



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 212 OF 2012

CLEMENT MUTURI KIGANOPLAINTIFF

- V E R S U S -

SHENGLI ENGINEERING CONSTRUCTION GROUP COMPANY

LIMITED..... DEFENDANT

RULING

1. The defendant took out the motion dated 19.5.2016 in which it sought for the plaintiff's suit to be ordered struck out and dismissed with costs. The motion is supported by the affidavit of Elizabeth Mbithe Kimanthi. When served, the plaintiff filed the replying affidavit he swore to oppose the motion.
2. I have considered the grounds stated on the face of the motion and the facts deponed in affidavits in support and against the application. I have further considered the submissions presented before this court. It is the submission of the defendant/applicant that it was awarded a tender for the construction of a section of the Nairobi-Thika Highway between Kenyatta University to Thika town, a stretch measuring 24 kms. The defendant pointed out part of its duties included *inter alia* construction work, making of temporary deviations and closing of some sections of the road but to be supervised by and approved by Government appointed consultants and the approval is only made after all safety and traffic evaluation measures have been thoroughly put in place. The defendant aver that under the contract document and the law, the responsibility for the nature, extent, control and supervision of all traffic and safety measures over the aforesaid road lay with the ministry of Roads and the relevant authorities specified in the Road Act, Cap. 408 Laws of Kenya of 2007.
3. The defendant further stated that these responsibilities were exercised on site by the Roads Engineer, an employee of the Ministry of Roads, to whom the defendant and its staff were required to report to for any approvals concerning the implementation of all such traffic and safety measures. The defendant continued to submit that its contractual obligations were to submit proposals for road safety and traffic control measures to the ministry for approval and to thereafter implement the same in accordance with such approvals and direction under the supervision by the consultant Engineer appointed by the Ministry of Roads or the authority in charge of the relevant section being worked on.
4. The defendant was emphatic that its contractual obligation were to submit proposals for road safety and traffic control measures to the ministry for approval and to thereafter implement the same in accordance with such approvals and direction under the supervision by consultant engineer appointed by Ministry of Roads or the authority in charge of the relevant section being worked on. The defendant argued that its primary responsibility under the contract was to construct the said road and in so doing, it did not assume any legal duty or responsibility to the public for the safety and traffic control aspects of the opening of the road or its use by motor vehicles. It is the defendant's submission therefore that liability for the loss and

damage arising out of negligence as pleaded in the Amended plaint cannot possibly attach to the defendant. It is for this reason that the defendant beseeched this court to dismiss this suit. It is the submission of Mr. Inamdar, learned advocate for the defendant/applicant, that the duty of care owed to the road users is placed on the Kenya National Highways Authority and not by an independent contractor. It is also argued that the general principle is that cases involving operations in Highways will cause danger and public policy demands that the duty holder be held personally liable for a discharge of duty and cannot be avoided. It is said that the Highways Authority can delegate performance of contract but not the duty of care.

5. The plaintiff on the other hand is of the view that the motion was filed after a long time therefore it is meant to delay the fair conclusion of the matter. Mr. Amuga, learned advocate for the plaintiff urged this court to find that the plaint raises triable issues which includes the question as to whether or not the defendant is liable for the accident. It is argued that the question can only be answered by interrogating the agreement. The plaintiff further submitted that a tort committed by an independent contractor cannot be visited upon the employer. The plaintiff was of the view that if the defendant is serious it can as well apply for amendment or in the alternative institute third party, proceedings against the Kenya National Highways Authority. These suggestions were flatly rejected by the plaintiff.

6. After a careful consideration of the material placed before this court plus the rival written and oral submissions, the following issues arose for determination:

7. First, whether the plaintiff's plaint discloses any reasonable cause of action against the defendant. It is the submission of the defendant that the amended plaint does not disclose a reasonable cause of action because it does not owe the road users the duty of care as an independent contractor. The defendant was of the view that Kenya National Highways Authority owed the duty which is non-delegable. The plaintiff is of the contrary view that the question can only be settled via a trial. It is not in dispute that the plaintiff in his amended plaint states that due to the negligent and poor conditions associated with the construction by the defendant, he lost control. The defendant on the other hand does not dispute the assertion that the construction was being undertaken by it, having been contracted by the Government of Kenya to construct, rehabilitate, upgrade, maintain and expand the Nairobi-Thika road. With respect, it cannot be said that the plaint is so hopeless. It raises serious questions of fact and law which can be interrogated via a trial. The question as to who is to blame, is one of the key questions which must be answered at the trial. The principle that the non-joinder or misjoinder of parties to a suit cannot defeat an action is still good law and the same principle applies to this suit.

8. Secondly, whether the contractual relationship between the defendant and the Ministry of Roads absolved the defendant from liability for the tort of negligence? I have already stated the arguments put forward by both sides over this issue. It would appear from the formal agreements between the defendant and the Ministry of Roads that contrary to the assertions made by the defendant that the defendant was mandated to control and routinely maintain traffic during the construction period. The agreement further states that the defendant shall provide a full time traffic safety officer to coordinate aspects of road safety for the whole site. The agreement seem to suggest that the Ministry of Roads and Kenya National Highways Authority delegated some of their functions to the defendant. The question which has to be answered is whether or not the Kenya National Highways Authority can be vicariously liable for the acts or omissions of the defendant.

9. In my view, this question cannot be answered through the current application and more so when the Ministry of Roads and Highways Authority are not parties to this suit. The other issue which was substantively discussed during the arguments is whether or not third party proceedings should have been taken out instead of the defendant seeking to have the suit struck out. I think it is a key debate which can only be settled when such an application is made and argued. From my analysis of the above twin issues, I have come to the conclusion that the suit cannot be dismissed on the basis of the reasons advanced. The suit is neither hopeless nor frivolous. The suit raises serious questions of fact and law which can only be settled through a substantive trial.

10. Consequently the motion is ordered dismissed with costs abiding the outcome of the suit.

Dated, Signed and Delivered in open court this 31st day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant