



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1810 OF 2013

(Before D.K.N. Marete)

VILLAGE PHOTOSHOP LTD.....CLAIMANT

Versus

MERCY WANJA MUTEGI t/a

Digiclicks Photographers.....1ST RESPONDENT

SALLY JACQUELINE MUTEGI t/a

Digiclicks Photographers.....2ND RESPONDENT

RULING

Before court are two applications dated 11th November, 2013 and 12th November, 2013 respectively. In the first application, the orders sought are;

1. *THAT this application be certified as urgent, service thereof be dispensed with in the first instance and the same be directed to proceed to hearing immediately in view of its urgency.*
2. *THAT this Honourable Court be pleased to issue restraining orders against the Respondents barring them from continuing to divert business of, the Claimant herein which grossly undermines the Claimant's business pending the hearing and determination of this application.*
3. *THAT this Honourable Court be pleased to issue restraining orders against the Respondents restraining them from engaging in competing or in any other way interfering with the clients and business of the claimant pending the hearing and determination of this application.*
4. *THAT the costs of this application be provided for.*

and these are grounded on facts that;

1. *THAT, 1st and 2nd Respondents are employees of the Claimant commencing from the year 2010 and 2009 respectively and the employment relationship up to date.*
2. *THAT, the Claimant is in the photography business and its work involves taking and producing*

photographs and for clients, which include schools and other institutions.

3. *THAT, the Claimant has consistently and continuously performed its duties under the implied contract of employment and the employment relationship, which included payment of a monthly salary to each of the Respondents.*
4. *THAT, the implied contract between the Claimant and the Respondents required that the Respondents shall always act in the best interest of the Claimant and they shall not engage in business whatsoever and particularly, they shall not engage in competing business. Indeed, the standard operating procedures which bound the Respondents prohibited such conduct of the Respondents.*
5. *THAT, in or about the year 2013, the Respondents registered a competing business and started carrying out a competing business in the name and style of Digicliks Photographers.*
6. *THAT, the Respondents further to engaging in competing business also diverted customers of the Claimant to the said Digicliks Photographers and thereby depriving the Claimant of its legitimate business and income.*
7. *THAT, even though the Respondent's action amounted to an act of gross misconduct and the Claimant had a right to terminate the employment of the Respondents, the Respondents did not terminate them at this point, but instead gave them warning letters in the interest of offering them a second chance.*
8. *THAT, the Claimant has suffered loss and loss of good will on account of the Respondent's competing business and their unconscionable diversion of business to the said Digicliks Photographers.*
9. *THAT, the loss that the Claimant has suffered due to the Respondents' employment has been massive both in monetary and non-monetary terms, and the conduct of the Respondents has been in gross breach of the claimant's policies and its standard operating procedures and in breach of the implied contracts of employment and the employment relationship.*
10. *THAT, the Claimant is in the business of photography and its lifeline is its customers and as shown in this Affidavit, the Respondent's conduct has put the business in jeopardy and it is only fair and just that the Claimant obtains a remedy from this honorable Court.*

In the application dated 12th November, 2013, the applicant seeks orders as follows;

1. *THAT this application be certified as urgent, service thereof be dispensed with in the first instance and the same be directed to proceed to hearing immediately in view of its urgency.*
2. *THAT this Honourable Court be pleased to issue restraining orders against the Respondents barring them from continuing to use the trade and marketing designs, order forms and general intellectual property of the Claimant herein which grossly undermines the Claimant's pending the hearing and determination of this application.*
3. *THAT the costs of this application be provided for.*

and these are grounded on facts that ;

1. *THAT, 1st and 2nd Respondents are employees of the Claimant commencing from the year 2010 and 2009 respectively and the employment relationship up to date.*
2. *THAT, the Claimant is in the photography business and its work involves taking and producing photographs and for clients, which include schools and other institutions.*

3. *THAT, the Respondents have in the usual performance of their duties have received and been in possession of the Claimant's trade and marketing designs and other intellectual property.*
4. *THAT, the Respondents have registered and begun trading in a competing business. They have proceeded to use the Claimant's trade and marketing designs and other intellectual property in the said business.*
5. *THAT, the Respondent's conduct is in breach of the law and the employment contract and has put the Claimant's business in jeopardy and it is only fair and just that the Claimant obtains a remedy from this honorable Court in the form of orders prayed herein.*

The claimant/applicant's case under the application dated 11th November, 2013 is that the 1st and 2nd respondents are her employees with effect from the years 2010 and 2009 respectively and this subsists to-date. The claimant is in the photography business and this includes taking and producing photographs for her clients who include schools and other institutions.

The respondents have continued to perform their duties under an implied contract and on a monthly salary. This implied contract is to the extent that they shall act in the best interest of the employer and further that they shall not engage in competing business.

The respondents in or about the year 2013 registered a competing business and carried out the same in the name and style of Digiclicks Photographers. They also diverted the clientele of the claimant/applicant to their new enterprise thereby engaging in competing business and depriving the claimant its legitimate business and income. Despite this misconduct, the respondents were retained in employment but served with warning letters – thereby as it were, giving them a second chance.

The claimant/applicant has suffered financial loss and loss of goodwill on account of the respondents competing business and diversion of business to the respondents. This is also a breach of the implied contracts of employment and the employment relationship besides interfering with her policies and standard operating procedures. The claimant utilizes the above set of facts and evidence in support of the other application dated 12th November, 2013.

The respondents in their replying affidavit sworn on 27th November, 2013 and filed on the same date aver their employment with the claimant was terminated on 9th May, 2011. Thereafter, the claimant engaged the respondents in the training of new staff that was to take over from the respondents and that such engagement was devoid of any contract with implied conditions.

Further, the claim of loss of earning is unsustainable as Makini School had stopped dealing with the claimant in 2012 and that no known contract *inter parties* existed so as to create loss of business. The respondents further aver that they were duped into signing the claimant's payroll on the pretense that it would be for accounting purposes but this was intended for use against their selves. And indeed, the respondent/applicant now uses the data availed so fraudulently to support this suit and application knowing well that she obtained the materials irregularly and through deceit.

The respondents deny infringing the claimants' intellectual property and aver that what they now use in their business is a standard document easily accessible from the internet and in use by all service providers in the line and industry. Further, no interference with the claimant's clientele is demonstrated and that the same is denied. The warning letters are an afterthought, fake and fraudulent, the same having been done outside any employment or other relationship *inter parties*.

This matter came to court on 12th November, 2013 where interim orders were granted as follows;

1. *THAT this application be certified as urgent, service thereof be dispensed with in the first instance and same be directed to proceed to hearing immediately in view of its urgency.*
2. *THAT this Honourable Court be pleased to issue restraining orders against the Respondents*

barring them from continuing to divert business of the Claimant herein which grossly undermines the Claimant's business pending the hearing and determination of this application.

3. *THAT* this Honourable Court be pleased to issue restraining orders against the Respondents restraining them from engaging in competing or in any other way interfering with the clients and business of the claimant pending the hearing and determination of this application.

It was to drag on until the 11th February, 2014 when the parties agreed to its disposal by way of written submissions.

In their written submissions dated 18th February, 2014 the claimant/applicant reiterates her case as presented in her pleadings. Their position is that their quest for restraint is plausible in that agreements for restraint of trade are valid as long as they pass the test of reasonableness. The respondents were impliedly restrained from engaging in competing business within their employer. This position, in the applicant's submissions, is sustained in the case of **Leland L. Salano vs. International Hotel (2013) eKLR** where Rika, J., found as follows;

“The employment relationship is grounded on mutual trust, confidence, good faith and fidelity. This demands that employees do not unfairly exploit information acquired or skills imparted, by their former employers to the detriment of their former employer's business. Ex-employees may join their former employers' competitors. The obligation of the employee to keep employer's information confidential is not automatically ended with the termination of employment. In the absence of an express term barring the employee from use of confidential material acquired in the course of employment after termination, the obligations of mutual trust, confidence, good faith, and fidelity imposes on the employee an implied contractual obligation to keep confidential the information obtained from the employer, during and after employment.”

This is all true and relevant in employment relationships. Restraint of trade must be upheld in all suitable cases. However, in the present circumstances, the applicant merely alleges. He does not demonstrate a case of implied terms or even breach of the same terms. The respondents allege unfair practices in the concoction of data on employment and the respondents' position on the payroll. This is not contradicted in evidence by the claimant. It is not even denied. This renders the evidence of the claimant/applicant wavy and unstable.

The respondents allege that they left the employment of the claimant's predecessor in the year 2011. No further business contacts were done except training of take-over staff. The issue and date of termination of employment is cardinal to the issues in dispute. It must be well established that there was indeed breach of the terms of the contract and confidence during the term of employment and thereafter. This is lacking. The claimant seeks to rely on an implied term of contract. There is no evidence of any written contract. Implied terms are a matter of law and must be deductible from the circumstances of the case and available data on the subject. I find it difficult to agree with this, more so with contested evidence on the date of termination of the employment of the respondents and also the purported method of obtaining this data. The operations of the claimant/applicant, if at all, render the entire evidence on employment questionable.

The respondent in their written submissions submit that prior to the institution of this suit there only existed a casual engagement between it and the respondents. This relationship was devoid of any specific implied condition as is now claimed. The Claimant does not adduce evidence or demonstrate this but merely alleges engagement.

On the breach of contract of intellectual property rights of the claimant, the respondents submit that this is farfetched in that there is no demonstrable linkage between the outlay of the claimant and respondents in their business image pursuit. Again, the claimant does not adduce evidence of any registered patent, trade design, logo or trade mark. On this, the respondents rely on the case of **Santam Services (EA) Ltd vs. Rentokil (K) and Kentainers (K) (15)**, where the Court of Appeal held that no infringement could have occurred before the grant of patent that the owners of proof of infringement squarely lay on the party who

claims that his industrial property has been infringed. This should be the case even here.

The respondents move on to submit that the claimants have not established a case for issue of an injunction as is established in the authority of **Giella Vs Cassman Brown, [1973] E.A. 358**. The claimant/applicant has not in the least established a *prima facie* case with a probability of success. Neither has he met the criteria on the other two principles of damages not being an adequate remedy in the event of success. This court is not in the circumstances tied up in deciding this matter on a balance of probabilities. The matter crumbles from the onset for failure to establish a *prima facie* case with a possibility of success. I am therefore agreeable with the submissions of the respondent to this extent.

As aforesaid, this is also not a matter that the court is called upon to decide on a balance of convenience as per the third limb of the Giella principles. The matter is straight and can be safely decided on the first and second principles.

I am in the circumstances inclined to dismiss these applications with costs to the respondents. This is on grounds that the applicant has not demonstrated a substantial case with a possibility of success or at all. He *in toto* fails to accomplish the criterion of the principles in Giella vs Cassman Brown above cited.

Delivered, dated and signed the 24th day of April, 2014.

D.K. Njagi Marete

JUDGE

Appearances:

1. Miss Munyaka instructed by Gikera and Vadgama Advocates for the Claimant/applicant.
2. Mr. Jaleny instructed by Jaleny & Company Advocates for the respondents.