



Mwaura v Taxify Kenya Limited (Employment and Labour Relations Cause 173 of 2019) [2023] KEELRC 1849 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1849 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 173 OF 2019**

BOM MANANI, J

JULY 27, 2023

BETWEEN

ALEX MWAURA CLAIMANT

AND

TAXIFY KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant has filed this action seeking a declaration that the Respondent unlawfully terminated the contract of employment between them. The Claimant seeks compensation against the Respondent for the alleged unlawful acts.
2. The Respondent denies liability for the claim. According to the Respondent, the contract of service between the parties was lawfully terminated through mutual agreement.
3. Conversely, the Respondent has counterclaimed against the Claimant for breach of a non-compete agreement between them. In addition, the Respondent states that the Claimant unlawfully authorized some payments to a rogue employee causing the Respondent loss of funds. Through the counterclaim, the Respondent prays that the Claimant be ordered to make good this loss besides being compelled to refund the monies paid to him under the Deed for Mutual Separation.
4. The Claimant denies having been party to the fraudulent scheme that resulted in the loss of funds by the Respondent. Further, the Claimant contends that the non-compete agreement between the parties was unconscionable and therefore unenforceable.

Facts of the Case

5. The Claimant avers that he was employed by the Respondent as from November 1, 2016. By an agreement of even date, the parties entered into a fixed term contract of service for a period of two years running up to November 1, 2019.



6. The Claimant avers that on January 31, 2019, he was summoned to a meeting by the Respondent's management whereat he was issued with an agreement for mutual separation. It is the Claimant's case that he was forced to sign the agreement thereby irregularly bringing to a close the contract of service between the parties.
7. To support his assertion, the Claimant states that the Respondent's General Manager informed him that he was going to malign the Claimant's name if he did not execute the instrument. The Claimant further alleges that the said manager told him that the decision to separate was political and had to be implemented. The Claimant alleges that the General Manager's actions threatened to degenerate into a scene that was going to embarrass the Claimant before his spouse and her employees. He contends that in order to avoid such eventuality, he signed the separation agreement. In the Claimant's view, the environment under which he signed the agreement exerted undue pressure on him.
8. On its part, the Respondent denies forcing the separation agreement on the Claimant. The Respondent asserts that in the period preceding their separation, the Claimant's performance deteriorated significantly. Besides, the Claimant allegedly allowed himself to be used by a rogue employee to steal from the Respondent by approving irregular and fraudulent payments to the said employee.
9. The Respondent contends that because of these matters, it became necessary for the parties to separate. It is the Respondent's case that the desire to end the employment relation between the parties without injuring the Claimant's reputation informed its decision to suggest a mutual separation. And hence the agreement to separate.
10. The Respondent states that the separation was discussed on the morning of January 31, 2019 before the parties prepared and signed the Deed for Mutual Separation. The Respondent indicates that the Claimant voluntarily signed the instrument in the presence of another employee who acted as his witness. It is the Respondent's case that the Claimant was subsequently paid his exit dues which he accepted.
11. The Respondent has accused the Claimant of acting in bad faith with intent to procure unjust enrichment through this litigation. According to the Respondent, the intention of entering into the separation agreement was to avoid muddying the waters for the Claimant. The Respondent states that its only desire when opting for a mutual separation as opposed to taking other disciplinary action against the Claimant was to give him a soft landing by ensuring that it protected his name from adversity in the event that he desired to pursue his career elsewhere. As a result, the Respondent suggests that it closed its eyes to the losses it had incurred as a result of the alleged infractions by the Claimant.
12. The Respondent further contends that when entering into the employment contract, the parties signed an agreement barring the Claimant from engaging in activities that were deemed to be in competition with the Respondent's business for a period of at least twelve months after termination of the employment contract. This included barring the Claimant from accepting employment with the Respondent's competitors.
13. The Respondent states that in breach of this agreement, the Claimant entered into a new contract of employment with Little Cab Ltd, a company that was running the same business as the Respondent. That this breach occurred within the non-compete period.
14. As a result, the Respondent seeks damages from the Claimant for breach of the non-compete agreement. Further, the Respondent prays that the Claimant be compelled to make good the loss it suffered through theft of its funds. The Respondent also prays that the Claimant refunds the money that he was paid pursuant to the separation agreement between them.



Issues for Determination

15. After analyzing the pleadings and evidence on record, the following, in my view, are the issues that present for determination in the matter: -
 - a. Whether the contract of service between the parties was lawfully terminated.
 - b. Whether the non-compete agreement between the parties is enforceable.
 - c. Whether the parties are entitled to the reliefs that they seek through their pleadings.

Analysis

16. In this section, I will consider the above issues sequentially. Thereafter, I will render the determination.
Whether the contract of service between the parties was lawfully terminated
17. It is not in dispute that the parties signed a Deed for Mutual Separation which had the effect of terminating the employment relation between them. What is in contest is whether the instrument was executed voluntarily. Whilst the Claimant contends that he was forced to sign the instrument, the Respondent asserts that both parties voluntarily signed it.
18. The impugned Deed for Mutual Separation was produced in evidence. The document shows that the Claimant's signature was witnessed by an attesting witness who appended his signature to signify that he was present and saw the Claimant sign the instrument.
19. Although the Claimant says he was forced to sign the document, he did not provide cogent evidence to affirm this assertion. Whilst it is evident that he signed the document in the presence of a witness, the Claimant failed to call the attesting witness to shed light on the circumstances under which the instrument was executed.
20. Allegation of coercion and undue influence must be proved with cogent evidence. The person alleging that an instrument is vitiated on grounds of undue influence or coercion must establish this assertion on a higher standard of proof than that of a balance of probabilities. Addressing this requirement, the Court of Appeal in *Patel & another v MJC & another (Suing as the guardians of PJP) (Civil Appeal 182 of 2019) [2022] KECA 364 (KLR)* stated as follows:-

‘It should also be appreciated that apart from specifically pleading undue influence, coercion and fraud, the same has to specifically [be] proved by cogent evidence and not on the balance of probabilities as wrongly held by the trial court. Prove has to be higher than on the balance of probabilities but slightly lower than prove beyond reasonable doubt.’
21. There is evidence that the Claimant received payments against the Deed aforesaid. He admitted this fact during cross examination. It is difficult to comprehend how an individual who has drawn a benefit based on an instrument to which he was a party can turn around to assail the instrument as having been procured under coercion. Such is a classical case of approbation and reprobation.
22. The Claimant testified that the Respondent's management followed him into his wife's business premises where they coerced him into executing the instrument. Surprisingly, he did not see the need to call his wife to affirm this assertion.
23. Having regard to the fact that an assertion of undue influence and coercion must be proved on a higher standard than a balance of probabilities, I am not satisfied that the Claimant has met this threshold. It was up to him to place before the court all the evidence that would have gone towards establishing this



higher standard. Evidence, including from the attesting witness and the Claimant's spouse, who are said to have been in the premises where execution of the instrument was procured through coercion, would have been of assistance in this respect. In my view, it was not enough for the Claimant to simply rely on his word against that of the Respondent's witness who categorically denied that coercion was applied to procure execution of the Deed.

24. It is settled law that a contract binds those who are party to it unless it is set aside on grounds of fraud, mistake, misrepresentation, undue influence or coercion (*Abmed Mohammed Noor v Abdi Aziz Osman [2019] eKLR*). The Claimant has not been able to convince me that execution of the Deed for Mutual Separation was procured through coercion. Consequently, I find that the instrument was validly procured with the consequence that the contract of service between the parties was validly and lawfully terminated through mutual agreement.
25. In their submissions, counsel for the Claimant have suggested that the Respondent was obligated to accord the Claimant a hearing before closing the contract between them in terms of sections 41, 43 and 45 of the *Employment Act*. With respect, these provisions have no application where parties to a contract of service agree to mutually separate. The provisions only find application when the employer takes a unilateral decision to terminate a contract of service. In the latter case, the law requires the employer to justify the decision to terminate the contract by demonstrating that he had valid reason to support his action and that he acted in accordance with due process.

Whether the non-compete agreement between the parties is enforceable

26. At the commencement of the employment relation, the parties entered into a separate agreement dated November 6, 2017. The agreement has a non-competition and non-solicitation clause barring the Claimant from engaging in the same or similar business as the Respondent or associating with the Respondent's competitors engaged in the same or similar business.
27. The Claimant does not deny entering into and executing the non-compete agreement. However, he asserts that at the time of signing the instrument, he lacked the requisite bargaining power. Further, the Claimant contends that the agreement is in any event ambiguous, unreasonable, excessively punitive, and unconscionable. In the Claimant's view, the agreement is against public interest. Therefore, it is not enforceable.
28. The law that regulates contracts in restraint of trade in Kenya is the *Contracts in Restraint of Trade Act* Cap 24 Laws of Kenya. Sections 2 and 3 of this brief Act of Parliament provide as follows: -

'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: -

 - a. 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 to 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;

- b. Where a minor has entered into any agreement or contract containing any such provision or covenant, the court shall also take into consideration whether it was for his benefit that he did so.

Notwithstanding and in addition to anything contained in section 2, any such provision or covenant shall be void in any case where an employer terminates the services of an employee in contravention of the terms of the contract of service.’

29. From the above provisions, it is clear to me that a contract does not become unenforceable merely because it contains a non-compete clause. However, the High Court has power to declare the clause on restraint of trade unenforceable if it is apparent that enforcement of the clause is against public interest or is inimical to the interests of one of the parties to the arrangement in comparison to the protection that it was intended to offer the other party.
30. Whilst the Act refers to the High Court as the only court with jurisdiction to determine the enforceability of such contracts, it is now agreed that courts of equal status to the High Court share in this jurisdiction in respect of matters that fall within their dockets. This position is expressed in the case of *Kenya Kazi Services Limited v Lucas Ndolo [2018] eKLR*.
31. A decision by an employer to terminate a contract of service that contains a non-compete clause automatically renders the non-compete clause inoperative if the employer’s decision is declared irregular. This is apparent from section 3 of the aforesaid Act. Consequently, an employer who is found to have unfairly terminated an employee’s employment automatically loses the right to enforce a non-compete clause against such employee.
32. The general trend has been for courts to avoid giving effect to non-compete clauses in contracts unless the clauses serve greater public good and are not inimical to the interests of the parties and justice generally. In *LG Electronics Africa Logistics FZE v Charles Kimari [2012] eKLR*, the court quoting the decision in the case of *Esso Petroleum vs. Harpers Garage 1967 All ER* stated that courts will not enforce a non-compete agreement which goes further than affording adequate protection to the legitimate interest of a person in whose favour it is granted.
33. In the case of *Esso Petroleum vs. Harpers Garage 1967 All ER*, the court also alluded to the need to consider the issue of equality of arms of parties when faced with the question of enforcement of a non-compete clause in a contract. Where parties had equality of arms when negotiating the contract that contains a covenant on restraint of trade, the court will not normally interfere with enforcement of the covenant. However, where there was no equality of arms between the parties at the point of negotiations, the court will likely refuse to enforce the restrictive clause if its enforcement has the potential of yielding injustice to the weaker party in the arrangement.
34. In employment contracts, it is historically recognized that employees stand in a weaker position in comparison to the position occupied by the employer. This disadvantage is even greater at the point of negotiating the terms of the contract. It is for this reason that the court will approach requests by the employer to enforce non-compete clauses in such contracts with caution.
35. In the case before me, the Claimant has stated that at the time of entering into the contract with the restrictive clause, he stood in a position of disadvantage which did not afford him a chance to question the desirability of the clause in the contract. The restrictive contract was given to him to sign alongside the employment contract.



36. The court is alive to the high levels of unemployment in Kenya and therefore the weak position that prospective employees stand in when negotiating terms of employment. Faced with the reality of losing a chance to secure a job opportunity if he declines to sign a non-compete contract, a prospective employee will most likely end up executing the non-compete contract even when he thinks it is not in his best interest to do so. Having regard to this reality, I am disinclined to consider the non-compete clause in employment contracts that are procured in such circumstances as reasonable.
37. If the court grants the Respondent's prayer to enforce the non-compete clause in the agreement of November 6, 2017, it will in effect be saying that it was equitable for the Respondent to seek to deprive the Claimant of a livelihood for twelve months by committing him to the restrictive contract. Such finding would, in my view, be unjust.
38. What is more, the non-compete clause in the contract between the parties was open ended and of a general nature. It sought to keep the Claimant away from opportunities in the industry where the Respondent operates for the mere reason that he had been in the Respondent's employment. The clause is not limited to protecting specific interests of the Respondent such as its trade secrets. Enforcing such open-ended restrictive agreement would work injustice against the Claimant. I do not think that it is in public interest to uphold such open ended non-compete agreements. Consequently, I find that the non-compete agreement between the parties is, in the circumstances of this case, not enforceable for being unreasonable, against public interest and unconscionable.
39. Finally on this matter, it is noteworthy that apart from the assertions through its amended pleadings and reference to the matter in the documents it tendered in evidence, the Respondent did not allude to the fact of the Claimant having joined Little Cab Ltd either in the written witness statement or oral testimony by its witness. The only evidence on the issue therefore is the media cuttings produced by the Respondent and the Claimant's concession that he had joined Little Cab Ltd. Noteworthy however is the fact that there was nothing in this evidence to suggest that the Claimant had transferred the Respondent's trade secrets to his new employer.
40. The only time an attempt is made to suggest that the Claimant had transferred the Respondent's trade secrets and other confidential information to the competitor is through the defense counsel's closing submissions. However, this attempt does not sit well with the accepted manner in which evidence ought to be tendered. Parties cannot tender evidence through submissions. And neither can counsel assume the position of his client to give evidence on a contested matter and more so through submissions.

Whether the parties are entitled to the reliefs that they seek through their pleadings

41. Having found that the Claimant voluntarily executed the Deed for Mutual Separation, I reach the conclusion that his contract of service was lawfully terminated. As a result, the Claimant is not entitled to the prayers that he seeks through his Statement of Claim.
42. Having found that the non-compete clause in the contract executed between the parties on November 6, 2017 is unreasonable, against public interest and unconscionable, the court declines to grant the Respondent's prayer for compensation against the Claimant for the alleged breach of the non-compete agreement. Similarly, as the court has found that the Deed for Mutual Separation executed by the parties is valid, the court arrives at the conclusion that clause 8.1 of the said Deed bars the Respondent from enforcing recovery of monies allegedly lost due to infractions by the Claimant whilst in employment since by executing the Deed, the Respondent waived this right. Further and absent the Deed for Mutual Separation being invalidated, the Respondent cannot seek to recall a benefit that was conferred on the Claimant under the said instrument.



Determination

43. The upshot is that both the claim by the Claimant against the Respondent and the counterclaim by the Respondent against the Claimant are devoid of merit. Accordingly, both claims are dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED ON THE 27TH DAY OF JULY, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the 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

