



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

**MISC. CAUSE NO. E194 OF 2021**

**NRG MEDIA LIMITED.....APPLICANT**

**VERSUS**

**CHARLES KARUMI MAINA.....RESPONDENT**

**RULING**

1. Through a Notice of Motion application dated 28<sup>th</sup> October 2019, expressed to be brought under the provisions of sections 12 (1), (3) and (4) of the Employment and Labour Relations Court Act, Rule 17 (1), (3) and (9) of the Employment and Labour Relations Court (Procedure) Rules, 2016, the Applicant seeks;

1. THAT this application be certified urgent and the same be heard ex-parte and service thereof be dispensed with in the first instance.

2. THAT this Honourable Court be pleased to grant a temporary order of injunction restraining the Respondent from performing services for, carrying or being engaged or interested or concerned directly or indirectly or publicly identify with the promotion of or the services provided by any other station within the Republic of Kenya or in any business which in any way competes with the Applicant's business pending the hearing and determination of this application within which time the Applicant will pay the Respondent his monthly salary.

3. THAT this Honourable Court be pleased to grant an order of injunction restraining the Respondent from performing services for, carrying or being engaged or interested or concerned directly or indirectly or publicly identifying with the promotion of or the services provided by any other radio station within the Republic of Kenya or in any business which in a way competes with the Applicant's business within the contracted non-compete clause under the contract of Employment and the Applicant pays the Respondent his salary during the non-compete period.

4. THAT cost of this application be borne by the Respondent.

2. The application is premised upon the grounds obtaining on the face of the said application and, the supporting affidavit and further affidavit that were sworn by the managing director of the Applicant company.

3. The application is opposed by the Respondent. This he did by filing grounds of opposition and a replying affidavit.

**The Applicant's case**

4. The Applicant is in the radio and entertainment industry in Kenya, and operates the radio station NRG

Radio, which came into being in 2018.

5. Through an employment agreement dated 2<sup>nd</sup> August, 2018 an employer-employee relationship was established between the Respondent and the Applicant, the Applicant being the employer and the Respondent the employee. The Respondent was employed under the agreement as a Radio Presenter within the Programme Department and as a Digital Associate in the Digital IT Department.

6. The Applicant stated that the Respondent hosted the radio station's breakfast show titled NRG Breakfast Club. According to the Applicant this programme was its station's most popular.

7. The Applicant cited various clauses from the agreement that it suggests are relevant to the instant matter, thus;

(i) That the applicant could pay half or part of all course fees, travel expenses and reasonable accommodation and subsistence expenses for the duration of formal trainings which the Respondent could undertake from time to time.

(ii) During the course of employment, the Respondent was prohibited from being engaged, concerned or interested directly or indirectly in any business, trade or occupation, in competition, conflict or that was likely or intended to compete or conflict with the business of the Applicant.

(iii) The Respondent was prohibited at all times during or after the termination of the agreement from divulging or communicating to any person or persons, or seeking to turn into his personal use or advantage or of any third party, any of the secrets, confidential information or any other information of whatever nature which could have come into his possession or received or obtained in relation to the dealings, transactions or affairs of the Applicant or the identity of those with whom the Applicant conducts business or in relation to the working of any process or invention or method of carrying on business, carried out or employed by the Applicant.

(iv) The Respondent agreed that damage alone would not be an adequate remedy for a breach of confidentiality and that it would be entitled to seek remedies of injunction, specific performance and other reliefs for any threatened or actual breach of the confidential information.

(v) Termination of the contract would be effected by either party giving to the other three months' notice in writing or three months' salary in lieu of notice.

(vi) Upon expiration or termination of the agreement, the Respondent would not, for a period of three (3) months, perform services for or carry or be engaged or interested or concerned directly or indirectly or otherwise publicly identified with the promotion of or the services provided by, any other radio station within Kenya or in any business which in any way competes with the Applicant's.

8. Due to the competitive nature of the industry wherein the Applicant is a player and its dependence upon public acceptability, the Applicant substantially invested in developing the Respondent's personality, services and abilities. The Respondent had no prior training or experience as a radio presenter.

9. At the cost of the Applicant, the Respondent underwent numerous trainings, and exposure events. One of those events being when the Applicant chose to take the NRG Breakfast Club crew, which included the Respondent to Las Vegas Nevada United States of America from the 22<sup>nd</sup> February, 2019, to 4<sup>th</sup> March, 2019, whereby they would air the show for two weeks during the USA Rugby Sevens tournament, to further promote the brand of the on-air personalities as well as the NRG Breakfast Club as a show.

10. The Applicant contended that as a radio presenter, the Respondent was privy to the information about the Applicant's products and services, and business conduct and was aware of the commercial and

competitiveness of the radio and entertainment industry and his role as a market magnet for the Applicant's radio station. He heavily interacted with the Applicant's clients in his role as a presenter.

11. Through an email sent out on the 9<sup>th</sup> day of September 2021, the Respondent resigned giving the applicant a three (3) months' salary in lieu of notice. The Applicant was startled by the resignation. It had handpicked the Respondent for employment and immensely invested in his training and development.

12. The Applicant stated that it has downed on it that the Respondent has since secured employment and is working already with one of its competitors in the Kenya market, the Homeboyz Radio, whereat he now handles an early morning show from 6.50 a.m. till 9.00 a.m.

13. It is the Applicant's take that the Respondent's action runs counter to stipulations of clause 15.1 to 15.8 of his employment contract with it.

14. To demonstrate that the Respondent did move as hereinabove stated, the Applicant has exhibited various articles on the Respondent by his new employer. That in fact the cheque for the 3 (three) months' pay in lieu of notice, was drawn by Radio Africa Group Limited, the owner of Homeboyz Radio.

15. The Applicant further stated that its leadership had a meeting with the Respondent and reminded him of the covenants of the employment agreement, and the surviving clauses of his employment contract. However, this notwithstanding, it subsequently occurred on the Applicant that the Respondent was in active employment of a competitor in breach of the terms of the agreement.

16. A notice of intention to sue ensued but the same did not attract any positive response from the Respondent.

17. The Applicant contends that the agreement bound the parties by its terms. The Respondent should be restrained from breaching the same or any term thereof to prevent prejudice on the Applicant's business, and the Respondent from taking unfair advantage out of the relationship that were.

18. The Applicant states that it has all through been and is, willing to pay the Respondent salary during the 3 (three) months non-compete period, but he has completely refused to pick the payments.

19. The Applicant further contends that the three (3) months is a reasonable period of restraint, considering the substantial investment made to the Respondent, and to safeguard the Applicant's business.

20. Through its further affidavit, the Applicant further contended that, over the years that the Respondent has worked with it, it has reposed tones of confidential information, trade secrets and numerous components of the radio programmes which were being aired by it through the Respondent as a digital associate and radio presenter.

21. The Applicant states that it rolls out the radio programmes to be aired by the radio station quarterly. The roll outs involve intense training of the digital associates and the radio presenters. The Respondent resigned from the employment with the Applicant on the 9<sup>th</sup> day of September 2021, towards the end of quarter three of the year and just when quarter four was about to commence.

22. According to the Applicant, it is evident that the crucial information reposed in the Respondent including the Applicant's trade secrets relating to the radio program for both quarter three and quarter four which were to remain strictly confidential are no longer safe. That it is further evident that the Respondent is exposing crucial information reposed in him during his employment, to the benefit of Homeboyz radio, his current employer.

### **The Respondent's case**

23. Through his grounds of opposition, the Respondent contends that the non-compete clause (15.1 of the

Employment Contract dated 2<sup>nd</sup> August 2018) upon which the instant application is predicated is unreasonable, ambiguous and unenforceable. The stipulation is not reasonable, it is neither for the interest of the parties herein nor that of the public.

24. The Respondent takes a position that a grant of the orders sought was having an effect of denying the Respondent his only source of livelihood and hence a violation of his rights.

25. Through his replying affidavit, the Respondent asserts that he is an actor, voice over artist and a radio presenter. That he is entirely dependent on those skills to earn a livelihood. He states that he is currently employed by Radio Africa Limited as a morning show presenter in one of their stations.

26. The Respondent stated that he was previously employed by the Applicant as a morning show presenter in its radio station until 9<sup>th</sup> September 2021 when he resigned and paid three months' pay in lieu of notice in accordance with clause 13 of the Employment Contract dated 2<sup>nd</sup> August 2018.

27. He contended that upon the resignation and payment of the three (3) months' salary in lieu of notice, he made various requests and proposals to facilitate a smooth transition that would include adherence to all the terms of the Employment Contract. This included, salary of three months to sustain him during the term of the non-compete clause, in the alternative waiver of the non-compete clause on account of its unfair terms; and also, execution of a non-disclosure agreement to provide comfort to the Applicant. Deliberately, the Applicant has not disclosed this, to Court.

28. That in fortification of the Applicant's case for an injunction restraining him from being in any gainful employment by any other radio station, the Applicant has not demonstrated any loss that it will suffer if he continued working with that other radio station.

29. He further contends that the clause that the Applicant seeks to enforce is not only unreasonable, and ambiguous but also wide in scope making it difficult to enforce. It would be absurd for this Court to issue a blanket order restraining him from continuing with his current employment or performing any duties for his current employer or any other employer in the media industry.

30. The clause upon which the application is premised is injurious to his profession and constitutional right to employment. Given the nature of his employment he does not have any trade secrets, confidential information of the Applicant that would necessitate barring him from employment, he asserts.

31. In the event that the Court grants the orders sought, then let the Applicant be directed to pay him salary equivalent to the one he is entitled to in his current employment, he concludes.

### **The Applicant's submissions**

32. Counsel for the Applicant Mr. Walewa reiterated the factual contents of the Applicant's supporting affidavit and further affidavit, further addressing this Court on the law in support of the application.

33. Counsel submitted that section 2 of the Contract in Restraint of Trade Act Cap 24, stipulates that a contract in restraint of trade is not unconstitutional for as long as it is particular in;

- (i) scope of time;
- (ii) Geographical location; and
- (iii) Scope of services restricted.

The contract, the subject matter in the instant application meets the aforesaid conditions. The restraint is time bound, three (3) months, the geographical area, Kenya is clearly stipulated, and that which the Respondent is restrained from doing within the non-compete period.

34. It was submitted further that the contract is not unfair and it does not limit the Respondent from earning a living. Once parties execute a contract, they are bound by the terms thereof and the terms are supposed to be respected.

35. That the breach the Applicant has cited is being continued with to the prejudice of its business.

36. In support of his submissions and therefore the Applicant's application counsel cited the decision in *Lisebo Lerato Pearl Remembulana & Pilansberg Platinum Mines – Labour Court of South Africa. Case No. J 808/13* cited with approval in the case of *Paul Njaga Kihara =vs= Chase Bank (Kenya) Limited in Receivership & another [2018] eKLR*.

*“When parties contract on specific contractual terms, they bind themselves to honour and perform their respective obligations in terms of that contract. Each party is entitled to expect that the other party has carefully looked into the future and has satisfied itself that it can meet its obligations for the entire term of the agreement. Accordingly, no party is entitled to later seek to escape its obligation in terms of the contract on the basis that its assessment of the future had been erroneous or had overlooked certain things. This is simply because the employer is free not to enter into an agreement. Not to hold the Respondent to contract law obligations it voluntarily and carefully imported into an employment relationship would be to introduce a grave level of uncertainty into a range of similar commercial arrangements.”*

37. Counsel further placed reliance on the holding in *Doge =vs= Kenya Cannery Limited [1989] KLR 127* to support the Applicant's position that the Respondent is estopped from running away from terms of a contract that he bound himself to thus;

*“It is a principle of justice and equity. It comes to this when a man by his words or conduct, has led another to believe that he may safely act on the faith of them and the other does act on them. He will not be allowed to go back on what he has said or done when it would be unjust or inequitable to do so.”*

38. And on enforcement of contract generally counsel seeks fortification for his submission in the holding of the Supreme Court of India in *Rajasthan State Industrial Development and Investment Corporation and another =vs= Diamond and Gem Development Limited and another AIR 2013 SC 1241*;

*“A party cannot be permitted to blow hot and cold, fast and loose or appropriate and reprobate. Where one knowingly accepts the benefits of a contract or a conveyance or an order is estopped to deny the validity of of binding effect on him of such a contract or conveyance or order.”*

### **The Respondent's submissions**

39. Mr. Agwenyi, like counsel for the Applicant reiterated the contents of the grounds of opposition and the replying affidavit filed by the Respondent. He sought to address, and addressed the Court on three aspects. First that clause 15.1 the employment agreement is ambiguous, so wide in scope making it extremely difficult to enforce. In support of this submission counsel placed reliance in the decision in *Craft Silicon Limited =vs= Nilauri Sekhar Roy [2018] eKLR*.

40. That based on the reading of section 2 of the contract of Restraint of Trade Act as was applied in the decisions of *HF Fire Africa Limited =vs= A.M.R. Gharieb [2004] eKLR* and *Bridge International Academies Limited =vs= Robert Kimani Kiarie [2015]*, the clause which the Applicant seeks to enforce is void.

41. It was further submitted that a grant of the orders sought will not benefit the parties herein. The Respondent will stand a risk of losing his job with the new employer. The Applicant has not demonstrated any loss that it is likely to suffer. On a balance of convenience if the order is granted the Respondent stands to suffer greater prejudice than the respondent.

## **Analysis and determination**

42. Outstanding for determination by the Honourable Court is limb 3 of the Applicant's application thus;

***“That this Honourable Court be pleased to grant an order of injunction restraining the Respondent from performing services for carrying or being engaged or interested or concerned directly or indirectly or publicly identifying with the promotion of or the services provided by, any other Radio station within the Republic of Kenya or in any business which in any way competes with the Applicant's business within the contracted non-compete clause under the contract of employment and the Applicant pays the Respondent his salary during the non-compete period.”***

43. The order sought has the implication of determining the dispute between the combatants' herein with finality. I have agonised over the manner in which the Applicant has approached this Court, by way of an application in the stead of a statement of claim, thereby wanting the Court to make a final decision on the merits or otherwise of the matter, on affidavit evidence. The dispute herein was not instituted in the right manner. A correct process was not invoked.

44. Looking at the rival affidavits by the parties herein, and the diametrically opposed positions that they have taken over the clause upon which the Applicant's application is predicated, it is my considered view that the issues would only be justly adjudicated upon, not through the affidavit evidence but through viva voce evidence, which should as usual be subjected to cross examination.

45. In addition, it is imperative to state that affidavit evidence cannot be used to determine complex issues. See *Ahad vs= CJE C.A. Civil Appeal No. 196 of 2017*. The issues presented by the parties in this matter are.

46. The Court consequently declines to make a determination of the dispute on a notice of motion application, the application dated 28<sup>th</sup> October 2021.

47. Having said this, this Court restrains itself from rendering a decision on the merits or otherwise of the dispute. The Applicant may want to approach the Court, through a correct procedure.

48. As costs follow the event, costs of this application shall be to the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 29<sup>TH</sup> DAY OF NOVEMBER 2021.**

**OCHARO KEBIRA**

**JUDGE**

**IN PRESENCE OF:**

**MR. MACHARIA FOR BARASA FOR THE APPLICANT.**

**MR. NGARUIYA FOR THE RESPONDENT.**