



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO. 326 OF 2018**

**KENYA KAZI SERVICES LIMITED.....PLAINTIFF**

**VERSUS**

**LUCAS NDOLO..... DEFENDANT**

**RULING**

1. Lucas Ndolo (the Defendant or Ndolo) urges this Court to find that it has no jurisdiction to hear and determine this dispute and does so through a Notice of Preliminary Objection dated 5<sup>th</sup> September 2018.
2. By a contract of Employment entered on or about 1<sup>st</sup> June 2007, Kenya Kazi Services Limited (Kenya Kazi or the Plaintiff) engaged Ndolo as an Employee. Ndolo held a senior position as the Director Nairobi. Sometime in early 2018, Ndolo requested for an early Retirement. Parties negotiated on the Terms and Conditions of the early Retirement which culminated in the execution of a General Release and Settlement Agreement dated 26<sup>th</sup> March 2018 (The Settlement Agreement). A feature of that Settlement Agreement is that it has certain Restraint of Trade clauses in respect to non-compete, non-solicitation and confidentiality.
3. The grievance by Kenya Kazi is that Ndolo has breached the Restraint of Trade clauses and alongside the Plaint presented to Court on 13<sup>th</sup> August 2018, Kenya Kazi sought certain Injunctive reliefs in the Motion of 13<sup>th</sup> August 2018.
4. There are two issues that I am asked to determine:-
  - a) Who between the Employment and Labour Relations Court (ELRC) and The High Court has jurisdiction to hear this matter?
  - b) If the answer to (a) above is that it is the ELRC, then should this Court strike out this matter or transfer it to the Court with jurisdiction?

This Court has given regard to the submissions of Counsel and now proceeds to give its answer to the two question.

5. Article 162(2) of The Constitution directed Parliament to establish Courts with status of the High Court to hear and determine Disputes relating to Employment and Labour Relations. In deference to those directions, The Employment and Labour Relations Court (ELRC) was established vide The Employment and Labour Relations Court Act (Act No. 20 of 2011) (The Act). Section 12 of the Act sets out the jurisdiction of that Court in the following terms:-

(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

- (a) disputes relating to or arising out of employment between an employer and an employee;
- (b) disputes between an employer and a trade union;
- (c) disputes between an employers' organisation and a trade union's organisation;
- (d) disputes between trade unions;
- (e) disputes between employer organisations;

- (f) disputes between an employers' organisation and a trade union;
- (g) disputes between a trade union and a member thereof;
- (h) disputes between an employer's organisation or a federation and a member thereof;
- (i) disputes concerning the registration and election of trade union officials; and
- (j) disputes relating to the registration and enforcement of collective agreements.

(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

- (i) interim preservation orders including injunctions in cases of urgency;
- (ii) a prohibitory order;
- (iii) an order for specific performance;
- (iv) a declaratory order;
- (v) an award of compensation in any circumstances contemplated under this Act or any written law;
- (vi) an award of damages in any circumstances contemplated under this Act or any written law;
- (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or
- (viii) any other appropriate relief as the Court may deem fit to grant.

(4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.

(5) The Court shall have jurisdiction to hear and determine appeals arising from—

- (a) decisions of the Registrar of Trade Unions; and
- (b) decisions of any other local tribunal or commission as may be prescribed under any written law.

6. It is of course true that the Employer/Employee Relationship between Kenya Kazi and Ndolo ceased on 31<sup>st</sup> March 2018 as provided on the Settlement Agreement. Kenya Kazi takes the view that it being so and this matter being in respect to breaches of the Restraint of Trade Clauses that occurred after the cessation of the Relationship, the dispute cannot be one within the realms of The ELRC.

7. These are strong arguments by Kenya Kazi, but there is a flipside. The Restraint of Trade Clauses are to me found within the Settlement Agreement. The objective of the Settlement Agreement is set out by the Agreement itself in Recital 'C' as follows:-

*“In consideration of the mutual obligations of the parties set out herein, the parties enter into this Agreement to record and implement the terms on which each party agrees to release the other in relation to each party's obligations under the Employment Agreement”.*

Put differently the settlement agreement was entered to record and implement the terms upon which the parties would sever their Employer/Employee Relationship.

8. The root of the Settlement Agreement is the Employer/Employee Relationship. Without that Relationship the Settlement Agreement would not have been necessary. The Settlement Agreement stems from the Employee/Employer Relation and the Restraint of Trade Clauses on that Agreement are partly the terms upon which the two agreed to end the Employment Contract. Indeed, the Restraint of Trade Clauses were agreed upon when Ndolo was still an Employee as the Settlement Agreement was made on 26<sup>th</sup> March 2018 but he ceased to be an Employee with effect from 31<sup>st</sup> March 2018. If a question arises about the validity and enforceability of the Restraint of Trade Clauses, then the same may have to be discussed within the context of the Employer/Employee relationship. There is in my view a nexus, perhaps an intimate one, between the terms of the Settlement Agreement (within which are the Restraints of Trade Clauses) and the Employer/Employee relationship between Kenya Kazi and Ndolo.

9. It would be too restrictive to hold that a dispute on the implementation of the Restraint of Trade Clauses or its Breach is not an Employment matter just because the Relationship has ceased when infact the agreement on the Restraint of Trade was an integral

understanding of how that relationship should be put to an end. And I may add that the position would not have been any different if the Restraint of Trade Clauses had been embedded in the Employment Contract that began the relationship. In both scenarios, the Restraint of Trade arrangement is a consequence of the Employer/Employee Relationship.

10. It must now be clear that the Court leans towards finding that the proper forum for hearing and determination of this dispute is The Employment and Labour Relations Court.

11. This finding is made even in the face of the provisions of Section 2 of The Contracts in Restraint of Trade Act cited to this Court by Kenya Kazi. The provisions are:-

“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, inasmuch as it affords more than adequate protection to 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;

(ii) where a minor has entered into any agreement or contract containing any such provision or covenant, the court shall also take into consideration whether it was for his benefit that he did so”.

12. This is an old statute that commenced on 31<sup>st</sup> December 1932 long before the establishment of The ELRC and The ELRC would have to be read into that statute as the Court with Jurisdiction if the Contract on Restraint of Trade is part of, connected with, relates or stems from an Employer/Employee Relation. The ELRC is the corresponding Court to the High Court in that statute in respect to those matters.

13. Further this decision is reached notwithstanding that Kenya Kazi has cited three cases being Lys and Trees Limited vs. Elverlyn Maregwa & Another [2009] eKLR, LG Electronics African Logistics FZE vs. Charles Kimani [2012] eKLR and Bridge International Academies Limited vs. Robert Kimani Kiane [2015] eKLR, in which the High Court adjudicated over disputes relating to contracts in Restraint of Trade even after The ELRC had been established. I am not told whether the issue of jurisdiction was ever raised in these matters. But perhaps unwittingly, attached to Kenya Kazi’s list of Authorities is a decision in Credit Reference Bureau Holdings Limited vs. Stewen Kanyihia [2017] eKLR in which The ELRC dealt with a dispute in respect to a Contract in Restraint of Trade notwithstanding that the Employer/Employee Relationship had ceased.

14. The second question is the easier one to deal with. Ideally, a Court ought to strike off a matter in which it is bereft of jurisdiction. But in the matter before me the jurisdiction is not with this Court but with a Court of Equal status. Save for the different mandates given to us by the Constitution, this and the ELRC are one and the same Court. If this Court finds that a matter should be before that Court and not here, then a sensible thing would be for the Court to simply have it transferred to where it ought to have been filed in the first place. It would be too drastic a step to take if I were to strike out the Suit.

15. In the end I transfer this Suit to The Employment and Labour Relations Court of Kenya at Nairobi for hearing and determination. Costs up to now shall be in the cause.

**Dated, delivered and signed in open Court at Nairobi this 2<sup>nd</sup>**

**day of November, 2018.**

**F. TUIYOTT**

**JUDGE**

Present:-

Deya h/b Omondi for Plaintiff

Gathu for Defendant

Fred - Court Assistant