**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENY AT MIGORI**

**CIVIL APPEAL NO. 24 OF 2016**

**BENSON OKELO OGOLA.....APPELLANT**

**-VERSUS-**

**SOUTH NYANZA SUGAR CO. LTD.....RESPONDENT**

***(Being an appeal from the judgment and decree by Hon. D. M. Kemei, Chief Magistrate (as he then was) in Migori Chief Magistrates Civil Suit No. 353 of 2014 delivered on 25/04/2016)***

**JUDGMENT**

1. The main issue for determination in this appeal is whether the Appellant herein **BENSON OKELO OGOLA** had the *locus standi* to sustain the lower court suit, **Migori Chief Magistrates Civil Suit No. 353 of 2014** (hereinafter referred to as **'the suit'**) in light of the contention that the Appellant had assigned the Growers Cane Farming and Supply Contract dated 06/05/2009 between the Appellant and the Respondent herein, **SOUTH NYANZA SUGAR CO. LTD** (hereinafter referred to as **'the Contract'**) to one **HELLEN ATIENO OKELLO**, the Appellant's spouse.

2. The existence of the contract is not in dispute. By that contract, the Appellant was to grow sugarcane on his parcel of land known as Plot No. 1018 measuring 0.4 Hectares in Field No. 36A Kamwango Sub-Location in Migori County and upon maturity sell it to the Respondent.

3. The Contract was for a period of five years or until one plant crop and two ratoon crops of the sugarcane were harvested from the subject parcel of land whichever event occured first.

4. It appears that all did not go well as by a Plaint dated 17/09/2014 and filed on 26/09/2014, the Appellant, then the Plaintiff, sought for a declaration that the Respondent, then the Defendant, was in breach of the contract and claimed compensation for the loss of the unharvested cane, costs and interest at court rates.

5. The Respondent entered appearance and filed a Statement of Defence dated 08/01/2015 and admitted the existence of the contract but denied being in breach either as alleged or otherwise. The Respondent contended that if at all there was any breach of the contract, then it was the Appellant who was in such breach as it particularized in paragraph 8 of the defence.

6. The suit was fully heard where both parties were represented by Counsels. The Appellant was the sole witness who testified and adopted his Statement as part of his testimony. He also produced some of the documents in his List of Documents as exhibits. They were the contract, the demand notice, Schedule of prices of sugar and the Sugar Act. The Respondent called its Senior Field Supervisor as its sole witness

and who did not adopt his Statement as part of his testimony. The witness however produced an Assignment contract and an Affidavit in contending that the Appellant had assigned the contract to his spouse one Hellen Atieno Okello and as such lacked any *locus standi* in the suit.

7. Judgment was rendered on 25/04/2016 and the suit was dismissed with costs for reason that the Appellant lacked the *locus standi* to sustain the suit. That is the judgment subject of this appeal.

8. The Appellant in praying that the appeal be allowed proposed the following three grounds in the Memorandum of Appeal dated 19/05/2016 and filed in Court on 24/05/2016:

> ***1. The learned magistrate erred in law and facts, when he failed to consider, evaluate and balance the pleadings, evidence and submissions thereby reaching to a wrong conclusion that the appellant had no locus standi to bring the suit thereby dismissing the plaintiff's suit.***
>
> ***2. The learned trial magistrate erred in law and in fact by purporting to dismiss the plaintiff's case for lack of locus standi yet the defendant did not produce the payment receipt for the purported sugar cane transfer as required by the law.***
>
> *3.* ***The learned trial magistrate was biased against the Appellant****.*

9. Directions were taken and the appeal was disposed of by way of written submissions where both parties duly complied with the filing of the submissions. On his part, the Appellant submitted that the trial court erred in finding that the Appellant lacked any *locus standi* given that the issue was not pleaded and even the documents adduced were contradicted accordingly. In support of that submission the Appellant relied on the cases of **G.P. Jani Properties Limited vs. Dar es Salaam City Council (1966) EA 281, The Independent Electoral and Boundaries Commission and Leonard Okemwa (Returning Officer) vs. Stephen Mule & others, Civil Appeal No. 219 of 2013 (2014)eKLR.** In praying for costs and interests from the date of the filing the suit, the Appellant relied on the case of **John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013) eKLR.**

10. The Respondent supported the trial court's decision in submitting that the trial court rightly upheld that the Appellant lacked any *locus standi* in the suit.

11.As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348).**

12. I have carefully perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties. From the judgment, the trial court in handling the aspect of *locus standi* expressed himself as follows: -

> ***'The statement of Defence does not indicate the issue of assignment of contract and it has been raised during the hearing. Indeed parties are bounded by their pleadings and expected to argue out their cases based on what they have pleaded in their documents before close of pleadings.***
>
> ***However by dint of provision of Article 159(2) (d) of the Constitution the courts are mandated to administer justice without undue regard to procedural technicalities. Hence the court are required to consider cases on their merits.***
>
> ***Indeed the issue of assignment of contract was not pleaded but has been introduced at the hearing stage. I find the issue of the assignment of contract to be a crucial one which should be determined even though it had not been raised in the pleadings. I have perused the said***

***Assignment of Contract and the companying Affidavit and find that the same was presented to the Defendant and it was processed going by several approvals and signatures and receipt number 151789 endorsed on the document."***

13. As rightly pointed out by the trial court, the issue of assignment of the contract was not part of the defence of the Respondent. In essence, the Respondent did not expressly plead it in its Defence filed on 08/01/2015. The issue was introduced in the Statement of one Richard Muok dated 24/07/2015 and filed on 27/07/2015 who is the Respondent's witness. Together with that Statement, the Respondent filed a List of Documents where it introduced an Assignment Contract and an Affidavit. These two documents were eventually produced as exhibits. Even with the filing of the said documents, the Respondent still did not deem it fit to amend its defence.

14. From the record, the suit was not set down for a pre-trial conference but the main hearing. On cross-examination, the Appellant denied ever assigning the contract to his wife. Apart from the foregoing, the Appellant was not further cross examined on the two documents; that is the Assignment Contract and an Affidavit. The Respondent's witness was cross-examined on the documents. He admitted that according to the contract book, the contract was still in the name of the Appellant and that he had no receipt for the requisite transfer fee of Kshs. 150/- which fee would effectively seal the assignment. He however referred to the serial number of the receipt issued which number appeared in the Assignment contract. This Court has seen the contract and noted that there were no changes entered in its Schedule A.

15. Parties in any suit are always bound by their pleadings. The pleadings are the backbone of the entire litigation. It is the pleading that clearly lays out the party's position in that suit. Anything forming part of the record of court must be anchored on the pleadings as far it tends to support or disprove any of the pleadings. The law recognizes that position so well that under **Order 2, Order 7** and **Order 8** of the **Civil Procedure Rules** a party is given an opportunity to amend its pleadings, as and when need arises. That is to avoid a party ambushing the other party moreso in our adversarial system of litigation.

16. I believe that the foregone position is not only cardinal in civil litigation but also too well settled. The Court of Appeal, has severally and properly so, expressed itself that parties are bound by their pleadings and that any defence not pleaded cannot be argued (**G.P. Jani Properties Limited vs. Dar es Salaam City Council (1966) EA 281),** that all issues in a suit must arise from the pleadings however well-intentioned and that any evidence which does not support the pleadings must be disregarded (**The Independent Electoral and Boundaries Commission and Leonard Okemwa (Returning Officer) vs. Stephen Mule & others, Civil Appeal No. 219 of 2013 (2014)eKLR),** among many others.

17. Therefore, the learned trial magistrate, with tremendous respect, having rightly found that the issue of assignment of the contract was not part of the pleadings before him and having not conducted a pre-trial conference, committed an irreversible error in considering that issue and finding the suit on that single issue. The appeal must succeed even solely on that score. There was hence no proof or admissible evidence that the Appellant had assigned the contract and as such had no *locus standi* in the suit. That contention ought to have failed.

18. The learned trial magistrate however invoked **Article 159(2)(d)** of the **Constitution** as the basis of considering the issue of assignment of the contract even though it was not properly on record and treated that as a procedural technicality. My response to that is that the Constitution must be applied holistically and a court enforcing the Constitution must do so while alive to the entire Constitution. In this case **Article 159(2)(d)** is to be taken in tandem with **Article 35** of the **Constitution** which guarantees a citizen the right to access any information held by another person which is required for the exercise of or protection of the right or fundamental freedom and **Article 50** of the **Constitution** which further guarantees a party to any dispute a right to a fair hearing which includes the right to information well before the case is heard. That is summed up as one of the rules of natural justice. (See the cases of **Ridge vs. Baldwin (1964) AC 40** and **Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR** among others).

19. Having found that the suit ought not to have been determined on the issue of lack of *locus standi,* it

now behooves this Court to ascertain whether the Appellant proved his case. The Appellant, in paragraphs 4, 5 and 6 of the Plaint pleaded that the Respondent failed to harvest the first ratoon crop thereby compromising the development of the second ratoon crop and demanded compensation for the loss. However, his position changed in the filed Statement as well as in his testimony in court. He then sought for compensation for the plant crop and two ratoon crops claiming that the Respondent did not harvest the plant crop and thereby compromised the development of the ratoon crops. In view of the foregoing discussion on the *locus standi*, this Court will hence not deal with the allegation that the Respondent did not harvest the plant crop but will only restrict itself to whether the first ratoon crop was developed and harvested as per the contract. Going by the Appellant's evidence that ***'the plant crop was not harvested even after I alerted the Defendant. the crop thus dried up. I could not develop the rest of the crop cycles'*** it is clear that the Appellant did not develop the first ratoon crop. The Appellant therefore did not prove his claim.

20. Although the Appellant has succeeded to the extent that he had the *locus standi* to sustain proceedings under the contract before the lower court, he still is unsuccessful in that he failed to prove his claim. He is equally caught up in the very web that this Court cannot entertain evidence which does not have a basis in the pleadings.

21. The upshot is that the following orders do issue: -

**a) The appeal hereby succeeds to the extent that the Appellant had the *locus standi* to maintain the suit and therefore the finding of the learned magistrate that the Appellant lacked the *locus standi* is hereby set aside accordingly;**

**b) The Appellant's suit still stands dismissed for failure to prove the claim;**

**c) Parties shall bear their own costs of the appeal as well as the costs of the suit.**

**DELIVERED, DATED and SIGNED at MIGORI this 6th day of June 2017.**

**A. C. MRIMA**

**JUDGE**