



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 770 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 27th September, 2018)

CRAFT SILICON LIMITED.....CLAIMANT/APPLICANT

VERSUS

NILADRI SEKHAR ROY.....RESPONDENT

RULING

1. The Application before Court is one dated 21/5/2018 brought through a Notice of Motion and filed under Section (12)(3)(i) of the Employment and Labour Relations Act, Rule 17(1), 17(3) and 17(5) of the Employment and Labour Relations Court (Procedure) Rules 2016 and any enabling provisions of the law.

2. The Applicants seek the following orders:-

1. THAT this application be certified urgent and be heard ex - parte in the first instance.

2. THAT this Honourable Court be pleased to grant 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 pending the hearing and determination of this application.

3. THAT this Honourable Court be pleased to grant 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 pending the hearing and determination of this application.

4. THAT this Honourable Court be pleased to grant a temporary order of injunction restraining the Respondent from directly or indirectly rendering services as an employee to any interposed entity that competes with the Claimant's products and services within the contracted non-compete clause under the contract of employment pending the hearing and determination of this application.

5. THAT this Honourable Court be pleased to grant 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 pending the hearing and determination of the suit.

6. THAT this Honourable Court be pleased to grant 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 competing businesses within the contracted non-compete clause under the contract of employment pending the hearing and determination of the suit.

7. THAT this Honourable Court be pleased to grant a temporary order of injunction restraining the Respondent from directly or indirectly rendering services as an employee to any interposed entity that competes with the Claimant's products and services within the contracted non-compete clause under the contract of employment pending the hearing and determination of the suit.

8. THAT costs of this application be provided for.

3. The Application is supported by the annexed affidavit of Andrew Kamau Ndichu the Applicant's employee in their legal department and on the following grounds:-

1. That the Respondent worked as an employee of the Claimant where he executed an employment contract that contained a surviving non-compete clause that expressly prohibited the Respondent for a period of one year from engaging any of the Claimant's clients after the termination of the employment contract, disclosing the Claimant's confidential information obtained whilst in the claimant's employment, and rendering any service that is in competition with the Claimant's business.

2. That the Respondent tendered his resignation sometime in December 2017, and served his notice where his last working day was 10th January 2018.

3. That the Respondent is currently working for a company that is engaged in the same core business as the Claimant and is in direct competition with the Claimant.

4. That further the Respondent is directly engaging with the Claimant's clients and is using confidential information for purposes of jeopardizing the Claimant's relationship and standing with its existing clients.

5. That these acts are in direct breach of the surviving non-compete clause in the Respondent's employment contract, whose terms the Respondent is bound by.

6. That 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 proceed engaging the Claimant's clients and unfairly using confidential information, the Claimant will irreparably lose its business reputation.

7. That there is no prejudice that the Respondent will suffer at the issuance of conservatory orders restraining him from engaging with the Claimants clients or disclosing the Claimant's business proprietary information.

8. That 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 Millions of shillings.

9. That the Claimant is hereby seeking the urgent intervention of the court by way of injunctive reliefs, to restrain the Respondent from further breaching the employment contract.

10. THAT it is in the interest of justice that this Honourable Court should declare the Respondents action to be in breach of the contract of employment.

4. In the Applicant's supporting affidavit, they have deponed to the matter raised in the above grounds but also annexed the Respondents Employment Contract as Appendix AKN-1 which shows his job description and clause 9 which contains a non-compete clause, that was to survive the contract of employment should it be terminated and which expressly provided as follows:-

a) "The Respondent acknowledges that the Claimant is in a highly competitive industry and the Respondent would be privy to highly confidential information and trade secrets of the Claimant Company that is crucial to the business operation of the company.

b) That should the Respondent leave the Claimant company to join a competing business, this would jeopardize the Claimant's confidential information, client confidences and client relationships.

c) That subsequently, and for a period of one year after the date of termination of employment, the Respondent will not render any services as an employee, for any entity that competes with the Claimant's products and services that it offers to its clients.

d) That further the Respondent agreed that during the noncompete period, he shall not engage with any of the Claimant's clients".

5. The Applicants aver that both parties signed this contract. They aver that the Respondent resigned from their employment in January 2018. However, they contend that the Respondent is now currently employed with Temenos East Africa as a Sales Manager, which job has the same role and job description as the one he had while employed by the Claimant. Temenos East Africa is also a software company that provides banking software solution to banks and other financial institutions.

6. The Applicants aver that the Respondent had been engaging their clients to their detriment and they have send him a demand notice to stop the engagements but he has adamantly refused to oblige.

7. They point out that they had an existing Software License Agreement with FMC Finance Limited in Zimbabwe and Zambia, which were procured during the period the Respondent was employed with them. They however aver that the Respondent has been engaging the said FMC Finance Limited in Zimbabwe trying to introduce himself to them and offering to provide services to them.

8. The Applicants aver that if the Respondent is allowed to continue with his activities, they stand to suffer loss in revenue to the extent of 35 million Kenya Shillings.

9. The Applicants aver that the nature of their work is sensitive and they stand to suffer lose if the Respondent is allowed to continue on the same path. They therefore seek Court's intervention to allow the prayers sought in the interest of justice.

10. The Respondent opposed this Application. They filed the following Grounds of Opposition on 8/6/2018:-

1. The Application is vexatious and an abuse of the Court process, in that no prima facie case with any probability of success has been disclosed to warrant the grant of any of the orders sought.

2. The Claimant has come to Court with unclean hands and is undeserving of any equitable reliefs.

3. The Claimant has failed to show that it will suffer irreparable injury which cannot be compensated by an award of damage in the event an order of injunction is not granted. It is

almost six months since the Respondent left employment and no grounds and/or evidence have been placed before the Honourable Court of any disclosure by the Respondent of trade secrets, confidential information or solicitation of the Claimant's staff.

4. The non-compete clause (the provision) upon which the Claimant's suit is predicated is unreasonable, ambiguous and unenforceable.

5. The Respondent shall seek to have the said provision declared to be void, having regard to:

a. The nature of the Respondent's profession,

b. The business in which both parties operate being ICT which knows no geographical boundaries,

c. The period of time and the area within which it is expressed to apply,

d. And to all the circumstances of the case,

6. The provision is not reasonable either in the interests of the parties, or in the interests of the public, inasmuch as the provision or covenant is injurious to the public interest,

7. The orders sought if granted will have the effect of denying the Respondent his only source of livelihood and hence violation of the Respondent's rights.

11. The Respondent also filed a Replying Affidavit where he depones to the issues raised in the above Grounds of Opposition. He avers that he resigned from the Claimant's employment on 14th December 2017. That before leaving, he actually recruited and trained his successor in order to ensure a smooth handover before he left.

12. He avers he has not and does not intend to act in breach of the covenants he made with the Claimant and as set out in the Claimant's letter dated 27th December 2017.

13. He avers that the Claimant had indicated they would pay him a net of 270,504 as his terminal dues but only paid him 50,000/= after making numerous unjustified further deductions as per his last payslip NSR-1.

14. He avers that he took up a job with his current employer where he leverages on Cloud Banking for Non-Banking Financial Institutions (NBFC) and majorly deals with microfinance institution in Middle East and Africa.

15. He avers that this role is distinct from his previous role in the Claimant's Company. He therefore avers that he has not breached any surviving terms of his employment contract with the Claimant. He also avers that he has not solicited business from the Claimant's clients as alleged in the affidavit.

16. He also avers that clause 9 of his employment contract with the Claimant is ambiguous, unreasonable and unfair as it limits him from obtaining employment with any person or entity in Kenya where he can only work and earn a living in Kenya.

17. He also states that it is not clear on the duration of his supposed restraint. It refers to 6 months and one year in the same paragraph. That the contract also seeks to deny him the use of his knowledge skills and experience to get a livelihood in these times in Kenya. He also avers that six months have lapsed since he left the Claimant's employment and the duration for the restraint has therefore lapsed.

18. The Respondent avers that his current employer and Claimant are not competitors. He contends that the Claimant's intention is to harass him as he has deponed and wants this application rejected.

19. I have examined all the averments of both parties plus their submissions filed herein.
20. In determining whether to grant the injunction sought, I am well guided by the law in the celebrated case of **Giella vs Cassman Brown (1973) EA 368**. Giella sets out the principles to be considered before an injunction can be issued. The three are – the Applicant must show he has a prima facie case, secondly that he stands to suffer irreparable injury which cannot be compensated by damages and three, in case of doubt, the Court would decide the case on a balance of convenience.
21. The Claimant/Applicant seeks to rely on clause 9 of the contract of employment between the Claimant/Respondent which has been captured in this judgement. The Clause in effect is what would call a “restraint of trade” clause. A restraint of trade clause has been defined as a contract between a buyer and a seller of a business, or between an employer and employee that prevents the seller or employee from engaging in a similar business within a specified geographical area and within a specified period (<http://thelawdictionary.org>).
22. Courts have generally held that contracts in restraint of trade are generally unenforceable unless they are reasonable.
23. In *Petrofina (Great Britain) Limited vs Martin* (1966) Ch 146 the Court held that:-
- “Every member of the community is entitled to carry on any trade or business that he chooses and in such manner as he thinks most desirable in his own interests as long as he does nothing unlawful, with the consequence that any contract which interferes with the free exercise of his trade or business, by restricting him in the work he may do for others, on the arrangements which he may make with others, is a contract in restraint of trade. It is invalid unless it is reasonable as between the parties and not injurious to the public interest”.***
24. This position has also been upheld by my brother and sister (see **Bridge International Academies Limited vs Robert Kimani Kiarie** (J. Mulwa) and **Credit Reference Bureau Holding Limited vs Stephen Kunyiha (2017) eKLR** (J. Abuodha).
25. In the current case, Clause 9(c) of the contract restrained the Respondent from any gainful employment in any company in competition with the Claimant.
26. In order for this Court to understand fully whether the company the Respondent currently works for is in competition with the Claimant, this Court would need to further understand what the company deals with and where their point of convergence is. Further information would also need to be supplied as to what the Respondent did for Claimant and what he is currently doing for the new company.
27. The Respondent has categorically stated that he has not done anything that is in conflict with the contract as the current employer is not in competition with the Claimant and that he does work which he did not do in his former employment.
28. It may not be easy to determine the point of competition between Claimant and Respondent’s current employer without dragging the Respondent’s current employer in this Court. Taking that route may prove to be very costly to both parties.
29. However, Clause 9(c) on its own stand out to be a clause stifling the Claimant’s own right to earn a living. An employer cannot restraint an employee to earn a living. The clause is indeed vague and not capped within any geographical boundaries.
30. Whereas the contract was signed by both parties, I am unable to order its enforcement at this interlocutory stage for standing in the way of the Claimant right to earn his living.
31. I will however only allow the Application in part by ordering that the Respondent should not contact the Claimant’s customers in any way during the period of one year since he resigned from employment as

per Clause 9(d) of the contract. This will be so pending the hearing and determination of this claim or until the period of restraint elapses whichever is shorter.

32. Costs of this application will be in the cause.

Dated and delivered in open Court this **27th day of September, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Makori for Respondent – Present

Applicant – Absent