



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO.E025 OF 2021

DIRECT PAY LIMITED.....APPLICANT

VERSUS

MARION KHASOA STEVENS.....RESPONDENT

RULING

The applicant, Direct Pay Limited filed application and Notice of Motion dated 22nd February, 2021 under the provisions of section 12(1) (3) (i) (viii) of the Employment and Labour Relations Court Act, Rue 17 of the Employment and Labour Relations Court (Procedure) Rules, section 7(1) of the Arbitration Act and Rule 43 of the Arbitration Rules, 2020 and seeking for orders that;

1. Spent.

2. A mandatory injunction issue compelling the respondent to cease her employment with Pesapal Limited whether in an active or passive capacity pending the hearing and determination of this application.

3. A mandatory injunction issue compelling the respondent to cease her employment with Pesapal Limited whether in an active or passive capacity pending the hearing and determination of Arbitral Proceedings to determine the dispute between the parties.

4. The costs of this application be provided for.

The application is based on the grounds that;

The respondent was prior to her resignation from the Applicant a product manager with the highest level of access to the Applicant's proprietary business information.

The respondent executed an addendum to her employment contract containing certain restrictive covenants including a non-complete covenant.

The applicant has just learnt that the respondent has taken up employment with Pesapal Limited, a direct competitor of the Applicant.

The respondent has breached the terms of the non-compete clause.

There exists an arbitration clause requiring the parties to submit a dispute for determination through arbitral proceedings.

The appointment of an Arbitral Tribunal for this dispute will take time, and the Applicant is apprehensive of the irreparable damage that will befall its business if injunctive relief is not granted urgently.

The Arbitration Act and Rules provide that the court can determine an application for injunctive relief prior to the appointment of an Arbitral Tribunal or even during Arbitral proceedings if the circumstances so require.

The applicant is willing to comply with any directions from the court pertaining to the orders sought.

It is in the interests of justice that the court grant the injunctive relief sought by the applicant.

The application is also supported by the affidavit of Agnes Mwatha and on the grounds that she is head of talent with the applicant and has authority to support the instant applicant. She avers that the respondent's designation prior to her resignation from the applicant was Product Manager vide letter of appointment dated 15th June 2020.

The respondent was one of the employees with the highest level user access to the applicant's proprietary business information and the applicant has now learnt that the respondent has taken up employment with Pesapal Limited, a direct competitor and has since issued letter of demand and served the respondent.

Ms Mwathi also avers that the respondent signed an addendum to her employment contract in 2018 with certain restrictive covenants. Pesapal Limited like the applicant is in the payments industry and provides merchants with online payment solutions including the ability to accept credit card and mobile money payments. By taking up employment with Pesapal Limited, the respondent has breached the terms of the non-compete covenant. Following breach of the non-compete covenant, the applicant has no way of safeguarding its proprietary business information that is within the respondent's knowledge.

The parties have agreed to have the dispute determined through arbitration and in the interim seek the court for protective measure through a mandatory injunction compelling the respondent to cease employment with Pesapal Limited as the applicant stands to suffer irreparable harm as its proprietary business information is what allows it to maintain its competitive edge. The irreparable harm include business losses with far-reaching effects which may be felt by the applicant and other employees as the applicant will struggle to remain in business following disclosure of its proprietary business information.

Ms Mwathi also avers that the applicant has written to the Chartered Institute of Arbitrators to appoint an arbitrator to determine the present dispute between the parties.

In response the respondent filed Grounds of Opposition in opposition to the application and on the grounds that the orders sought have the effect of subjecting the respondent to an abrupt loss of employment and a living on the basis of a restrictive clause without any guarantee that after the expiry of the remainder of restrictive period she will secure suitable employment. The applicant's interest under the restrictive covenant is limited to business interests and not to clog the respondent's right to earn a living through employment. Other than mere speculation and conjecture there is nothing presented to show that the business interests are suffering as a result of the alleged breach by the respondent.

The respondent other grounds are that the applicant has failed to demonstrate the nature of the secrets or information which the respondent had gained access and has in her possession and the manner in which this is likely to be divulged or used in the new employment to the detriment of the applicant.

The applicant has not focused on restraining the respondent from disclosing to a third party or using the alleged secrets and or privileged information but only to render the respondent jobless.

The respondent's further grounds are that the orders sought by the applicant if issued would be against public policy and in contravention of fair labour practices under article 41 of the Constitution read with section 2 of the Contracts and Restraint of Trade Act. Applicant be dismissed with costs.

The respondent has relied the following cases – **Credit Reference Bureau Holdings Limited v Steven Kunyiha [2017] eKLR**; **Steel Structures Limited v David Engineering Ltd & another [2007] eKLR**; **LG Electronics Africa Logistics FZE v Charles Kimari [2012] eKLR**; and **Bridge International Academies Limited v Robert Kimani Kiarie [2015] eKLR**.

Both parties made oral submissions.

The applicant submitted that the respondent has not denied that there exists there is a non-compete agreement between the parties upon termination of employment and in breach thereof the respondent has secured new employment with a competitor resulting in these proceedings. To prevent damage and harm, the respondent should be compelled to cease employment with Pesapal Limited as while in the employment of the applicant she had access to business secrets and information and were such to be divulged to third parties, such will occasion harm and damage to the applicant.

The applicant is seeking to protect its legitimate business interests while the respondent has failed to demonstrate how her rights under the restrictive covenant have been violated. The balance of rights and convenience favours the applicant.

The respondent submitted that the applicant is seeking for a mandatory injunction pending the arbitral proceedings whereas employment terminated in October, 2020 and such proceedings will run for 12 months and to stop the respondent from working without a corresponding benefit is contrary to fair labour practice. there is no proprietary right under threat.

The respondent also submitted that who is before the court is the respondent's access to the *zoho* and *EPO* systems of the applicant and who should have fashioned the applicant with a relief seeking to restrain access or diversion of information but has opted to restrict respondent from ever working for the next 7 months. As such, the applicant has not met the threshold for the grant of mandatory injunctive orders.

In the case of **Credit Reference Bureau Holdings Limited v Steven Kunyiha [2017] eKLR** the court held that competition in business cannot be avoided in a free market and in the case of **Steel Structures Limited v David Engineering Ltd & another [2007] eKLR** the court held that it is against public policy to stop an employee from seeking greener pastures. In the case of ; **LG Electronics Africa Logistics FZE v Charles Kimari [2012] eKLR** the court held that an employee cannot be restricted from his employment pending an arbitration which cannot be predicted and in the case of **Bridge International Academies Limited v Robert Kimani Kiarie [2015] eKLR** it was held that mandatory injunction should only issue in exceptional case and this is not one such case. There is no prima facie case

established to justify the orders sought. where there is damage suffered, such can be compensated.

Determination

At this stage, the single issue for determination is whether the court should issue a mandatory injunction compelling the respondent to cease employment with a third party pending hearing of the arbitral proceedings to determine the dispute between the parties.

As a principles, a mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not be granted in the absence of special circumstances, in a clear case, and where the court finds this ought to be decided at once. See **Joseph Kaloki t/a Royal Family Assembly v Nancy Atieno Ouma [2020] eKLR** and in **Shariff Abdi Hassan v Nadhif Jama Adan [2006] eKLR** the court held that;

The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.

In this case, the applicant's case is that the respondent was prior to her resignation from the applicant a product manager and had the highest access to proprietary business information and since she had executed an addendum to her employment contract containing restrictive covenants and including a non-compete covenant, by securing new employment with a third party and a direct competitor is in breach of the terms of the non-compete clause.

The applicant has attached evidence of employment vide letter dated 15th June, 2020 and a letter and notice of resignation dated 13th August, 2020 and an acceptance of the resignation dated 18th August, 2020. Employment started on 15th June, 2020 and ended on 13th August, 2020. Under clause 5 of the Supporting Affidavit of Ms Mwathi, she avers that;

5. THAT the Respondent signed an addendum to her employment contract in 2018 with certain restrictive covenants including a non-compete clause at clause 7.4B of the addendum. Annexed hereto and marked „AM4? is the addendum dated 13th March 2018 with the non-compete clause 7.4B highlighted.

The agreement is made on 13th March, 2018. The agreement covers a period before the employment commenced and ceased. Under clause 4 of the Agreement, the parties agreed that;

4. the Employer and Employee entered into an Employment Contract dated March 14th, 2018 (the “contract”) on the terms defined in the Contract.

The subject term employment is removed from the agreement to justify a *prima facie* case to warrant the grant of a mandatory order at this instance.

Even where there was a *prima facie* case present, which is not the case here, the respondent ceased employment with the applicant on 13th August, 2020 and the instant applicant was filed on 22nd February, 2021. A period of over 6 months apart.

As rightly submitted by the respondent's counsel in the case of **Credit Reference Bureau Holdings Limited v Steven Kunyiha [2017] eKLR**;

... the restraint clause sought to be enforced if allowed would effectively keep the defendant out of employment with a competitor for 5 months only. In my view, enforcing such clause would not be in the interest of Justice for two reasons, namely, the damage, if any that was bound to be inflicted upon the plaintiff by the defendant's employ in a competitor company has now been substantially suffered as it has been now seven months since the defendant left employment with the plaintiff. Secondly, the effect of the restraint would be to remove the defendant from employment for a period of only 5 months without any guarantee that he will be employed once the 12 months contractual hiatus elapses. I think in a country like Kenya where unemployment is soaring every single day, subjecting the defendant to loss of employment on the basis of a restrictive clause would be unreasonable and not in the interest of either party. Indeed such an action would be contrary to public policy.

Whereas the Constitution, 2010 has prohibited forced labour as being slavery and servitude and the Employment Act, 2007 has outlawed forced employment in similar terms as under the constitution, the counter should apply. no employer should be allowed to restrict an employee from seeking alternative employment unless in very exceptional circumstance and which must be demonstrated to the court. in equal measure, for the court to allow such a restraint with regard to the right to work as secured under Article 18 of the African Charter on Human and People's Rights read together with Article 2(6) of the Constitution, 2010.

To restrict the right to work would go contrary to fair labour practices, a right secured under Article 41 of the Constitution, 2010. Such an action would be contrary to public policy as rightly held **LG Electronics Africa Logistics FZE v Charles Kimari** and in this case, the instant application filed over 6 months after employment terminated to allow the sought restraint would be unreasonable.

The respondent has a legitimate right to work and earn a living. Without a corresponding benefit from the former employer, to issue a restraint to cease her current employment would be a fundamental departure from the right to fair labour practices and impede fair competition. See **Steel Structures Limited v David Engineering Ltd & another [2007] eKLR**;

... A temporary injunction is sought to restrain him from taking up employment with the 1st Defendant or any other individual, company or organisation that is engaged in competitive business with the Plaintiff in violation of the contract between him and the Plaintiff. As far as employment with the 1st Defendant is concerned, it is a **fait accompli**. The 2nd Defendant took up that employment on 15th January, 2007, about three months before the suit and applications were filed. The court cannot restrain that which has already been done. What about employment with other individuals, companies or organisations? On account of the comments I have already made regarding the 2nd Defendant's right to seek greener pastures and the undesirability of holding him to employment with the Plaintiff, I would not grant this temporary injunction. Besides, it appears to me that the Plaintiff's main complaint is that the 2nd Defendant has moved over to the 1st Defendant with the Plaintiff's industrial secrets. That issue is already the subject-matter of the other suit already mentioned. Whatever loss the Plaintiff may have suffered thereby will be taken care of in that suit.

Without any prayer with regard to restrict disclosure and diversion of any information, to seek to restrain the respondent from working will not meet the ends of justice. As noted above, without a *prima facie* case, the orders sought must fail.

Accordingly, for the reasons above, application dated 22nd February, 2021 is declined and hereby dismissed with costs to the respondent. It is so ordered.

Delivered in open court at Nairobi this 11th day of March, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi