REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 835 OF 2019

ALEX GATOTO.....CLAIMANT/ RESPONDENT

VERSUS

QED SOLUTIONS LIMITED.....RESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant filed a Notice of Motion Application dated 1st March 2021 seeking Contempt of Court orders against the Claimant/Respondent. The Application is based on the grounds that on 24th December 2014, the Honourable Justice Byram Ong'aya *inter alia* issued a temporary injunctive order that the interim orders are extended until further orders by the Court or until mention and subject to the Parties abiding by the clause on 'Confidentiality of Information' at page 4 of 5 of the Confirmation of Employment Letter dated 19th May 2017. The Respondent/Applicant asserts that the Claimant/Respondent has through his proxies and current employer M-tenders Africa, his officers, servants or agents, continued to breach the restrictive terms of the said Contract of Employment prohibiting him from divulging to, or from giving or sharing any confidential and proprietary business information obtained whilst in the Applicant's employment. Further, that the Claimant/Respondent has on many occasions since issuance of the said orders, communicated with the Applicant's clients, from a client list at his disposal, and taken business away from the Applicant by himself and through his current employer, his officers, servants or agents. The Respondent/Applicant asserts that it is evidentially clear that the Confidential Information accessed by the Claimant in the course of his employment with the Applicant are now being used for his benefit and to the detriment of the Applicant and that by virtue of the said contempt of court orders, the Applicant continues to lose significant business through undercutting of its rates which the Claimant was familiar with. The Respondent/Applicant avers that it is imperative for this Court to give effect to its orders that the Claimant/Respondent be committed to civil jail for contravening the Applicant's economic rights and to further protect the integrity of the Court in the eyes of the public and that the balance of convenience lies in granting of the orders sought as failure will result to great prejudice to the Applicant which cannot be compensated by award of damages only. The Respondent/Applicant filed a Supporting Affidavit sworn by its Chairman, Alex Mbugua who annexes in his affidavit *inter alia*, a copy of extracted email correspondences sent to the Respondent/Applicant's client by the Claimant himself on behalf of his employer and company, soliciting the said client from the Applicant. He lists 11 companies in the Applicant's client lists who the Claimant approached and avers that the Claimant also uses the Applicant's templates, documents, information and trade secrets to lure their clients. He further avers that the Claimant has managed to take away the business of AAR from the Applicant as evidenced by an advert confirming the same and that the Claimant approaching the said companies was in breach of the clear terms of the said Court Order. That it is clear from the proposals sent to the Applicant that the Claimant is adamant on furthering the said contemptuous actions. He also annexes in his affidavit a copy of the letter dated 21st July 2020 by the Claimant' Advocates acknowledging to have directly communicated with the Applicant's Clients' List without any consent of the Applicant as required.

2. The Claimant/Respondent in his Replying Affidavit depones that his current employer, M-tenders Africa Limited, is a company that undertakes e-procurement services and hence undertakes the same line of business as his former employer, the Applicant herein. He avers that he once met the Applicant's Chairman during a presentation where both the Applicant and Respondent had been invited to present for a potential client and since then the said Chairman has been under the misguided assumption that the Claimant established the said business to compete the Applicant's business. He further avers that his employment contract with the Applicant did not have any non-compete clause restraining or prohibiting him from working in a rival or competing business with the Applicant. He denies ever acting in breach of the said confidentiality clause in any manner during or after his employment with the Applicant. The Claimant avers that by virtue of the doctrine of privity of contract, the said confidentiality clause cannot be extended to cover other persons or employees of his current employer who are not privy to the said contract and that no evidence has been adduced to demonstrate that he disclosed confidential information to such persons as alleged. The Claimant/Respondent avers that the e-procurement service industry currently has only three players including his current employer, the Respondent/Applicant and a Company called SRM Hub and who are all available to provide such services. That the Respondent/Applicant enjoyed a monopoly in e-procurement services before the entry of M-tenders Africa Limited and SRM Hub and that clients are as such at liberty to engage the services of any of the three companies in appreciation of healthy competition in the market. That the email correspondence produced by the Applicant simply demonstrates execution of his official duties as the Business Development Manager of M-tenders Africa Limited and that no evidence has been adduced to demonstrate that he solicited for any such services. The Claimant avers that all engagements with clients are based on competitive recruitment and where all of the three players in the e-procurement services are granted an opportunity to showcase their product through the various stages of the tendering process. The Claimant asserts that the assumption by the Respondent/Applicant that he was instrumental in stealing its clients is therefore misguided and a malicious

misrepresentation of facts and denies being issued with any client list by the Applicant. He avers that in any case the Applicant has always been publicly displaying a list of its clients on its website and that such information cannot therefore be classified as being 'confidential'. The Claimant/Respondent avers that he got hold of a false and malicious email by the Applicant's Chairman where he had circulated and distributed defamatory material against M-tenders Africa Limited so as to disparage it and dent its economic interest. He further relies on his Grounds of Opposition dated 6th April 2021 opposing the Respondent's application herein on the ground that the Applicant is inviting the Court to make final order at an interlocutory stage. He avers that the Application herein has also been made in bad faith following a mutual understanding by all parties to abandon all applications and proceed to full trial of the suit as per directions taken on the 27 th January 2021 and it should as such be dismissed forthwith with costs.

3. The Respondent/Applicant submits that Clauses 4 and 5 of the Confirmation of Employment Letter dated 19th May 2017 read;

> 'Confidentiality of Information
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> During your employment you may become aware of information relating to the business of QED, including but not limited to client lists, trade secrets, client details and pricing structures.
>
> Confidential information, including client lists, trade secrets, pricing structures and any and all documents created by you in the course of your employment remain the sole property of QED. You shall not, either during or after your employment, without prior consent of QED, directly or indirectly divulge to any person or use the confidential information for your own or another's benefit'.

4. The Respondent submits that **Black's Law Dictionary (Ninth Edition)** defines contempt of court as "*Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment*." The Respondent submits that the current regime as regards punishment for contempt of court is to be found in Section 63 of the Civil Procedure Act and Section 5 of the Judicature Act. The Respondent relies on the case of **Kristen Carla Burchell *vs.* Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005** at the High Court of South Africa which laid down the principles of law that in order to succeed in civil contempt proceedings, the applicant has to prove:

> i. the terms of the order;
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> ii. knowledge of these terms by the respondents; and
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> iii. failure by the respondents to comply with the terms of the order.

The Respondent submits that the South African Court further stated that the applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

> iv. the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
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> v. the defendant had knowledge of or proper notice of the terms of the order;
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> vi. the defendant has acted in breach of the terms of the order; and
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> vii. the defendant's conduct was deliberate.

5. It is the Respondent/Applicant's submission that the orders issued by the Court were clear, unambiguous and binding on the Claimant/Respondent and that the alleged contemnor has not disputed knowledge of the terms of the said order and that it has described in its Supporting Affidavit the manner in which the Claimant has breached the terms of the order. It submits that the Claimant's actions were deliberate because he copied word-for-word the documents including the proposals created or obtained by him during the course his employment with the Respondent/Applicant. It further submits that if the Claimant/Respondent was unsatisfied with the Order of 24th December 2019, he should have sought to appeal against such Order and/or set it aside and that as long as the said Orders exist, the Claimant/Respondent is bound to obey the same to the letter. In support of this submission it cites the case of **Republic *v* Kenya School of Law *&* 2 Others *Ex parte* Juliet Wanjiru Njoroge *&* 5 Others [2015] eKLR**. It also cited the case of **Africa Management Communication International Limited *v* Joseph Mathenge Mugo *&* Another - Civil Case No. 242 of 2013** where Mabeya J. stated that the actions of the respondent violate the rule of law and ought to be punished to safeguard the fundamental administration of justice. The Respondent/Applicant's prays that this Court equally does not depart from the same trend purposely to uphold the rule of law and cite the Claimant/Respondent to be in contempt of the orders of this Court. The Respondent/Applicant submits that the Application herein has not in any way canvassed issues that will make the court grant final orders that are pending in this suit. That it has deemed itself injured by the contemptuous actions of the Claimant/Respondent and that Article 22 of the Constitution grants this Court the inherent power to make such orders as may be necessary for the ends of justice. That in determining the application, this Court ought to only consider evidence of the actions of the Claimant/Respondent after the Order was made and not before issuance of the same. It submits that the Application is therefore not premature as it seeks to punish an offence which if not stopped, this Court will only be stamping its authority in regards to compliance of its orders.

6. The Claimant/Respondent submits that a perusal of the Counterclaim filed by the Respondent/Applicant herein in the substantive suit shows that one of the substantive questions for determination is whether the Claimant has acted in breach of the confidentiality clause in his former employment contract with the Respondent. Further, that the said issue is also included in the Claimant's proposed list of issues it forwarded to the Respondent/Applicant vide a letter dated 24th February 2021. That in determining the contempt application before the court, this Honorable Court would therefore invariably determine the substantive matters raised in the Respondent's Counterclaim at an interlocutory stage and which will be detrimental and prejudicial to his interest. The Claimant submits that he will have been denied the

chance to cross-examine the Applicant on its assertions and to test the veracity of the allegations and would constitute a breach of the right to a fair trial as guaranteed under Article 50 of the Constitution of Kenya. He relies on the Court of Appeal decision in **Olive Mwihaki Mugenda & Another *v* Okiya Omtata Okoiti & 4 Others [2016] eKLR** where the Court of Appeal guided by the *dicta* of the Court in the decisions of **Vivo Energy Kenya Limited *v* Maloba Petrol Station Limited & 3 Others [2015] eKLR** and **Stephen Kipkebut t/a Riverside Lodge and Rooms *v* Naftali Ogola [2009] eKLR**, were convinced and satisfied that the learned judge erred in law in granting final orders at the interlocutory stage when the main Petition had not been heard. The Claimant/Respondent further cites the case of **John Harun Mwau *v* Linus Gitahi & 13 Others [2016] eKLR** where Lenaola J. (as he then was) held a similar opinion and quoted Rika J. in the case of **East African Portland** that: "*Interim orders are not suitable if by their grant, they finally determine the substantive dispute. The Courts must be wary of prejudgment of the substantive merits.*" It is the Claimant/Respondent's submission that the court has on occasion set out the principles governing contempt applications before the court and that the Court set out the elements to be satisfied in **North Tetu Farmers Company Limited *v* Joseph Nderitu Wanjohi [2016] eKLR** similar to those enumerated in the case of **Kristen Carla Burchell** *(supra)* cited by the Applicant herein. He submits that the terms of the Order in question and knowledge of the same are not in contention and that the Respondent/Applicant must demonstrate that he has deliberately breached the orders of this court. The Claimant submits that the Applicant must further demonstrate through cogent evidence that he and not any other person has acted in breach of the confidentiality clause. He invites this Court to note in the first instance that there was no a non-compete clause in his former contract of employment with the Applicant and he is hence not precluded, excluded, or restricted from being gainfully employed by any other entity carrying out the similar business with the Applicant. The Claimant submits that therefore the normal execution of his contractual and employment duties to his current employer which include communicating with clients cannot possibly be deemed as an act of contempt. He further submits that the Honourable Court is being asked to punish him for executing his contractual duties with his current employer and which move is prejudicial to his economic interest, contrary to public policy and an affront to the Constitution. The Claimant submits that the Respondent/Applicant has not discharged the evidentiary burden of proof of any violation of the orders of this Court and has only placed before the Court mere assumptions and speculations. In support of this submission he relies on the case of **Mutitika *v* Baharini Farm [1985] eKLR** where the Court of Appeal addressed the burden of proof in Contempt proceedings and stated thus:-

> "In, Re Breamblevale Ltd [1969] 3 All ER 1062, Lord Denning MR. (as he then was), at page 1063, had this to say,
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> "A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time- honoured phrase, it must be proved beyond reasonable doubt".
>
> With the greatest possible respect to that eminent English judge, that proof is much too high for an offence "of a criminal character" and, ipso facto, not a criminal offence properly so defined.
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> We agree with Mr. Khaminwa's submissions in this respect. In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi - criminal in nature Winn LJ on page 1064 was in our view right in saying that the guilt has to be proved." (emphasis theirs)

The Claimant thus urged the dismissal of the Respondent's motion with costs.

7. The Respondent's motion asserts the Claimant is in breach of the Court orders issued by Ong'aya J. on 24th December 2019. Ong'aya J. *inter alia* issued a temporary injunctive order that the interim orders are extended until further orders by the Court or until mention and subject to the Parties abiding by the clause on 'Confidentiality of Information' at page 4 of 5 of the Confirmation of Employment Letter dated 19th May 2017. The confidentiality clause provided as follows:-

> During your employment you may become aware of information relating to the business of QED, including but not limited to client lists, trade secrets, client details and pricing structures. Confidential information, including client lists, trade secrets, pricing structures and any and all documents created by you in the course of your employment remain the sole property of QED. You shall not, either during or after your employment, without prior consent of QED, directly or indirectly divulge to any person or use the confidential information for your own or another's benefit'.

8. The Claimant is alleged to have breached this confidentiality clause. As evidence, the Respondent annexes an email from the Claimant. Confidentiality clauses are in essence restrictive covenants and may be permitted in some cases. A clause under which the employee agrees not to enter into or start a similar profession or trade in competition against the employer is a non-compete clause under the rubric of confidentiality. This restrictive covenant is what the Claimant had in his contract with the Respondent. As a contract provision, the confidentiality clause in the contract herein must conform to traditional contract requirements including the consideration doctrine. The Respondent was perhaps aware of the possibility that upon termination or resignation, the Claimant might begin working for a competitor or start a business and gain competitive advantage by exploiting confidential information about their operations or trade secrets, or sensitive information such as customer/client lists, business practices, upcoming products and marketing plans. The confidentiality clause in this case was too broad and offended the public policy doctrine as the Claimant would not work and earn a living since he was restricted by this covenant against him either during or after his employment, without prior consent of the Respondent, directly or indirectly divulge to any person or use the confidential information for his own or another's benefit. This was beyond the reach of a confidentiality clause as all the Respondent needed to do was bar the Claimant from using the lists, confidential information and the like for the benefit of another (enterprise) but not bar him for using the knowledge and skills acquired for his livelihood. The clause as phrased would deny the Claimant the opportunity to work in any other company offering similar services as the Respondent and therefore was an overreach. As analysed above, the Respondent's motion is therefore devoid of merit and is accordingly dismissed. Costs to be in the cause.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY 2021

NZIOKI WA MAKAU

JUDGE