



REPUBLIC OF KENYA



**KENYA LAW**

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**Hotel Online Kenya Limited & 2 others v Kamau & another (Cause E932 of 2023) [2024] KEELRC 121 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 121 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE E932 OF 2023**  
**NZIOKI WA MAKAU, J**  
**FEBRUARY 2, 2024**

**BETWEEN**  
**HOTEL ONLINE KENYA LIMITED & 2 OTHERS ..... CLAIMANT**  
**AND**  
**PATRICK NG'ANG'A KAMAU & ANOTHER ..... RESPONDENT**

**RULING**

1. The application before me is the claimants'/applicants' notice of motion application dated November 6, 2023 is expressed to be brought pursuant to section 12(3)(i) of the [Employment and Labour Relations Act](#) and rule 17(1), 17(3) and rule 17(5) of the [Employment and Labour Relations Court \(Procedure\) Rules](#). It seeks the following orders in the main:-
  - (1) That this application be certified urgent and be heard *ex-parte* in the first instance.
  - (2) That this honourable court be pleased to issue a temporary order of injunction restraining the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> respondent whether by himself, employees, servants or agents from further contacting, enticing, engaging, interfering with, canvassing for and/or soliciting the claimant's clients, directly or indirectly, within the contacted non-compete clause under the contract of employment pending the hearing and determination of this application.
  - (3) That this honourable court be pleased to issue a temporary order of injunction restraining the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent whether by himself, employees, servants or agents from directly or indirectly disclosing the Claimant's confidential information, proprietary business information and trade secrets to the Claimant's clients and/or competing business within the contracted non-compete clause under the contract of employment pending the hearing and determination of this application.
  - (4) That this Honourable Court be pleased to issue a temporary order of injunction restraining the Respondent whether by himself, employees, servants or agents from further contacting,



enticing, engaging, interfering with, canvassing for and/or soliciting the Claimant's clients, directly or indirectly, within the contacted non-compete clause under the contract of employment pending the hearing and determination of this suit.

- (5) That this Honourable Court be pleased to issue a temporary order of injunction restraining the Respondent whether by himself, employees, servants or agents from directly or indirectly disclosing the Claimant's confidential information, proprietary business information and trade secrets to the Claimant's clients and/or competing business within the contracted non-compete clause under the contract of employment pending the hearing and determination of this suit.
- (6) That this Honourable Court be pleased to issue a temporary order of injunction restraining the Respondent from directly or indirectly rendering services as an employee to any interposed entity that competes with the Claimant's products and services within the contract non-compete clause under the contract of employment pending the hearing and determination of this application.

2. The application is premised on the following grounds:-

- a) That the Respondent worked as an employee of the Claimant as the Head of Revenue Management, a position he served in since December 15, 2019 where his main role was engaging with clients and collecting revenue for the Claimants.
- b) That the employee executed an employment contract that contained a surviving non-competition clause that expressly prohibited the Respondent from engaging in any work for another Employer that is related or in competition with his employer and in any event, the employee was contractually obligated to disclose to his employer any other employment or consultancy relationships for approval.
- c) That the surviving non-compete and confidentiality clause expressly prohibited the Respondent for a period of one (1) year from engaging any of the claimant's clients after the termination of the employment contract and disclosing the claimant's confidential information obtained while in the claimant's employment, and rendering any service that is competition with the claimant's business.
- d) That claimant and the respondent enjoyed a good work relationship for four (4) years until sometime in October 2023, when the Respondent tendered his resignation by way of an email dated October 13, 2023 with his last working day being October 13, 2023.
- e) That shortly after the termination of his employment through resignation and contrary to the non-compete clause, the 1<sup>st</sup> Respondent engaged in a competitive business by way of incorporating a new business venture, the 2<sup>nd</sup> Respondent, herein known as Rev Connecta under the sole membership and directorship of the 1<sup>st</sup> Respondent.

3. The Applicant asserts that the 2<sup>nd</sup> Respondent, being the business name of the 1<sup>st</sup> Respondent is directly engaging in the same core business as the Claimant and is in direct competition with the Claimant. The Applicant further asserts that the 1<sup>st</sup> Respondent is directly engaging with the Claimant's clients and could possibly be using confidential information in a manner that is detrimental to the claimant's business and its relationship with its clients and that this act of the 1<sup>st</sup> Respondent is in direct breach of the surviving non-compete clause in the 1<sup>st</sup> Respondent's employment contract whose terms the 1<sup>st</sup> Respondent is contractually bound by.



4. It was asserted that the Claimant has suffered and continues to suffer massive losses as a result of the action of the 1<sup>st</sup> Respondent and is rightfully apprehensive that should the 1<sup>st</sup> Respondent proceed engaging the Claimant's clients and unfairly using the confidential information, the Claimant will irreparably lose its business reputation. And that there is no prejudice that the Respondent will suffer at the issuance of the injunctive reliefs restraining them from engaging with the claimant's clients or unfairly using claimant's proprietary information to their advantage. The Applicant asserts that the Claimant is essentially seeking the urgent intervention of this honourable court by way of injunctive reliefs, to restrain the Respondent from further breaching the employment contract or any term thereof to prevent prejudice on the Claimant's business and the Respondents from taking unfair advantage out of the relationship that were. The application was further supported by the sworn affidavit of Havar Wormstrand Bauck, the Chief Executive Officer of the Claimant.
5. The Respondents upon service resisted the motion through an affidavit sworn by the 1<sup>st</sup> Respondent the Proprietor of Rev Connecta, the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent asserts that he is a stranger to the alleged written employment contract filed by the Applicants and dated the 15<sup>th</sup> December 2019 and the non-compete clause therein that is the subject matter of this Application and suit. He deponed that the 1<sup>st</sup> Respondent's signature that appears on the alleged written employment contract is an electronic signature and that the Applicants have not presented a pattern or any evidence to show that he actually acknowledged receipt of the alleged written employment contract and effected his electronic signature on it. He stated that by virtue of his prior engagement with the Applicants, the Applicants had access to his electronic signature. The 1<sup>st</sup> Respondent asserts that the Applicants are not being truthful as to the chronology of events that explain their engagement with the 1<sup>st</sup> Respondent and hence prove to be unreliable. The 1<sup>st</sup> Respondent deponed that the first point of engagement between the Applicants on one hand and the 1<sup>st</sup> Respondent on the other dates back to 9<sup>th</sup> January 2020 after the 3<sup>rd</sup> Applicant sent an email to the 1<sup>st</sup> Respondent offering him a job opportunity for a period of 4 months. The 1<sup>st</sup> Respondent asserts the said contract actually lapsed after about 2 months when the 3<sup>rd</sup> Applicant sent an email on 15<sup>th</sup> March 2020 sending most of its staff including the 1<sup>st</sup> Respondent on an unpaid leave with immediate effect. That after being terminated from employment, the 1<sup>st</sup> Respondent moved to work in a different company for a period of one month and attached a payslip from Q-Sourcing Limited. The 1<sup>st</sup> Respondent deponed that he later engaged with the Applicants as from September thereabout through an oral agreement whereby he was doing piecemeal tasks and after the business relationship between the Applicants and the 1<sup>st</sup> Respondent was solidified, he rose to the position of Head of Revenue Management. He deponed that their contractual terms were solely based on an oral agreement which did not include a non-compete agreement. The 1<sup>st</sup> Respondent asserts that during the course of employment, he asked for a written employment contract from the Applicants but the same was not issued to him. The 1<sup>st</sup> Respondent asserts that on 13<sup>th</sup> October 2023 he tendered his resignation on personal reasons by way of email whereby he reiterated that there was no valid written employment contract between him and the Applicants.
6. The 1<sup>st</sup> Respondent deponed that the Applicants only raised the issue of the alleged written employment contract and a non-compete clause as an afterthought when they realized that the 1<sup>st</sup> Respondent had started a flourishing business. The 1<sup>st</sup> Respondent asserts that from the above chronology of events, it is evident that it is not reasonably possible that the Applicants had a valid written employment contract with the 1<sup>st</sup> Respondent dated 15<sup>th</sup> December 2019 and hence the alleged breach of any terms therein is incorrect. He deponed that in any case and without prejudice to the foregoing, the salary figure of Kshs. 127,461.93/- represented in the alleged written employment contract is not accurately captured and in fact a true representation of the figure in the Kenya Revenue Authority (KRA) portal. That by virtue of the Pay as You Earn (PAYE) remitted by the 1<sup>st</sup> Applicant



- in favour of the 1<sup>st</sup> Respondent for the period January 1, 2022 to December 31, 2022, it shows an annual taxable salary of Kshs. 547,800/- and by dint of the taxable salary for the period 1<sup>st</sup> January 2022 to December 31, 2022 as shown in annexure "PNK5" there is a reasonable inference that the 1<sup>st</sup> Respondent was earning a salary of Kshs. 45,650/- per month. The 1<sup>st</sup> Respondent thus urged on behalf of the Respondents that the motion be denied.
7. Parties filed written submissions which they opted to orally highlight. I thus captured the oral submissions of the parties through their Counsels.
  8. Ms. Kemunto of M/s L.K Getanda & Associates, Counsel on record for the Claimants/Applicants submitted that the employee worked for the Claimant and upon leaving, contacted former clients of the employer to solicit business from them and that thereafter, the clients moved to give business to the Respondent. She argued that while they did not doubt the expertise of the Respondent because he was employed on merit and qualification, the Claimant expected him to look for his own clients and build his client base. She explained that after the Claimant issued a demand letter on October 30, 2023, the Client said they would not continue business with the Claimant. That the Respondent had registered a business whose core was the business similar to his employer and what followed was that the clients who had existed under the Claimant's care moved their business to the 2<sup>nd</sup> Respondent. That the Claimant had also filed documents before Court indicating that the business is owned by the 1<sup>st</sup> Respondent. She confirmed that they moved to Court to stop solicitation of the Claimant's clients since the Respondent was approaching other clients.
  9. Mr. Okenya for M/s Kisumba Kariuki & Co. Advocates, Counsel on record for the Respondents stated that they rely on the Replying Affidavit filed before Court challenging the Application. He submitted that there was no contract between the Applicant and Respondent that could bring out the non-compete clause. That the first point of engagement dated 9<sup>th</sup> January 2020 was an email from the Applicant and that they challenged the validity of the unwritten contract. That the electronic signature was obtained without consent of the Respondent and had been obtained through prior engagement. On the point of alleged stolen Clients, Counsel for the Respondents submitted that the Clients had fallen out with the Applicant due to the mishandling between Applicant and Clients. That this led to the Applicant seeking orders restraining or preventing the 1<sup>st</sup> Respondent from operating or conducting his business. It was their prayer that the Court suspends the interim orders granted due to misrepresentation of facts by the Applicant as explained in the Replying Affidavit. Secondly, that the Respondent is unjustly suffering as a result of the interim orders issued since his business is the only source of income he relies on and he has huge financial responsibilities to his family. It was the submission of Counsel for the Respondents that they hope the Court suspends the Orders to allow the Respondent to regain his position financially.
  10. In a brief rejoinder, Counsel for the Claimants/Applicants submitted that with regard to lifting of orders, they rely on the decision of Wasilwa J. in *Craft Silicon Limited v Niladri Sekhar Roy* [2018] eKLR (Nairobi ELRC Cause No. 770 of 2018). Counsel maintained that the Respondent could do his business but not interfere with the Claimant's clients. That the Respondent was aware of the problems with previous clients as supported by the email marked PKN-8. She questioned how the Respondent would have known the nature of personal issues indicated if indeed he was not interfering. Counsel further argued against the issue of a contract asserting that the Respondent had referred to the relationship in terms of pay, clients, treatment received and his exit meaning he was indeed engaged as the Claimant's employee. She further submitted that the argument that the Respondent is suffering unjustly is unfair to the Claimant and that although no one has asked for the Respondent to be barred from doing his business, he is only stopped from interfering with the Claimant's clients using the Clients list and contacts. Counsel pointed out that the Body in charge of regulating is the



one that informed them of the shift as evidenced in the emails attached. That they had not asked for the Respondent's income to be taken away and were simply requesting the protection of their clients and for the Claimant to cease and desist interfering.

11. The matter herein relates to a non-compete clause alleged to have formed part of the contract of the parties. It is asserted the Respondents have benefitted unlawfully from business acquired in contravention of the non-compete clause. The *Employment Act* does not have express provisions on non-compete and the fall back is to common law and judicial precedent. The case cited being *Craft Silicon Limited v Niladri Sekbar Roy* (*supra*) a decision of Wasilwa J. is one in a series of other decisions made by this court. In the case of *Credit Reference Bureau Holdings Limited v Steven Kunyiba* [2017] eKLR Abuodha J. held that

...Business competition is the essence of free markets. Whereas it would not be right to allow practices that unfairly and unduly open up ones business secrets and market edge to its rivals, it would on the other hand not be right to encourage a practice where in order to survive the competition, such business shackles its employees from obtaining employment with its competitors. In the digital age, there are in place business processes which can minimize the risk of an employee accessing or inappropriately using employers trade secrets once out of such employment. Experience and expertise garnered from working for a particular employer cannot be reasonably restrained without stunting such employees career. In order to be enforceable such restraint must seek to restrain the use of only that which is uniquely that employer's secret and not knowledge and skill which can be acquired by learning, experience or development in technology.

16. The applicant before me as rightly submitted by counsel for the defendant has not shown or demonstrated the nature of the secrets or information that the defendant gained access to and the manner in which he is likely to divulge or use the same in his current employment to the detriment of the plaintiff. It is conceded that the plaintiff and Credit Info CRB where the defendant obtained employment are in the same line of business however apart from possible use of experience and skills acquired while working for the plaintiff in his new job, the plaintiff has not alleged or shown that the defendant has in his possession material or classified information which if used at his new work place would prejudice or harm its business interest. (Emphasis by underline - mine)

12. The Court is persuaded that the contract which has been cast in a negative light and whose provenance cannot be determined without an in depth analysis of its authenticity – which can only be in a full fledged trial not the present interlocutory application is tenuous to found an action against the 1<sup>st</sup> Respondent restraining him from conducting the business he conducts under the 2<sup>nd</sup> Respondent. In general, non-compete clauses are not to be enforced especially where they hinder the right to survival by restricting the 1<sup>st</sup> respondent in the work he may do for others, or the arrangements which he may make with others. Such a contract is ipso facto a contract in restraint of trade and is accordingly invalid unless it is reasonable as between the parties and not injurious to the public interest. The Court thus finds there is no merit in the applicant's notice of motion which is hereby dismissed albeit with no order as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF FEBRUARY 2024**

**NZIOKI WA MAKAU**

**JUDGE**

