



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 135 OF 2020

REDINGTON KENYA LIMITED.....CLAIMANT

-VERSUS-

THOMAS N. NABENDE.....1ST RESPONDENT

FIRST DISTRIBUTION LIMITED.....2ND RESPONDENT

RULING

1. The 2nd Respondent filed a Chamber Summons dated 18.3.2020 seeking the following orders:

- a. This Honourable Court be pleased to strike out the suit against the 2nd Respondent.*
- b. This Honourable Court be pleased to strike out the name of the 2nd Respondent from the suit.*
- c. This Honourable Court do provide such other orders and directions as it may deem fit and just to grant.*
- d. The costs of this application and the suit be provided for.*

2. The application is based on grounds that:

- a. The Claimant's claim has not disclosed any reasonable cause of action against the 2nd Respondent
- b. A cursory perusal of the claim and the prayers sought oscillate within the contract of service between the Claimant and the 1st Respondent, which was a restrictive covenant under clause 7.
- c. The Claimant has not provided any nexus between their claim and the 2nd Respondent.
- d. Since employment of the 1st Respondent on 5.2.2020 to his termination on 9.3.2020, it has neither closed any deals related with the 1st Respondent nor received any confidential information of the Claimant from the 1st Respondent.
- e. The 2nd Respondent was not privy to the 1st Respondent and the Claimant's contractual terms and it came across the contract of service upon service of the claim.

3. The Application is supported by the affidavit of Yuraisha Mari , the African Region General Manager of Epsidon Technology Distribution (PTY) Limited, a foreign company registered in Kenya and trading as the 2nd Respondent.

4. He contended that after an interview for the position of Business Development Manager for East Africa region, the 2nd Respondent offered the 1st Respondent the position which he accepted on 16.12.2019 on condition that he would issue a 30 days' notice to his previous employer, the Claimant.

5. He contended that on 19.2.2020, the 2nd Respondent was informed that the Claimant had raised a formal complaint against the 1st Respondent and the 2nd Respondent on the basis that the 1st Respondent was an employee of both the Claimant and the 2nd Respondent because he had not resigned from the Claimant.

6. He contended that the 2nd Respondent sought from the 1st Respondent a copy of the formal resignation, the date of resignation and a confirmation that he was not in possession of any of the Claimant's assets or information. That the 1st Respondent provided his responses to its enquiries and indicated that he had verbally resigned.

7. He averred that upon the 2nd Respondent's assessment, it concluded that the 1st Respondent attained employment without full disclosure of his employment to the Claimant and proceeded to terminate his services on 9.3.2020.

8. The Claimant opposed the application through a Grounds of Opposition which were not dated and an undated Replying Affidavit sworn by Ajeet Ghatwal its Manager Human Resource. The affiant averred that the Claimant employed the 1st Respondent as the Sales Account Manager for Value Business and in total disregard of his existing employment contract, on 14.1.2020, he entered into an employment contract with the 2nd Respondent, a competitor.

9. The deponent averred that by employing the 1st Respondent whilst still under contract with the Claimant, the 2nd Respondent facilitated the breach of the restrictive covenant, the duty of confidentiality, non-solicitation and non-competition owed by the 1st Respondent to the Claimant and thus had exposed the Claimant to loss and damage.

10. He averred that the Claimant continues to suffer losses as a result of the actions of the Respondents who are unfairly using confidential information thus it is important for the 2nd Respondent to remain as a party to the proceedings.

11. The Application proceeded by way of written submissions. The 1st Respondent did not file any response to the application but filed his submissions.

2nd Respondent's submissions

12. The 2nd Respondent submitted that the ELRC Procedure rules do not provide for the striking out of parties from proceedings due to misjoinder thus leaving it to reset back to the Civil Procedure Rules, 2010 citing Order 1 Rule 10 (2) of the Civil Procedure Rules 2010 and the finding in **Francis Kimutai Bii v Kaisungu Limited [2016] eKLR** where the Court applied the provisions of the Civil Procedure Act and Rules.

13. It submitted that it is neither a necessary nor proper party in the proceedings because claim discloses no cause of action against it. It relied on **Zephir Holdings Limited v Minosa Plantations Ltd & 2 Others [2014] eKLR**, **Pizza Harvest Limited v Felix Midigo [2013] eKLR** and **Werrot & Co. Ltd & 3 Others v Andrew Douglas Gregory & 2 others [1998] eKLR** on the test of determining whether one should be viewed as a party to a case.

14. It submitted that the only nexus the Claimant has with the Applicant is that it employed the 1st Respondent while under the claimant's employment. It relied on the Court of Appeal's finding in **Karl Wehner Claasen v Commissioner of Lands & 4 Others [2019] eKLR** where it cited the Blacks' Law definition of a cause of action.

15. It submitted that the issue in this suit is the breach of an employment contract between the 1st Respondent and the Claimant, and consequently, under the doctrine of privity of contracts, the terms of the contract would only bind the parties to it. It relied on **Aineah Liluyani Njirah v Agha Khan Health Services [2013] eKLR** where the Court held that a contract cannot be enforced by or against a person not a party even if the contract is made for its benefit.

16. The 2nd respondent maintained that it was not a party a party to the contract and the breach that occasioned this suit was not due to its act or omission.

17. Finally, it submitted that no cause of action can be sustained against it and urged the Court to strike out the suit against it with costs.

1st Respondent's submissions

18. The 1st Respondent argued that his contractual relationship with the 1st Respondent is distinct and the Claimant cannot purport to seek variation by including the 2nd Respondent. It submitted that the 2nd Respondent is not necessary part to the suit hence the suit against should be struck out.

Claimant's submissions

19. The Claimant submitted that the 1st Respondent's contract of employment with the 2nd Respondent was a breach of the contract between it and the claimant. It further submitted that the 2nd Respondent encouraged the 1st Respondent to breach his employment contract with the sole aim of receiving and benefiting from its trade secrets.

20. It maintained that it has a cause of action against the 2nd Respondent and relied on the holding in **D.T. Dobbie Kenya Co. Ltd v Joseph Mbaria Muchina & ano (1982) 1 KLR** that if a suit shows a mere semblance of a cause of action it ought to be allowed to go forward.

21. It further submitted that there exists a prima facie case against the 2nd Respondent because it has demonstrated that the 1st Respondent breached the restrictive covenant in conjunction with the 2nd Respondent. It further submitted that the 2nd Respondent is enjoined in the suit

so as to determine the extent to which it benefited from the 1st Respondent's breach of confidential information.

22. In its view the suit and the pleadings disclose a reasonable cause of action against the 2nd Respondent and urged the court to dismiss the application.

Issues for determination

23. The main issue for determination is whether name of the 2nd Respondent should be struck out for misjoinder.

24. Order 1 Rule 10 of the Civil Procedure Rules provides:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

25. The Claimant alleges that 1st Respondent was knowingly engaged by the 2nd Respondent while under its employment and disclosed its confidential information and trade secrets to the 2nd Respondent. In its Claim, it seeks a permanent injunction against the Respondents from interfering with the contract of the 1st Respondent. It argues that the 2nd Respondent should remain a party to the suit because it benefited from the 1st Respondent's breach of the contract.

26. The indisputable fact is that the 1st Respondent separately entered into two contracts of employment with the Claimant and the 2nd Respondent. The contract of employment dated 24.11.2016 was between the Claimant and the 1st Respondent. Based on the doctrine of privity of contract, the rights and obligations under that contract would only be conferred upon the parties therein. It would be contrary to this doctrine, to impose any obligation on the 2nd Respondent, because it is a stranger to the contract.

27. The Court of Appeal in **Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another [2015] eKLR** held:

“In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly a contract cannot be enforced either by or against a third party...Over time some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter.”

28. Likewise, in this case, I do not find there to be any cause of action against the 2nd Respondent because the issue in dispute is the breach of the contract by the 1st Respondent. Further, this case does not lie within the exceptions stated in the above decision. In addition, I find that the applicant has not demonstrated that the 2nd respondent is a necessary party to the suit. Consequently, the name of the 2nd Respondent is struck from the suit for misjoinder.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 2ND DAY OF SEPTEMBER, 2021.

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling 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.

ONESMUS N. MAKAU

JUDGE