



IN THE COURT OF APPEAL  
AT NAIROBI  
(CORAM: TUNOI, O'KUBASU, J.J.A. & ONYANGO OTIENO, AG.J.A.)  
CIVIL APPLICATION NO. NAI. 32 OF 2004 (19/2004 UR)  
BETWEEN

H.F. FIRE AFRICA LIMITED ..... APPLICANT

AND

AMR GHARIEB ..... RESPONDENT

(Application from an intended appeal from the Ruling and Order of the High Court of Kenya at Milimani Commercial Courts, Nairobi (Mohamed Ibrahim, J.) made on 10th December, 2003

in

H.C.C.C. NO. 665 OF 2003)

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RULING OF THE COURT

This is an application under rule 5(2)(b) of the Court of Appeal Rules (the rules) in which the applicant, H.F. Fire Africa Limited is seeking the following orders:-

***“1. A temporary injunction do issue to restrain the Respondent on his own behalf or on behalf of any person firm or company and by himself or through his agents principals employers servants or any company or otherwise however from directly or indirectly breaching the covenants conditions and terms of the Agreement between the parties dated 14 th***

***June, 2000 and carrying on any business similar to or in competition with the business of and/or from seeking or procuring orders from or doing business with any person firm or company who has at any time done business with, and/ or endeavouring to entice away any person who has at any time been employed or engaged by and/or divulging or disclosing to any person whatsoever or otherwise making use of any trade secret or confidential information concerning the business or finances or any of the dealings transactions or affairs of the Applicant Company or any of its subsidiaries holding companies suppliers principals agents distributors or customers within the Republic of Kenya until the final determination of the Appeal .***

***2. This Hon ourable Court do grant any such further or other relief as it may deem fit and just in all the circumstances to grant.”***

The genesis of this application is the High Court Civil Suit No. 665 of 2003 filed at the Milimani Commercial Courts in which the applicant, as the plaintiff, filed a suit against the respondent, (**Amr Gharieb**) and simultaneously filed an application by way of Chamber Summons under Order XXXIX rules 1, 2 and 3 of the Civil Procedures Rules. In that Chamber Summons application the applicant sought very wide and far-reaching injunctive orders which were all geared towards the specific enforcement of the covenants in respect of restraint of trade on the part of the respondent. There were also orders sought

to restrain the alienation and/or disposal of the company's property and assets and from the making of false, malicious, scandalous and defamatory statements against the applicant company, its directors majority share-holders amongst others. When the application came up before the High Court (Ibrahim J) ex parte, the learned Judge granted virtually all the orders sought in that Chamber Summons application dated 23rd October, 2003, but on interim basis not exceeding 14 days . The said orders were extended from time to time pending the inter partes hearing. After the inter partes hearing of the application before the same learned Judge (Ibrahim J), the applicant's application was dismissed and the interim orders which had been granted discharged. In dismissing the application the learned Judge expressed himself thus:-

***“In the circumstances of this case, the covenants are likely to be used for a purpose other than the protection of the plaintiff company. The plaintiff company is in control of a shareholder whose interest go beyond the comp any and the line between protection of the company or the other interest is now not clear.***

***In the light of the foregoing, I do hereby hold that the plaintiff has not shown prima facie case with a probability of success with regard to the covenants the summary dismissal and the properties and assets of the company. I therefore do hereby dismiss the application with costs to the defendant. The interim orders are hereby discharged forthwith. The inquiry as to damages to be undertaken at the same time as th e trial of this suit.”***

Consequent upon the above ruling by the superior court the applicant company now comes to this court under rule 5(2)(b) of the rules seeking the orders set out at the commencement of this ruling.

Mr. Amin, for the applicant, submitted that the respondent being the former Managing Director of the applicant company owned, (together with his wife,) 40% of the applicant company and if the application sought is not granted then the intended appeal would be rendered nugatory. He went on to submit that the respondent was in breach of the contractual covenant as contained in the agreement of 14th June, 2000 as he had already incorporated a company with the sole objective of competing with the applicant company. Mr. Amin based his submissions on the decision in **JOHN MICHAEL DESIGN PLC V. COOKE & ANOTHER , [1987] 2 ALL E.R. 332** as in his view the facts in that case are similar to the facts in this case.

To answer Mr. Amin's submission, Mr. Owino, for the respondent, was of the view that in this application the crucial authority is the relevant statute, which in his view, is the **Contracts in Restraint of Trade Act** (Cap.24 Laws of Kenya) . Mr. Owino then relied on the Memorandum of Agreement dated 13th June, 2003 between Heshon Foud and the respondent and the Agency Agreement. The latter agreement, according to Mr. Owino, has not expired. It was Mr. Owino's submission that the provisions of the covenant were void and as such there is no arguable appeal. As regards the decision in **JOHN MICHA EL DESIGN PLC** (supra), it was Mr. Owino's contention that it was distinguishable from the present case. He asked us to dismiss this application

. It is to be observed that the respondent was the Managing Director of the applicant company. In a Memorandum of Agreement dated 13th June, 2003 signed by the parties clauses 4 and 5 of that Agreement provided:-

***“4. Amr Ghariieb shall be appointed Managing Director of H.F. Fire Africa Limited and a Managing Director's Service Agreement shall be executed between the relevant parties in that regard. 5. Amr Ghariieb hereby undertakes and guarantees not to compete in any way either in his personal capacity or as a director or shareholder of any other entity with H.F. Fire International Inc. in any of its business act ivities in the geographical area specified in clause 3 above.”***

Pursuant to the foregoing, the Managing Director's Agreement was entered into on 14th June, 2000 which set out in great details the relationship between the applicant company and the respondent. There was also signed on the same day (14th June, 2000 ) an Agency Agreement. These agreements

governed the relationship between the applicant and its Managing Director (the respondent herein). What triggered this litigation was a letter dated 22nd August, 2003 addressed to the respondent informing him that he had been summarily dismissed from his position as “Managing Director for Gross Misconduct” .

When the application under Order XXXIX of the Civil Procedure Rules came up before the superior court, the learned Judge, correctly, in our view, came to the conclusion that in Kenya we have a specific Act of Parliament dealing with contracts in restraint of trade, the Contracts of Restraint of Trade Act (Cap.24 Laws of Kenya ). Section 2 of the said Act provides:-

***“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, inasmuch 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.”***

The learned Judge considered the foregoing together with the various agreements signed between the parties and came to the conclusion that the restricting covenants were not only suspect but void.

This being an application under rule 5(2)(b) of the rules it is upon the applicant to show that its intended appeal is arguable and not frivolous, and further, that the intended appeal were it to eventually succeed would be rendered nugatory if we refused to grant the orders sought in this application.

In this ruling we have endeavoured to set out the genesis of the relationship between the parties, the agreements governing that relationship, what triggered the dispute and the findings of the superior court on the applicant’s application which was dismissed leading to an appeal being filed. It is now upon us to decide whether the applicant has succeeded in meeting the test under rule 5(2)(b) of the rules. It is to be observed that throughout this ruling, we have deliberately avoided making any firm conclusions in a bid to avoid any prejudice to the suit in the superior court and the intended appeal.

Having considered all that has been urged before us, we find that as the Agency Agreement is still in force and any damages that the applicant might suffer would adequately be compensated by way of damages, we are of the view that this is not a proper case in which to grant the very wide and far reaching injunctive orders which are all geared towards the specific enforcement of the restrictive covenants that the learned Judge ruled to be void. We would say no more on the matter but only pronounce our decision in this application which is to the effect that the Notice of Motion application brought under **rule 5(2)(b)** of the rules and dated **19th February, 2004** is hereby dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 19 th day of March, 2004.**

**P.K. TUNOI**

.....

**JUDGE OF APPEAL**

**E.O. O’KUBASU**

.....

**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**AG. JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**