant had access to confidential information, trade secrets and the plaintiff's customers. The plaintiff was apprehensive that such information was being used by the 1st defendant for the benefit of the 2nd defendant to the its detriment as the 2nd defendant was involved in a business similar to that of the plaintiff. The 1st defendant had set up a place of business for the 2nd defendant within 1km of the plaintiff at Ruiru.

7. Further, that the 1st plaintiff had continued to approach and deal with the clients of the plaintiff on behalf of the 2nd defendant leading to financial loss by the plaintiff. That the actions of the 1st defendant were in breach of the surviving non-compete clause in the shareholder's agreement.

8. For the foregoing reasons, the plaintiff was desirous of invoking the dispute resolution mechanisms under clause the shareholder's agreement and required the status quo to be maintained pending the arbitral proceedings. The plaintiff had since suffered loss of KShs. 6,577,830/= as a result of the 1st defendant's said actions.

9. The application was opposed by the defendants vide a replying affidavit of **Mayank Nikhilbhai Patel** sworn on 1/2/2021. It was the defendants' case that the plaintiff's case was speculative. That there was no evidence that the 1st defendant was acting in breach of the shareholder's agreement. That there were no prayers sought against the 2nd defendant and that the clause 26.6 of the agreement ousted this court's jurisdiction in dispute resolution.

10. It was contended that the contents of the shareholder's agreement were not explained to the 1st defendant as English was not his first language. That the agreement did not state with certainty the scope of trade or goods, items within which it related to hence the scope was generalized. That the 2nd defendant was never a party to the agreement and was not bound by it. That the applicant did not show any contract that it owns that was likely to be breached. The deponent denied opening the business at Ruiru as alleged but affirmed that the same belonged to the 2nd defendant. He denied the allegations by the plaintiff.

11. In the further affidavit of **Savan Kunjbi Hari Desai** sworn on 22/2/2021, the plaintiff stated that on 2/11/2020, the 1st defendant issued various marketing text messages from his number 0721***211 enticing the its customers who he was aware existed in the plaintiff's client list. The screenshots of the said text message were produced as evidence. It was urged that the application be allowed.

12. The parties filed their respective submissions which the Court has considered.

3. **Section 7 of the Arbitration Act** provides: -

“(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.”

14. This provision empowers the Court to protect arbitral proceedings by protecting the subject matter of arbitration. In **Coast Apparel Epz Limited v Mtwapa Epz Limited & another [2017] Eklr**, it was held that: -

“Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the court or the tribunal – such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo, measures intended to provide security for costs and injunctions. Under our system of the law on arbitration, the essentials which the court must take into account before issuing the interim measures of protection are: -

1. The existence of an arbitration agreement.

2. Whether the subject matter of arbitration is under threat.

3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application.

4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties.”

15. I fully associate myself with the rendition of the law in the above case. In the present case, the shareholder's agreement had an arbitral agreement in clauses **25 and 26.1-26.6**. The application has met the first test.

16. The second test is whether the subject matter for arbitration is under threat. The plaintiff submitted that the subject matter of the suit was the applicant's clientele and business which were under the danger of being wasted as the defendants were already soliciting for its clients using its trade secrets. As proof, the plaintiff produced screenshot messages by the 1st defendant of 2/11/2020 of marketing text messages to the plaintiff's customers. This was never specifically denied or responded to by the defendants.

17. The plaintiff also averred that it had already lost an estimated sum of Kshs. 6,577,830/= because of the 1st defendant's actions that were in breach by the shareholder's agreement. The applicant attached a breakdown of lost business from clients due to the breach of the shareholder's agreement by the 1st defendant.

18. In light of the above, I find that the subject matter for the arbitration is under threat. It then follows that the applicant is worthy of interim protective measures.

19. This court is however alive to the fact that the plaintiff has not commenced the arbitral process as set out in clauses **26.1-26.6** of the agreement. Orders for interim protection are not to be issued at large. They should be specific and time bound to avoid abuse.

20. Accordingly, I allow the application as prayed and order that the arbitral proceedings be commenced in terms of the shareholders' agreement within 30 days of the date herein. The cost of the application will abide the arbitral proceedings.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2021

A. MABEYA, FCIArb

JUDGE