REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

CIVIL APPEAL NO. 1 OF 2018

(Formerly Nyeri ELRC APPEAL 2 of 2018)

BLOOMINGDALE ROSES (K) LTD……..……....APPELLANT

VERSUS

GLADYS KATHURE NTEERE…….....…RESPONDENT

JUDGMENT

1. The Appeal herein is from the decision of the learned Chief Magistrate Hon. H.N. Ndungu in Meru Chief Magistrate's Civil Case No. 239 of 2016 between Gladys Kathure Nteere *v* Bloomingdale Rose Kenya Limited on the judgment delivered on 22nd February 2018. The grounds of appeal are as follows:-

> 1. The Chief Magistrate erred in law and facts by hearing and determining a matter that is statutorily barred by Section 90 of the Employment Act 2007.
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> 2. The Chief Magistrate erred in law and facts by hearing and determining a work injury claim contrary which she lacked the jurisdiction to entertain.
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> 3. The Chief Magistrate misdirected herself by hearing and determining a work injury claim contrary to the
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> provisions of the Work Injury Benefits Act 2007.
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> 4. The Chief Magistrate erred in law and facts by hearing and determining a work injury claim filed contrary to the procedure set out under the Work Injury Benefits Act 2007.
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> 5. The Chief Magistrate misdirected herself by finding the Appellant liable and entering judgment against the Appellant on liability contrary to the provisions of the
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> Work Injury Benefits Act 2007.
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> 6. The Chief Magistrate misdirected herself by awarding special damages contrary to the Work Injury Benefits Act 2007.
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> 7. The Chief Magistrate misdirected herself by hearing a matter in which the Respondent deliberately failed to comply with the procedure for lodging claims for compensation under the Work Injury Benefits Act 2007 and in the circumstances allowing the Court's process to be abused.

2. The Appellant thus sought the appeal to be allowed with costs for defending the case in the lower court and the decision of the Hon. Chief Magistrate be set aside in its entirety and the same be substituted with an order dismissing the Respondent's suit against the Appellant. To the appeal were attached the pleadings, documentary evidence adduced as well as the judgment of the learned Chief Magistrate alongside the final order and decree of the court.

3. The Respondent was opposed and filed grounds opposing the appeal. The Respondent asserts that the appeal was filed by an advocate who was not representing the Appellant in the court below without leave of the court as required under Order 9 Rule 7 and 9 of the Civil

Procedure Rules 2010 and in the absence of such leave the appeal was incompetent. It was the position of the Respondent that the issues of jurisdiction were not raised in the first instance before the trial court. The Respondent submitted that on limitation, the primary suit was filed within a year of the cause of action accruing and therefore the provision of Section 90 of the Employment Act which came into force on 2nd June 2008 was not abridged. The Respondent was of the view that the Magistrates Court Act No. 26 of 2015 which came into force on 2nd January 2016 gave the Magistrates Court jurisdiction in terms of Section 90(b) thereof. She asserts that contrary to the requirements of the Work Injury Benefit Act 2007, the Appellant failed to co-operate and did not report the injury as required by law prompting the filing of the primary suit. The Respondent assets that there are no grounds to reverse the decision of the learned Chief Magistrate in the appeal before the court.

4. Directions on the request for filing of written submissions in opposition and support of the appeal were granted by this court and the parties duly filed their submissions in order for the court render its judgment on the appeal. The Appellant filed its submissions on 26th October 2018 and submitted that in line with the decision in Kenya Airports Authority *v* Shadrack Abraham Kisongochi [2016] eKLR (Maraga, Musinga, Gatembu JJA) jurisdiction flows from either the Constitution, legislation or both and thus a court of law can only exercise jurisdiction conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred by law. The Appellant submitted that the Respondent ought to have filed her claim on or before the 5th August 2016 and that failure to do so caused her claim to be time barred and the court therefore lacked jurisdiction to entertain it. The Appellant submitted that under the Work Injury Benefits Act 2007, the Respondent was required to make a written or verbal report to the employer within 24 hours of the injury occurring. This would prompt the filing of the claim with the Director of Occupational Safety and Health and the insurer of the employer.

5. The employer was required by law to lodge the claim with the Director of Occupational Safety and Health as well as report to the insurer upon the receipt of the report from the employee. Penalties are provided to the employer who fails to make the report and the insurer who fails to satisfy a claim properly lodged in terms of the Act. Reliance was placed on the authority of Hon. Attorney General *v* Law Society of Kenya & Another [2017] eKLR (Waki, Makhandia, Ouko JJA) in the appeal against the decision of Ojwang J. (as he then was) where the learned superior court judge held various sections of the Work Injury Benefits Act inconsistent with the former Constitution. The Court of Appeal reversed the learned Judge and held that there was nothing offensive or discriminatory in the provisions of the Work Injury Benefits Act 2007. It was the Appellant's contention that in reversing the decision of the High Court, the Court of Appeal upheld the process where the Director of Occupational Safety and Health has exclusive power to determine the compensation due to an employee injured at work and the recourse of a dissatisfied employee is to appeal the decision of the Director in writing to the said Director of Occupational Safety and Health and if dissatisfied with the outcome of the appeal prefer the second appeal to the Employment And Labour Relations Court. The Appellant submitted that the Respondent did not therefore have any recourse to the court below and the decision of the learned Chief Magistrate was therefore a nullity and invalid *ab initio*.

6. The Respondent on her part submitted that the issues for determination in this appeal were whether the primary suit was filed on time and whether the learned Chief Magistrate had jurisdiction to hear the suit. On jurisdiction, the Respondent submitted that the portion of Section 90 of the Employment Act that the Appellant based its arguments on related to a continuing injury or damage. The Respondent asserted that the period between the delivery of the decision of Ojwang J. (as he then was) till the Court of Appeal delivered the decision on 17th November 2017, the sections of the Work Injury Benefits Act had been declared unconstitutional. The Respondent relied on Section 16 of the Civil Procedure Act which makes provision that no objection as to the place of suing shall be allowed on appeal unless such objections were taken in the court on first instance and there has been a consequent failure of justice.

7. The appeal raises various novel points and is also challenged on novel points. The Appellant's counsel now on record was not the counsel on record for the Appellant in the court below. On the other hand, the legislation in force is challenged on the basis of a decision made by the High Court and reversed by the Court of Appeal. This being a first appeal, my mandate as the first appellate court is, as was restated by the Court of Appeal in PIL Kenya Ltd *v* Oppong [2009] KLR 442. The learned Judges of Appeal held as follows.

> *"It is the duty of the Court of Appeal, as a first appellate court, to analyse and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that."*

8. The file from the Chief Magistrate was not availed at the time the appeal was filed and was only availed on request by this court. The Appellant in the suit before the Magistrate was the defendant and in its defence admitted that the Court had jurisdiction. That explains why no challenge was made at that point on the issue of the jurisdiction she exercised in the matter. In addition, some of the provisions of the Work Injury Benefits Act 2007 had been challenged in court by the Law Society of Kenya. Ojwang J. (as he then was) in Law Society of Kenya *v* The Attorney General & Another [2009] eKLR stated as follows:-

> *After hearing counsel for the Applicant/Petitioner, for the Respondent, and for the Interested Party, I made a ruling which will still prove relevant, as the main cause is determined. That ruling reads, in part, as follows:*
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> *"It is not contested that there are many workmen's compensation cases pending before Magistrates' Courts throughout the country. Such cases had been brought on the basis of either the now-repealed Workmen's Compensation Act(Cap. 236, Laws of Kenya), or the common law, or both. The suitors in such cases would have been exercising their rights sounding in fundamental rights, as secured under Chapter V of the Constitution of Kenya, and so they had legitimate expectations that the judicial process would handle and conclude their cases. The enactment of the Work*
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> *Injury Benefits Act, 2007, so far as it goes, would be a normal exercise of the legislative power of the Kenyan Parliament, in accordance with the terms of s. 30 of the Constitution of Kenya. There is, however, room for conflict between the Constitution's empowerment to Parliament, on the one hand, and the Constitution's safeguards for the citizen's rights, on the other: and whenever such a conflict occurs, then ordinarily, it is the High Court's mandate to make a sensible interpretation, and to declare the correct understanding of the Constitution. The relevant questions on this point turn on the content of the Work Injury Benefits Act, 2007, and the manner in which it touches on on-going proceedings before the Courts of law. These are substantive questions to be*

resolved during the hearing of the petition itself. But at this stage, a prima facie position is to be taken that those fundamental rights of the citizen which are safeguarded by the Constitution, and which are already the subject of litigation in [the] Courts, must have an opportunity for resolution in the normal manner."

The foregoing reasoning led to certain orders, which were made in the ruling on 22nd May, 2008; and the relevant paragraph thus reads: "On the foregoing grounds, I will order that, pending the hearing and determination of the main cause, all pending litigation which had been commenced on the basis of either the Workmen's Compensation Act …. or of the common law, or of a combination of both regimes of law, shall continue to be prosecuted and, in a proper case, finalized on the basis of the operative law prior to the entry into force of the Work Injury Benefits Act, 2007.

The position above is what was operational when the suit before the Chief Magistrate's Court was filed by the Respondent.

9. In a paper presented at the Annual Judges Colloquium held at Mombasa, Kenya between 20th August and 25th August 2018 titled the *Effective Date of Declaration of Unconstitutionality of Statute, Doctrine of Eclipse, Spoil System And Acquiring Rights From An Unconstitutional Provision* Hon. Justice (Prof.) Otieno-Odek, Judge of Appeal, the then Director of the Judiciary Training Institute (JTI), had this to say on the question of the effective date of declaration of unconstitutionality of a statute:-

The legal and jurisprudential question the subject of this inquiry is the effective date of the declaration of unconstitutionality. From which date is the Act or provision unconstitutional? A judgment is effective from the date of its pronouncement. Is the pronouncement date the effective date of unconstitutionality of an Act or statutory provision declared to be unconstitutional? What is the legal effect on the parties and third parties of the declaration of an Act or provision to be unconstitutional?

There are various possible effective dates and scenarios. These are:

(i) The date of pronouncement of the judgment.

(ii) The date when the Act or impugned statutory provision was gazetted or came into force. In this context, the declaration of unconstitutionality is retroactive.

(iii) A date in future and temporary suspension of declaration of invalidity by the Court.

(iv) A date in future when Parliament decides to repeal the law. In this context, the law remains in the law books but it is a dead letter law until the legislature repeals or abrogates the impugned law.

Other pertinent questions include: is the law declared unconstitutional enforceable? What if other courts or tribunals are not aware of the decision declaring an Act or provision to be unconstitutional? What about pre-2010 laws inconsistent with the 2010 Constitution, are they invalid? Case law abound that support any of the above scenarios.

10. The learned Judge of Appeal went on to cite a series of determinations of various courts ranging from the Supreme Court to the Court of Appeal and the High Court. In the end, it was clear that the best approach in determining the question is the following. Was the law applicable at the time one that permitted the filing of the claim at the Chief Magistrates Court at Meru? The answer is that at that period in time, the issue of jurisdiction had been settled by the Ruling of Ojwang J. (as he then was) and subsequently the Judgment of the learned Judge delivered in 2009. Upon reversal by the Court of Appeal on 17th November 2017, the position is that the decision of the High Court was erroneous to a large extent and therefore, any suit now filed and pending before the courts seeking compensation has stalled. In that regard, the suits that had been concluded cannot in my considered view, be said to have been determined *per incuriam* or in error as the decisions predating the finding by the Court of Appeal are unaffected by the determination as to hold otherwise would mean every party that participated in a Work Injury Benefits Act case can resile from the decisions made after the coming into force of the legislation based on this decision. In this case, the determination of the Court of Appeal in Civil Appeal 133 of 2011 reported as Hon. Attorney General *v* Law Society of Kenya & Another [2017] eKLR is not retroactive in application. A pragmatic approach clearly reveals the decision is prospective as it cannot apply to cases that were concluded and judgments given prior to its pronouncement.

11. In my view therefore, the Appellant misapprehended the law pronounced by the learned Judges of the Court of Appeal in this elaborate judgment. Having said that, the case before the learned Chief Magistrate was determined on 22nd February 2018 *per incuriam* as the Court of Appeal had already made a pronouncement. It was erroneous to that extent. In the final result I will dismiss the suit before the Chief Magistrates Court and make no order as to costs.

The Claimant's injury claim is to be referred to the Director Occupational Safety and Health as required by law. There will be no order as to costs on this appeal as the advocate who filed the appeal was not on record in the primary suit and took over conduct of the matter without seeking and obtaining leave of the court before coming on record. For that reason there will be no order on costs.

It is so ordered.

Dated and delivered at Meru this 8th day of November 2018

Nzioki wa Makau

JUDGE