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Protecting Your Business: Trade Secrets, Non-Compete Clauses and Employee Exits Under Kenyan Law

Introduction

Your best salesperson just resigned. In a few days they are sitting at your competitor's desk with your client list, formula and business strategy.

This catches you off guard as an employer and your business is left exposed. These valuable assets placed your business at a competitive advantage.

The question that an employer in Kenya must grapple with is "what can the law do about it"?

Legal Framework

A trade secret is commercially valuable information that derives its worth precisely because it is not publicly known.

A trade secret is some of the most valuable intellectual property a business owns and yet it never gets registered.

It lives in the minds of employees, in databases, in process manuals and in the accumulated know-how of a team.

A trade secret can last indefinitely, provided it remains confidential. This protection may, however be lost where the trade secret enters the public domain.

Articles 2(5) and 2(6) of the Constitution of Kenya incorporate international law into domestic law.

Kenya is a signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which sets minimum standards for the protection of undisclosed commercial information.

Under TRIPS, information qualifies for protection if three conditions are met: it is not generally known or readily accessible to those who normally deal with it; it holds commercial value because of its secrecy and the person controlling it has taken reasonable steps to keep it confidential.

Additionally, intellectual property developed by an employee during the course of employment belongs to the employer under both the Industrial Property Act 2001 and the Copyright Act 2001, unless a contract provides otherwise.

Strategies for protecting trade secrets

The most effective first line of defence is contractual.

1.Non-Compete Clauses

This is a contractual promise by an employee that, after leaving a job, they will not work for a competitor or start a competing business for a certain period of time and within a certain area.

The purpose of this clause is to hamper an exiting employee from disclosing confidential information, trade secrets or strategic knowledge belonging to the business.

Non-compete clauses are enforceable in Kenya, but only within defined parameters.

For a non-compete clause to hold up in a Kenyan court, it must meet four requirements:

It must be geographically specific; it must be time-limited to a period courts regard as reasonable.

It must be tied to a legitimate and identifiable business interest your actual trade secrets and client relationships, not general competitive advantage.

And it must not be so broad that it prevents the employee from practising their profession altogether.

2.Non-Disclosure Agreements

Every employee with access to sensitive commercial information should be bound by a clearly drafted non-disclosure agreement (NDA).

The NDA should identify the categories of confidential information it covers with enough specificity to be meaningful not a vague clause covering "all information the employee encounters" but a defined list that reflects the actual sensitive material in your business.

It should set out the circumstances in which disclosure is and is not permitted. And it should establish obligations that survive the end of the employment relationship, without a time limit.

3.Non-Solicitation Clauses

Non-solicitation clauses prohibit a departing employee from approaching your clients or recruiting your staff.

4.Identify and Document Your Trade Secrets

A business should conduct a systematic audit of the information it generates and holds. It should identify which categories of that information meet the legal threshold for trade secret protection, commercially valuable, not publicly known and actively kept confidential.

5.Restricting Access to Sensitive Information

This is done by restricting access on a need-to-know basis, using password protection and encryption.

6.Manage the Exit Process systematically

An employee can exit through resignation, termination, redundancy, retirement and mutual agreement.

The exit process itself is a critical risk management moment and it deserves the same structured attention as any other significant business transaction.

It includes revocation of system access and recovery of company property. The employee can also be reminded of their continuing obligations.

Enforcement: IP Remedies When Employees Breach

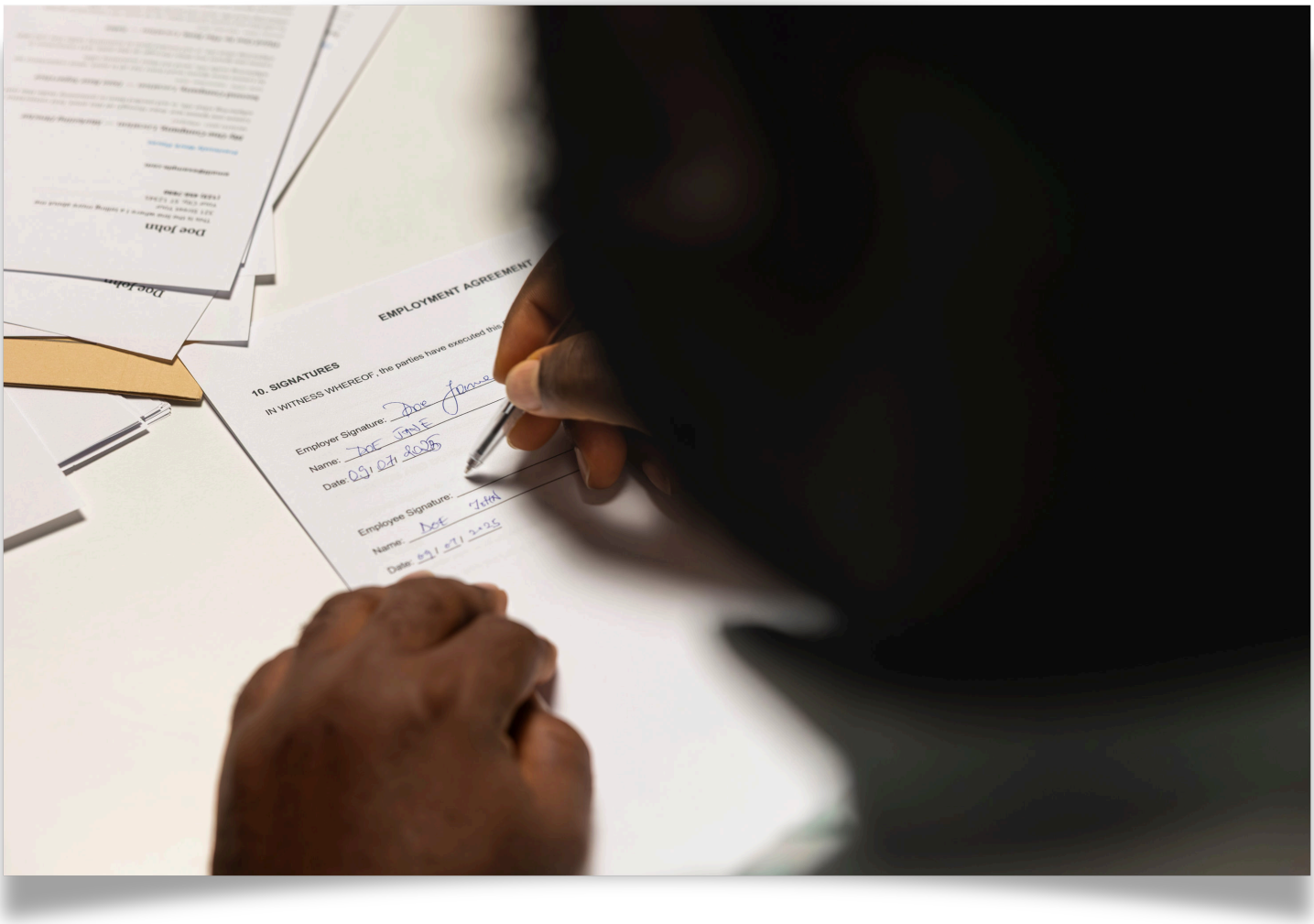
When a former employee misuses an employer's trade secrets or confidential information, the employer has several causes of action under Kenyan law.

Breach of contract under the NDA or the employment agreement is the most straightforward.

The common law action for breach of confidence provides an equitable remedy independent of contract, available even where no NDA exists if the circumstances of disclosure implied an obligation of confidence.

Remedies available include injunctive relief, damages, account of profits and an order for delivery and destruction.

It is worth noting that the strength of any remedy will be directly tied to how well the business protected the information in the first place.



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