



**Mediheal Group Ltd t/a Mediheal Group of Hospitals & another v Umesh  
(Cause E022 of 2021) [2022] KEELRC 3811 (KLR) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3811 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE E022 OF 2021  
NJ ABUODHA, J  
JULY 29, 2022**

**BETWEEN**

**MEDIHEAL GROUP LTD T/A MEDIHEAL GROUP OF  
HOSPITALS ..... 1<sup>ST</sup> CLAIMANT**

**MEDIHEAL HOSPITALS & FERTILITY CENTRE LTD T/A MEDIHEAL  
HOSPITALS & FERTILITY CENTRE ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**NICHAT UMESH ..... RESPONDENT**

**RULING**

1. By a motion dated June 14, 2021, the claimant/applicants sought orders among others that:
  - a) That pending the hearing and determination of this suit a conservatory order be and is hereby issued restricting the respondent from divulging any confidential information that may have come to his knowledge or possession in the course of employment with the claimants;
  - b) That pending hearing and determination of this suit, a temporary injunction be and is hereby issue restraining the respondent from seeking employment in Kenya with an enterprise in competition with the claimants or setting up or continuing an enterprise either alone, or with others that will be in competition with the claimants' enterprise.
2. The application was supported by the affidavit of Dr Swarup Rarjan Mishra who deponed on the main that:
  - a) That I am a male adult of sound mind and the Director/Chief Executive Officer (CEO) of the claimant companies herein having the authority of the Board of Directors of the claimant companies to swear this affidavit on their behalf hence I am competent to do so.



- b) That the orders sought herein are key for the running of the businesses of the claimants, a key and essential service provider especially during the period of the Covid – 19 pandemic.
- c) That the respondent was employed by the 1<sup>st</sup> claimant and seconded at the 2<sup>nd</sup> claimant (a subsidiary of the 1<sup>st</sup> claimant) as a General Manager of the Mediheal Hospital & Fertility Centre based in Eldoret on a contractual basis vide an appointment letter dated August 15, 2016.
- d) That vide an addendum dated January 23, 2020, the respondent was further retained as the vice president of operations, a position that was held by the respondent till he deserted employment on February 12, 2021.
- e) That under addendum, the contract was extended and could only be terminated by either party upon issuance of a two (2) month notice or salary in lieu of notice.
- f) That constructively, the respondents work permit with the claimants had been renewed for a further two years with effect from May 31, 2019.
- g) That in the course of the respondent's employment, he was issued with the claimant's official laptop computer HP Envy x360 (corei7)/5CD7484197, 1TBHHD, 16GB RAM for purposes of discharging his operational, financial, personnel and data access and synthesis for the claimants.
- h) That the said laptop was and still integrated to the hospital human resources, financial and patient/client management systems allowing eh respondent as the then vice president of operations issue instructions and discharge other managerial duties. This information is still accessible to the respondent.
  - i) That the laptop further held, synthesized and processed the claimants' vital data, namely nursing handover records, ward discharge/transfer records, inpatient medical records, statistics on pathology, disease, epidemic and genomic sequencing key to response to client's medical needs, confidential patient/client data among others.
- j) That the respondent had operational control over the claimants' information management system through the laptop that was accordingly configured. The refusal to hand over the laptop computer has therefore hampered the claimants transition to a successor who cannot effectively control its operations without the control access point in the said laptop computer.
- k) That even after deserting employment, the respondent continues accessing the hospital (claimants') critical data despite having deserted employment and left the jurisdiction. The matter has since been reported to the National Police Service.
- l) That in compliance with the [employment Act](#), the claimants have further made a report of desertion of duty by the respondent to the Labour Office in Eldoret in April 16, 2021.
- m) That the claimants' operations which were mainly controlled from the said laptop since the respondent was the vice president of the operations, cannot be readily accessed by the claimants and hence occasioned suffering to its business operations, loss of revenue and reputation.
- n) That to mitigate its loses and to avert the likelihood of such critical data held by the respondent from landing in the wrong hands, the claimants proceeded to place a caveat in the Daily Nation Newspaper indicating the Respondent is no- longer its employee.
- o) That the continued illegal possession of the claimants' laptop together with data and operational controls by the respondent continues to hamper the claimants' business and



exposes it to further risk and operational difficulty especially in the wake of the third wave of the Covid – 19 pandemic.

- p) That the respondents position was based on confidentiality and thus the continued possession of the said laptop computer constitutes a continued breach of confidentiality by the respondent.
  - q) That prior to the respondent deserting duty, in breach of the employment contract (clause 9 and 19) not to engage in any other employment or business in competition with the claimants, the respondent together with other Kenyans registered and incorporated two entities namely Max Cure Hospitals Limited and Maylove Medicare & Cure Hospitals Limited which are engaged in the provision of medical services and in direct competition with the claimants.
  - r) That the respondent is further prohibited by clause 21 of the Employment Act from taking up any job in Kenya after separation from the claimants for a period of two years in Kenya without a written ‘no objection certificate’ from the claimants.
  - s) That the respondent’s actions of breach of contract and confidentiality has exposed the claimants to huge financial and reputational loss as evinced by the business audit disruption report attached herewith showing that the claimants are estimated to lose about Kenya Shillings Two Hundred and Forty Million (Ksh 240,000,000/=) of the orders sought are not granted to mitigate the claimants’ losses.
3. The respondent filed a replying affidavit on July 23, 2021 in which he deposed among that:
- a) That I am the respondent herein hence competent to swear this affidavit.
  - b) That at the time of my constructive dismissal from employment I had risen to the rank of vice president operations.
  - c) That I have not used the said work permit to further any of my personal ventures and/or used the same to further some illegal and/or per incuriam ends contrary to the provisions of the contract of employment and the Laws of Kenya.
  - d) That the said application and the supporting affidavit are laced with untruths, lies and blatant disregard of any tenets of natural justice and I shall be seeking review and/or setting aside of the orders issued ex parte at the hearing thereof.
  - e) That my working relationship with the claimants has been one full of threats, servitude, slavery in the 21<sup>st</sup> century thus I could not continue working for such an organization and as such I issued 2 resignation letters even though they didn’t acknowledge any of them.
  - f) That the allegations contained at paragraphs 4,5,6,7 and 8 regarding employment is acceded to, to the extent that I was employed by the respondent as the vice president operations but during my very difficult tenure at the said hospital, I was being harassed my salary was being constantly delayed, threatens to the extent that the claimants’ director would tell me that in the event that I try to leave or resign from employment, he would use extrajudicial means to assassinate me.
  - g) That I came in possession of the laptop in question because it was issued to me while employed at Mediheal Hospital and fertility centre and indeed the same was being used to do administrative work even though I am aware of the fact that the Hospital can simply access its records from any computer since they have the log in access and they are the administrators.



- h) That even during my tenure at the said hospital the Hospital would run in my absence since by law I am required to take leave and at times I was off duty.
- i) That I have not and cannot be able to access information in the said laptop as at now, further it is within my knowledge that the hospital can access the data from any laptop or computer as long as they have the log in credentials for which they are the administrators and authorized to do so.
- j) That I presented my resignation letter to the Hospital way back in the year 2018 but the Hospital failed and/or neglected to receive the said letter and take any action on the same instead, the hospital director chose to threaten me with unknown dire consequences.
- k) That since then I have made several attempts to resign as per clause 4 and 20 of the employment contract between myself and the claimants but they failed and /or neglected to adhere to my notices and kept on threatening me with dire consequences in the event that I leave employment.
- l) That I have been advised by my advocates on record whose information I believe to be true that an employment relationship has to come to an end and it is only fair that the employment relationship came to an end and in this instance, the claimant acted in a way that is contrary to the tenet of natural justice, fundamental breach of contract and as a result, I was constructively dismissed from employment.
- m) That I have resigned from the claimant institution on two occasions being July 17, 2018 and January 23, 2021 as per clause 4 and 20 of the employment contract. On both occasions, I was met with threats and hostility as described above and as earlier enumerated, I resigned and issued my final notice on January 23, 2021 but the hospital's management failed and/or neglected to accept my notice, instead the hospital management and in particular Dr Mishra the hospital director threatened that he would ensure I do not go anywhere.
- n) That having issued my notice of resignation, the Hospital withheld my salary for the period November 2020 to February 10, 2021 when my notice period ended.
- o) That I am surprised by the claimants annexure marked SRM 2 which is an alleged addendum to my employment contract which is not signed by me since I never signed any further documents regarding employment save for the initial employment contract. For avoidance of doubt, the said addendum is a forgery and I am not aware of the same thus it should be struck off from the court record.
- p) That as a result of the hospitals refusal to accept my resignation and clear me in order for me to leave employment without any of their items. I left with the hospitals official laptop computer which I have since made arrangements to return to the claimants.
- q) That it was my desire to hand over all the claimants items and/or properties but the claimants refused to receive any of their items simply because they did not want to accept my resignation thus I could not clear with the hospital.
- r) That the claimants themselves published in the local dailies that I had ceased employment from February 12, 2021 hence they cannot allege that I had deserted employment since they had received my resignation which lapsed on February 12, 2021.
- s) That having been served with the court order issued by the honourable court on June 24, 2021, and having been advised by my advocates on record whose information I choose to put full



reliance upon, I have made arrangements for delivery of the said laptop and the same in a breath of fresh air since I have been desiring to return all of the claimants' properties but they keep on declining.

- t) That Maylove Medicare clinic was established in error and as at now the same was closed upon realization.
  - u) That during my tenure with the claimants, my salary was not being paid on time, constant harassment since 2018, thus I had to find other means to make some money in order to sustain myself and my family which was in Kenya with me.
  - v) That I had made several attempts to resign from the claimant's institution before establishment of the said hospital but they constantly refused to accept my resignation.
  - w) That I aver that the said hospital started operations in Kisumu on July 7, 2021 hence I could not have used the claimants' resources and/or time to run the said company and further, its nature of business, town and size cannot compete with the claimants.
  - x) That I have been advised by my advocates on record whose information I believe to be true that the alleged non-compete clause is in direct contravention of article 41 of the Constitution which guarantees me fair labour practices.
  - y) That I have been further advised by my advocates on record whose information I believe to be true that such a non-compete clause is against public policy and in particular for a person in the health industry, further I have acquired my knowledge over a long period of time thus is very unfair for the claimants to purport to micromanage my knowledge to the detriment of the general public.
  - z) That the applicant has failed to demonstrate the nature of confidential information I came across while in employment with the claimants and I have been advised by the advocates on record whose information I believe to be true that in order to be issued to restricting me from carrying out any business, the applicants have to show the information I came across, its nature, its uniqueness and firm that is when the court can direct issuance orders in a non-compliance clause contract.
4. The claimant filed a supplementary affidavit in response to the respondent's affidavit and stated inter alia that:
- a) That the claimants deny the allegations of constructive dismissal of the respondent as alleged at paragraph 3 of the replying affidavit and aver that the respondent deserted duty as documented in Police Report OB 39/12/02/2021 at Naiberi Police Station and the report made to the County Labour Office on April 16, 2021.
  - b) That contrary to the averments of the respondent at paragraph 4 of his replying affidavit, the respondent contradicts himself at paragraphs 27 and 28 by admitting to being part of the incorporation of Max Cure Hospital Limited and Maylove Medicare and Cure Hospital which actions militate against the terms of the work permit issued to the respondent.
  - c) In response to the contents of paragraph 9 and 10 of the respondents replying affidavit, the claimants aver that even if the respondent was on leave, the laptop computer was key in controlling key data by the person relieving the respondent of his duties on leave. Thus, by taking away the claimants tool of trade, the respondent incapacitated the claimants thereby occasioning huge financial losses and operational difficulties.



- d) That in response to the contents of paragraph 11 of the respondents replying affidavit, the claimants aver that the respondent's contact was renewed as evinced by annexure 11SRM-2 annexed to my supporting affidavit to the application dated June 14, 2021. In that regard, the purported resignation was subsumed by the acceptance of the renewal of contract and the respondent is estopped from going back on his election to renew the contract.
- e) That in response to the contents of paragraph 13 of the respondents' replying affidavit, the claimants vehemently deny the allegations of unfair labour practices and avers that the respondent's allegations are mere afterthoughts as they were not reported before any government agency or to the claimant's human resource department as per the human resource policy.
- f) That in further response to the contents of paragraph 13 of the respondents replying affidavit, the claimants further deny the alleged particulars of forced labour/servitude and/or unfair labour practices and invites the claimant to strict proof. The claimants further aver that:
- i) The respondent was paid his salary, benefits and entitlements Timeously and in accordance with his employment contract.
  - ii) That the respondent never made reports to any government authority of the alleged death threats (if any) and never gave notice of any of the allegation through the claimants channels as stipulated in the employment manual.
  - iii) That all the respondent's allegations of threats to life and unknown consequences are not only untrue but also afterthoughts considering that they were never reported to the relevant government authorities or channeled in writing to the Respondent's line manager as stipulated in the claimants Employment manual.
  - iv) The claimants aver that the non-issuance of certificate of service was as a result of the respondent's desertion of duty without notice and contrary to the subsisting employment contract.
  - v) That claimants reiterate that the Respondents averments under paragraph 13 and the purported particulars therein are mere afterthoughts.
- g) That in response of contents of paragraphs 14 of the respondent's replying affidavit, the claimants maintain that they employment relationship came to an end through the respondents desertion and that the respondent was never constructively dismissed as alleged. The respondent is invited to strict proof.
- h) That in response to the contents of paragraph 15 of the respondent's replying affidavit, the claimants aver that the respondent's allegation of constructive dismissal are mere afterthoughts in light of the fact that the respondent deserted duty and allegations of harassment and intimidation were never reported to any government authority or channeled through the claimants' complaint mechanisms. The claimants maintain that the respondent's allegations are escapist and geared towards masking the real issues in controversy.
- i) That in response to the respondents averments at paragraph 19 of the replying affidavit, the claimants reiterate that the respondents' employment was renewed as per the addendum dated January 23, 2020. As a result, the respondent is invited to strict proof on the allegations of forgery as the same is an afterthought and no report has been made to the relevant government agencies or a forensic document examiner's report issued to corroborate the allegations which the claimants maintained are utter falsehoods.



- j) That in response to the contents of paragraph 27,28,29,30,31 and 31 of the respondent's replying affidavit, the claimants aver that the same constitutes an admission that the respondent engaged in her gainful employment opportunities and business contrary to the dictates of the work permit and the employment contracts restraining the respondent from any further employment or competition with the claimants.
- k) That in response to the averment of paragraph 34 of the respondent's replying affidavit, the claimants aver that the contract in restraint of trade is valid and was lawfully and knowingly executed by the respondent and the respondent cannot be permitted to renege from it as it would expose the claimants to the predatory conduct of former employees such as the respondent.
5. In submissions in support of the application, Mr Maiyo for the claimant submitted among others that the respondents act of deserting work and returning to India was a breach of the terms of his appointment letter prohibiting him from leaving the country without prior permission of the claimant's management.
  6. On confidentiality, counsel submitted that the claimant and respondent were in an employment relationship which involved among other things circulation and churning of confidential information. In what constituted confidential information, counsel relied on the case of *Joan Njeri Kamau v Association of Action Aid International & 2 others* [2020] eKLR where the court stated that for the information to be confidential it must have the necessary quality of confidence about it, namely, it must not be something which is public property or public knowledge. What makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.
  7. According to counsel, the respondent held a very high position of the vice president. The position allowed him to access information on the whole operations of the 2<sup>nd</sup> applicant. The information met all the requirements of confidential information as the same was not in public knowledge or public property. The information was applicable in the trade and industry and of very high economic value. The said information if disclosed to third parties including competitors, the claimant would incur very huge financial loss. The loss would be so damaging as to drive the claimant to sudden collapse and disintegration.
  8. Mr Maiyo further submitted that parties need not have signed a written non-disclosure agreement for them to be limited from sharing confidential information. This was upheld in the case of *Magdalene Kiboi & 17 others v Engen Kenya Ltd* [2019] eKLR. where court stated therein that as long as the information was proprietary in nature and is revealed in confidence, the employee has a common law duty not to reveal the information.
  9. Counsel submitted that the respondent while still in employment of the claimant established or participated in the establishment of Max Cure Hospital Ltd and May Love Medicare & Cure Hospitals Ltd. The claimant was therefore apprehensive that the respondent will use the data and trade secrets of the claimant in running these businesses. The claimant therefore sought an order prohibiting the respondent from divulging confidential information including trade secrets pending the hearing and determination for the suit. If the order sought was not granted and respondent allowed to share the confidential information about the claimant, there would be an infringement of clause 14 of the Employment contract which prohibited the respondent from divulging, sharing or parting with any trade secrets during the course or cessation of employment for at least 2 years.



10. On the issue of whether the claimant merits an interim injunction, counsel submitted that the application was merited as it met the requirements of an application for injunction as set out in the case of *Giella v Cassman Brown*. According to counsel, the respondent signed an employment agreement with the claimant upon being issued with work permit which limited him from working elsewhere other than for the claimant. Clause 11 of the employment agreement also prohibited the respondent from deserting his workplace without prior permission of the claimant.
11. Concerning the non-compete clause, counsel submitted that this was not in breach of article 41(1) of the *Constitution* which provides for fair labour practices. According to counsel, contract in restraint of trade was not generally outlawed if it was reasonable. For a contract in restraint of trade to be reasonable, it must be limited as to time, geographical coverage and scope of activities. In this regard counsel relied on the case of *LG Electronics Africa Logistics FZE v Charles Kimani* [2012] eKLR.
12. Mr Maiyo submitted that clause 21 of the Employment contract signed between the respondent and the claimants satisfied these elements as it was limited for a period of two years. The restriction covered employment within Kenya which was one of the terms of the work permit issued to the respondent.
13. On the issue of constructive dismissal, counsel submitted that it was not sufficient for the respondent to plead constructive dismissal. Evidence was required in that regard to demonstrate the conduct of the employer was intolerable leading to resignation from employment. According to counsel, there was no constructive dismissal as the respondent breached the terms of the contract of employment and when he was verbally summoned to explain the breach he deserted employment and returned to India.
14. Mr Aloo for the respondent submitted that the applicants failed to make a full disclosure to court that they had withheld the respondent's salary for four months to the tune of Ksh 1,500,000. Further the claimant failed to disclose to the court that the respondent had resigned earlier on from employment and failed to disclose the suffering the respondent underwent under the applicants thus they had come to court with unclean hands and was undeserving of the orders sought.
15. Regarding contract in restraint of trade counsel submitted that the court has power to declare provisions or covenant to be void where the court is satisfied that having regard to the nature of the profession trade, business or occupation concerned, the period of time and area within which it is expressed to apply. Counsel relied on the case of *HF Fire Africa Ltd v AMR Gharieb* [2004] eKLR. where it was stated that covenants in restraint of trade are not to be used for a purpose other than the protection of the plaintiff company. Further in the case of *Credit Reference Bureau Holdings v Steven Kunyiba* [2017] eKLR. The court stated that business competition was the essence of free markets. Whereas it would not be right to allow practices that unfairly and unduly open up one's business secrets and market edge to rivals, it would be on the other hand not be right to encourage a practice where in order to survive competition such business shackles its employees from obtaining employment with its competitors.
16. According to Mr Aloo, the claimant failed to pin-point the nature of confidential information which the respondent came across, shown how the information was unique to them and how the information could be detrimental if divulged. The claimant's contention was that the laptop which had since been returned had the operational and confidential information but as it stands the prerequisite of the orders sought had not been met. Further the claimant and the respondent were in the medical field hence contract in restraint of trade could not take precedence over the general health of the public.
17. Mr Aloo further submitted that the establishment of Max Cure Hospital was not fatal and fundamental breach counsel urged the court to take judicial notice that the hospital was based in Kisumu. While the claimant was based in Eldoret hence the case for unfair competition did not arise.



18. On the issue of constructive dismissal, counsel submitted that the respondent resigned twice but on both occasions the resignation was not accepted. According to Mr Aloo, these two occasions indicated that the respondent was serious on leaving the claimants employment as per the contract and gave notice of intention to do so. But the claimant instead of discussing the issue at hand, withheld the respondent's salary, made threats and the respondent reported the same to the Indian High Commission.
19. This is an interlocutory application for injunction and the principles as appreciated by both counsel are settled in the case of *Giella v Cassman* and later supplemented by the case of [\*American Cynamid v Ethicon\*](#) on the issue of balance of convenience where the court is in doubt.
20. The claimant herein alleges that the respondent having held the position of vice president of the claimant was privy to sensitive and confidential information which he should not be allowed to share with 3<sup>rd</sup> parties because if he did the claimant could suffer serious financial loss which could lead to its collapse.
21. According to the claimant most of the information was contained in the work laptop that was assigned to the respondent which, when the suit was commenced, was in the possession of the respondent. The claimant sought under certificate of urgency the return of the laptop and the court granted the orders in that regard. The laptop has since been returned to the claimant.
22. Clause 14 of the employment contract binds the respondent not to divulge the claimant's secrets during the period of his employment and for two years after cessation thereof. The contract however does not seem to prohibit the respondent from working or engaging in any business in competition with the claimant what the contract does is to prohibit the respondent from discoloring the claimant's secrets during the currency of his employment and two years after the termination of his employment. It is deponed by the claimants in their affidavit that most of this confidential and business information was contained in the work laptop assigned to the respondent which he has since returned.
23. The provisions to section 2 of the [\*Contracts in Restraint of Trade Act\*](#) empowers the court to declare the provisions or covenant to be void where the court is satisfied that having regard to among other things the nature of the profession, trade, business or occupation concerned, the period of time and the area within which it was expressed to apply.
24. Both the claimant and the respondent are engaged in the provision of medical services. For avoidance of doubt Dr Mishra the deponent to the affidavit in support of the application and the respondent are both medical doctors. Therefore, to restrain the respondent from practicing his profession requires satisfactory evidence in support. The court will in this regard rely on the case of [\*Credit Reference Bureau Holdings Ltd v Steven Kunyibia\*](#) [2017] eKLR quoted by the respondent. The court here stated that business competition is the essence of markets. Whereas it would not be right to allow practices that unfairly and unduly open up one's business secrets and market edge to its rivals, it would on the hand not be right to engage a practice where in order survive the competition, such business shackles its employees from obtaining employment with its competitors. In digital age there are in place business processes which can minimize the risk of an employee accessing or inappropriately using the employer's trade secrets. However employment experience and expertise garnered from working for a particular employer cannot be reasonably restrained without stunting such employee's 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.



25. As observed earlier the information the claimant feared the respondent could misuse was contained in his work laptop which he has since returned. The claimant as an institution and one involved in provision of medical services must be having a robust ICT department which can successfully log off the respondent from the system and permanently deny him permission to access the system. The claim that the respondent could even after leaving the claimant employment still access the claimant's system does not sound practical and correct.
26. To this extent the court is not persuaded that the claimant has made a *prima facie* case to justify the granting the interim orders.
27. The matter will therefore proceed to full trial without any interim injunction.
28. It is so ordered.

**DATED AT ELDORET THIS 29<sup>TH</sup> DAY OF JULY, 2022**

**DELIVERED THIS 29<sup>TH</sup> DAY OF JULY, 2022A**

**BUODHA JORUM NELSON**

**JUDGE**

