



**Excel Global Limited v Kithinji & another (Cause E137 of 2025)
[2025] KEELRC 1687 (KLR) (10 June 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1687 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E137 OF 2025
BOM MANANI, J
JUNE 10, 2025**

BETWEEN

EXCEL GLOBAL LIMITED CLAIMANT

AND

MARTIN MURIERA KITHINJI 1ST RESPONDENT

OSWAL COLLEGE 2ND RESPONDENT

RULING

1. The Claimant and 1st Respondent had an employment relationship under which the 1st Respondent was hired as a lecturer. The parties executed an undated contract to anchor the relationship.
2. Clause 5 of the contract (the non-compete clause) provides as follows:

During the continuance of your employment, you shall not without the written consent of the company be employed by any other person, firm or company whether for or without reward and shall devote your full time and energies to the service of the company. You cannot work in the same industry of education or institution doing any of the same course as our college at least for 6 months after leaving this company to avoid conflict of interest.”
3. On 2nd December 2024, the 1st Respondent issued the Claimant with a notice of intention to resign from employment. The notice was expressed to take effect one month after the date of issue, that is to say, 2nd January 2025.
4. Subsequently, it appears that the Claimant commissioned an investigation against the 1st Respondent to establish whether he had taken up employment with its competitors in contravention of the non-compete clause in the contract between them. The investigation appears to have established that the 1st Respondent had taken up employment with the 2nd Respondent one month after he tendered the resignation notice.



5. Disconcerted with this development, the Claimant filed the instant suit seeking orders to bar the 1st Respondent from continuing in the service of the 2nd Respondent. The Claimant further seeks a declaration that the 1st Respondent's action of taking up employment with the 2nd Respondent is in breach of the non-compete clause in the contract between them (the Claimant and 1st Respondent).
6. Accompanying the suit is an application dated 25th February 2025 filed under certificate of urgency. In the application, the Claimant seeks the following orders:-
 - a. Spent.
 - b. That the court issues an order of temporary injunction to restrain the 1st Respondent from taking up employment with the 2nd Respondent or any other entity that offers the same products and services as those offered by the Claimant during the non-compete period pending the hearing and determination of the suit.
 - c. That the court issues an order to restrain the Respondents, their agents and servants from enticing and or canvassing for the Claimant's clients within the non-compete period pending the hearing of the suit.
 - d. That the court issues an order to restrain the Respondents, their agents and servants from utilizing or disclosing the Claimant's confidential information and trade secrets to competing entities within the non-compete period pending determination of the suit.
 - e. That the court gives directions on costs of the application.
7. The application is supported by an affidavit sworn by Karan Gupta, the Claimant's director. The affidavit reiterates the matters set out earlier in this ruling.
8. Although the 1st Respondent was served with summons to enter appearance together with the instant application, he neither entered appearance in the matter nor filed a response to either the main claim or the application. In effect, he has not contested the proceedings.
9. The 2nd Respondent has opposed the application. It has filed a replying affidavit dated 20th March 2025 and a Notice of Preliminary Objection dated 14th March 2025.
10. The 2nd Respondent confirms that it entered into a contract of service with the 1st Respondent on 6th January 2025. It contends that prior to this, the 1st Respondent was a stranger to it.
11. The 2nd Respondent avers that at the time the 1st Respondent signed the contract of service with it, he did not disclose that he had signed a contract of service with the Claimant with a non-compete clause. The 2nd Respondent contends that the 1st Respondent did not disclose any obligations he owed the Claimant under their contract of service.
12. The 2nd Respondent contends that the Claimant has not demonstrated that the two (the 2nd Respondent and Claimant) are engaged in the same business or that they are serving the same market. As such, it contends that the application should be disallowed.
13. In the preliminary objection, the 2nd Respondent avers it has no employment relation with the Claimant. As such, it contends that it is improperly impleaded in the suit.



Analysis

14. The employment contract between the Claimant and 1st Respondent has a non-compete clause. The clause bars the 1st Respondent from taking up employment with the Claimant's competitors within six (6) months of termination of the employment relation between the two.
15. The preliminary material placed before the court shows that the 1st Respondent's resignation from the Claimant's employment crystalized on 2nd January 2025, a month after he tendered the notice to resign. As such, the bar that was intended by the non-compete clause crystalized as from 2nd January 2025 for a period of six (6) months.
16. The six (6) months that the non-compete clause is to remain effective run up to 2nd July 2025. As such, if the court issues the orders sought by the Claimant, they will only be effective until 2nd July 2025 where-after, they will automatically lapse.
17. The 2nd Respondent admits that it entered into a contract of service with the 1st Respondent on 6th January 2025. According to the investigation report which is annexed to the Claimant's affidavit in support of the application for interim reliefs, the 2nd Respondent and Claimant are engaged in the same industry. The report further confirms that the 1st Respondent has since been hired by the 2nd Respondent.
18. Besides the 2nd Respondent averring in the replying affidavit that the Claimant has not demonstrated that the two are engaged in the same industry, it (the 2nd Respondent) has not provided cogent evidence to rebut what is alluded to in the aforesaid investigation report. As such, the court accepts in the interim the averments in the investigation report that the two are engaged in the same industry.
19. The Claimant has further provided preliminary material to demonstrate that the two (the Claimant and 2nd Respondent) are situate within a walking distance. The 2nd Respondent has not disputed this fact. As such, the court accepts the preliminary evidence that the two are situate within close proximity.
20. The law on non-compete agreements is now fairly settled. The general position is that courts are often reluctant to enforce such agreements unless it is apparent that the parties enjoyed equality of bargaining power during their negotiations and that the contracts are not inimical to public interest (*Mwaura v Taxify Kenya Limited (Employment and Labour Relations Cause 173 of 2019) [2023] KEELRC 1849 (KLR) (27 July 2023) (Judgment)*). With regard to employment contracts, such agreements are considered void against the employee if his contract of service is unlawfully terminated (see section 3 of the *Contracts in Restraint of Trade Act* Cap 24 Laws of Kenya).
21. That said, a contract does not become void merely because it contains a non-compete clause. However, the High Court is empowered to declare a non-compete clause in a contract as void if it is satisfied that the provision is unreasonable or contrary to public interest (see section 2 of the *Contracts in Restraint of Trade Act* Cap 24 Laws of Kenya and *Mwaura v Taxify Kenya Limited (Employment and Labour Relations Cause 173 of 2019) [2023] KEELRC 1849 (KLR) (27 July 2023) (Judgment)*).
22. In the instant suit, the preliminary material placed before the court shows that the Claimant and the 1st Respondent entered into the impugned contract in restraint of trade. The contract is, prima facie, valid.
23. The record shows that the contract of service between the Claimant and 1st Respondent was terminated through resignation by the 1st Respondent. As such, it (the contract) was not unlawfully terminated by the Claimant so as to render the non-compete clause in it null and void.



24. As pointed out earlier in the ruling, although the 1st Respondent was served with summons to enter appearance in the cause alongside the instant application, he did not file responses to the suit and application. As such, the court has no materials placed before it to suggest that at the time the Claimant and the 1st Respondent entered into the impugned contract, either of them was negotiating from a position of disadvantage. Further, there is no material placed before the court to suggest that the contract is unreasonable or injurious to public interest. The foregoing being the case, the court has little option but to uphold the non-compete clause in the contract.
25. The 2nd Respondent contends that there is no employment contract between it and the Claimant. As such, it contends that it is improperly impleaded in the cause.
26. Nevertheless, the court notes that the 2nd Respondent has not couched the above objection as a jurisdictional question. Rather, it has couched it as a matter of misjoinder of parties to the suit essentially conceptualizing it from the prism of whether it (the 2nd Respondent) is a necessary party to the action.
27. The 2nd Respondent having elected to approach the objection as one of misjoinder of parties as opposed to a purely jurisdictional issue, it was required to file a formal application in respect of the issue as opposed to a bare Notice of Preliminary Objection. This view is informed by the manner in which Order 1 rule 10 (2) of the Civil Procedure Rules is couched. It provides as follows:-

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
28. Under this rule, the court may of its own motion without an application by the parties, order to be struck out the name of a party who has been improperly impleaded in a cause or order to be added a party who is necessary in a suit. However, where a party to the suit originates the request to remove or add another party, he is required to make a formal application. Having regard to the provisions of Order 51 rule 1 of the Civil Procedure Rules, I understand the law to require such application to be presented through a Notice of Motion as opposed to a bare Notice of Preliminary Objection.
29. The Employment and Labour Relations Court (Procedure) Rules, 2024 do not speak to the matter of joinder, non-joinder and misjoinder of parties. In the premises, the question that arises is whether this court is entitled to resort to the [Civil Procedure Act](#) and Rules to fill the lacuna.
30. I have previously expressed the view that the court should only be guided by the Employment and Labour Relations Court (Procedure) Rules to manage proceedings before it. However, this view was overruled by the Court of Appeal in the case of *TNT Express Worldwide (Kenya) Limited v Timothy Graeme Steel* (Civil Appeal E365 of 2018) [2022] KECA 881 (KLR) (10 June 2022) (Judgment). This should explain why I have referred to the aforesaid provisions of the Civil Procedure Rules to address the matter at hand.
31. In the premises, the court takes the position that the question of misjoinder of the 2nd Respondent in the suit ought to be pursued through a formal application as contemplated under Order 1 rule 10 (2) and Order 51 rule 1 of the Civil Procedure Rules. Absent such application, the court will not pronounce itself on the matter for the moment.



Determination

32. The upshot is that:-

- a. The court issues an order of temporary injunction to restrain the 1st Respondent from taking up employment with the 2nd Respondent or any other entity that offers the same products and services as those offered by the Claimant during the non-compete period.
- b. The court issues an order of temporary injunction to restrain the 1st Respondent either by himself or through the 2nd Respondent or his agents and servants from enticing and or canvassing for the Claimant's clients within the non-compete period.
- c. The court issues an order of temporary injunction to restrain the 1st Respondent either by himself or through the 2nd Respondent or his agents and servants from utilizing or disclosing the Claimant's confidential information and trade secrets to competing entities within the non-compete period.
- d. For the avoidance of doubt, the orders here-before issued shall remain valid and in force only during the non-compete period as agreed in the contract between the Claimant and 1st Respondent, that is to say, until 2nd July 2025 where-after they will lapse automatically.
- e. The costs of the application shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED ON THE 10TH DAY OF JUNE, 2025

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the 1st Respondent

.....for the 2nd Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

JUDGE

