Restrictive Covenants in Employment Contracts: A Kenyan Perspective

Linda Khaemba*

Abstract

The article examines the legal framework governing restrictive covenants in employment contracts in Kenya. It discusses the legal position on restrictive covenants in Kenya, noting that they are generally unenforceable unless they are held to be reasonable by the courts. The article highlights the importance of ensuring that restrictive covenants are reasonable and necessary to protect the legitimate interests of the employer and examines the efforts made by courts to balance the employer's interests with the employee's rights and public interest. Overall, the article provides a valuable resource for employers and employees seeking to understand their rights when restrictive covenants are in issue in employment contracts in Kenya, as well as for employment lawyers and policymakers who are considering the effects of restrictive covenants on individuals and the public.

Keywords

Restrictive covenants; employment law; contract law; non-compete clauses; non-solicitation clauses.

I. INTRODUCTION

Bridge International Academies (BIA) invested in the education sector in Kenya, with a business model of opening low-cost for-profit schools. The schools posted excellent test scores, generating excitement that led to the company receiving funds from the World Bank, developed countries and high-profile philanthropists. However, concerns were raised about allowing a company to profit from the poor by charging for education which is a right and a public good.[1]

* Lecturer, School of Law, Moi University, Kenya. ORCID: 0009-0008-2304-6980.

[1] Education International, 'World Bank to exit investment in for-profit school chain Bridge International Academies' (Education International, 16 March 2022). Available: https://www.ei-ie.org/en/item/26362:world-bank-to-exit-investment-in-for-profit-school-chain-bridge-international-academies. All links in this article have been verified on 18 October 2024.

The excitement was replaced with caution, and then controversy. Protesters argued that the fees charged were high, teachers were poorly trained and poorly paid, and were forced to read scripted lessons from tablets.[2] There were also complaints about failure to adhere to education regulations. Employment-related grievances culminated in some employees leaving and starting competing schools. BIA responded by filing several lawsuits to enforce restrictive covenants in employment contracts. The company sought to prevent former employees from using the company's teaching methodology, soliciting former colleagues, students, and parents, running rival schools near their former workplace, and disclosing confidential information. This article examines court decisions to determine how Kenyan courts resolve matters where restrictive covenants are at issue. The competing rights between employer, employee, and the public will be highlighted and discussed.

Lifelong commitment to a single employer is no longer the norm.[3] Employers invest in employees by upskilling them in response to changes in the business environment. Training related to the employee's health, safety and welfare in the workplace is mandatory and is done at the employer's cost.[4] The Constitution requires the government to provide "adequate and equal opportunities for appointment, training and advancement"[5] for public servants. The Public Service Commission is mandated to "develop human resources in the public service".[6] Several training institutions exist to fulfil this role.[7] Private sector employers have less robust training programmes.[8] Mandatory training levies are collected from employers generally,[9] while others are sector-specific.[10] Employees are exposed to the employer's work processes, plans, clients, business contacts, and information, and have access to both tangible and intangible forms of the employer's property. When employees leave to form or join competing businesses, their former employer's business may be subjected to unfair competition through use of proprietary information of the business. The employer may also view funds spent in training as a dead cost. Businesses also spend resources building their client database, perfecting work processes, and developing or acquiring property required to maintain a competitive edge. Employees can also constitute a serious liability where they act disloyally during and after employment. Disgruntled former employees can negatively affect their previous employer by denting their image and reputation, releasing confidential information, accessing information systems without

[2] Rebecca Ratcliffe and Afua Hirsch, 'UK urged to stop funding 'ineffective and unsustainable' Bridge schools' (The Guardian, 3 August 2017). Available: https://www.theguardian.com/global-development/2017/aug/03/uk-urged-to-stop-funding-ineffective-and-unsustainable-bridge-academies.

[3] Jacob Omolo, 'The dynamics and trends of employment in Kenya' (Institute of Economic Affairs, Research Paper Series No 1/2010) 30. He notes that "[m]ost employers in Kenya, particularly those in the private sector have resorted to increasing use of casual, temporary and part-time, contract, subcontracted and outsourced workforces to ostensibly reduce labour costs, achieve more flexibility in management and exert greater levels of control over labour." Both the National and County governments have also indicated that they plan to hire new employees on contract terms as opposed to the 'permanent and pensionable' model. See Lydia Nyawira, 'Governors resolve to employ new workers on contract only' (The Standard, 2019). Available: https://www.standardmedia.co.ke/article/2001315229/governors-all-new-workers-to-be-hired-on-contract-only.

[4] The Occupational Safety and Health Act, Act No 15 of 2007, s.3 and s.10.

[5] Constitution of Kenya, Article 232(1)(i).

[6] Constitution of Kenya, Article 234(2)(f). The PSC is established under Article 233 of the Constitution.

[7] Examples of such institutions are: The Kenya School of Government, The Kenya School of Monetary Studies, The Kenya Judiciary Academy, Kenya School of Revenue Administration and Directorate of Criminal Investigations Academy.

[8] See Ministry of Education and Ministry of Labour and Social Protection, *National Skills Development Policy* (2020) 20 (noting that the low participation of employers in skills development was a challenge). Available: https://www.knqa.go.ke/wp-content/uploads/2020/06/National-Skills-Development-Policy-2020-28-6-2020-F.pdf.

[9] An example is the Industrial Training Levy created under s.5B of the Industrial Act, Cap 237 Laws of Kenya. The Board managing the fund shares training costs with registered employers 'as evenly as possible.'

[10] An example is the tourism fund created under s.66 of the Tourism Act (Act No 28 of 2011). Per s.68(f) of the Act, one of its purposes is training and capacity building.

authority[11] and performing other actions that can sabotage operations. In *Safaricom Plc v Kinuthia & 2 Others,*[12] an employer, sought an injunction to bar two former employees from selling subscriber data to a betting firm. The sale would have resulted in disclosure of the personal subscriber details of 11.5 million subscribers, interfered with the subscribers' constitutional right to privacy, and exposed the employer to adverse legal and regulatory action.[13] The defendants' actions would also have contravened statutory law which prohibited the disclosure of subscriber data without the subscriber's consent.[14] The court granted an injunction to safeguard the data which had 'landed in the wrong hands.' There was no discussion touching on specific aspects of the employment contract like the existence of a confidentiality clause, or of measures the employer had put in place to safeguard subscriber data.

The problem of employees misusing data and information obtained in the course of their employment is not unique to Kenya.[15] As foreign businesses set up shop in Kenya, they tend to import standards and practices that have worked for them elsewhere. BIA included restrictive covenants in employment contracts indiscriminately. The broader socio-economic context of their operations, the public interest in quality education and the employees' interests could have played a more prominent role in the analysis of the suitability of such clauses in specific contracts. An examination of the education sector would have revealed its importance to the country, the existence of a large pool of trained teachers available for hire, and stakeholder concerns that should have informed their use.

The following sets of rights are considered by courts in interpreting the clauses: the employer's business interests, the employee's work-related interests, and society's interest in having a market in which the best skills are available to drive advancement in various areas of human enterprise.

II. WHAT IS A RESTRICTIVE COVENANT

English common law forms part of Kenya's colonial legacy. English common law of contract has persuasive authority and is applicable in Kenya by virtue of the Law of Contract Act.[16] Expositions of English common law by scholars are therefore useful and regularly cited by Kenyan courts. Kenyan courts also reference decisions of other foreign courts and scholarly works when rendering decisions.

Chitty points out the conceptual difficulty of defining restrictive covenants[17] arising from the fact that contracts by their nature define rights and obligations between parties to the

---

[11] Akita, 'The Cybersecurity Risks From Ex-Employees' (2023). Available: https://www.akita.co.uk/what-are-the-cyber-security-risks-from-ex-employees/#:~:text=Download%20of%20data,them%20to%20do%20their%20job.

[12] [2021] eKLR.

[13] This fear was not unfounded. A complaint was made to the Data Commissioner. See Lewis Njoka, 'Safaricom reported to watchdog over alleged failure to protect data' (People Daily, 11 February 2021). Available: https://www.pd.co.ke/business/safaricom-reported-to-watchdog-over-alleged-failure-to-protect-data-67908/.

[14] Kenya Information and Communications Act, Act No 2 of 1998, s.27A(2)(c).

[15] In the US, the problem was so widespread that the government warned employers about the threat posed to their business networks and proprietary information by such employees, noting that several investigations had been prompted by data breaches and misuse of proprietary information resulting in huge economic losses. See FBI, 'Increase in Insider Threat Cases Highlight Significant Risks to Business Networks and Proprietary Information' (23 September 2014). Available: https://www.ic3.gov/PSA/2014/PSA140923.pdf.

[16] Cap 23, Laws of Kenya. The preamble provides that it is "[a]n Act of Parliament to apply the English common law of Contract to Kenya."

[17] Hugh Beale and Joseph Chitty, *Chitty on Contracts* (31st edn, Sweet & Maxwell, 2012) 1270.

exclusion of all others.[18] Lord Diplock described a contract in restraint of trade as "one in which a party (the covenantor) agrees with any other party (the covenantee) to restrict his liberty in the future to carry on trade with other persons not party to the contract in such manner as he or she chooses."[19] Cheshire, Fifoot, and Furmston define it as "one by which a party restricts his future liberty to carry on his trade, business or profession in such a manner and with such persons as he chooses."[20] Jill Poole observes that courts intervene in restraint of trade cases to "protect the public interest in freedom of contract."[21] Courts have time and again reiterated the fact that they do not rewrite contracts between parties.[22] Although the employer and employee are free to regulate their future behaviour, the externalities resulting from this exercise of their freedom must be addressed through balancing public policy concerns.

Freedom from the employee perspective is questionable because of bargaining power disparities inherent in employment relationships. The employer has the job opportunity, resources, managerial edict, and the power to hire and fire or otherwise restructure their business to suit their objectives. Restrictive covenants protect an employer's interests. Anson observes that the rules in this area have "changed from time to time, both in form and in spirit, in response to changes in conditions of trade."[23] The decision on whether or not to uphold a restrictive covenant involves making a public policy choice in balancing competing interests, with the result that it is affected by changes in societal values.[24] In balancing rights, Kenyan courts have considered varied interests such as the right to work, the state of the labour market, competition and employers' investment in employee training and in their business.

III. LEGAL EFFECT

Section 3(1) of the Judicature Act requires all courts including the Employment and Labour Relations Court to exercise their jurisdiction in conformity with the Constitution, all written laws and "the substance of the common law, the doctrines of equity and the Statutes of General application in force in England on the 12th August, 1897".[25] The application of common law is however limited to situations where there is no applicable written law, and only "so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as may be rendered necessary."[26]

Kenyan courts have affirmed that the employment relationship is "governed by the general law of contract as much as by the principles of common law now enacted and regulated by the Employment Act[27] and other related statutes."[28] The Employment Act spells out the minimum terms and conditions of employment[29] which are supplemented by common law rules. The Law of Contract Act applies "the common law of England relating to contract"[30] in

[18] *Ibid*.
[19] *Petrofina (Great Britain) v Martin* [1966] Ch 146, 180.
[20] Michael Furmstone, Cheshire, Fifoot and Furmstone (15th edn, Oxford University Press, 2007) 517.
[21] Jill Poole, *Textbook on Contract Law* (9th edn, Oxford University Press, 2008) 636.
[22] *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd* [2001] eKLR.
[23] Jack Beatson, *Anson's Law of Contract* (28th edn, Oxford University Press, 2002) 376.
[24] See supra (n 20).
[25] Cap 8, Laws of Kenya.
[26] Judicature Act, Cap 8 Laws of Kenya, s.3(1)(c).
[27] Act No 11 of 2007, Laws of Kenya.
[28] *Krystalline Salt Limited v Kwekwe Mwakele & 67 Others* [2017] eKLR.
[29] Cap 226, Laws of Kenya, s.3(6).
[30] Cap 23, Laws of Kenya, s. 2; See *Pauline Wangeci Warui v Safaricom Limited* [2020] eKLR.

the country. However, when transplanting English common law, its suitability for local circumstances must be considered.[31] The local circumstances in Kenya require an examination of the economy generally, the labour market and the needs and performance of specific industries to determine whether the situation warrants a wholesale transplantation of rules on restrictive covenants.

Initially, common law was hostile to agreements that had "as their mere purpose the elimination of competition,"[32] sometimes at pain of penal sanction.[33] Such agreements were deemed to interfere with trade and freedom of contract.

It was feared that restraints which prevented a person from pursuing their vocation and earning a livelihood would injure them and their dependants, and also be detrimental to the public by depriving it of a useful member.[34] Over time, courts began to uphold these agreements to protect certain business interests. In *Mitchell v Reynolds,*[35] an agreement under which the defendant agreed to forfeit a bond of £50 if he opened a competing business within five years was upheld. In effect, "a restraint was prima facie valid if it was supported by adequate consideration and was not general."[36] This rule was restated in *Nordenfelt v Maxim-Nordenfelt*.[37] The court stated that all restrictive covenants (whether general or particular) are *prima facie* void but can be enforced if found to be reasonable as between the parties and not injurious to the public interest.

The Contracts in Restraint of Trade Act was enacted "to make lawful certain contracts in restraint of trade."[38] Section 2 provides that a contract which restrains a party from exercising any "profession, trade, business or occupation" is not invalidated simply because of the existence of such a clause. It empowers the High Court to declare such provisions void where they are not reasonable either in the interest of the parties (by affording one party more than adequate protection), or in the interest of the public. The interests of employers, employees and the public must therefore be balanced.

Chitty observes that courts scrutinise restrictive covenants in employment contracts more jealously because of the likelihood of bargaining power disparities.[39] To merit protection, an employer must demonstrate "either that the employee has learnt the employer's trade secrets, or that he has acquired influence over the employer's clients or customers."[40] A restrictive covenant cannot be used to contain competition.[41]

---

[31] *Nyali v AG* [1956] 1 QB 1, 16-17 [Lord Denning]. He stated: "Just as with the English oak, so with the English common law. One could not transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed, but it needs careful tending. So with the Common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over; but it has also many refinements, subtleties and technicalities which were not suited to other folk. These off-shoots must be cut away. In these far-off lands the people must have a law which they understood and which they will respect."

[32] *Esso Petroleum Co Ltd v Harper's Garage (Stourport)* [Lord Morris of Borth-y-gest]; Parker CJ in *Mitchell v Reynolds* 24 ER 247.

[33] GH Treitel, *Treitel on the Law of Contract* (8th edn, Sweet and Maxwell, 1991) 401 (citing Dyer's case in which a, court threatened to imprison an employer who attempted to enforce such an agreement).

[34] Lord Morris of Borth-y-gest in *Esso Petroleum Co Ltd v Harper's Garage (Stourport).*

[35] (1711) 1 P WMS 181.

[36] Treitel (n 33) 401.

[37] [1894] AC 535.

[38] Cap 24, Laws of Kenya (preamble).

[39] Hugh Beale and Joseph Chitty, *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012) 1285.

[40] Treitel (n 33) 404.

[41] *Ibid*.

IV. CONSIDERATIONS TO MAKE WHEN DETERMINING ENFORCEABILITY

Section 2 of the Contracts in Restraint of Trade Act provides that a court may hold a restrictive clause to be unreasonable where it "affords more than adequate protection to the party in whose favour it is imposed against something which he is entitled to be protected."[42] The restraint must go no further than protecting the legitimate interest of the party seeking to enforce it; anything broader would be against the public interest.[43] In assessing whether the provision is reasonable, the court takes into consideration the profession, trade or business or occupation concerned, the duration, geographical scope, and all circumstances of the case.[44]

a. Protectable interests

An employer may seek to restrict or prevent the employee from: opening a similar competing business; working for a competitor; using trade secrets or other proprietary information for another employer or business and soliciting clients or employees to move with them to the new business they are joining.

i. Trade secrets, confidential information, and other proprietary information

Society has witnessed growth of intangible forms of property, technological advances and changing forms of business. Businesses and employers generate intellectual capital and information for different audiences. Some of these are protectable as intellectual property upon meeting the relevant tests. Fisk states that there has been "a gradual shift to recognising knowledge, as a form of property, and then recognising that property as belonging to someone other than the employee who possessed it."[45] Restrictive covenants can be used to prevent former employees from using confidential information to adversely affect the employer. The employee's right to utilise knowledge and the employer's interest in maintaining control over certain information must be balanced.[46]

Typically, an employer who seeks to control the use of information obtained by employees will include a Non-Disclosure or Confidentiality Clause in the employment contract. The protected subject matter should be clearly spelt out. [47] An employer must show that the employee dealt with or was privy to confidential or special knowledge which would be damaging to their business interests if revealed to a competitor.[48] The employer must demonstrate that their business interests have been affected by or are likely to be affected by the employee's breach,[49] and show how the confidential information had been used.[50]

---

[42] Cap 24, Laws of Kenya.
[43] *Esso Petroleum Company Limited v Harper's Garage (Stourport) Limited* [1968] AC 269; Treitel (n 33) 408.
[44] Cap 24, s.2(i).
[45] Catherine L Fisk, 'Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, the Rise of Corporate Intellectual Property, 1800-1920' (2001) 52 Hastings LJ 441, 446.
[46] *Ibid* 443.
[47] *SBI International Holdings Ag (Kenya) v Amos Hadar* [2015] eKLR [49] (stating that "the court must be careful not to issue orders whose effect is to leave an employee or former employee walking on egg shells wondering what information about his employer or former employer he can or cannot disclose").
[48] *Martha Wangari Kariuki v Muli Musyoka & another* [2021] eKLR.
[49] *Direct Pay Ltd v Marion Khasoa Stevens* [2021] eKLR.
[50] *LG Electronics Africa Logistics FZE v Charles Kimari* [2012] eKLR.

Some protection can be obtained under existing law. The trade secrets doctrine protects business information which employees have access to.[51] Courts create a distinction between trade secrets which qualify for protection, and general information which does not.[52] Both the employer and employee have implied common law duties. An employee has a duty not to reveal information of a proprietary nature which is obtained in confidence. Irregularly obtained confidential information has been expunged from court records by employers because the duty not to reveal confidential information of a proprietary nature "applies irrespective of whether or not there exists a confidentiality agreement or clause in the employee's contract and generally extends beyond the life of the employment relationship."[53] In other cases, courts have examined such clauses to determine their scope. In one case, the court noted that the clause was silent on disclosure for litigation purposes, finding that the court was not a competitor and did not fit the description of "any person, firm or corporation."[54] Such agreements cannot be used to prevent the disclosure of illegal and immoral activities which are detrimental to society.[55]

In considering what amounts to confidential information, the test in *Advtech Resourcing (Pty) Ltd v Kuhn*[56] has been considered persuasive.[57] The information must be useful, private, and must have economic value to the person claiming protection. In *Leland Salano v Intercontinental Hotel* confidential documents in the employment context were described as those containing secret information "or information which is not generally known, or accessible to other persons,"[58] and are deemed confidential when the owner has taken reasonable steps to limit access by unauthorised persons. These include confidentiality policies; restricting access; marking the documents confidential; indicating business interests which would be affected by their disclosure, and use of post employment covenants. The court observed that it was easier to protect confidential information during the currency of the employment relationship by implying a duty of fidelity, than after the relationship has ended. It was persuaded by the rule in *Faccenda Chicken Limited v Fowler*[59] which permits a former employee to use information obtained in the course of the employment provided; he did not actively memorise or copy it; and the information did not amount to a trade secret at the time. The court further noted that it had discretion to call for the production of any relevant document.[60]

Employers who wish to protect confidential information upon expiry of the employment relationship must take reasonable steps to keep proprietary information secret[61] to protect "that which is uniquely that employer's secret."[62] Justice Abuodha suggested that employers should exploit digital resources to safeguard trade secrets.[63] In one of the BIA cases, the employer alleged that the employee had stolen "the system" and was using its teaching methodology

[51] Catherine L Fisk, 'Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, the Rise of Corporate Intellectual Property, 1800-1920' (2001) 52 Hastings LJ 441.
[52] Gillian S Morris and Simon Deakin, *Labour Law* (Bloomsbury Academic, 2012) 378.
[53] *Magdalene Kiboi & 17 Others v Engen Kenya Limited* [2019] eKLR; *Nduati & 26 Others v Ernst & Young LLP Cause* E186 of 2021 [2022] KEELRC 3926 (KLR) (22 September 2022) (Ruling).
[54] *Josephine Ndirima v Medecins Sans Frontiers Belgium* (Cause 454 of 2022) [2022] KEELRC 3814 (KLR) (19 August 2022) (Ruling).
[55] *Bhupinder Singh Kalsi & another v Kenya Airways PLC* [2018] eKLR; *GNK v USA-Africa Management Co Ltd & another* [2016] eKLR [10].
[56] 2007(4) ALL SA 1386, C [51].
[57] Cause E186 of 2021 [2022] KEELRC 3926 (KLR) (22 September 2022) (Ruling); *Bhupinder Singh Kalsi & another v Kenya Airways PLC* [2018] eKLR.
[58] [2013] eKLR.
[59] [1987] 1 Ch. 17.
[60] Industrial Court Act, Act No. 20 of 2011, s.20.
[61] See Article 39 of the General Agreement on Trade and Tariffs (opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948) (GATT).
[62] *Credit Reference Bureau Holdings Ltd v Steven Kunyiha* [2017] eKLR [15].
[63] *Credit Reference Bureau Holdings Ltd v Steven Kunyiha* [2017] eKLR [15].

without laying evidence to prove the allegation.[64] It was possible to conclude that either BIA had not clearly identified its intellectual property assets and drafted clear provisions to protect them, or that the restrictive covenants were designed to make it difficult for teachers to leave for no justifiable reason.

In addition to these measures, employers may consider a garden leave provision since this ensures that the employee's common law duties of fidelity, loyalty, good faith, and confidentiality are upheld during the leave period. During the garden or gardening leave period, an employee is required to serve their notice period at home while on full pay.

ii. Maintaining a stable, well-trained workforce

For employers who wish to maintain a competitive edge in their sector, training serves as a good incentive to retain staff. Lester observes that it is hard to maintain a well-trained workforce "in the current mobile economy,"[65] noting that courts are generally reluctant to protect an employer's investment in employee training unless it is coupled with some other protectable interest. Justice Abuodha stated that "[e]xperience and expertise garnered from working for a particular employer cannot be reasonably restrained without stunting such employees' careers"[66] and that restraints only apply to "that which is uniquely that employer's secret and not knowledge and skill which can be acquired by learning, experience or development in technology."[67]

An employee may encourage other employees at their former workplace to quit and join them at their new workplace. This has the effect of destabilizing operations especially where key employees are poached. It may also be unfair for some employers to refuse to invest in developing their employees' skills and rely on raiding employees that other employers have nurtured. Employees may also be adversely affected in the long run if employers decline to invest in developing their potential for fear of losing their "investment."[68]

The government has supported initiatives by employers to upskill staff by passing legislation to mitigate some of these costs. In some industries, employers are required by legislation to make monthly contributions to a central kitty for training their employees.[69]

Employers try to protect their interests through:

Non-Solicitation Clauses: A cursory survey of cases involving restrictive covenants shows that courts generally grant interim orders preventing former employees from soliciting clients and co-workers.[70] These clauses were upheld in some of the BIA cases, including matters where the geographical scope of the former employee's activities was

[64] *Bridge International Academies Limited v Robert Kimani Kiarie* [2015] eKLR.
[65] Gillian Lester, 'Restrictive Covenants, Employee Training, and the Limits of Transaction-Cost Analysis' (2001) 76 IND LJ 49, 50.
[66] Credit Reference Bureau Holdings Limited v Steven Kunyiha [2017] eKLR [15].
[67] *Credit Reference Bureau Holdings Limited v Steven Kunyiha* [2017] eKLR [15].
[68] See Gillian Lester, 'Restrictive Covenants, Employee Training, and the Limits of Transaction-Cost Analysis' (2001) 76 IND LJ 49, 57.
[69] Hotel & Catering Levy payable under the Hotels and Restaurants Act, Cap 494 Laws of Kenya, National Industrial Training Authority Levy payable under the Industrial Training Act, Cap 237 Laws of Kenya.
[70] *Bridge International Academies v Bonface Nyanumba Ombati* [2015] eKLR; *HF Fire Incorporated and Another v Sayed Mohammed & Another* [2017] eKLR.

not confirmed.[71] In *Craft Silicon Limited v Niladri Sekhar Roy,* the court found the non-compete clause "vague and not caped within any geographical boundaries,"[72] but still proceeded to order the former employee not to contact his former employer's customers pending hearing and determination of the suit, or till expiry of the restraint period, whichever came earlier.

Agreements with the competition (Anti-Poaching Agreements): In some cases, employers enter 'anti–poaching' agreements under which they agree not to hire each other's workers.[73] In *Kores Manufacturing Company Ltd v Kolok Manufacturing Co Ltd*,[74] a company attempted to restrain a competing company from hiring a former employee. The companies had agreed not to engage each other's former employees without first obtaining consent. The court held that the agreement was unreasonable because the restraint imposed was greater than required to protect business interests. In *Bluebird Aviation Limited v Mathew Njae Kearie & Another*, a defendant hinted at the existence of an industry practice within the aviation sector which required airline operators "to obtain clearance from the previous employer before employing somebody from other firms."[75] The court found that no evidence had been adduced to prove the existence of the practice but did not interrogate the validity of such agreements. Such agreements are bound to be subjected to the provisions of the Competition Act[76] and declared anticompetitive. The Act prohibits any agreement or practice between competitors that has the effect of preventing, distorting or lessening competition in trade in goods or services.[77] These agreements may take several forms, including oral or written agreements, express or implied conduct and inferences from the commercial relationship between the parties.[78] Anti-competitive agreements in the labour market depress wages, limit employee mobility, suppress competition for talent within a sector, slow down innovation, prevent new businesses from starting and hinder business dynamism.[79]

Training Bonds: Both public sector and private sector employers make use of bonding agreements to bind their employees to work for them for a defined period after expiry of the training period. Usually, the agreement is ancillary to the employment contract, and employees who benefit from the training are required to sign the bond agreements. The procedure and formalities required may differ from employer to employer. For some public sector employers, the bond is an instrument executed between the parties and

[71] See *Bridge International Academies v Nelly Atieno Omondi & 5 Others* [2018] eKLR (the court granted an injunction restraining former employees from soliciting staff, students and parents. The court noted that the claimant's witness had stated that the competing school was "near" but did not indicate the distance with respect to the 5km restriction boundary); *Bridge International Academies v Bonface Nyanumba Ombati* [2015] eKLR (The court issued an injunction to prevent the defendant from soliciting parents, students and staff of his former school. The competing school was described as being "less than a stone throw away").
[72] [2018] eKLR [29].
[73] Angie Davies, Eric D Reicin, and Marisa Warren, 'Developing Trends in Non-Compete Agreements and Other Restrictive Covenants' (2015) 255 ABA Journal of Labour & Employment Law 270.
[74] [1958] 2 WLR 858.
[75] [2018] eKLR
[76] Act No.12 of 2010.
[77] Act No 12 of 2010, s.21.
[78] Competition Authority of Kenya, *Consolidated Guidelines on Restrictive Trade Practices under the Competition Act.* Available: https://cak.go.ke/sites/default/files/Consolidated%20Guidelines%20on%20Restrictive%20Trade%20Practices%20.pdf.
[79] Promoting Competition in the American Economy (9 July 2021). Available: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

registered as a deed under the Registration of Documents Act.[80] Similar to garden leave provisions, the restrictions apply during the life of the employment relationship. For public sector employees, the bond duration is based on the mode and duration of study.[81] The bond amount forms the basis of paying liquidated damages in the event of default, and is based on the mode of study and funding of the training.[82] It is extremely rare for Kenyan courts to decline to uphold the provisions of a bonding agreement.[83] The employer must however prove the existence of the bond and that training in fact took place.[84] Courts usually enforce the provisions of the training bond without subjecting it to a 'reasonableness test' similar to other restrictive covenants.

One court declined to enforce a bond which had been executed after completion of the training,[85] while another upheld it despite the employee stating that he had not signed it before an advocate as alleged (who incidentally was representing the employer), and in the face of complaints regarding its retrospective application.[86] The judge stated that the employee's case was "whimsical and escapist"[87] and that unless he could demonstrate that there was duress and undue influence, he could not "escape his contractual obligations through technicalities of the law."[88] An analysis based on the rules relating to past consideration may have been more persuasive.

Some courts have stated that by executing a bond, an employer commits to keeping the employee on their payroll for the duration of the bond.[89] Another court held that the bonding agreement is based on the contract of service, and where this had lapsed, the parties were still required to execute a fresh one to regulate their relationship.[90] The employee had been bonded for a five–year period and had sought compensation for the unexpired bond period.

iii. Maintaining clients, business contacts

For a restraint to be upheld, the employer should demonstrate that the employee knew the clients and had acquired influence over them.[91] The nature of the work should be such that clients rely on the employee's skill and judgement, or deal with them directly so that they are likely to follow them if they open their own business.[92] Such restraints can be upheld where the

[80] Cap 285, Laws of Kenya.
[81] Kenya Public Service Commission, *Guidelines on the Bond for Training Public Servants* (2018).
[82] Public Service Commission, *Guidelines on the Bond for Training Public Servants* (2018).
[83] Examples of cases where Training Bonds have been enforced: *James Muriithi Njogu v Office of the Director of Public Prosecutions Advisory Board* [2021] eKLR; *Seven Seas Technology Ltd v Eric Chege* [2019] eKLR (awarding employer Kshs. 492, 126 in training costs); *Martha Wangari Kariuki v Muli Musyoka & another* [2021] eKLR (awarding employer training costs of US$ 1,562.50 for unexpired bond period); *Bluebird Aviation Limited v Mathew Njae Kearie & another* [2018] eKLR (awarding employer US$ 30,000 being training costs incurred).
[84] *Techno Service Limited v Michael Karue Wachira* [2013] eKLR.
[85] See *Elimu Sacco Society Limited v Catherine Muthoni Njiru* [2015] eKLR.
[86] *Bluebird Aviation Limited v Mathew Njae Kearie & Another* [2018] eKLR (the former employee had stated that the bond was being applied retrogressively).
[87] Bluebird Aviation Limited v Mathew Njae Kearie & Another [2018] eKLR.
[88] Bluebird Aviation Limited v Mathew Njae Kearie & Another [2018] eKLR.
[89] See *Gladys N Muchena v Aga Khan Education Service, Kenya* [2018] eKLR; *Michael Chelogoy v Daystar Limited T/A Daystar University* [2007] eKLR (awarding employee salary for unexpired bond period; employer had declared him redundant).
[90] *Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho- Kariuki* [2017] eKLR (overturning an award of gross salary for the unexpired bond period).
[91] *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688.
[92] Michael Furmstone, Cheshire, Fifoot and Furmston's Law of Contract (15th edn, Oxford University Press, 2007).

employee had influence over the employer's customers, and can capitalise on the employer's trade connections and make use of confidential information.[93]

b. Consideration

Agreements to be supported by consideration. In Dyer's Case, the court declined to enforce a non-compete agreement between an apprentice and his former master for want of consideration.[94] The pre-existing duty rule bars employees from making demands for more after agreeing on terms.[95] If the employer is unwilling to renegotiate the terms of engagement, the employee has the "right to seek greener pastures."[96] Restrictive covenants limit an employee's options without furnishing consideration for the handicap imposed on the employee.

Is additional consideration required to support a restrictive covenant? In some states in the United States, initial or continued employment is deemed to be sufficient consideration for the restrictive covenant, while in others, something more is required because the employee is incurring a detriment with no corresponding benefit.[97] The response sometimes turns on when the restrictions are introduced. One view suggests that the salary and other benefits paid to an employee constitute sufficient consideration, and that restrictive covenants which are introduced after the employment relationship has commenced should be supported by consideration, which may take the form of a revised benefits package.[98] In *Direct Pay Limited v Marion Khasoa Stevens,*[99]an employer sought a mandatory injunction to compel an employee to quit her new job based on a restrictive covenant contained in an addendum to the contract of employment. The court stated that "[w]ithout a corresponding benefit from the former employer"[100] such a restraint would contravene fair labour practices and impede competition.

Adequacy of consideration will be considered when deciding whether to uphold a restraint.[101] Treitel observes that although adequacy of consideration is no longer an essential requirement for contracts, courts may consider the quantum of consideration when determining the reasonableness of the clause.[102] This has happened in other areas of contract law. In *Cutter v Powell,*[103] in declining to award a claim for *quantum meruit* where a sailor had died before completion of the voyage, the court stated that the sailor had made an absolute undertaking to receive payment upon completion of the voyage. It is likely that the court took into consideration the adequacy of the consideration in that case since it noted that the sailor stood to earn almost four times the normal wages.[104]

---

[93] *Herbert Morris v Saxelby* [1916] 1 AC 688.
[94] See *Dyer's Case* (1414) 2 Hen V.
[95] *Stilk v Myric* [1809] EWHC KB J58.
[96] *Steel Structures Limited v David Engineering & Another* [2007] eKLR.
[97] Angie Davies, Eric D Reicin & Marisa Warren, 'Developing Trends in Non-Compete Agreements and Other Restrictive Covenants' (2015) ABA Journal of Labour & Employment Law 255, 257.
[98] *Decorus Ltd v Daniel Penfold & Another* [2016] EWHC 1421 (QB).
[99] [2021] eKLR.
[100] [2021] eKLR.
[101] Treitel (n 33) 409. See *Mitchell v Reynolds* (1711) 1 Pwms 181.
[102] Treitel (n 33) 401.
[103] (1795) 101 ER 573.
[104] See Ninetieth Report of the Law Reform Committee of South Australia, Relating to the Reform of the Law Regarding Entire Contracts and the Rule Usually Known as the rule in *Cutter v Powell* (1986). Available: https://law.adelaide.edu.au/system/files/2019-02/90-Entire-Contracts-and-the-Rule-in-Cutter-v-Powell.pdf.

c. *Constitutional rights and values*

The Kenyan Constitution does not contain an express right to work.[105] Courts have however read the right to work into the existing framework of rights which govern the employment relationship. Prior to 2010, courts used the Bangalore Principles to apply international law where there was no conflict with Kenyan law.[106] In 2010, international law was expressly incorporated as part of Kenyan law.[107] Kenya is a State party to international and regional legal instruments which recognise the right to work.[108] In *Direct Pay Limited v Marion Khasoa Stevens*[109] the court imported the right to work from the African Charter on Human and Peoples' Rights and held that a restriction of the right to work is not a fair labour practice and was contrary to public policy. Both the right to work (enjoyed by labour) and property rights (protecting capital) are equally important.[110]

Employees cannot be forced to continue serving an employer. In *Steel Structures Limited v David Engineering & Another,* an application for an order to compel a competitor to terminate an employment contract and "forthwith release"[111] a former employee to it was met with disapproval since it raised serious issues such as servitude.

d. *Employee interests*

The employment relationship arises from a contract between the employer and the employee. This contract operates in a political, social, and economic context in which law addressing various concerns and interests supplement the private arrangement. The overhaul of the country's labour and employment laws and the adoption of Kenyan Constitution (2010) resulted from "over a century of struggle for reforms."[112] In colonial Kenya, the power imbalance inherent in employment was exacerbated by the Master-Servant status relationship created by the State and settler community. Employers harnessed the State's coercive power to force natives into the labour market, and once there, to keep them from deserting or absconding duty. Legislation strongly reflected the employers' interests.[113] Freedom of mobility was restricted through the *kipande* system[114] under the Registration of Natives Ordinance and an employer could keep a worker bound to them by refusing to sign it or writing unflattering things, effectively preventing an employee from moving on.[115] This power imbalance between employers and employees was

[105] Examples of Constitutions containing an express right to work: Constitution of Norway, Article 110; Constitution of India, Article 41; Constitution of Egypt, Article 12; Constitution of Italy, Article 4; Constitution of Finland, s.15.
[106] See *Rono v Rono* (2005) AHRLR 107.
[107] Article 2(6) provides of the Constitution of Kenya provides that "[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution."
[108] Universal Declaration on Human Rights (adopted 10 December 1948) 217 A(III) (UNGA), Article 23(3); International Covenant on Social, Economic and Cultural Rights (ICESCR) opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), Article 6; The African Charter on Human and People's Rights, Article 15.
[109] [2021] eKLR.
[110] *Nagle v Feilden* [1966] 2 QB 633. The complainant challenged a jockey club's policy of not licensing women to train horses on their grounds. Lord Denning stated that the right to work was as important as property rights, explaining that "[t]he common law of England has for centuries recognised that a man has a right to work at his trade or profession without being unjustly excluded from it."
[111] [2007] eKLR.
[112] Kenya Human Rights Commission, *Labour Rights Legal Framework in Kenya* (2019). Available: https://www.khrc.or.ke/index.php/publications/213-labour-rights-legal-framework-in-kenya/file.
[113] David M Anderson, 'Master and Servant in Colonial Kenya' (2000) 41 JAL 459.
[114] The *kipande* was a document that black men were issued with by the colonial government. It served as a pass to authorise movement and contained employment details of the holder.
[115] David M Anderson, 'Master and Servant in Colonial Kenya' (2000) 41 JAL 459, 465.

one of the main issues the reforms attempted to address by entrenching labour rights in the Constitution and statute law. Whereas statutory law has made several advances in balancing employer and employee rights, courts have been hesitant to interrogate the power dynamics in employment contracts, preferring to interpret its restrictions in accordance with laid down common law principles.

An interrogation of the local circumstances should inform the use and enforcement of restrictive covenants. Courts are alive to the high rate of unemployment and the economic situation in the country.[116] In Kenya where the formal sector is much smaller than the informal sector[117] which is characterised by "low-income jobs with high job insecurity"[118] bargaining power is skewed in favour of the employer. Few workers can afford the luxury of declining a job offer because of the existence of a restrictive covenant. In *Credit Reference Bureau Holdings v Steven Kunyiha* Justice Abuodha stated that "where unemployment is soaring every single day, subjecting the defendant to loss of employment on the basis of a restrictive clause would be unreasonable,"[119] not in either parties' interest and moreover, contrary to public policy.

A report titled "Bridge v Reality"[120] highlighted BIA's practice of hiring unqualified, inexperienced teachers (primarily school leavers) as a cost saving measure and disregarding legal requirements which prescribe teacher qualifications. Most of the academy managers also lacked the proper credentials to serve in those positions.[121] Teachers worked under "contracts demanding 59-65 hours of work per week for a salary just above USD100"[122] and most of the teachers interviewed stated their contracts were unfair when compared to benefits received by teachers in public schools. True to its culture of cultivating a climate of fear and resorting to litigation to respond to perceived threats to its business interests, BIA sued the authors of the report, a journalist, staff and others.[123] In other cases, BIA resorted to threats and intimidation, going as far as orchestrating the arrest of a PhD researcher who was compiling a report on BIA operations in Uganda.[124] It is easy to conclude that suits filed to enforce restrictive covenants against staff were designed to perpetuate this culture of repression. The preservation of business, profits and reputation should not be done at the expense of employee interests in seeking growth. Work is a source of dignity which allows employees to meet aspirational goals to use their talent and passion to make a difference. A restrictive covenant can place temporary or permanent brakes on an employee's plans to meet their life goals. A lost job or business opportunity is not easily regained given the abundance of supply in the country's labour market.

---

[116] *Credit Reference Bureau Holdings v Steven Kunyiha* [2017] eKLR.

[117] International Labour Organisation, *Prospects: Assessment of Public Employment Services and Active Labour Market Policies in Kenya* (ILO, 2021) 25. Available: https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@dgreports/@ddg_p/documents/publication/wcms_822596.pdf. The report placed the number of those working in the formal sector at 3.91 million against 15.051 million engaged in the informal sector based on the 2019 National census.

[118] Vincent Okara and Brian Obiero, *Labour Demand in Kenya: Sectoral Analysis* (Kenya Institute of Public Policy Research and Analysis, 2018) KIPPRA Discussion Paper No216 of 2018, 2.

[119] [2017] eKLR [14].

[120] Education International and Kenya National Union of Teachers, 'Bridge v Reality: A study of Bridge International Academies for-profit schooling in Kenya' (2016) 8. Available: https://www.ei-ie.org/en/item/25702:bridge-vs-reality-a-study-of-bridge-international-academies-for-profit-schooling-in-kenya.

[121] Education International and Kenya National Union of Teachers, 'Bridge v Reality: A study of Bridge International Academies for-profit schooling in Kenya' (2016) 23.

[122] Education International and Kenya National Union of Teachers, 'Bridge v Reality: A study of Bridge International Academies for-profit schooling in Kenya' (2016) (n 121) 2.

[123] See East Africa Centre for Human Rights, Compliant to the Compliance Advisor/Ombudsman International Finance Corporation (16 April 2018). Available: https://www.cao-ombudsman.org/sites/default/files/downloads/CAOComplaintEACHRights-16April18.pdf.

[124] Neha Wadekar and Ryan Grimm, 'Harvard Grads Saw Big Profits in African Education. Children Paid the Price' (The Intercept, 23 March 2023). Available: https://theintercept.com/2023/03/23/bridge-schools-africa-kenya-education/.

Although common law only entertains the question of bargaining power "in exceptional cases where as a matter of common fairness it [is] not right that the strong should be allowed to push the weak to the wall,"[125] employment contracts with onerous clauses should be examined through the lens of the power dynamic, local industry and economic conditions which affect the employee's ability to negotiate freely. Transplanting rules from more advanced economies with lower unemployment rates and more developed labour markets may ignore the local realities.

An employer should not claim more protection than is necessary to secure their interests. Clauses designed to prevent competition from former employees[126,] or to prevent them from working for a competitor without a proper basis [127] will not be upheld. An employer must demonstrate that they appreciate the demarcation between their proprietary interests and the employee's general stock of knowledge which the employee should be free to deploy in the labour market. Fisk notes that contract law was used to replace mutual obligations in employment law with a scheme that increased employer rights through implication "including rights to employee ideas and inventions"[128] and shifted "rights from employees to firms."[129] Perhaps the distinction between intellectual property assets which the employee was exposed to at work and those assets they participated in creating while at work should be explored further by courts when determining the employer and employee's interests.. Rules which require employees to automatically cede inventions or creations should be interrogated to restore equitable dealing between employers and employees.

In another case, the court upheld a bond but stated that the matter of the employer deducting a 20% training levy required robust litigation because "further studies are not a gift to the individual except where the individual fails to adhere to the terms of the bond."[130] An employer who requires their employees to acquire certain skills or additional qualifications does so to improve productivity. It may therefore be unfair to subject the employee to a 20% cut of their basic salary in addition to bonding them to remain an employee, usually for a period equivalent to the training period.[131]

e. Geographical scope

There should be a relationship between the area the employee was employed to work in and the post-employment geographical restriction. Restrictions imposed on areas outside a business's area of operation may render the clause too broad to be enforced.[132] In *Craft Silicon Limited v Niladri Sekhar Roy,*[133] the court took issue with a restrictive covenant which was vague and did not contain geographical boundaries. However, strangely, in some BIA cases,

[125] *Alec Lobb (Garages) Ltd & Others v Total Oil GB Limited* [1985] 1 All ER 303.
[126] *Herbert Morris v Saxelby* [1916] 1 AC 688 (the court declined to enforce a clause preventing an engineer from working anywhere in the UK for a seven-year period).
[127] *Martha Wangari Kariuki v Muli Musyoka & Another* [2021] eKLR.
[128] Catherine L Fisk, *Working Knowledge: Employee Innovation and the Rise of Corporate Intellectual Property, 1800-1930* (University of North Carolina Press, 2009) 79.
[129] *Ibid* 82.
[130] *James Muriithi Njogu v Office of the Director of Public Prosecutions Advisory Board* [2021] eKLR.
[131] See Kenya Public Service Commission, *Guidelines on the Bond for Training Public Servants* (2018). Available: https://publicservice.go.ke/index.php/publications/policies-guidelines/category/62-guidelines.
[132] *Commercial Plastics Ltd v Vincent* (1965) 1 QB 623.
[133] [2018] eKLR.

statements that a competing school had been established "less than a stone's throw away" and "near" the employer's school did not prevent the court from granting interlocutory relief.[134]

What is considered reasonable in scope depends on the nature of work the employee performs. In *Giella v Cassman Brown & Co Ltd,*[135] a clause barring an employee from engaging in similar work within a ten-mile radius of the Central Post offices of six major cities and towns in East Africa was considered unreasonable. Some businesses, especially those which operate in technology-driven sectors, are not confined by geographical boundaries. In *Radio NRG Media v Andrew Kibe & Another, Radio Africa (Proposed Interested Party),*[136] the court declined to lift orders restraining former employees (radio presenters) from working for any radio station in Kenya. The national reach of the radio station would have rendered a narrower restriction ineffective. Broader restrictions based on their former employees' reach, influence and contacts in the defined areas may therefore be justified.

f. Duration

Employees who are gainfully employed contribute to nation-building by paying taxes and performing other social roles. Restrictive covenants can delay the employee's re-entry into the workforce. The shorter the restraint period, the more likely it is that the court will consider it reasonable. In *Herbert Morris Ltd v Saxelby,*[137] the court declined to uphold a seven-year non-compete clause. However, each case is determined by its facts. Life-long restraints have been upheld in cases where the area of competition is small and patronised by a loyal clientele.[138] The duration of an employee's service and notice period can also be taken into consideration when determining reasonableness.[139]

If the employer has already secured their interests using some other means such as a garden leave provision, the court may decline to place an additional burden on the employee.[140] However, where the employee has access to information that would benefit the organisation they are joining, both the restrictive covenant and garden leave clause may be upheld.[141] In general, because courts seem more prepared to uphold agreements that do not cause hardship on the employee, employers can consider the option of placing employees on garden leave as a fair labour practice. Legislators can also enhance employee protection by capping the

---

[134] See Bridge *International Academies v Nelly Atieno Omondi & 5 Others* [2018] eKLR; *Bridge International Academies v Bonface Nyanumba Ombati* [2015] eKLR.
[135] [1973] EA 358.
[136] [2019] eKLR.
[137] [1916] 1 AC 688.
[138] *Fitch v Dewes* [1921] 2 AC 158.
[139] *See* in *Giella v Cassman Brown & Co Ltd* [1973] EA 358, 361. Justice Spry noted that it was unclear how the activities of the employee who had held his position for less than two years were likely to seriously injure the company, or to merely cause annoyance.
[140] See *Air New Zealand v Kerr* NZ EmpC 153 ARC 38/13 [71]. The court declined to enforce a restrictive covenant because the employee had already been subjected to a six-month garden leave period. The court surmised that the new employer probably knew more about the former employer's operations than the employee they were hiring Ford J stated that "the correct approach to be adopted is that a garden leave provision should be taken into account by the court when considering the reasonableness of the duration of any post-employment restraint covenant."
[141] In *Vodacom (Pty) Ltd v Godfrey Motsa & MTN Group* J74/16 [2016], an employment contract had a six-month notice period for termination and restricted the employee from working for a competitor for six months after the employment relationship terminated. The employee was required to be available to ensure a seamless transition. The court took into consideration the fact that in his position, he had access to strategic decisions on a micro level and that this information would directly benefit the competitor he was moving to. Both the gardening leave clause and the restraint clause were upheld.

duration and requiring employers to pay employees during the restraint period[142] t produce a more balanced outcome for the employee.

g. Nature of the profession and sector

An employee who is higher up in the organization's hierarchy or performs a core function may have more access to the employer's proprietary information and clients. In *NRG Media Limited v Andrew Kibe Mburu & another; Radio Africa Limited (Proposed Interested Party),* an employer successfully argued that the clause was necessary for some of its employees "due to the commercial competitive nature of radio and entertainment industry".[143] In the BIA cases, restrictive covenants appeared indiscriminately in employment contracts[144] of teachers and other staff. In several cases, BIA was unable to articulate the interests it sought to protect and to substantiate allegations it made against its former employees.[145] It is easy to speculate that the clauses were included to compel employees to continue serving at a pittance. The likelihood of poorly paid employees addressing their grievances through court is low.[146] The adverse effects of these contracts were borne by the public since key factors in delivering quality education such as teacher autonomy and quality teaching and professionalism were compromised. The promise of affordable quality education made to the public was compromised by BIA's strategy of slashing the largest costs (teachers' salaries).[147] Failing to cater for teacher welfare by breaching standards set for employees in a crucial service-oriented sector such as education exposed vulnerable students to abuse.[148]

Kenya intends to create a knowledge-based economy in order to stimulate wealth creation, improve social welfare and enhance global competitiveness.[149] Leveraging Information and Communication Technology (ICT) will help the country to incentivise trade and investment and create employment opportunities.[150] The growth of the knowledge economy is likely to be accompanied by an increase in such clauses in employment contracts as employers

[142] In Germany, the duration is capped at twenty-four months and employers are required to pay employees at least 50% of their last salary during the restriction period (German Commercial Code, s.74 and s.74a); The UK government has made proposals to limit the duration of non-compete agreements to three months and to encourage employers to use paid notice periods to protect their interests. See Department for Business and Trade, UK Government, *Smarter regulation to grow the economy* (10 May 2023). Available: https://www.gov.uk/government/publications/smarter-regulation-to-grow-the-economy/smarter-regulation-to-grow-the-economy#reforming-regulations-to-reduce-burdens.

[143] [2019] eKLR [7].

[144] See *Bridge International Academies v Nelly Atieno Omondi & 5 Others* [2018] eKLR [6].

[145] *Bridge International Academies Ltd v Robert Kimani Kiarie* [2015] eKLR (BIA sought to enforce a non-compete clause but failed to substantiate its allegations); *Bridge International Academy v Kalondi* [2019] eKLR (application to enforce the non-compete failed).

[146] A few former employees filed law suits to address underpayment and other unfair labour practices. See *Moses Ochieng Owiso v Bridge International Academies* [2019] eKLR (claim for underpayment dismissed because of absence of wage regulations in the education sector. His pay was Kshs 7,400 (about 52 USD per month); *Fredrick Obiero v Bridge International Academy Ltd* [2020] eKLR (successful claim for unfair termination); *James Sudhe Philip* v Bridge International Academies [2020] eKLR (successful claim for unlawful termination).

[147] Neha Wadekar and Ryan Grimm, 'Harvard Grads Saw Big Profits in African Education. Children Paid the Price' (The Intercept, 23 March 2023). Available: https://theintercept.com/2023/03/23/bridge-schools-africa-kenya-education/. According to the authors, the curricula were externally prepared and loaded on tablets which teachers were required to "read to the class, word for word."

[148] Education International, 'Exposed: Collusion and Cover-up - A World Bank and Bridge International Academies Scandal' (Education International, 21 March 2024). Available: https://www.ei-ie.org/en/item/28452:exposed-collusion-and-cover-up-a-world-bank-and-bridge-international-academies-scandal. See also Neha Wadekar and Ryan Grimm, 'Harvard Grads Saw Big Profits in African Education. Children Paid the Price' (The Intercept, 23 March 2023). Available: https://theintercept.com/2023/03/23/bridge-schools-africa-kenya-education/.

[149] See Government of Kenya, *Knowledge Management Policy for Kenya* (Draft Policy, 2020) 7. Available: https://www.planning.go.ke/wp-content/uploads/2020/11/Knowledge-Management-Policy-Draft-July-2020.pdf .

[150] BBC, 'Kenya begins construction of 'silicon' city Konza' (BBC, 23 January 2013). Available: https://www.bbc.co.uk/news/world-africa-21158928.

seek to protect their intellectual capital and maintain a competitive edge. In nascent industries like the creative industry and ICT, and in others which rely on a few highly skilled workers, restrictive covenants can stifle growth. They limit worker mobility, suppress wages and slow down human advancement by concentrating specific skills in a few employers in a sector.[151] An examination of specific sectors and their importance to the economy should be considered. The indiscriminate use of restrictive covenants is inimical to competitive labour markets.[152] Although the wage inequality in Kenya can be attributed to several other factors, the potential of restrictive covenants to create inefficient labour markets should be considered.[153]

Although there is a dearth of research on the economic effects of restrictive covenants on the Kenyan economy in general and on specific sectors, it may prove useful for Kenyan courts to reflect on the growing disinclination to support these clauses in other countries.[154] The application of common law rules should be based on an examination of local circumstances and the sectoral needs of the labour market should be taken into consideration.

h. Other considerations

i. Reasons for separation

An employee who is a victim of unfair labour practices such as discrimination and abuse may wish to quit the employer as opposed to the job.[155] Restrictive covenants can have the effect of discouraging them from unshackling themselves from a toxic work environment. In cases of wrongful termination, the employee's obligations under the contract lapse.[156] Termination through redundancy occurs when an employer abolishes the job or office occupied by an employee.[157] Where the employee is declared redundant without meeting the test of procedural and substantive fairness, the clause may be rendered ineffective.[158] Even where the redundancy has complied with the relevant law, a dog in the manger rule that allows an employer to enforce a restrictive covenant by benching them and preventing them from re-entering the workforce is harsh.

---

[151] See Parker CJ in Mitchell v Reynolds (1711) 24 Eng Rep 347 (noting that corporations are always labouring for exclusive advantages in trade and to concentrate it in as few hands as possible).

[152] Promoting Competition in the American Economy (9 July 2021). Available: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

[153] Alexander JS Clvin and Heidi Shierholz, 'Noncompete Agreements" (Economic Policy Institute, 10 December 2019). Available: https://www.epi.org/publication/noncompete-agreements/. The authors also noted that non-compete agreements in the US resulted in "rising inequality and largely stagnant wages among all but the highest-paid workers."

[154] Federal Trade Commission, 'FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition' (5 January 2023). Available: https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

[155] See Mark A Lemley and Orly Lobel, 'Banning Noncompete Agreements to Create Competitive Job Markets' (San Diego Legal Studies Paper No 21-010, 2021). Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3773893.

[156] Contracts in Restraint of Trade Act, Cap 24, Laws of Kenya, s.3 provides that agreements "shall be void in any case where an employer terminates the services of an employee in contravention of the terms of the contract of service." Also see Hugh Beale and Joseph Chitty, *Chitty on Contracts* (31st edn, Sweet & Maxwell, 2012) 1282.

[157] Employment Act, Act No 11 of 2007, Laws of Kenya, s.2.

[158] Contracts in Restraint of Trade Act, Cap 24, Laws of Kenya, s.3.

ii. Freedom to choose who to work for

Contracts are legal bonds formed by the willing. Some employers attempt to use restrictive covenants to punish employees or prevent them from leaving. Employment relationships in which the employee is forced to stay on in a job they would rather quit is akin to slavery or servitude.[159] An employer also cannot prevent an employee from seeking greener pastures,[160] or keep them out of the employment market while the matter is being addressed through court or other dispute resolution mechanisms.[161]

V. ENFORCING A RESTRICTIVE COVENANT

a. Jurisdiction

In *Kenya Kazi Limited v Lucas Ndolo,*[162] the Employment and Labour Relations Court (ELRC) considered whether it had jurisdiction to entertain a claim for breach of a restrictive covenant contained in a settlement agreement concluded by the parties at the end of the employment relationship. The claimant argued that High Court jurisdiction to determine the matter.[163] The court found that it had jurisdiction to hear the matter since the root of the parties' agreement was the employment relationship. The judge observed that the Contracts in Restraint of Trade Act predated the establishment of the ELRC. He opined that the clause was important for understanding how the employment relationship was terminated and that it would not have made a difference if the restrictive covenants contained in the employment contract.

Where the matter arises from a contract of employment in which the employee's gross earnings do not exceed Kshs.80,000 per month (approximately 505 GBP), the matter may be heard by a Magistrate of the rank of Senior Resident Magistrate and above (special magistrates).[164] This however does not deprive the Employment and Labour Relations Court jurisdiction to hear any matter filed before it.[165] Where the contract of employment provides for earnings which exceed Khs.80,000 per month, a suit filed in the Magistrate's court is incompetent and the ELRC has no power to sanitise it by ordering its transfer.[166]

b. Practical challenges

Because the restrictive covenant periods tend to be short, most employers instinctively approach the court for interim relief, usually by way of a request for an injunction. For an injunction to be granted, the applicant must demonstrate that they meet the threshold set out in the *locus classicus* decision of *Giella v Cassman Brown.*[167] The court adopted the following

[159] *Direct Pay Limited v Marion Khasoa Stevens* [2021] eKLR.
[160] *Steel Structures Limited v David Engineering Ltd & Another* [2007] eKLR.
[161] *LG Electronics Africa Logistics FZE v Charles Kimari* [2012] eKLR.
[162] [2018] eKLR.
[163] Contracts in Restraint of Trade Act, Cap 24, Laws of Kenya, s.2.
[164] Gazette Notice No 6024 of 22 June 2018 shared the jurisdiction of the Employment and Labour Relations Court. See *Jiffy Pictures Limited v Ofula* (Civil Appeal E140 of 2021) [2022] KEELRC 4022 (KLR) (29 September 2022) (Judgment).
[165] *Jackline Oichoe v Jilag Limited* [2022] eKLR.
[166] *John Adoyo & 6 Ohers v De La Rue Currency and Security Print Limited* [2022] eKLR.
[167] (1973) EA 358.

principles established in *EA Industries Ltd v Trufoods Ltd*[168] to guide the determination on when to offer interlocutory relief:

1. the application must establish a *prima facie* case with a probability of success;
2. the applicant must demonstrate that they will suffer irreparable loss which cannot be compensated through damages if the application is not granted;
3. if in doubt, the court determines the case on a balance of convenience.

Courts will usually not grant an injunction which has the effect of a decree of specific performance in contracts for personal services.[169] Proving that the employee is working for a competitor is easier than proving that they have been employed to perform a similar role. In many of the cases filed, employers file suit without proof of harm the organization is suffering or is likely to suffer as a result of the employee's actions.[170] One court suggested that a complainant would find it hard to prove the point of competition with the new employer without enjoining it at great cost to the parties.[171] In another case, the court found that the applicant had "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"[172] to its detriment.

Many courts have stated that the weighty interests that have to be balanced when hearing claims based on restrictive covenants do not subject themselves to a process for grant of interim reliefs which can have the effect of determining the dispute between the parties without hearing arguments to allow the court to balance the competing interests.[173] In *HF Fire Africa Ltd v Ghareib,*[174] a one-year restraint period was likely to expire before the case was concluded. The court observed that if it granted interim relief, a judgement in favour of the defendant after the expiry of the period would be useless, while a win for the plaintiff would be unfair. Courts are also reluctant to grant orders which amount to "standing in the way of the Claimant earning a living."[175]

Since restraints are only enforceable if the duration is deemed reasonable by the court, the employer will in many instances not enforce the time limits set because such cases are subject to the court's diary.

c. Whom to sue?

An employer can sue a former employee who is in breach of the restrictive covenant. Some employers have also sued the new employer for inducing breach or otherwise interfering with a contract.[176] In the *Craft Silicon case,* the court stated that in order for it to determine whether

[168] [1972] EA 420 (suit for passing off).
[169] Hugh Beale and Joseph Chitty, Chitty on Contracts (31st edn, Sweet & Maxwell, 2012) 1284.
[170] *Bridge International Academies Limited v Robert Kimani Kiarie* [2015] eKLR (the court stated that the applicant had placed mere allegations before it and had made no effort, even remote, to demonstrate how the former employee had breached any of the noncompete clauses in their contract).
[171] *Craft Silicon Limited v Niladri Sekhar Roy* [2021] eKLR.
[172] Credit Reference Bureau Holdings Ltd v Steven Kunyiha [2017] eKLR.
[173] *NRG Media Limited v Charles Karumi Maina* [2021] eKLR.
[174] [2003] EA 434.
[175] *Craft Silicon Limited v Niladri Sekhar Roy* [2018] eKLR.
[176] *Lumley v Gye* [1853] EWHC QB J73, cited with approval in *Imranali Chandhabai Abdulhussein v Bamburi Portland Cement Ltd* [1994] eKLR. The case concerned the tort of inducing a breach of contract.

the companies were in competition, it would have to understand what both companies did and what the employee was doing for the new employer as compared to their old role.[177] In *Steel Structures Ltd v David Engineering & Another*[178] a firm sought a permanent injunction to restrain a competitor from inducing its employees to breach their employment contracts, and a temporary injunction to compel it to terminate its contract with a former employee. In declining to grant the orders whose effect it described as drastic, the court stated that the new employer was "not privy to the contracts of employment between the Plaintiff and any of its employees"[179] and that no evidence had been adduced to show that it had enticed them to work for it. It concluded that the recruitment had been done on a competitive basis in an "open market favouring employers."[180] In another case, the court made a declaration that the new employer had induced or contributed to the unlawful termination of the employment contracts with the former employer, without making specific orders for relief.[181]

Employers in the media industry in Kenya have made use of restrictive covenants to protect their interests. In one case, an employer wrote to a former employee's lawyer stating that "she should not be allowed to go on air since she posed a threat to her former employer."[182] They went as far as attempting to influence advertisers against her.[183] There are also cases where the former employer contacts the employee's new employer requesting them not to interfere with the contract in place with their former employee. In *NRG Media Limited v Andrew Kibe Mburu & Another; Radio Africa Limited (Proposed Interested Party),* former employees were restrained from breaching a non-compete clause that prevented them from working anywhere in Kenya for three months.[184] The former employer wrote to the new employer regarding the contractual obligations relating to the non-compete clause, prompting it to make an application to be enjoined in the suit. The court noted that there was already an existing contract of employment with the new employer, but nevertheless declined to lift the temporary injunction it had granted to enforce the restrictive covenant.

d. Time

Courts are unlikely to assist an employer who is attempting to bolt a stable with no horse in it. An employer who wishes to enforce such an agreement must seek legal action promptly since courts cannot "[r]estrain that which has already been done."[185] Courts are reluctant to grant orders that have the effect of shutting down competing businesses that are already operating.[186] They also consider the likelihood of the employee securing alternative employment if restrictions are applied after a new job has been secured.[187]

[177] *Craft Silicon v Niladri Sekhar Roy* [2018] eKLR.
[178] [2017] eKLR.
[179] *Ibid*.
[180] *Ibid*.
[181] *Bluebird Aviation Limited v Mathew Njae Kearie & Another* [2018] eKLR.
[182] Mumbi Mutoko, '6 Media Personalities Who Had Bitter Fallouts With Employers' (Kenyans.co.ke, 19 July 2022). Available: https://www.kenyans.co.ke/news/77441-6-media-personalities-who-had-bitter-fallouts-employers.
[183] Mumbi Mutoko, '6 Media Personalities Who Had Bitter Fallouts With Employers' (n 182).
[184] [2019] eKLR.
[185] *Steel Structures Ltd v David Engineering Ltd & Another* [2007] eKLR (the suit was filed three months into the employee's new employment contract).
[186] *Bridge International Academies v Bonface Nyanumba Ombati* [2015] eKLR.
[187] *LG Electronics Africa Logistics FZE v Charles Kimari* [2012] eKLR.

e. Burden of Proof

The burden of proof rests on the employer seeking to enforce the clause.[188] They must demonstrate that it protects a legitimate business interest, is reasonable between them and their former employee, and that it does not harm public interests. In many cases, employers fail to discharge this burden because of failing to demonstrate the harm they are likely to suffer if the restriction is not upheld.

f. Severability

A restrictive covenant which is found to be unreasonable is void. Courts have adopted the blue pencil rule[189] to excise the offending parts of an agreement and enforce the rest,[190] marking the limits of freedom of contract.[191] Kenyan courts have applied the doctrine of severability to excise offending portions of illegal contracts.[192] Courts have stated that the test of severability turns on the terms and conditions of the contract itself.[193] An express severability clause in a contract will be enforced, and if there is none, "reference may be made to extrinsic evidence on the intention of the parties."[194]

VI. CONCLUSION AND RECOMMENDATIONS

Employers have many legitimate interests that can be protected from exiting employees. Restrictive covenants can be used to protect some of these interests. They should however not be designed to place unnecessary restrictions on employees as courts are more likely to enforce agreements which do not fairly burden the employee. Many of the interests that employers identify for protection are already protected under other areas of law or can be addressed using other legal mechanisms. In most of the cases, courts uphold employees' interests by enforcing constitutional rights and public policy concerns.

The most effective solutions for protecting employer interests are found in preventive law practices such as conducting legal audits to identify areas of risk and putting appropriate measures in place to contain it. Recruitment processes, managerial practices and the reward and remuneration systems should be aligned with the law and best practice within a sector to prevent the ventilation of grievances outside the workplace.[195] Lawyers should be slow to encourage clients to include restrictive covenants in employment contracts where these risk assessments have not been done. Employers should be encouraged to assess the level of harm they are likely to suffer if the employee performs actions contained in the restrictions and to specify the cost and consequences of failing to adhere to the agreement. Liquidated damages

[188] *Giella v Cassman Vrown & Co Ltd* [1973] EA 358, 360.
[189] Under the blue pencil rule, courts cancel the unenforceable part of a contract and uphold the rest of the agreement.
[190] *Scorer v Symour-Johns* [1966] 1WLR 1419.
[191] *Trans Mara Sugar Co Ltd & Another v Ben Kangwaya Ayiemba & Another* [2020] eKLR (Mrima J).
[192] *Samwel Sonye Oyaya v South Nyanza Sugar Co Ltd* [2020] eKLR (Mrima J).
[193] *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others* (2017) eKLR cited in *Trans Mara Sugar Co Ltd & Another v Ben Kangwaya Ayiemba & Another* [2020] eKLR (Mrima J).
[194] *Trans Mara Sugar Co Ltd & Another v Ben Kangwaya Ayiemba & Another* [2020] eKLR (Mrima J).
[195] See *e.g. Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd* [1958] 2 WLR 858 [Jenkins LJ].

clauses such as those contained in training bond agreements are usually enforced by courts and can go a long way in assisting parties to weigh their position post-termination. Legislators can also consider enhancing employee protection by introducing duration caps and excluding some employees from the ambit of such clauses.