Otaba v Kenya Forest Service (Civil Suit 42 of 2018)
[2022] KEHC 12155 (KLR) (22 June 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL SUIT 42 OF 2018

OA SEWE, J

JUNE 22, 2022

FORMERLY ELDORET ELRC NO. 193 OF 2018

BETWEEN

LAWRENCE M. OTABA ..... CLAIMANT

AND

KENYA FOREST SERVICE ..... RESPONDENT

JUDGMENT

[1] The claimant herein, Lawrence Otaba, filed a claim before the then Industrial Court of Kenya at Kisumu on July 11, 2013 against the respondent, Kenya Forest Service, claiming Kshs. 22,332,600/= together with interest thereon and costs of the suit. His cause of action was that he supplied and/or delivered various tree seedlings/seeds to the respondent at its own behest amounting to Kshs. 22,332,600/= which the respondent has failed or neglected to pay for. He further pleaded that he invoiced the respondent and followed up the matter with the respondent as well as the relevant line ministries with no tangible results; hence this suit.

[2] In response, the respondent filed a Memorandum of Reply dated September 16, 2013. It averred that the claimant was employed by the by Lake Victoria Environment Management Project (LVEMP) Catchment Afforestation as general labourer; and that the project fell under the Ministry of Environment and Natural Resources. It therefore averred that it is a stranger to the payments set out in the claimant's document marked Appendix 4 amounting to Kshs. 27,000/= for the supply of seedlings. The respondent further denied having received seedlings worth Kshs. 22,332,600/= from the claimant and stated that the alleged requisition attached to the Memorandum of Claim seem to have emanated from the Ministry of Environment and Natural Resources. The respondent further pointed out in its Memorandum of Reply that the documents aforementioned, though not signed, were purportedly stamped by Lake Victoria Environment Project (LVEMP). Thus it was the contention of

the respondent that it is a stranger to all the Local Service Orders attached to the Claim and the invoices exhibited by the respondent in support thereof.

[3] At paragraphs 25 and 26 of the Memorandum of Reply, the respondent raised the issue of jurisdiction and asserted that:

(a) The Industrial Court had no jurisdiction to determine the claim; and that in any event, the respondent was not a party to the subject contract for the supply of seedlings;

(b) The Claim was improperly before the Court and therefore ought to be struck out for want of jurisdiction.

[4] The suit was taken over from the Industrial Court by the Employment and Labour Relations Court pursuant to its mandate under Article 162(2)(a) of the *Constitution*. Thereafter, the respondent filed a Preliminary Objection on the 9th March 2017 contesting the jurisdiction of the Employment and Labour Relations Court (hereinafter, the ELRC) on the following grounds:

[a] That the claimant's contractual claim of Kshs. 22,332,600/= for alleged supply of tree seedlings/seeds to the respondent or the defunct Ministry of Environment & Natural Resources or the Lake Victoria Environmental Programme falls outside the jurisdiction of the ELRC.

[b] That the ELRC was established for the sole purpose of handling employment and labour related matters and is therefore not an ordinary civil court;

[c] That the jurisdiction of the ELRC is clearly circumscribed and stated in Section 12(1) of the *Industrial Court Act* of 2011;

[d] That where an employee is a public officer such as the claimant who alleges that he was an employee of the Ministry of Environment & Natural Resources and the Kenya Forest Service, he was prohibited from trading with or having contractual relations with or being awarded any tender or contract by the organization he was working with.

[5] Accordingly, the respondent prayed that the claimant's contractual claim of Kshs. 22,332,600/= be struck out with costs; and that an order be issued referring the issue of the said contract to the Public Service Commission for investigation and disciplinary action as provided for in Part V of the *Public Officer Ethics Act*, No. 4 of 2003.

[6] The Preliminary Objection was upheld by the ELRC (Hon. Onyango, J.) and orders made as hereunder in a ruling delivered on 8th February 2018:

> " 1) That this claim relates to a contract of supply of seeds and seedlings by the claimant to the respondent and this court therefore has no jurisdiction to hear and determine the claim by virtue of Article 162(2)(a) of the *Constitution* of Kenya, 2010 and Section 12(1) of the *Employment and Labour Relations Court Act*.
>
> 2) That the case is transferred to the High Court, Eldoret under whose jurisdiction the contract was entered into, for hearing and determination."

[7] The matter was accordingly transferred to the High Court, Eldoret and was thereafter fixed for hearing on April 20, 2021 when the claimant testified as PW1. His evidence was that he was employed by the respondent in 2003 as a casual labourer in Eldoret, earning wages of Kshs. 150 per day; and added that the Forest Department was then under the Ministry of Environment and Natural Resources.

He further stated that on November 15, 2004 he was transferred to the office of Lake Victoria Environmental Management Programme (LVEMP) where he was being paid Kshs. 175/= per day as a casual employee; and that in the course of time, he was given a contract to supply tree seedlings while working as a casual labourer. Thus he stated that he supplied tree seedlings to the respondent from the year 2005 to 2009 for which he was not fully paid. He broke down his claim for the unpaid supplies amounting to Kshs. 22,332,600/= as follows:

[a] For 2005 – Kshs. 4,251,000/=.

[b] For 2006 - Kshs. 3, 404, 500/=

[c] For 2007 - Kshs. 5, 323, 500/=

[d] For 2008 - Kshs. 3, 849, 200/=

[e] For 2009 - Kshs. 5,504,400/=

[8] The claimant further stated that his services were terminated in 2009 on the ground that the respondent had no money to hire casuals; and that when he claimed the outstanding sums due for the supplies made, the respondent's officers became evasive and rude to him. He consequently filed this suit before the Industrial Court and thereafter engaged a lawyer to follow up the matter on his behalf. He explained, in the course of time, that his advocate abandoned the suit because he was unable to pay his fees. He produced the original documents comprising the Bundle of Documents annexed to the Statement of Claim and they were marked collectively as the Plaintiff's Exhibit 1.

[9] On behalf of the respondent, Beatrice Ndunge Mbula (DW1), an Assistant Director of Forestry, Kenya Forest Services, gave evidence on June 29, 2021. She adopted her witness statement dated November 26, 2013, wherein she stated that she was a stranger to the alleged letters of appointment annexed to the claimant's Memorandum of Claim, and purported to have been signed by her on behalf of the respondent. She pointed out that the letter marked as Appendix II is dated July 15, 2008, yet it was alleged that the claimant was engaged from January 2006 to December 2006; a period of over three months. She made reference to Government policy which states that casuals cannot be engaged for a period of more than three consecutive months. She further stated that the North Rift Conservancy office which the claimant alleges he was posted to did not exist before September 2008 when she was deployed to serve in that station in an acting capacity.

[10] According to DW1, the claimant's allegation that he supplied seedlings worth Kenya Shillings 22 Million was outrageous as her office did not directly implement any tree planting programme. She also pointed out that the Local Service Orders exhibited by the claimant purport to have been issued by different bodies and yet bear the rubber stamp of different institutions; which scenario is not practicable. She therefore posited that the claimant's documents are forgeries, purposefully made up to support this fraudulent claim. For instance, DW1 pointed out that the Local Service Orders dated July 6, 2005, January 5, 2006, February 3, 2006, January 2, 2007, February 2, 2007 and May 15, 2007 must have been forged because the respondent had no capacity to spend Kenya Shillings 22 Million; granted that its total budget was below that said amount.

[11] In her oral testimony before the Court, DW1 conceded that she knows the claimant and that the was working for LVEMP as a casual labourer/watchman at a time when she was deployed to the project as Community & Micro Project Officer. She stated, in cross-examination that between 2005 and 2008, LVEMP was in a bridging period; and therefore no funds were coming to it.

[12] DW2 was Fred Ogombe Okumu, who gave evidence on June 29, 2021. He conceded that the claimant is well-known to him; and that he got to know him in 2009 when he was deployed to the North Rift

Office; and that the claimant would be engaged to work as a casual watchman from time to time, whenever there was shortage of staff. DW2 denied that there were any arrears of salary owing to any of the casual labourers. He explained that whenever they ran out of funds, they would lay off the casual labourers. He adopted his witness statement, which does not appear to be on the file.

[13] At the close of the defence case, directions were made for the filing of written closing submissions by counsel. In his submissions dated July 12, 2021, Mr. Lawrence Otaba, the claimant herein, proposed three issues for determination, namely:

[a] whether he was employed by the respondent;

[b] whether he was paid his dues and

[c] whether he supplied seedlings to the respondent.

[14] On whether the claimant was employed by the respondent, the claimant made reference to the various letters of appointment marked Appendix 1 to 3 to prove that he was duly employed by the respondent; and that all the letters emanate from the respondent and show he was deployed to work in various forest stations. He also pointed out that the respondent has acknowledged that indeed he was its employee.

[15] On whether he was paid his dues, the claimant relied on the letter marked Appendix 3(a) in proof of his assertion that he was employed from 3rd January, 2006 to 29th December, 2006 at the rate of Kshs. 250/= per day. He submitted that during this period he did not receive any wages; and therefore that he is owed Kshs. 63,000/= by the respondent. He further made reference to Appendix 8(b) to demonstrate that he forwarded his complaint to the respondent and is yet to be paid.

[16] With regard to the supply of seedlings to the respondent, the claimant endeavoured to convince the Court that he did supply seedlings and that the supplies were done when he was working for Lake Victoria Management Project, which the respondent was in charge of, in so far as afforestation and conservation of the environment were concerned. He drew the Court's attention to the Local Service Orders produced by him and marked Appendix 6(a)-6(l) to support his assertion. He added that the Local Service Orders were signed by the requisitioning officer and verified by the task coordinator; and were accompanied by invoices produced as Appendix 7(a)-7(j). On the basis thereof, the claimant urged the Court to find that delivery of the seeds and seedlings was indeed made in accordance with the law. He therefore posited that respondent's claim that the Local Service Orders were forgeries is baseless as no Counterclaim was filed by the respondent to plead the alleged forgeries. He urged the Court to find that he had proved his case on a balance of probabilities that indeed he was an employee of the Defendant herein; that his dues for the year 2006 have not been paid; and that he has not been paid by the respondent for seeds and seedlings supplied valued at Kshs. 22,332,600/=. On that account, he prayed that his claim be allowed with costs plus interest.

[17] The respondent's written submissions were filed herein by Prof. Sifuna on the July 22, 2021. On his part, he submitted that a party is bound by his pleadings; and therefore that, to the extent that the claimant prayed only for Kshs. 22,332,600/= for goods allegedly supplied to the respondent, his testimony in connection with the sum of Kshs. 63,000/= for alleged unpaid wages is untenable. He relied on *IEBC & Another v Stephen Mutinda Mule & 3 Others* [2010] eKLR to support the proposition that any evidence led by a party which does not support the averments in that party's pleadings must be disregarded.

[18] It was further the submission of Prof. Sifuna that this court lacks the jurisdiction to determine the claim for unpaid wages in the sum of Kshs. 63,000/= for the reason that it is an aspect that falls under the jurisdiction of the Employment and Labour Relations Court (ELRC). Counsel posited therefore

that the Court must confine itself to the determination of the claim for Kshs. 22,332,600/= for alleged supply of tree seedlings to the respondent.

[19] Prof. Sifuna also took the posturing that, in respect of the claim for Kshs. 22,332,600/=, the claimant has not discharged the burden of proof as required under Section 107 and 108 of the *Evidence Act*. In his view, the claimant failed to demonstrate on a balance of probabilities that the seedlings were ordered for by the respondent; that they were actually supplied by him and that he was not paid for them. He urged the Court to find, from the evidence presented herein, that the claimant did not seem to know the entity he supplied with the seeds and seedlings. He also pointed out that the claimant did not produce any delivery note to show that he actually supplied the seedlings, or the date and the quantities supplied.

[20] Counsel made reference to the *Public Procurement and Asset Disposal Act* No. 33 of 2015, being the statute that governs procurement by public entities. He explained that it would be illegal for goods worth over Kenya Shillings 22 Million to be procured other than by a transparent public tender process. He urged the Court not to promote an illegality, or allow the claimant to benefit from or enjoy the fruits of his illegal acts.

[21] Prof. Sifuna also pointed out that, quite apart from the fact that all the vouchers relied on by the claimant are unsigned, it should be noted that all the Local Service Orders are stamped by Lake Victoria Environment Management Project (LVEMP), even though they bear the name of the respondent. He also pointed out that the only document among the claimant's documents that was purportedly signed by the Head of Kenya Forest Service, North Rift Conservancy, LSO No. 2454 dated 15th May, 2007 (marked Appendix 6(h) in the claimant's Bundle of Documents) was disowned by the respondent and its two witnesses as a forgery.

[22] Lastly, counsel for the respondent submitted that there was no privity of contract between the claimant and the respondent; the claimant having testified that the seedlings were supplied to the Forest Department of the Ministry of Environment and Natural Resources long before the KFS came into existence. Hence, Prof. Sifuna was of the view that the claimant ought to have sued the Ministry of Environment and Natural Resources or the Attorney General as the principal advisor of the Government of Kenya. Thus, counsel urged the Court to dismiss this suit with costs, adding that it was as ill-advised as it was unsubstantiated.

[23] I have given due consideration to the evidence adduced herein in the light of the parties' pleadings and the written submissions filed herein by learned counsel. First and foremost, a preliminary issue was raised by learned counsel for the respondent as to whether the Court has jurisdiction to entertain the aspect of the claimant's suit touching on alleged unpaid wages amounting to Kshs. 63,000/= for the period 3rd January, 2006 to 29th December, 2006. It is trite that where the Court's jurisdiction is questioned, that issue ought to be dealt with in limine by the Court, before attempting a merit consideration of the matter at hand. The rationale for this is to be found in the oft-repeated words of Hon. Nyarangi, JA in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR thus:

> "Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

[24] In this instance, Prof. Sifuna took the view, and correctly so, that the claim for wages, being a dispute between an employer and employee is a matter reserved for the ELRC by dint of Article 162(2)(a) of the *Constitution* as read with Section 12(1) of the *Employment and Labour Relations Court Act*. It is however noteworthy that this matter was instituted at the ELRC and was only transferred to the High Court *vide* the ruling dated 26th January, 2018, by which the ELRC found that the subject matter was civil in nature and therefore fell within the jurisdiction of the High Court. It was on that basis that this suit was transferred to this court.

[25] I have consequently scrutinized the Memorandum of Claim dated July 8, 2013 and noted that indeed, the claimant only prayed for Kshs. 22,332,600/= for seedlings supplied together with interest and costs. There is no prayer for unpaid wages of Kshs. 63,000/= in that Memorandum of Claim. That aspect of the claimant's case is therefore untenable. Untenable because it is trite that parties are bound by their pleadings and are therefore not permitted to deviate therefrom and adduce evidence in respect of matters not raised by their pleadings. The Court of Appeal reiterated this principle in Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others (*supra*) and quoted with approval the following excerpt from the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC* 91/2002:

> "...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...
>
> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

[26] Similarly, in *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 Others* [2016] eKLR, the Court of Appeal, while discussing the same point, cited with approval, the following excerpt from an article by Sir Jack Jacob entitled "*The Present Importance of Pleadings*" published in [1960] Current Legal Problems, at page174:

> "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce on any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered

to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

[27] Lastly, in *Raila Amolo Odinga & Another v IEBC & 2 Others*, [2017] eKLR the Supreme Court of Kenya also quoted from the decision of the Supreme Court of India in *Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & Another*, Civil Appeal Nos. 5710-5711 of 2012 [2014] 2 S.C.R. as follows:

> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings..."

[28] It is manifest therefore that the aspect of the claim for wages does not arise for determination, not so much because the Court does not have jurisdiction to handle such disputes, which are reserved by the Constitution for the ELRC, but because that claim is not one of the prayers sought by the claimant herein. It therefore does not merit the attention of the Court for the reasons aforestated.

[29] That said, the single issue that presents itself for determination herein is whether the claimant has proved his claim for Kshs. 22,332,600/= on a balance of probabilities. Needless to mention that, in a case of this nature, the burden of proof is on the claimant/plaintiff to prove his allegations on a balance of probabilities. Thus, Section 107 of the *Evidence Act*, Chapter 80 of the Laws of Kenya is explicit that:

> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

[30] Likewise, Section 108 of the *Evidence Act* provides that:

> The onus of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

[31] Thus, the Court of Appeal in the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, held: -

> "...As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act..."

[32] In a bid to discharge the burden of proof on him, the claimant's testimony was that he received a requisition from the respondent to supply it with seedlings between January 4, 2005 and February 6, 2009. He produced the requisition as Appendix 6(a) in his Bundle of Documents marked the Plaintiff's Exhibit 1. He explained that he proceeded accordingly and supplied seedlings to the defendant worth Kshs. 22,332,600/= for which the respondent is yet to pay, made up as hereunder:

[a] For 2005 – Kshs. 4,251,000/=.

[b] For 2006 - Kshs. 3, 404, 500/=

[c] For 2007 - Kshs. 5, 323, 500/=

[d] For 2008 - Kshs. 3, 849, 200/=

[e] For 2009 - Kshs. 5,504,400/=

[33] In addition to the requisition aforementioned, the claimant produced a set of Local Service Orders allegedly issued by the respondent over the period in question (Appendix 6(a)-(L) as well as supporting invoices (Appendix 7(a)-(j) in the claimant's Bundle of Documents produced and marked Exhibit 1). His case was strongly resisted by the respondent, whose counsel urged the Court to find that the suit is completely devoid of merit, the same having been based on forged documents.

[34] A brief background would help place matters in perspective. The respondent, Kenya Forest Service, is a state corporation for purposes of Section 2(b) of the *State Corporations Act*, Chapter 446 of the Laws of Kenya, in which "a state corporation" is defined to mean:

> "...a body corporate established before or after the commencement of this Act by or under an Act of Parliament or other written law..."

[35] Thus, having been created under The *Forests Act*, No. 3 of 2005 (now repealed), the respondent was under obligation to ensure compliance with the relevant provisions of the *Exchequer & Audit Act*, Chapter 412 of the Laws of Kenya and the *Public Procurement and Disposal Act* of 2005 (hereinafter, "the repealed PPDA") in all of its procurements undertaken during the period in issue. In Section 29 of the repealed PPDA, it was the norm that all public procurements, especially procurements of goods and services worth over Kshs. 500,000/= would be undertaken by way of open tender. It is therefore curious that in the claimant's case, the claimant could have been awarded a contract to supply seedlings worth millions on the basis of the single requisition marked Appendix 6(a) that purports to have been valid for 5 years between 2004 and 2009.

[36] The second noteworthy aspect is that, under the applicable law at the time in issue, public entities would use Local Service Orders for the procurement of services; while Local Purchase Orders would be used for the procurement of goods. It is therefore not surprising that the Local Service Orders produced as Appendix. 6(b)-6(l) were disowned by the respondent. One of the reasons given for this by DW1 and DW2 is that some of the service orders preceded the respondent's existence, which was from February, 2007. Examples of such LSOs are dated 4th January, 2005; 6th July, 2005; 5th January, 2006; 3rd February, 2006 and 2nd January, 2007.

[37] The claimant was unable to explain this anomaly; and on their part the respondents distanced themselves from the said documents contending that they are all forgeries. Thus, in her evidence DW1 explained that:

> "...LSOs are not for procurement of goods. They are used for procurement of services. For goods the KFS uses LPOs – Local Purchase Orders. It is not possible for 2 entities to do a joint procurement. This claim is not genuine."

[38] DW1 further pointed out that although the twelve LSOs bear running serial numbers, the dates are inconsistent with that sequence; granted that some were purportedly issued over one year apart. In this regard, DW1 testified that:

> "...The document s/no 2461 is dated 2/1/2007. The next LSO is No. 2462 dated 22/1/2008. That is a year's difference. The 3rd one is No. 2464 dated 3/2/2006. This was 2 years back yet they are following each other. The next one is LSO No. 2465 of 22/2/2007. The 5th one is 2466 dated 8/2/2008. That is again one year's difference. During that time the offices were closed during the post-election violence...The same difference can be seen in the LSOs numbers 2467 and 2468. They follow one another and yet the time lapse is long..."

[39] The aforementioned discrepancies are telling; and can only be understood from the prism of the respondent's assertions of forgery for they imply that the institution did not make any procurement for one year, before the next LSO was again issued to the claimant. Indeed, the claimant conceded in cross-examination thus in connection with the LSO No. 2459 dated 24th January 2005:

> "...The LSO dated 24/1/2005 is No. 2459. It bears the logo and address of Kenya Forest Service. It is not a forgery. It was issued to me after 2010. It was backdated...It is true KFS was not in existence in 2005. The next LSO is no. 2463. It was also backdated..."

[40] It is incredible that an entity, in the light of the stringent procurement legal regime in place, would issue and backdate LSOs by 5 years as the claimant would want the Court to believe. Indeed, it is notable, from a cursory look at the claimant's documents that all of them, including the so called requisition letter and the LSOs and the invoices are in the same hand; which DW1 unhesitatingly stated is the claimant's handwriting. It will be recalled that the claimant is well known to DW1, having worked under her charge at the North Rift Conservancy Office in Eldoret.

[41] Further to the foregoing, it is significant that, whereas the requisition in question was allegedly issued to the claimant by the Ministry of Environment and Natural Resources under which the Lake Victoria Environmental Management Project then fell, the suit has been filed against the Kenya Forest Service; never mind that the Local Service Orders were stamped on behalf of the LVEMP on documents purporting to have emanated from Kenya Forest Service. It is therefore telling that in cross-examination, the claimant conceded that:

> "...I was initially employed by the Forest Department. It was then under the Ministry of Environment & Natural Resources. At that time the Kenya Forest Service was not there. Kenya Forest Service was created in 2007. In this case I have sued the Kenya Forest Service and not the Forest Department or the Ministry of Environment...It is true that KFS was not in existence in 2005...I was employed by LVEMP and I made my supplies to LVEMP. It is in existence up to now. I have not sued LVEMP..."

[42] What therefore emerges from the foregoing is a clear case of misjoinder; and an admission by the claimant that he impleaded the wrong party; thereby raising the fundamental question as to whether there existed privity of contract between the claimant and the respondent in the first place. The Court of Appeal in the case of *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* [2015] eKLR discussed the doctrine of privity of contract at length and observed that:

> "...In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the

contract. Accordingly a contract cannot 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 rendered the principles thus:

"My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it."

In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them *Agricultural Finance Corporation v Lendetia Ltd* (*supra*), *Kenya National Capitalcorporation Ltd v Albert Mario Cordeiro & another* (*supra*) and *William Muthee Muthami v Bank Of Baroda*, (*supra*). Thus in *Agricultural Finance Corporation v Lendetia Ltd* (*supra*), quoting with approval from *Halsbury's Laws of England*, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was reiterated:

"As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

[43] More importantly, the claimant failed to exhibit delivery notes to confirm that he indeed delivered seedlings to the respondent, or its predecessor department or LVEMP. When cross-examined on this omission by Prof. Sifuna, he conceded that:

> " ...I confirm that I have not produced any delivery notes to prove that I delivered seedlings..."

[44] There is therefore an evidential gap in the claimant's case in that his evidence falls short of completing the supply chain as by law provided. In fact, the claimant's suit for Kshs. 22,332,600/= becomes even more doubtful considering the reasonableness of his continuing to supply seedlings worth millions year in year out between 2004 and 2009 without payment. And, if it is true he made such supplies, why is it that in on 31st January 2011, after he complained about non-payment to the Permanent Secretary, Ministry of Environment and Mineral Resources, his outstanding debt was captured as amounting to only Kshs. 427,500/=? It would be expected that the letter dated 31st January, 2011 (marked Appendix 8(b) in the claimant's Exhibit 1) by the PS, Ministry of Environment and Mineral Resources to the PS, Ministry of Forest and Wildlife would have contained the full amount of the claimant's debt had it been a genuine claim.

[45] Then there is the pertinent question as to whether, as an employee of the respondent the claimant could engage with the respondent in the business of supplying seedlings. Section 31(d) of the *repealed PPDA* provided, in peremptory terms, that:

> "(1) A person is qualified to be awarded a contract for a procurement only if the person satisfies the following criteria—
>
> ...
>
> (d) the procuring entity is not precluded from entering into the contract with the person under section 33;"

[46] Section 33 of the repealed *PPDA* on the other hand, provided that:

(1) Except as expressly allowed under the regulations, a procuring entity shall not enter into a contract for a procurement with—

(a) an employee of the procuring entity or a member of a board or committee of the procuring entity;

(b) a Minister, public servant or a member of a board or committee of the Government or any department of the Government or a person appointed to any position by the President or a Minister; or

(c) a person, including a corporation, who is related to a person described in paragraph (a) or (b)."

[47] It is plain therefore that even if, arguendo, I were to find that the supplies were indeed made, the contract would have been illegal from the standpoint of the above provision. The maxim of *ex turpi causa non oritur actio* would come into play, notwithstanding that the respondent did not plead fraud in its Memorandum of Reply. In *Scott v Brown, Doering, McNab & Co. (3)* [1892] 2 QB 724 it was held that:

> " This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him."

[48] The maxim has been applied in numerous cases in our jurisdiction. For instance, in *Kenya Ports Authority v Fadhil Juma Kisuwa* [2017] eKLR, in which the claimant relied on forged certificates to found a claim against his employer, the Court of Appeal held that:

> " We can only emphasise that *ex turpi causa non oritur actio*, based on the doctrine that no legal remedy or benefit can flow from an illegal act, explained succinctly by Lord Mansfield CJ in *Holman v Johnson* (1775) 1 Cowp 341 as follows:
>
> "The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this; *ex dolo malo non oritur actio* ["no action arises from deceit"]. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own standing or otherwise, the cause of action appears to arise *ex turpi causa* ["from an immoral cause"], or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

[49] In the result, and for the reasons aforementioned, I find no merit at all in the claimant's claim dated July 8, 2013. The same is hereby dismissed, with an order that each party shall bear own costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 22ND DAY OF JUNE 2022.

OLGA SEWE

JUDGE