



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 2455 OF 2016**

(Before Hon. Lady Justice Hellen S. Wasilwa on 20<sup>th</sup> June, 2017)

**H.F FIRE INTERNATIONAL INCORPORATED.....1<sup>ST</sup> CLAIMANT**

**H.F GIZA SYSTEMS (K) LIMITED FORMERLY**

**H.F FIRE INTERNATIONAL (K) LIMITED.....2<sup>ND</sup> CLAIMANT**

**VERSUS**

**SAYED HOSSAM MOHAMED ELSHEBRAWI**

**MOHAMED KHALIFA .....1<sup>ST</sup> RESPONDENT**

**INTELLIGENT BUILDING MANAGEMENT**

**SOLUTION LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Application before Court is dated 25.22.2016 brought under Section 3(i), (ii), 12(1) (a), of the Employment and Labour Relations Court, Section 2 of the Restraint of Trade Act and all other enabling provisions of the law seeking for Orders:

***1. That this application be certified urgent and be heard exparte in the first instance.***

***2. That pending the hearing and final determination of the Application herein the Honourable Court be pleased to issue an order restraining the 1<sup>st</sup> Respondent either by himself or as a shareholder and director of the 2<sup>nd</sup> Respondent from setting up and or seeking employment from the Claimants competitors either as an agent or shareholder and from divulging information relating to the Claimants' business to the Claimants competitors either by himself or through his agents.***

***3. That pending the hearing and final determination of the Claim herein a temporary injunction be issued restraining the Respondent from using and or divulging confidential information relating to the Claimants' business within his knowledge whether by himself as the employee of the Claimants' competitors or by his own agent, servant or as shareholder, consultant to any***

*person, business or organization, their servants or agents.*

*4. That an order be issued restraining, the Respondent herein from soliciting and or contacting the Claimants' customers and or bidding for projects or contracts with the Claimant whether by himself as the employee of the Claimants' competitors or by his own agent, servant or as shareholder, consultant to any person, business or organization, their servants or agents pending the hearing and final determination of the Claim herein.*

*5. That costs of this application be provided for.*

2. The Application is premised on the grounds:

*1. That vide a contract of employment dated 1<sup>st</sup> July 2011, the Applicant herein employed the 1<sup>st</sup> Respondent as its Business Development and Operations Manager for the Geographical Region containing Kenya and any other countries in East Africa approved in writing by the Management.*

*2. That the 2<sup>nd</sup> Applicant processed and secured a work permit for the 1<sup>st</sup> Respondent for the purpose of employment only as per the Job description in the contract and also only for the Applicant.*

*3. That the nature of employment and position of the 1<sup>st</sup> Respondent entailed access to confidential information and also allowed the Respondent access to the Applicant's customers and or customers list and employees.*

*4. That as a result of the said contract of employment under clause 3.1.6 (A to E) contained a confidentiality clause together with a restraint of trade clause in which the 1<sup>st</sup> Respondent agreed that for so long as the agreement shall remain in effect for a period of three (3) years thereafter he shall not among other things directly or indirectly, individually compete nor be involved as owner, partner, shareholder, joint venture partner, Director, associate, consultant, expert, shareholder, joint venture partner, Director, associate, consultant, expert, employee or in any other manner whatsoever in any entity engaged in any business that competes with the Applicant in the territory.*

*5. That the 1<sup>st</sup> Respondent agreed not to solicit business from any of the Applicant's clients or suppliers except on behalf of or for the benefit of the Applicant and not to solicit any of the Applicants' employees, technicians or sale representatives for purpose of their employment or for obtaining technical knowhow, expertise, assistance or information.*

*6. Further the 1<sup>st</sup> Respondent undertook and agreed that enforcement of the Applicants' remedy by way of an injunction or restraining order for breach of the confidentiality and restraint of trade clauses contained in the contract of employment will not prevent him from earning, a livelihood and maintain his standard of living through temporary employment in any other non-competing sector.*

*7. That on or about 1<sup>st</sup> February 2015, the 1<sup>st</sup> Respondent herein tendered his resignation from employment with the Applicant with effect from 31.3.2015.*

*8. That after resigning from the Applicant Company the 1<sup>st</sup> Respondent incorporated the 2<sup>nd</sup> Respondent of which he is a shareholder and director and is carrying on business that is in direct competition with the Applicant.*

*9. That the 1<sup>st</sup> Respondent has through the 2<sup>nd</sup> Respondent submitted tenders in competition with the Applicant and has been awarded contracts and or projects of which the Applicant also tendered.*

**10. That the 1<sup>st</sup> Respondent has also gone ahead and solicited the Applicants' employees for purposes of employing them in the 2<sup>nd</sup> Respondent in competition with the Applicant.**

**11. That the 1<sup>st</sup> Respondent has also been soliciting for business from the Applicant's clients and customers and has been sending them emails to solicit business for and on behalf of the 2<sup>nd</sup> Respondent to compete with the Applicant.**

**12. The Applicant has as a result of the conduct of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents suffers and continues to suffer irreparable loss.**

3. The Application by the Respondents who filed affidavit wherein the 1<sup>st</sup> Respondent admits that there was an employment relationship between him and the Claimants which terminated on 25.3.2015 when he resigned.

4. He avers that he has strictly adhered to the provisions of clause 3.1.6 (A to E) of the contract of employment. That he has neither solicited business from any of the Applicants' clients or suppliers, employees, technicians or sales representatives nor has he directly or indirectly been in competition or engaged in any business that competes with that of the Applicant whilst an employee.

5. The 1<sup>st</sup> Respondent also avers that he resigned on 24<sup>th</sup> March, 2015, and for the Respondent to state that he incorporated a competing Company two months prior to the date of resignation is not true as the Company was incorporated on 6<sup>th</sup> May, 2015.

6. He further states that he has a separate legal entity from the 2<sup>nd</sup> Respondent hence the actions of the 2<sup>nd</sup> Respondent cannot be imputed on him.

7. He avers that the application by the Claimants is meant to prevent him from earning a livelihood and prays for the Application to be dismissed with costs.

8. The 2<sup>nd</sup> Respondent has also filed a Replying Affidavit sworn by one Muzamil Mohamed Hussein who is the Manager of the 2<sup>nd</sup> Respondent. He states that the Company was incorporated on 6<sup>th</sup> May, 2015, and it has never had any dealings with the Claimants nor is it privy to any contract that may have been entered between the Claimants and the 1<sup>st</sup> Respondent.

9. He further avers that the 2<sup>nd</sup> Respondent has never poached or solicited any clients or employees of the Claimants and is as such wrongly enjoined in these proceedings since there is no attributable to it and there are no Orders sought enforceable against it. They pray for the Application to be dismissed with costs.

10. The 2<sup>nd</sup> Respondent also raised a preliminary objection dated 8.12.2016, wherein they raise the following grounds:

**1. That the suit is frivolous, vexatious, and an abuse of the process of the Court.**

**2. That the claim dated 25<sup>th</sup> November, 2016, discloses no reasonable cause of action in law.**

**3. That the pleadings and evidence placed before this Honourable Court do not disclose any cause of action, reasonable or identifiable as against the 2<sup>nd</sup> Respondent Company.**

**4. That the Claim is incompetent, bad in law, rendering it liable to strike out in limine.**

## **Submissions**

11. On the Preliminary Objection the Claimants/Applicants submit that they entered into an agreement with the 1<sup>st</sup> Respondent which had a restraint of trade clause to the effect that he was not supposed to be a shareholder and/or director of any Company in competition of the Claimants and or competing with the Claimants either directly and/or indirectly as a shareholder and or director of any Company within the specified area.

12. They state that upon resignation the 1<sup>st</sup> Respondent incorporated the 2<sup>nd</sup> Respondent wherein he is a director and shareholder and he has been passing himself off as an affiliate of the Claimants soliciting for the clients and employees contrary to the contract of employment which had a restraint of trade clause.

13. They state that the Preliminary Objection satisfies the criteria set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors (1969)EA 696** where it was held that:

***“A preliminary objection is in the nature of what used to be a de-murrer. It raises a pure point of law which is argued on the assumption that facts pleaded by the other side are correct.”***

14. The 2<sup>nd</sup> Respondent has completely denied the facts in the Memorandum of Claim and as such that there is a joinder of issues which means that there are triable issues before the Court ascertainable from the pleadings. They cite the case of **Charles Mugane Njonjo & Another Vs Gucokaniria Kihato Traders and Farmers Company Limited Civil Appeal No. 203 of 2012** in support of this assertion.

15. Further they state that the only way that the Court can ascertain that the evidence and pleadings do not disclose a cause of action is by way of evaluating the same through a full trial and not through a Preliminary Objection.

16. That the Preliminary Objection is an abuse of Court process and should be dismissed with costs.

17. On the Application the Claimants submit that the 1<sup>st</sup> Respondent's actions are in breach of clause 3.1.6 (A to E) which contained a confidentiality clause to the effect that:

**“3.1.6**

***The employee shall be responsible for ensuring that Fire duly complies with all applicable laws concerning taxation and pays all local and foreign income taxes, employment benefit programs as required by law in the country or countries not the territory in which Fire is or may be operating.***

***Fire acknowledges that during the course of this agreement, the employee may obtain and be in possession of intellectual property and confidential information from Fire as to its customers, products, systems, designs and other information which is exclusive property of Fire and not generally known and which constitutes a valuable and irreplaceable asset of Fire. Accordingly and in consideration for the execution of this agreement by Fire, the employee agrees for so long as this agreement shall remain in effect and for a period of three (3) years thereafter that:***

***A. The employee shall not directly or indirectly, individually compete not be involved as owner, partner, shareholder, joint venture partner, Director, associate consultant, expert, employee or in any other manner whatsoever in any entity engaged in any business that competes with Fire in the territory.***

***B. The employee shall not solicit business from any of Fire's customers clients or suppliers except on behalf of and for the benefit of Fire, nor shall the employee solicit any of the Fire's employees, technicians or sales representatives for the purpose of their employment or for obtaining any technical knowhow, expertise, assistance, information or advice whatsoever from the, by the employee in his personal capacity or by any entity other than firm in which the employee in his personal capacity is an owner, partner, shareholder, joint venture partner,***

*director, associates, consultant, expert, employee or with which the director has any involvement or relationship whatsoever.*

*C. The employee acknowledges that certain information belonging to Fire including but not limited to sales manuals, pricelists and customer lists constitute Fires trade secrets and intellectual property and shall be and remains Fire's sole and exclusive confidential property. The employee shall not disclose any such information to others. The employee shall not use such confidential information in any way except in furtherance of his services on Fire's behalf and Fire's business.*

*D. The employee acknowledges that in the event of any breach, or threat of breach of any of the provisions hereof by him, Fire stands to suffer irreparable harm and an award in damages may be an inadequate remedy and that the loss and damage to Fire caused by such breach would not be capable of being compensated solely in monetary terms. Accordingly upon the employee's breach or threat thereof, Fire shall be entitled to immediate injunctive relief in the form of an order restraining him from committing any such breach in any court of competent jurisdiction.*

*E. The employee warrants, represent and agrees that in the event of the termination of this agreement for any reason whatsoever, the employees experience and capabilities are such that he can readily obtain alternative employment or be self-employed in other fields of sectors of the economy other than that in which Fire is engaged and the enforcement of Fire's remedy by way of an injunction or restraining order for a breach of the foregoing provisions of this paragraph will not prevent the employee from earning a livelihood and maintain his standard of living through employment in any other non-competing sector to Fire”.*

18. The Claimants emphasize that clause ‘E’ was breached and as such the Court should allow the application as drawn.

19. The Respondent in support of the Preliminary Objection state that the substratum of the Claim is that the Claimants entered into a contract with the 1<sup>st</sup> Respondent the provisions of which were allegedly breached by the 1<sup>st</sup> Respondent. A suit has been filed against the 2<sup>nd</sup> Respondent who is not a party to the agreement which is the basis of the suit.

20. They state that 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 as was stated in the case of **Agricultural Finance Corporation Vs Lengetia Limited and Jack Mwangi(1985)eKLR.**

21. The Respondents further submit that the suit fails to disclose a reasonable cause of action as pleadings ought to precisely define the dispute to eliminate ambushes and surprises and avoid wastage of time and unnecessary expenses involved in calling for witnesses as was held in the case of **Global Vehicles Kenya Limited Vs Lenana Road Motors (2015)eKLR.**

22. As to whether the Claimants are entitled to the injunctive orders sought they rely on the case of **Steel Structures Limited Vs David Engineering Ltd & David Njoroge Muiruri Nairobi HCCC No. 329 of 2007** where the Court observed that for mandatory temporary injunction:

*“it is also now well settled, the applicant must further demonstrate that there are special circumstances warranting the grant of interlocutory mandatory injunction... Interlocutory mandatory injunction will be granted only in the clearest of cases... As a general rule, it is against public policy for any employee to be restricted from seeking greener pastures. Contracts in restraint of trade are as a general rule against public policy.”*

23. Further that the prayers sought do not qualify to be granted as provided in section 2 of the Restraint of Trade Act Cap 24 Laws of Kenya. That the Claimants have not established special circumstances to warrant the grant of the injunctive reliefs sought. That a prima facie case has not been established and neither have they shown that they would suffer irreparable loss that would not be adequately compensated

by an award of damages as set out in the case of **Giella Vs Cassman Brown & Co. Ltd (1973) E.A. 358.**

24. They pray for the Application to be dismissed with costs.

25. I will first dispose of the Preliminary Objection so raised by the Respondents. The 2<sup>nd</sup> Respondent has raised a Preliminary Objection to the effect that there is no cause of action raised against them and so the suit should be struck out as against them.

26. A Preliminary Objection has been defined in **Mukisa Biscuit Manufacturing Company Limited vs. West End Distributors Limited (1969) EA 696** as:

***“...consists of a point of law which has been pleaded and which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit”***

27. The Claimant/Applicants have enjoined the 2<sup>nd</sup> Respondent herein in this suit which the 2<sup>nd</sup> Respondent avers is an abuse of the Court process since they did not have any contract with the Claimants.

28. This Court will only determine whether there were any links between the Claimants and 2<sup>nd</sup> Respondent after hearing the matter. It will be based on facts that will be presented before this Court and cannot be determined at this stage.

29. In the premise, I find the Preliminary Objection untenable and I dismiss it accordingly.

30. On the issue of the main application before Court, the Applicant seeks a permanent Injunction restraining the Respondent either by himself or as a shareholder and director of the 2<sup>nd</sup> Respondent from setting up or seeking employment from Claimants competitor and also divulging information relating to the Claimants' business either by himself or through his agents.

31. Indeed the contract between the Applicant and 1<sup>st</sup> Respondent is clear on its terms of Clause 3.1.6 (A) that:

***“the employee shall not directly or indirectly, individually compete nor be involved as owner, partner, shareholder, joint venture partner, Director, associate, consultant, expert, employee or in any other manner whatsoever in any entity engaged in any business that competes with Fire in the territory. Soliciting of business from Fire's customers, clients or suppliers except on behalf of FIRE is also prohibited”.***

32. The Applicants however averred that the 1<sup>st</sup> Respondent has been in breach of this clause and has continued to set up a business which has competed with their business.

33. It is my view that this is in direct conflict with the express provisions of the contract between the Claimant and 1<sup>st</sup> Respondent and which should be honoured. The exact particulars of the 1<sup>st</sup> Respondent's involvement have however not been explained except in the demand letter dated 25/8/2015 without full particulars. The 1<sup>st</sup> Respondent has indeed denied any breach.

34. It would be an injustice at this stage in time to determine without indeed there is a breach of this term of the contract without taking in vica voce evidence and it is therefore my determination at this point that justice can only be determined after full hearing of this claim.

35. The Respondents are however restrained from soliciting for employees of the Claimant. In relation to the other prayers, the status quo shall be maintained and the parties are urged to take a hearing date on priority basis in order to determine this case at the earliest time possible.

Read in open Court this 20<sup>th</sup> day of June, 2017.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Mude holding brief Ekuru for Respondent

Claimant –Absent