Lipa Later Limited v Wanini (Cause E750 of 2023)
[2024] KEELRC 696 (KLR) (19 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 696 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E750 OF 2023

JK GAKERI, J

MARCH 19, 2024

BETWEEN

LIPA LATER LIMITED ..... CLAIMANT

AND

CAROLINE WANINI ..... RESPONDENT

RULING

1. Before the court for determination is the Applicant's Notice of Motion dated 11th September, 2023 filed under Certificate of Urgency seeking orders that:

    1. Spent.
    2. Spent.
    3. Spent.
    4. Spent.
    5. Spent.
    6. Pending the hearing and determination of this claim, the court be pleased to issue an injunction barring the Respondent from being engaged, interested or concerned whether as a Principal, agent, representative, partner, director, employee, consultant or any other capacity in any competing as per the terms of clause 14 of the Employment Contract dated 29th July, 2022.
    7. Pending the hearing and determination of this claim, an injunction barring the Respondent from disclosing any/or sharing any confidential information, files, records, correspondence, memoranda, notes or other documents (including without limitation, those in computer readable form) including all materials authored, prepared or contributed by the Respondent to any 3rd Party.

8. The costs of this Application be provided for.

2. The Notice of Motion is expressed under Order 42 Rule 6(1), Order 51 Rule 1 of the *Civil Procedure Rules* and Section 1A, 1B & 3A of the *Civil Procedure Act* and is based on the grounds set forth on its face and the Supporting Affidavit of Mr. Michael Maina sworn on 11th September, 2023 who deposes that the applicant was employed the Respondent on 19th July, 2022 as Head of Partner Success Manager – Kenya, effective 1st August 2022 at Kshs.420,000/= per month.

3. The affiant further deposes that under Clause 12 of the contract of employment, the Respondent covenanted that not all confidential files, records, correspondence, memoranda etc was the exclusive property of the applicant and had to be delivered to it.

4. That under Clause 13, the Respondent covenanted not to disclose confidential information during or after employment and under Clause 14, not without the applicant's written consent for a period of 12 months from date of termination of employment, be engaged in any manner with a competing company or solicit the applicant's clients within 12 months of termination of employment.

5. It is the affiant's position that the Respondent's position entailed overall growth of the partnership business and partnership relationship management and partner success, management of teams, customer marketing, sales revenue growth process formation and team leadership and she took part in many management meetings and high level strategic meetings.

6. That the Respondent resigned on 1st July, 2023 citing various reasons.

7. The affiant depones that the resignation was intended to conceal the Respondent's intention to join Craft Silicon Kenya, a competitor of the applicant as Head of Product in July which thereafter launched a Buy Now Pay Later Product on or about 1st August, 2023 thus competing with the applicant.

8. That the Respondent was using proprietary information and processes, products and confidential information obtained from the applicant.

9. That the Respondent is in breach of the contract of employment as she did not seek written consent to take up employment with Craft Silicon Kenya, is engaged in competition with the applicant and is breaching the confidentiality clause of the agreement.

10. That unless restrained, the Respondent will continue breaching the contract and enable the competitor access the applicant's confidential information and obtain an unfair advantage over the applicant.

11. That it is in the interest of justice that interim orders issue to prevent disclosure of confidential information as the applicant stands to suffer irreparable harm and the balance of convenience is in the applicant's favour.

Response

12. In her Replying Affidavit sworn on 1st February, 2024, the Respondent deposes that she was an employee of the applicant from 1st August, 2022 to 31st July, 2024 for a period of 2 years and resigned on 1st July, 2023 effective 31st July, 2023 and secured a job with Craft Silicon in July 2023 as Head of Product-Buy Now Pay Later (BNPL) developed before she joined the company, to launch and market it.

13. The affiant states that she has not breached her contract of employment with the applicant.

14. The affiant states that her employer launched a product dubbed Spotit to their customers under which the bank determines the parameters of its customers.

15. That the applicant is a lender and Craft Silicon Kenya is not and the two products are different.

16. It is the affiant's averment that she had no data of bank customers under Spotit nor access the banks intended customers.

17. That the affiant was not directly involved in product development and had no technical background but had created a customer user journey for Craft Silicon Kenya and was still bound by the non-disclosure clause of the agreement and the product was yet to go live.

18. That the BNPL is a world-wide concept.

19. The Respondent prays for a chance to be heard.

Applicant's submissions

20. Counsel for the applicant detailed the facts of the case including the contents of the employment contract as a background to the law on injunctions and relied on the sentiment of the court in *Giella V Cassman Brown Co. Ltd* (1973) EA 358 to highlight the essentials of an injunction as well as those in Nguruman Ltd V Jan Bonde Nielsen & 2 others (2014) eKLR.

21. As regards prima facie case, the decision in *Mrao Ltd V First American Bank of Kenya & 2 others* (2003) KLR 125 was cited to urge that the applicant had met the threshold as the Respondent joined a competitor within 12 months of leaving employment.

22. Reliance was also made on the provisions of Section 2(2) of the *Contracts in Restraint of Trade Act* to argue that as the Respondent entered into the employment contract freely and was bound by its terms.

23. On disclosure of confidential information, counsel submitted that as the Respondent was involved in high level management meetings as late as 26th July, 2023, the Respondent divulged confidential information to the new employer and the application ought to be allowed on this ground.

24. Sentiments of the court in *National Bank of Kenya Ltd V Pipe Plastic Samkolit (K) Ltd & another* (2002) EA 503 were cited to buttress the submission.

25. On irreparable injury, counsel submitted that the Respondent is likely to give out the applicant's trade secrets to a competitor which could occasion loss of market share and such loss was unquantifiable.

26. On balance of convenience, counsel urged that it was tilted in favour of the applicant owing to the irreparable loss.

27. Counsel invited the court to allow the Notice of Motion.

Respondent's submissions

28. Counsel submitted on sufficiency of resignation notice, breach of terms of employment contract and whether the applicant had the right to bar the Respondent from working for another company after resignation.

29. On notice, counsel submitted that the Respondent gave the applicant sufficient notice from 1st to 31st July, 2023 and thus complied with the law. The applicant did not contest the length of the notice given by the Respondent.

30. As regards breach of the contract of employment, the Respondent's counsel submitted that the product launched by Craft Silicon Kenya, Spotit, was different from the applicant's Buy Now Pay Later (BNPL) in that Spotit's target is clients are banks not borrowers and the Claimant did not breach the contract of employment.

31. As to whether the applicant could bar the Respondent from working for another employer, counsel submitted that the Claimant resigned from the applicant by given a notice and appreciated the knowledge gained in the course of her employment, and joined a company which launched a BNPL Product which precipitated the suit.

32. Counsel urged that the Respondent was directly involved in the development of the product but had created a customer user journal for Craft Silicon Kenya and had a non-disclosure agreement with the current employer.

33. That the BNPL Product launched by the Respondent's employer was not in competition with the applicant.

34. Finally, counsel submitted that the Respondent was not afforded a hearing before the suit was filed, not even a demand letter.

35. Counsel urged the court to dismiss the application.

Determination

36. The issue for determination is whether the applicant's notice of motion is merited.

37. It is common ground that the Respondent was an employee of the applicant effective 1st August, 2022 and resigned on 1st July, 2023, vide a resignation notice.

38. It is also not in contest that the Respondent's employment contract had a confidentiality clause and post termination obligations.

39. Put in alternative terms, the employment contract has restraining clauses, typically called contracts in restraint of trade, not to engage in a completing business within 12 months after cessation of employment or solicit the applicant's customers or employee of its employees.

40. It is unclear when the Respondent joined the new employer as Head of Product and the company launched a BNPL Product styled as Spotit on 1st August, 2023.

41. On the face of it, the applicant has not placed sufficient material on record to demonstrate that Craft Silicon Kenya was a competitor or that the Bank led BNPL Product was identical or similar to its products, the bone of contention in this case.

42. Pages 26 – 31 of the Applicant's documents contain information whose source is yet to be authenticated.

43. Was the launch coincidental or carefully planned?

44. Since the Respondent's notice of termination run from 1st July, 2023 to 31st July, 2023, it is highly unlikely that the Respondent was involved in its conception or development of the product as she was working for the applicant and no evidence has been adduced to prove the contrary. Similarly, 1st August, 2023 and 31st July, 2023 are too close.

45. When could the Respondent have participated in its conceptualization and development of the product, let alone the launch?

46. No doubt the Respondent as a Head of Partner Success Manager participated in many management meetings of the applicant and was aware of its products and other strategies the company had or were in the pipeline and could use the such information to the detriment of the applicant.

47. However, no evidence has been adduced to demonstrate that the Respondent either disclosed confidential information to Craft Solutions Kenya or was actively involved in the conceptualization and development of Spotit.

48. In her Replying Affidavit, the Respondent deposes that the product had already been developed before she joined Craft Solutions Kenya.

49. The crux of the suit is that the applicant seeks to have the Respondent injuncted from working for the current employer or sharing or disclosing confidential information pending the hearing and determination of the suit.

50. The principles that govern the grant of a temporary injunction are well settled as enunciated by the Court of Appeal in *Giella V Cassman Brown & Co. Ltd* (*Supra*) as follows;

> " First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (E.A Industries Ltd V Trufoods (1972) EA 420)."

51. On *prima facie* case, the sentiments of the Court of Appeal in *Mrao Ltd V First American Bank, Kenya* (Supra), cited by the applicant's counsel are instructive that;

> " A Prima facie case in a civil application includes but not confined to "genuine and arguable case." It is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

52. The pith and substance of the applicant's case is that the Respondent has and continues to breach certain clauses of the contract of employment it had with her and should be restrained from sharing or disclosing confidential information of the applicant.

53. A cursory reading of Clause 14 of the contract between the Claimant and the Respondent dated 29th July, 2022 reveals that the Respondent covenanted not to do or undertake certain actions or activities within 12 months after termination of employment, without written consent of the employer (the applicant).

54. It is not in dispute that the Claimant left the applicant's employment on 31st July, 2023 and joined the current employer in August, 2023.

55. This far, the court is in agreement with the applicant's counsel's submission that the applicant has, based on the material before the court established a prima facie case.

56. The concept of probability of success was explained in *Habib Bank Zurich V Eugene Marion Yakob* CA No. 43 of 1982.

57. As regards irreparable injury or loss, the sentiments of the court in *Nguruman Ltd V Jan Bonde Nielsen & 2 others* (*Supra*) are instructive;

> "On the second factor, that the applicant must establish he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold required and the burden is on the applicant to demonstrate prima facie the nature of the injury."

58. According to *Halsbury's Law of England* 3rd Edition Vol. 21 paragraph 739 at page 352,

> ". . . By the term irreparable injury meant injury which is substantial and could never be adequately remedied or atoned for by damages, not which cannot possibly be repaired . . . In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured."

59. Although the applicant's counsel submitted that the applicant will suffer irreparable harm as the Respondent will give out its trade secrets to its competitor, counsel tendered no evidence to demonstrate that the Respondent had done so in the past or was likely to do so and any loss ensuing from the competition would be unremediable in monetary terms.

60. Instructively, the applicant/claimant prays for Kshs.10,080,000.00 as damages for breach of contract, an indication that the injury that could arise is quantifiable in moneys counted.

61. In the Supporting Affidavit, the affiant deposes that the irreparable harm will be the Respondent's continuing to share confidential information with a competitor.

62. For the foregoing reasons, it is the finding of the court that the applicant has failed to demonstrate how the loss or harm it was likely to suffer in the absence of an injunction will be unquantifiable in monetary terms.

63. Finally, in *Byran Chebii Kipkoech V Barnabas Tuitoek Bargoria & another* (2019) eKLR, the court explained the concept of balance of convenience as follows;

> "The meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiff, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants, if an injunction is granted but the suit ultimately dismissed. . .
>
> In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."

64. In this case, the applicant has not demonstrated the comparative inconvenience to the parties if the injunction sought is granted or withheld.

65. The argument that the Respondent could secure employment elsewhere while the applicant would remain in operation lacks congruence as it is unclear as to how long the Respondent would take to secure alternative employment.

66. Having failed to establish that it stood to suffer irreparable harm if the injunction sought is not granted the court is not persuaded that the balance of convenience would be in the applicant's favour.

67. For the foregoing reasons, it is the finding of the court that the applicant has failed to demonstrate that the application for a temporary injunction is merited.

68. In the upshot, the Notice of Motion dated 11th September, 2023 is unmerited and it is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH DAY OF MARCH 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE