



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2622 OF 1998

SUNBIRD HELICOPTERS LTD..... PLAINTIFF

VERSUS

MICHAEL ODONGO..... DEFENDANT

RULING

This is the plaintiffs application for the following orders;

1. -----

2. An injunction to restrain the defendant from being employed by or providing services to Austair Helicopters (EA) limited or any other person, firm or company until 31st July, 1999 or otherwise breaching the agreement dated 26th June 1998

3. An injunction to restrain defendant by himself his servants or agents or otherwise however from using and / or disclosing any confidential information acquired by the defendant from plaintiff and or any trade secrets of plaintiff.

4. Costs of this application to be paid by defendant in any event.

The application is based on a plaint filed on 24.11.98. The facts in the plaint and in the affidavit to support the application show that the plaintiff and the defendant entered into a written contract of service on 26.6.98 by which defendant agreed to be employed and plaintiff agreed to employ defendant as Helicopter Chief Engineer for a minimum period of one year at a monthly salary of shs 150,000/-. The defendant was to commence work on 1st August 1998 but it is averred that, in flagrant breach of contract, plaintiff failed to present himself for work and instead took up similar job with Austair Helicopters (EA) ltd, a company in direct competition with the plaintiff. Mr. Robert J. Wilhelm, a director of plaintiff company, deposes inter alia that, in the course of discussions with defendant and with a view to preparing defendant for the job, defendant was recipient of certain confidential information and plaintiffs trade secrets confidential to and the property of the plaintiff which defendant has used or divulged to Austair Helicopters (EA) limited. Plaintiff avers that it was an express and or an implied term of the agreement that defendant would work exclusively for the plaintiff or in alternative an implied term that defendant would not render services in the course of business to any other than plaintiff and that he would act towards plaintiff in good faith, loyalty and fidelity.

Plaintiff further avers that it cannot commence and proceed with its business of maintaining helicopters without an Engineer as defendant is one of the only six licensed Aircraft Mechanical Engineers for Helicopters in Kenya all who are engaged and as he has been unable to get a foreign engineer. Plaintiff avers that it has lost profit. A part from an order for injunction other relief's sought in the plaint include Damages for breach of contract, exemplary damages; and as alternative to injunction,

an account of defendants profits resulting from confidential information gather and the payment of the sum found due.

Defendant deposes among other things that he had been contracted by Ausair Helicopters (EA) limited way before June 1998; that he has never been in the employment of plaintiff and the issue of confidentiality and plaintiffs trade secrets in fondles. He denies that he is in breach of any contract. Mr. Kibet for plaintiff relies on several authorities the main one being Warner Brothers Pictures incorporated versus Nelson (1937) 1KB 209. In that case, Branson J. said at page 217 2nd paragraph:

“The conclusion to be drawn from the authorities is that, where a contract of service contains negative covenants the enforcement of which will amount either to decree of specific performance of the positive covenant of the contract or to the giving of a decree under which the defendant either remain idle or perform those positive covenants, the court will enforce those negative covenants; but this is subject to further consideration. An injunction is a discretionary remedy, and the court in granting it may limit it to what the court considers reasonable in all the circumstances of the case.”

The stringent contract which the court in the above case was considering sound the defendant in the suit, inter alia, to render her exclusive services to the plaintiffs and to perform solely and exclusively for them. /the defendant also bound herself that she would not during the term of the contract render any services for any other person etc without written consent.

The case of Boob versus Green (1995) 2QB 35 shows that, in a contract of service, there is an implication that the servant undertakes to serve his master with good faith and fidelity and that if such implied term is breached by the servant an injunction may issue.

Turning to the recent case Mr. Kibet contends that plaintiff is not seeking to enforce the agreement by forcing defendant to work for the plaintiff but plaintiff is enforcing a negative covenant that, for the contract of one year defendant should not work for anybody else. Plaintiff thus seeks an order for injunction for one year.

Mr. Njuguna for defendant, contends among other things, that when defendant failed to start work the contract was terminated and what plaintiff would be entitled to is damages for breach of contract.

In the cases cited by Mr. Kibet where injunction to enforce a negative covenant has been issue, the defendant had executed a contract containing the negative covenants and had infact started work. The courts in those case were construing the terms of the contract of service. The decision were not based on the mere fact that defendant had entered into a contract of service to serve for a period and had failed to serve for the agreed period. In the present case, the “Employment contract” is sketchy. While, by the contract the defendant “ agrees” to work for plaintiff for a minimum period of one year and agrees if requested to “establish a bond satisfactory to Sunbird to guarantee this undertaking” the contract does not contain any negative terms. Perhaps the bond to be executed would have contained the negative covenant but the bond was not executed. The negative covenant cannot be implied.

Moreover, the nature and scope of the negative covenant varies from contract to contract and it is difficult to ascertain the negative covenants which would have been incorporated in the contract in dispute. Even if negative covenants binding defendant to work exclusively for the plaintiff and not to engage in any other employment during the contract period were incorporated into the contract, it is doubtful that the court would enforce them by an order for injunction because it appears that the nature of the injunction sought will result in either the defendant remaining idle or being forced to work for the plaintiff.

For those reasons I dismiss the application with costs to the defendant.

E. M. Githinji

JUDGE

4.3.99

Mr. Katwa for Mr. Kibet present

Mr. Njuguna present

Order: Ruling to be typed and copies supplied as requested.

E. M. Githinji

Judge