



**Amitruck Limited v Ochieng (Cause E508 of 2022)
[2022] KEELRC 13548 (KLR) (15 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13548 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E508 OF 2022
L NDOLO, J
DECEMBER 15, 2022**

BETWEEN

AMITRUCK LIMITED CLAIMANT

AND

JACOB OCHIENG RESPONDENT

RULING

1. This ruling proceeds from the notice of motion dated July 20, 2022, by which the claimant seeks the following reliefs:
 - a. 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 contracted non-compete clause under the contract of employment dated July 21, 2021 pending the hearing and determination of the suit;
 - b. 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 businesses within the contracted non-compete clause under the contract of employment dated July 21, 2021 pending the hearing and determination of the suit.
2. The Motion is supported by an affidavit sworn by the claimant’s founder and chief executive officer, Mark Mwangi and is premised on the following grounds:
 - a. That vide an employment contract dated July 21, 2021, the Respondent was employed as the head of commercial sales at the claimant company. The employment contract contained a surviving non-compete clause that expressly prohibited the respondent from soliciting any



of the claimant's clients after the termination of the employment contract for a period of two years;

- b. The employment contract also contained confidentiality clauses that specifically provided that the claimant's customer data formed part of confidential information and that the confidentiality clause survived the termination of the employment contract;
 - c. The respondent tendered his resignation on March 22, 2022;
 - d. The respondent is currently working for Craft Silicon Ltd that owns Little App, a company that has just recently ventured into the same core business as the claimant and is in direct competition with the claimant;
 - e. The respondent is directly soliciting the claimant's clients and is using the claimant's confidential information for purposes of jeopardising the claimant's relationship and standing with its existing clients;
 - f. These acts are in direct breach of the surviving non-compete clause in the respondent's employment contract, which clause still binds the Respondent;
 - g. The claimant has suffered and continues to suffer massive losses as a result of the actions of the respondent and is apprehensive that should the respondent continue soliciting the claimant's clients and unfairly using its confidential information, then the claimant will irreparably lose its business and income;
 - h. There is no prejudice that the respondent will suffer at the issuance of conservatory orders sought restraining him from engaging with the claimant's clients or disclosing the claimant's business proprietary information;
 - i. The relief of damages is not and cannot be sufficient as the claimant is at the risk of losing its clients and unless the continued breach is restrained, the claimant risks losing its investments leading to hundreds of millions of shillings in losses and loss of a flagship Kenyan owned start-up;
 - j. The claimant seeks the intervention of the court by way of injunctive reliefs to restrain the respondent from further breaching the employment contract dated July 21, 2021.
3. The claimant accuses the respondent of diverting its business to a competitor through unorthodox means, by on-boarding entities associated with the claimant's business.
 4. The matter went before the duty judge, Stella Rutto J on July 21, 2022, who granted interim orders as follows:

“That in the interim and pending further directions from the court, the respondent is hereby restrained whether by himself, his servants or agents from directly or indirectly disclosing the applicant's confidential information, proprietary business information and trade secrets to the applicant's clients and or competing businesses within the contracted non-compete clause under the contract of employment dated July 21, 2021.”
 5. The respondent opposes the claimant's motion by his replying affidavit sworn on 30th July 2022.
 6. The respondent takes the view that the application is incompetent, defective and an abuse of the court process.



7. He states that the non-compete clause in the employment contract dated July 21, 2021, upon which the application is predicated, is unreasonable, ambiguous and unenforceable.
8. The respondent avers that his resignation on 29th March 2022, was instigated by the claimant's mistreatment, frustrations and a toxic work environment.
9. He concedes that a month after his resignation he joined Little App as Head of Business Logistics, a position he terms as more senior than that of head of commercial sales he had held at the claimant.
10. Regarding the accusation that he had poached the claimant's client, food for education, the respondent responds that the contract between the claimant and food for education had no exclusive clause prohibiting the client from sourcing for other service providers.
11. The respondent denies diverting any business from the claimant.
12. The respondent takes issue with the non-compete clause in the employment contract which he considers to be contrary to fair labour practices, a right guaranteed under article 41 of *the Constitution* and article 18 of the *African Charter on Human and People's Rights* read together with article 2(6) of *the Constitution*.
13. He adds that the non-compete clause is unconstitutional as it does not meet the limitations imposed under section 2 of the *Contracts in Restraint of Trade Act*.
14. The claimant's chief executive officer, Mark Mwangi swore a supplementary affidavit on August 12, 2022, stating that by its plea, the claimant does not seek to bar the respondent from earning a living but rather, to stop him from poaching the claimant's clients, to the detriment of its business.
15. The claimant accuses the respondent of continuing unabated with soliciting of its core clients and use of its confidential and proprietary business information and trade secrets, despite the subsistence of interim injunctive orders.
16. In this regard, the claimant points out that the respondent had solicited and directly poached another of the claimant's core clients by the name Majid Al Futtaim Hypermarkets Ltd, trading as Carrefour Supermarket.
17. The orders sought by the claimant fall within the purview of an interlocutory injunction and the threshold to be achieved by an applicant for such an order was set many years ago in *Giella v Cassman Brown & Company Limited* (1973) EA 358 as follows:

“Firstly, 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.”
18. In its decision in *Nguruman Limited v Jan Bonde Nielsen & others* [2014] eKLR the Court of Appeal confirmed that the three conductions in *Giella v Cassman Brown* (supra) are to be considered as:

“...separate distinct and logical hurdles which the applicant is expected to surmount sequentially...”



19. The first port of call is therefore an inquiry as to whether a prima facie case has been established. In its decision in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 the Court of Appeal defined a prima facie case in the following terms:

“In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter... the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial...”

20. In pursuing its plea, the Claimant relies on Clause 8 of the Respondent’s employment contract which provides as follows:

- a. The Employee expressly agrees that she [he] shall not, either during her [his] employment period, or for a period of two (2) years following the termination of this Agreement, engage with or deal with any third party, concerned with or interested in a business which is the same, similar to, or in competition with, the Employer within Kenya.
- b. Further to the above, the Employee agrees that she [he] shall not, during the period of engagement with the Employer undertake any professional work outside the company and neither shall she [he] purport to offer any professional services in the name of the company without the Employer’s knowledge and authority first had and obtained in writing from the Employer. The Employee hereby agrees that this clause is fundamental and goes to the root of this agreement.
- c. The Employee also agrees to support the mission, goals and values of the Employer, offer her [his] expertise to help ensure the success of the Employer, and to actively participate in all requests for her [his] assistance and response in all Employer related matters and fulfil her [his] obligations under the scope of this Agreement diligently and professionally.

21. The claimant also relies on clause 11 of the employment contract which designates the following as forming part of confidential information:

- a. Information relating to the strategic and planning objectives of the Employer;
- b. Information relating to the activities, relationships, structures, products, services, customers and clients of the Employer both current and future;
- c. Information contained in the documentation or software and/or associated material of the Employer;
- d. Technical, scientific, commercial, financial and market information know-how and trade secrets;
- e. Data concerning personnel matters;
- f. All customer data and any feedback received;
- g. Employee information;
- h. Plans, designs, drawings, functional and technical requirements and specifications;
- i. Briefing templates, scripts, databases and other storage media (of whatever nature).



22. Ordinarily, the first question to ask in an application for interlocutory injunction is whether a prima facie case has been established. In this case however, a perusal of the Statement of claim alongside the notice of motion reveals that what the claimant seeks is in fact, determination of the entire claim at the interlocutory stage. For reasons that were not clear to the court, none of the parties addressed this issue, which really is the crux of the matter before me.
23. In the normal scheme of things, causes of action ought to be determined at full trial. However, in special circumstances, a matter may be disposed of at the interlocutory stage.
24. As held by Ringera J (as then was) in *Airland Tours & Travel Limited v National Industrial Credit Bank* (Milimani HCCC No. 1234 of 2002) in an interlocutory injunction, there is no requirement on the court to make any conclusive or definite findings of fact or law.
25. It follows therefore that a party who presents an interlocutory application whose determination would amount to determination of the main claim bears the duty to demonstrate the special circumstances of their case. This becomes more critical where the parties have presented rival affidavit evidence, as in this case.
26. By its notice of motion, the claimant accuses the respondent of breaching his employment contract, first; by soliciting and diverting the claimant's clients to his current employer and second, by misusing confidential information belonging to his former employer.
27. On his part, the respondent not only denies the accusations levelled against him by the claimant, but he also accuses the claimant of strong-arm tactics of unreasonable muzzling with the aim of getting him out of his current employment. the claimant goes further to question the constitutionality and enforceability of the non-compete clause in the employment contract.
28. I have considered this matter carefully and have formed the opinion that the issues raised cannot be fully ventilated and determined at the interlocutory stage. For this reason, I am constrained to decline the claimant's application dated July 20, 2022, with the consequence that the interim orders granted on July 21, 2022 are vacated.
29. The costs of the application will be in the cause.
30. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF DECEMBER 2022

LINNET NDOLO

JUDGE

Appearance:

Mr. Otieno for the Claimant

Mr. Momanyi for the Respondent

