



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**  
**KENYA AT NAIROBI**  
**CAUSE 260 OF 2017**  
**CREDIT REFERENCE BUREAU HOLDINGS LIMITED.....CLAIMANT**  
**VERSUS**  
**STEVEN KUNYIHA.....RESPONDENT**

**RULING**

1. The motion dated 13<sup>th</sup> October, 2016 sought among other an injunction against the defendant restraining him from entering into and remaining in any employment with credit Info CRB Kenya or any other persons in competition with the plaintiff pending the hearing and determination of the instant suit.
2. The applicant further sought injunctive orders restraining the defendant from disclosing or sharing in any manner with Credit Info CRB Kenya Ltd any confidential information including the applicant's trade secrets, pricing and unique competitive business strategies pending the hearing and determination of the suit.
3. The application was based on the main grounds that;
  - a. The plaintiff and the defendant entered into a contract of employment containing express restrictive clauses prohibiting the defendant for a period of twelve months after termination of his employment with the plaintiff from entering into any employment or engagement with any of the plaintiff's competitors and from giving or sharing any confidential and proprietary business information obtained whilst in the plaintiff's employment with the plaintiff's competitors and from giving or sharing any confidential and proprietary business information obtained whilst in the plaintiff's employment with the plaintiff's competitors. He accepted that the confidential information that he would have access to as an employee of the plaintiff was of strategic importance to the plaintiff's business and that it had a legitimate proprietary and commercial interest therein which it was obliged to protect.
  - b. The defendant has in breach of the said agreement, been engaged by Credit Info CRB Kenya Limited a company in direct competition with the plaintiff.
  - c. The defendant has confirmed that he intends unless restrained by this Honourable Court to continue to commit breaches of the agreement referred to hereinabove effectively enabling the plaintiff's competitor to gain access to the plaintiff's confidential information and gain unfair advantage over the plaintiff in its business operations to the plaintiff's detriment.
  - d. The plaintiff will suffer serious irreparable prejudice and harm if the application herein is not

heard expeditiously and the orders sought.

4. The application was further supported by the affidavit of one

a. That by contract of employment dated 30<sup>th</sup> May 2014 (“**the contract of employment**”), the plaintiff employed Mr. Steven Kamau Kunyiha, the defendant herein as its group business development manager.

b. That the contract of employment contains express restrictive clauses prohibiting the defendant for a period of twelve months after termination of his employment with the plaintiff from inter alia entering into any employment or engagement with any of the plaintiff’s competitors and from giving or sharing any confidential and proprietary business information obtained whilst in the plaintiff’s employment with the plaintiff’s competitors. The defendant accepted that the confidential information that he would have access to as an employee of the plaintiff was of strategic importance to the plaintiff’s business and that it had a legitimate proprietary and commercial interest therein which it was obliged to protect.

c. That defendant’s employment with the plaintiff terminated on 5<sup>th</sup> April 2016.

d. That the defendant was the Chief Executive Officer of the plaintiff at the time of his exit from the company having previously been the Business Development Manager. His responsibilities enabled him to have access to confidential and proprietary business information of the plaintiff, including information relating to trade secrets, pricing and unique competitive business strategies.

e. That on or about 11<sup>th</sup> May 2016, the plaintiff received information that the defendant had considered taking up employment with a competitor of the plaintiff, namely Credit Info Kenya Limited. The plaintiff reminded the defendant of his contractual obligations and further informed him that entering into such a contract would constitute a breach of his contract. Despite this, the defendant has continued in employment and has indicated that he will not cease the breach.

f. That Credit Info Kenya Limited is a direct competitor of the plaintiff engaged in the same core business as the plaintiff.

g. That in its letter of 10<sup>th</sup> June 2016 to the defendant, the plaintiff advised the defendant to terminate his employment or engagement with Credit Info with immediate effect, otherwise the plaintiff would be forced to institute legal proceedings to enforce Clause 11.6 of the contract of employment. I verily believe that no reply was received by the plaintiff from the defendant.

5. The respondent opposed the application and filed a replying affidavit in which he deponed in the main that;

a. That Clause 13.1 of the employment contract, provided that the contract of employment was terminable by either party in writing on notice of three calendar months or payment in lieu thereof.

b. That, vide a letter dated 5<sup>th</sup> January 2016 addressed to Grant Philips, and in compliance with the said clause, I tendered my notice of resignation by giving the plaintiff three months’ notice to terminate the contract. The three months’ notice was to lapse on 5<sup>th</sup> April 2016.

c. That, in the said letter I stated my reasons for leaving employment as having found an opportunity that I believed would enable me achieve my long-term career goals.

d. That on the 11<sup>th</sup> day of April 2016, I entered into an employment contract with Credit Info CRB Kenya Limited.

e. That I have been advised by my advocates on record, which advise I believe to be true, that the

clause in the employment contract that restrains me from being employed in any company, firm, and partnerships which compete with my former employer (the plaintiff herein) is in contravention of Article 41(1) of the Constitution which provides that every person has a right to fair labour practices.

f. That I have further been advised by my advocates that the clause is unreasonable, against public policy and an infringement of my personal liberties and therefore not enforceable as drawn.

g. That this is because the effect of the said clause is to prevent me for a period of twelve months from earning a living by rendering services in the filed I have over time acquired skill and knowledge in.

h. That the nature of my employment with the plaintiff did not entail access to any confidential information which if divulged would be injurious to the plaintiff's business.

i. That, consequently the allegation that I may have used the plaintiff's confidential information for the benefit of my present employer is false and has not been supported by any evidence. Further, the plaintiff has not disclosed which confidential information I was allegedly privy to during the course of my employment.

j. That I can confirm that I never took any confidential information or documents to my current employer. I only went with my brain and experience and nothing more.

6. In his submissions in support of the application, Mr. Kotonya for the applicant submitted that the respondent's contract of employment with the applicant prohibited him for a period of twelve months after termination of the contract from entering into any employment or engagement with any of the claimant's competitors and from giving or sharing any confidential and proprietary business information obtained whilst in the claimant's employment with claimant's competitors.

7. According to counsel the respondent acknowledged that by virtue of his position he would be accessible to confidential information relating to the claimant's business for which there was need to have a restraint of trade agreement. The respondent in breach of the said agreement has been engaged by Credit Info CRB Kenya Limited, a company in direct competition with the claimant.

8. According to Mr. Kotonya, following the tests set by **Giella Vs. Cassman Brown**, the applicant had demonstrated a *prima facie* case with probability of success to warrant grant of an interlocutory injunction. Further that the applicant had adequately demonstrated through the supporting and further affidavit of Rose Kinuthia that the prejudice and detriment the applicant stands to suffer if the orders sought are not granted in that the imminent threat of disclosure of confidential information acquired in the course of respondent's employment with the applicant to a direct business rival was incapable of compensation by an award of damages. In support of the application counsel relied on the cases of **IYS and Tees Ltd. v. Everlyne Madegwa & another [2009] eKLR**, **Thomas Marshall Exports Ltd. V. Guinle and Thomas V. Farr 2007 EWCA civ. 118**.

9. Mr. Musyoka for the respondent on his part submitted that the restrictive clause was unreasonable as it purported to prohibit the defendant from working for any competitor anywhere in the world. According to counsel a restrictive clause can only be justified if it is reasonable in the interest of the parties and public thus the onus of showing that the restraint was reasonable rests on the party who alleges its violation.

10. In support of his submission, counsel cited the case of **LG Electronics Africa Logistic FZE v. Charles Kimani [2012]eKLR**. Counsel further submitted that if the restraint clause sought to be enforced is allowed, it would keep the defendant out of employment with a competitor for a period of only three months considering that the restraint was to be for a period of twelve months and the defendant's contract terminated on 5<sup>th</sup> April, 2016.

11. Counsel further submitted that the plaintiff has failed to prove that the nature of the defendant's employment entailed the defendant having access to confidential information which if divulged would cause irreparable injury to its business. Further the plaintiff has not produced any evidence to show the defendant has breached his duty of confidentiality. The plaintiff, according to counsel merely alleged that the defendant was working for a competitor for which he was restrained for twelve months from the date of termination of his employment contract. According to Mr. Musyoka, by October, 2016 when the suit was filed, the defendant had worked for the new employer since April, 2016 and no evidence was availed to show the defendant had breached the confidentiality rule.

12. Section 2 of the Contracts in Restraint of Trade Act (cap 24) provides that;

“Any agreement or contract which contains a provision or covenant whereby a party thereto is restrained from exercising any lawful profession, trade, business or occupation shall not be void only on the ground that the provision or covenant is therein contained”

Provided that-

i. The High Court shall have power to declare the provision or covenant to be void where the court is satisfied that, having regard to the nature of the profession, trade, business or occupation concerned, and the period of time and the area within which it is expressed to apply, and to all the circumstances of the case, provision or covenant is not reasonable either in the interests of the parties, inasmuch as it affords more than adequate protection to the party in whose favour it is imposed against something against which he is entitled to be protected, or in the interests of the public, inasmuch as the provision or covenant is injurious to the public interest.

13. It should be noted that this Section empowers the Court to declare the provisions of such contract void where the Court is satisfied that the covenant is not reasonable either in the interest of the parties or against public interest. That is to say unlike other ordinary contracts where the sanctity of the contract is to be observed, the Court is empowered to second guess what the parties have agreed on to restrain and see if the continuity of such restraint is in their best interest or that of the public. In the case of **Esso Petroleum v. Harpers Garage [1967] All ER** cited by the defendant, Lord Reid aptly observed that Courts will not enforce a restraint which goes further than affording adequate protection to the legitimate interest of a person in whose favour it is granted.

14. Further in the case of **LG Electronics Africa Logistics FZE vs. Charles Kimani [2012] eKLR Justice Mutava** (as he then was) observed that 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.

15. I could not agree more. Business competition is the essence of free markets. Whereas it would not be right to allow practices that unfairly and unduly open up ones business secrets and market edge to its rivals, it would on the other hand not be right to encourage a practice where in order to survive the competition, such business shackles its employees from obtaining employment with its competitors. In the digital age, there are in place business processes which can minimize the risk of an employee accessing or inappropriately using employers trade secrets once out of such employment. Experience and expertise garnered from working for a particular employer cannot be reasonably restrained without stunting such employees career. In order to be enforceable such restraint must seek to restrain the use of only that which is uniquely that employer's secret and not knowledge and skill which can be acquired by

learning, experience or development in technology.

16. The applicant before me as rightly submitted by counsel for the defendant has not shown or demonstrated the nature of the secrets or information that the defendant gained access to and the manner in which he is likely to divulge or use the same in his current employment to the detriment of the plaintiff. It is conceded that the plaintiff and Credit Info CRB where the defendant obtained employment are in the same line of business however apart from possible use of experience and skills acquired while working for the plaintiff in his new job, the plaintiff has not alleged or shown that the defendant has in his possession material or classified information which if used at his new work place would prejudice or harm its business interest.

17. The application is therefore found without merit and the order of interlocutory injunction declined.

18. It is so ordered.

Dated at Nairobi this day of 2017

**Abuodha J. N.**

**Judge**

**Delivered this 28<sup>th</sup> day of April 2017**

**Abuodha J. N.**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha J. N.**

**Judge**