REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO.105 OF 2013

GIBB AFRICA LIMITED.....APPELLANT

VS

DAVID KIPLAGAT ROTICH.....RESPONDENT

(Being an Appeal from the Judgment of the Principal Magistrate Honourable F. Kyambia

in Eldoret Chief Magistrate's Court Case No. 892 of 2012,

dated 19th July, 2013)

JUDGMENT

1. The appellant had been sued as the respondent's employer and that due to breach of contract of employment, the respondent was exposed to radiation and he lost vision of both eyes. This allegation was denied and they averred that it was Sinohydro Corporation Limited who were the employers on site. Therefore, the appellant filed an application dated 11.3.2013 under Notice of Motion seeking for the following orders:

1) That the plaintiff's/respondent's suit herein be struck out.

2) *That costs of this application and of the suit be borne by the plaintiff.*

2. The application was based on the grounds that:

a) The suit is based on a contract of employment to which the defendant is a stranger as it was not the plaintiff's employer.

b) The plaintiff's suit is time barred by virtue of the provisions of Section 90 of the Employment Act, No. 11 of 2007.

c) The suit is bad in law as it is premised upon an inquiry under sections of the Work Injury Benefits Act which were declared unconstitutional in Nairobi High Court Petition No.185 of 2008.

d) *The suit is an abuse of the court process*.

3. The court heard the said application was dismissed with costs to the respondent on 19.7.2013. The appellant was dissatisfied with the same and appealed against. A memorandum of appeal dated 16.8.2013 and filed on 19.8.2013, the following grounds were raised;

1) The learned magistrate erred in law and in-fact by failing to find that the contract of employment dated 31.10.2008 (employment contract) was between the respondent and Emali-Oloitokitok Road Supervision project, as per the contract between The Government of the Republic of Kenya and Sinohydro Corporation Ltd Dated 5.10.2007 (works contract). The Government of the Republic of Kenya is the owner of the project represented by then Permanent Secretary, Ministry of Roads and Public Works.

2) The learned magistrate erred in law and in fact by failing to find that the respondent was an employee of the Emali -Oloitokitok Road Supervision project, which was under the direct responsibility and supervision of the Chief Engineer (Roads) Ministry of Roads and Public works as provided under clause 1.1 appendix to bid incorporated in the aforesaid works contract agreement.

3) The learned magistrate erred in law and in fact by failing to find that the respondent was employed under the provisions of clause 1237.1 of the special specification incorporated in the aforementioned works contract and that the respondent was paid under the

said provision by the contractor who in turn was reimbursed by the Government of the Republic of Kenya.

4) The learned magistrate erred in law and in fact by failing to find that the employment contract specifically states in clause 15.1 that the appellant is not liable for the remuneration of the respondent and could therefore not be a proper party to be sued.

5) The learned magistrate erred in law and in fact by failing to find that the appellant was not a contracting party in either the employment contract or works contract in the said project that the plaintiff was engaged in during which the cause of action is alleged to have risen and the appellant could not therefore owe the respondent any/ or statutory, contractual duty of care as alleged. Under clause 117 of the Standard Specifications for Road and Bridge Construction incorporated in the works contract, the obligation to provide safe working environment on the project lies with the contractor. That the respondent has sued the wrong party.

6) The learned magistrate erred in law and in fact by failing to find that the suit was time barred by virtue of the provisions of Sections 90 of the Employment Act. No.11 of 2007.

7) The learned magistrate erred in law and in fact by dismissing the appellant's application for striking out dated 11.3.2013, which was against the weight and propriety of the affidavit evidence placed before him.

8) The learned magistrate erred in law and fact by failing to find that the suit was bad in law as the same was premised on an inquiry under the provisions of Sections 4 and 23 of the Work Injury Benefits Act which by then had been declared unconstitutional in Nairobi High Court Petition No. 185 of 2008.

Submissions

Parties agreed to canvass the appeal by way of written submissions.

Appellant's submission

4. They argued ground 1, 2, 3, 4 and 5 as one ground. They averred that the Government of the Republic of Kenya represented by the Permanent Ministry of Roads to supervise the Emali-Oloitoktok Road Project on behalf of the Chief Roads Engineer, Ministry of Roads as the Engineers' Representative. The actual employer for the respondent was SinoHydro Corporation Ltd. There was a contract between the Government and the contractor. The contractor Sinohydro was to make all payments. Further the laboratory Technician and the Assistant Laboratory Technician was to be employed by the Engineer but to be paid by the Contractor. The court could therefore not assume that all works done by the appellant on the contractual site were being done for and on behalf of the principal.

5. The trial court erred in interpreting the doctrine of privity of contract whereby a contract cannot confer rights or impose obligations on any person other than the parties to the contract. A contract could not be enforced either by or against a third party, in ***Dunlop Pneumatic Tyre Co. Ltd v. Selfridge & Co. Ltd [1915] AC 847*****,** Lord Haldane, LC stated that, ***"my lords, in law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it."***

6. In addition, the suit filed by the respondent was time barred by virtue of *Section 90* of the *Employment Act, No. 11 of 2007*. The respondent was to commence proceedings within three years after the act or omission or in the case of continuing injury or damage within twelve months next after the cessation thereof. See ***The A.G & Anor v. Andrew Maina Githinji & Anor (1996) eKLR.*** Also *Section 4(2)* of the *Limitation of Actions Act* provides that an action founded on tort is to be filed within 3 years, the respondent was an assistant laboratory technician between June 2008 and October 2008, he brought the claim in October 2011, thus he was statutorily barred and he never sought leave of the court to institute the legal proceedings. See also ***Nicodemus Marani v. Timsales Ltd [2014] eKLR.***

7. In addition to the above, the suit being time barred, the lower court did not have jurisdiction to entertain the same. The court was referred to ***Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989] KLR 1, Re The Matter of the Interim Independent Electoral Commission S.C, Constitutional Application No.2 of 2011 [2011] eKLR and in Samuel Kamau Macharia & Anor v. K.C.B Ltd & 2 Ors S.C Application No. 2 of 2012 [2012] eKLR.***

8. The appellant filed supplementary submissions and urged that there was no employer-employee relationship between the two. There was a contract between the Ministry of Roads and Public Works and Sinohydro Corporation Ltd at clause 137.1 of the Special Specifications to the Contract, the Chief Engineer (Roads) would employ some employees for attendance of the Resident Engineer (the appellant), but payment would be paid by the contractor. The appellant was only to supervise the workers.

9. Finally, the court was urged to vacate the orders made by the lower court on the application dated 11.3.2013, the suit be struck out against them and they be awarded costs for the appeal and in the lower court.

Respondent's Submission

10. It was denied that the respondent was employed by Sinohydro Corporation as alleged by the appellant since payment was being done by them. The appellant had referred the respondent to *Dr. Kahenya* for assessment for purposes of compensation under the *Occupational Health* and *Safety Act, No. 15 of 2007* and the *Work Injury* and *Benefits Act, No. 13 of 2007*. The appellant had paid the respondent Ksh 45,480/= as terminal dues through a letter dated 17.6.2009. It is the appellant who forwarded a dully filled DOSHI Form and medical report to the Occupational Health and Safety Officer, Ministry of Labour and Human Resource Development vide a letter dated 30.11.2009. The appellant changed mind when they received a letter from the Provincial Occupational Health Services indicating that the respondent was to get Ksh 1,407,600/= as compensation. The appellant wrote a recommendation letter indicating that the respondent was their employee from the 24th

April 2008 to 25th May 2009.

11. The court can only strike out pleadings if the said pleadings do not raise triable issues, striking out pleadings has to be sparingly and in clear and obvious cases, in ***Nicholas Kiptoo Arap Korir Salat v. I.E.B.C & 6 Ors [2013] eKLR, W.Ouko,*** JA held that, "***the power to strike out pleadings which may deprive a party of the opportunity to present his case has to be a last resort and in the clearest cases ever."*** See also ***DT Dobie Company Ltd v. Joseph Mbaria Muchina & Anor (1982) eKLR and Humphrey Mbaka Nandi t/a Nyati Distillers Ltd v. Equity Bank(K) Ltd & 2 Ors [2018] eKLR.*** Further under *Article 159 (2) d* of the C*onstitution* it is provided that justice shall be administered without undue regard to technicalities.

12. On whether the suit was based on a contract of employment and if there existed an employment relationship between the appellant and respondent, it was urged that, the suit was on contract of employment and on tort. The respondent had pleaded particulars of negligence. The claim was not a contractual or employment dispute and thus *Section 90* of the *Employment Act* did not apply. In ***Kiamokama Tea Factory Company Ltd v. Joshua Nyakoni, Civil Appeal No.169 of 2009*** the court held that it is the substance of the claim that must be examined. Whereas in ***Eldoret Steel Mills Ltd v. Evans Makori Michael, Eld H.C .C.A No. 104/2012*** the court held that the omission by the employer remains the omission of a statutory duty which is a tort.

13. The respondent's claim was tenable unlike the appellant's contention that the suit was time barred. The appellant was diagnosed with progressive loss of vision in both eyes due to exposure to harmful chemicals at the work place. The medical reports were prepared on 2.12.2009 and 25.11.2009 by Dr. Nyongesa and Dr. Kahenya while the Doshi forms were filled on 11.11.2009, the progressive loss of vision was due to continuous exposure to radiation at the workplace. *Section 42* of the *Work Injury Benefits Act*, ***"for purposes of this Act, the commencement of an occupational disease is deemed to be the date on which a medical practitioner diagnosed the disease for the first time or such earlier date as the medical practitioner may determine if it is more favorable to the employee."***

14. The respondent's claim is for damages under common law and breach of statutory duty and not an employment issue *perse*, hence *Section 90* of the *Employment Act* are not applicable but *Section 4(1)* of the *Limitation of Actions Act* is. See ***Eldoret Steel Mills Ltd v. Evans Makori*** (supra***).***

15. In addition, the assessment of the respondent's claim was done on 3.12.2009 under the Work Injury Benefits Act thus the respondent's suit was filed within time, therefore the appellants claim that the suit be struck out was misconceived. Finally, the court was urged to dismiss the appeal with costs.

Analysis and determination

16. The issues that arise for determination are:

i. Whether the respondent was the appellant's employee

ii. Whether the suit against the appellant was time barred

iii. Does the appeal have merit?

iv. Who shall bear costs?

17. The appellant had been sued in the lower court as a Limited Liability Company who were carrying on business as consulting engineers. At paragraph 3 of the plaint the respondent averred that he was employed by the appellant as an Assistant Laboratory Technician at their Emali-Oloitoktok Road Project. The respondent had suffered progressive loss of vision in both eyes due to radiation. He had been exposed to radiation between the months of June 2008 to October 2008. This was denied by the appellant. The court has a duty to determine whether the respondent was employed by the appellant or not.

18. In their submissions the appellant strongly denied ever employing the respondent, and averred that it was Sinohydro Corporation, since payment was made by them. The letter dated 31.10.2008 addressed to the respondent has the appellants letter head. The same is addressed as follows:

> ***"We attach herewith the Employment Contract formalizing your deployment on this contract. If the terms and conditions are acceptable to you, sign at the designated space and return."*** The letter had an employment contract attached to it. The appellant relied on the clause 137.1 whereby it gave some list of staff employed by Engineer but paid by the contractor which included the respondent.

19. In ***Krystalline Salt Ltd v. Kwekwe Mwakele & 67 Ors [2017] eKLR*** the court held as, ***"secondly, employment 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 and other related statutes. In that sense employment is seen as an individual relationship negotiated between the employee and the employer according to their needs."*** The letter had been drafted by the appellant asking him to sign the contract.

20. The issue raised by the appellant that the respondent was employed by the Sinohydro contractors is neither here nor there. The respondent was not aware of any private agreement between the appellant and a third party. It is the respondent who had been asked by the appellant to sign a contract. As held in ***Dunlop Pneumonic Tyre v. Selfridge & Co. Ltd [1915] AC 847,*** where a third party is mentioned in a contract, he cannot enforce any of its terms nor have any burdens from that contract enforced against him.

21. The respondent raised another issue on filing suit after the stipulated period of three years. The respondent had alleged that he was

injured out of a prolonged exposure to radiation, between June 2008 to October 2008. The Limitation of Actions Act provides as follows:

"4. Actions of contract and tort and certain other actions

> ***(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—***
>
> > ***(a) actions founded on contract;***
> >
> > ***(b) actions to enforce a recognizance;***
> >
> > ***(c) actions to enforce an award;***
> >
> > ***(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;***
> >
> > ***(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.***
>
> ***(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:***

The plaint is dated 29th October 2012, the respondent's claim was both on contract of employment and breach of statutory duty. The appellant urged that *Section 90* of the *Employment Act* automatically disqualifies the respondent's suit against them, however from the respondent's pleadings the claim is based on negligence. *Section 90* of the *Employment* Act provides as follows:

> ***"Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act (Cap 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof."***

This Section does not therefore apply in this particular case, and the case is not therefore time barred.

The appeal therefore lacks merit and is dismissed with costs to the respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 17th day of October, 2019

In the presence of:

Mr. Muriithi for the appellant

Mr. Yego for the respondent

Ms Abigael – Court assistant