REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 467 OF 2015

GOGNI RAJOPE CONSTRUCTION CO. LIMITED.....APPELLANT

-V E R S U S –

PATRICK MUISYA MUSAU .....RESPONDENT

(Being an appeal from the ruling of the Chief Magistrate Court at Nairobi, Milimani Commercial Courts (Hon. L. Arika (Mrs) SPM CMCC 740 of 2011 delivered on 29th September, 2015

JUDGEMENT

1. Patrick Mutisya Musau, the respondent herein, filed an action before the Chief Magistrates, Court Milimani Commercial courts against Gogni Rajope Construction Co. Ltd, the appellant herein vide the plaint dated 29.03.2011 and amended on 29.8.2011. In the original plaint the respondent sought for judgement in the sum of kshs.3,050/= with interest and costs. In the amended plaint he added the prayer of general damages. The respondent averred in the plaint that he was employed by the appellant as a plant operator on contract between 20.3.2009 and 29.9.2009. It is said that on or about 10th July 2009, the plaintiff was severely injured by a fuel drum while in the course of his duty in the Sudan. He accused the appellant for being negligent by failing to provide safe structures and systems of work. The respondent obtained judgement in default of defence vide the request filed on 3rd August 2011. When the appellant learnt of the entry of the default judgment, it sought to have the same set aside vide the motion dated 8th December 2014.

2. The motion was opposed by the respondent. Hon. Arika, Learned Senior Principal magistrate, heard the application and dismissed the same on 29.9.2015. Being dissatisfied with the dismissal order, the appellant preferred this appeal and put forward the following grounds:

1. THAT the honourable learned magistrate erred in law and fact in generally dismissing the appellant's Notice of Motion dated 19th December 2014.

2. THAT the honourable learned magistrate erred in law and fact by ignoring pertinent points of law presented before her by the appellant and instead dwelling on non issues in rendering a decision.

3. THAT the honourable learned magistrate erred in law and fact by failing to note and to find that the cause of action in the suit was an accident that occurred in the republic of South Sudan, outside the jurisdiction of the subordinate court, or any other court in the republic of Kenya acting in its Original jurisdiction and as such, jurisdiction was wanting and therefore rendering an erroneous decision in her ruling.

4. THAT the honourable learned magistrate erred in law and fact when she failed to note and to make a finding that the plaintiff's amended plaint filed on 5th September 2011 which formed the basis of the final judgment of the subordinate court and decree was never served upon the plaintiff and as such, no regular judgement could be made on unserved pleadings, a fact that was glaringly ignored by the learned magistrate.

5. THAT the honourable learned magistrate did not properly direct her mind to the peculiar circumstances of the case and the pertinent matters brought before her and thereby failed to exercise her discretion properly.

6. THAT the honourable learned magistrate misdirected herself when she applied the wrong principles of law in deciding the application before her.

3. When the appeal came up for hearing, learned counsels recorded a consent order to have the same disposed of by written submissions. I have re-evaluated the arguments and the decision of the trial magistrate. I have also considered the rival written submissions. Two main grounds which were also argued before the trial court were also raised and argued on appeal. The first ground is to the effect that the trial magistrate failed to appreciate that there was no service at all of the summons and the plaint and the amended plaint. The appellant pointed out that the judgment is based on an amended plaint which was not served. The affidavit of service merely referred to service of the original plaint dated 29.3.2011 and not the amended plaint dated 5th September 2011. It is also pointed out that the respondent's request for judgment filed on 3rd August 2011 and the submissions filed on 12.8.2013 all refer to the original plaint dated 29.3.2011. This court was beseeched to find that the trial magistrate, erred to rely on an amended plaint which had not been served. The respondent conceded that the amended plaint dated 5.9.2011 was not served upon the appellant. It was his argument that by the time of filing the amended plaint interlocutory judgment had been entered against the appellant thus obviating the necessity of service of further pleadings upon the appellant. There is no dispute that the judgement pronounced against the appellant before the trial court is predicated upon the amended plaint dated 5.9.2011. The learned senior principal magistrate therefore misapprehended the point was she completely ignored this important point of law. For this reason alone the order dismissing the motion dated 8.12.2014 must be set aside.

4. The second ground which was argued before the trial court and on appeal is the question of jurisdiction. It is the submission of the appellant that the cause of action arose in Southern Sudan which is outside the territorial jurisdiction of the trial court. According to the respondent the dispute is based on the contract of employment which was entered in Kenya and breached in Southern Sudan therefore the respondent had a choice under Section 14 of Civil Procedure Act, to either file the action in Kenya or in Sudan. It is also said that the appellant has registered offices in Kenya. The respondent further argued that South Sudan has no competent judicial system to adjudicate over the dispute. I have carefully considered the rival arguments over the question of jurisdiction. There is a terse admission by the parties that the contractual relationship between the appellant and the respondent was entered in Kenya. It is also not in dispute that the appellant had its registered offices in Trisue Towers along Murang'a Road in Nairobi Kenya. There is no dispute that the cause of action arose in Southern Sudan. With respect, I agree with the submissions of the respondent that in the circumstances of this case and pursuant to the provisions of Section 14 of the Civil Procedure Act, the plaintiff (Respondent) had the option to instituting the suit in either Southern Sudan or in Kenya. I therefore find no merit in the appeal on this ground.

5. In the end, the appeal partially succeeds.

For the avoidance of doubt, the appeal is allowed with the consequence that the order dismissing the motion dated 8.12.2014 is set aside and is substituted with an order allowing the motion in terms of prayer 2. I decline to grant prayer 4. A fair order on costs is to direct which I hereby do, for each party to meet its own costs.

Dated, Signed and Delivered in open court this 27th day of January, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent