IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL CASE NO.214 OF 1992

LUJUNA SHUBI BALLONZI, SENIOR..... PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES OF CHAMA CHA MAPINDUZI.. DEFENDANTS

R U L I N G

SAMATTA, J.K:

One of the principal questions I have to decide in this matter is whether the Plaintiff (now the respondent), Mr. Lujuna Shubi Ballonzi, Senior, has locus standi or standing to bring the action which is now before this Court. In his plaint the respondent has sued the Registered Trustees of Chama Cha Mapinduzi (hereinafter referred to by its acronym; CCM), praying for the following reliefs, among others:

(1) a declaration that CCM is not a political party;

(2) an order that the defendants be dissolved and liquidated;

(3) a declaration that the defendants have no rights to movable and immovable properties which they have "purported" to acquire by using subventions from the Consolidated Fund;

(4) an order that the defendants pay all external debts amounting to not less than seven billion dollars "incurred on behalf of Tanzanians"; and

(5) a permanent injunction restraining the defendants from using and/or alienating properties in their

possession.

In the plaint the respondent avers, inter alia:

"3. That the Defendants on or about the 5th day of February, 1977, took all assets of the Tanganyika National African Union of Tanganyika and the Afro Shiraz Party of Zanzibar ("The Founder Parties").

4. That the Founder Parties were, without authority and mandate of the people, receiving subventions from the Consolidated Fund of Tanzania and compulsory contributions from people residing in Tanzania and others doing business with Tanzania and used those moneys to acquire movable and immovable properties which were then registered in their respective names. ALTERNATIVELY the founder parties should have used those funds prudently for the benefit of all Tanzanians.

5. The Defendants without the authority and mandate of the people of Tanzania constituted themselves a state party on or about the 5th day of February, 1977, and continues to receive and use funds from the Consolidated Fund and compulsory contributions aforesaid in the same manner as the Founder Parties until the 30th day of June, 1922.

6. That the Defendants are continuing to coerce the business community to contribute to them funds by using their position as a de facto Government. These funds can only be received for and on

behalf of all Tanzanians.

7. That the Defendants, without the authority and mandate of Tanzanians, transferred to themselves assets that they had acquired from the Founder Parties and registered them in their names and further acquired other properties from the subventions referred to in paragraph 5 herein and registered them in their names.

8. That the Defendants have no right to the properties referred to in para 7 herein because these properties were purchased, acquired and/or constructed from funds which belonged to the peoples of Tanzania the overwhelming majority of whom are not members of the Defendants and therefore can hold such properties as trustees of the people of Tanzania and not as Trustees of CCM.

9. The Plaintiff has never been a member of the Founder Parties and CCM but has contributed to the funding of the Consolidated Fund through payment of taxes and has been forced on several occasions to contribute towards CCM which moneys have found their way in the coffers of the Defendants.

10. It is estimated that the Defendants have accumulated properties worth shillings seven hundred and eighty billion

(T.shs.780,000,000,000/=) from state funds and have used one trillion shillings (Tshs.1,000,000,000,000/=) to activities unrelated to welfare of Tanzanians and have through mismanagements, outright theft and autocracy incurred an external debt of dollars seven billion (7,000,000,000,) ostensibly on behalf of Tanzanians but without the authority and mandate of the people.

11. That on the 1st day of July, 1992, the Defendants have in an autocratic manner constituted themselves as a political party and continue to cling on properties referred to in para 7 herein as theirs and have shown no intention to return them to the Government of the United Republic of Tanzania despite demand.

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14. For purposes of jurisdiction and court fees the value of the subject matter of the suit is in excess of four trillion shillings (4,000,000,000,000/=)."

I have decided to quote the averments in the plaint **in extenso** because of the unusual character of the case. The Defendants (now the applicants) have filed, under Order VI, rule 16 and S.95 of the Civil Procedure Code (the Code) and s.2(2) of the Judicature and Application of Laws Ordinance, Cap. 453, an

application in which they pray that the plaint be struck out on one or more of the following grounds:

(1) it discloses no reasonable cause of action;

(2) it is scandalous, frivolous and vexatious; and

(3) it is an abuse of the process of the Court.

The application was heard **ex parte** because, although he was duly served with notice of hearing, the respondent, who was not legally represented, did not appear at the hearing.

Mr. Uzanda (who was assisted by Ambassador Rutakyamirwa and Miss Mujasiri) strenuously attacked, from several fronts, the respondent's right in law to bring his action against the applicants. The learned advocate contended that the suit is incompetent for not disclosing a cause of action and for being scandalous, frivolous and vexztious and an abuse of the process of this Court. He advanced four grounds in support of that contention. Those grounds may, without doing any injustice to the very skilful manner in which the learned advocate put forward his arguments, be summarised as follows:-

(1) The purported representative suit is incompetent because the mandatory provisions of Order 1, rule 8 of the Code have not been complied with.

(2) The suit is incompetent in law because no cause of action on trust has been disclosed by the plaint.

(3) Assuming that the respondent has (properly) pleaded a trust, the non-compliance with the provisions of s.67 of the Code is fatal to the suit.

(4) Since the case is based on averments that the applicants were receiving subventions from the Consolidated Fund, the

suit should have been instituted against the Government, and not against the applicants. In any case, the payment of those funds is not a justiciable issue or one which is subject to review by the courts.

In this country, **locus standi** is governed by the common law. According to that law, in order to maintain proceedings successfully, a plaintiff or an applicant must show not only that the court has power to determine the issue but also that **he** is entitled to bring the matter before the court: see Halsbury's Laws of England, 4th ed., para 49 at p.52. Courts do not have power to determine issues of general interest: see Re I.G.Farbenindustrie A.G. Agreement [1943] 2 All E.R. 525. They can only accord protection to interests which are regarded as being entitled to legal recognition. They will thus not make any determination of any issue that is academic, hypothetical, premature or dead. Because a court of law is a court of justice and not an academy of law, to maintain an action before it a litigant must assert interference with or deprivation of, or threat of interference with or deprivation of, a right or interest which the law takes cognizance of. Since courts will protect only enforceable interests, nebulous or shadowy interests do not suffice for the purpose of suing or making an application. Of course, provided the interest is recognised by law, the smallness of it is immaterial. It must also be distinctly understood, I think, that not every damage or loss can be the

subject-matter of such proceedings. The maxim damnum sine injuria ergo agitat (there may be damage or loss sustained without any act being done which the law views as unlawful) is, without any shadow of doubt, part of the law of this country. An example of damnum absque injuria (loss without a wrongful act) is where a man puts up a shop in order to attract the customers of another shop. In Gregory and Another V London Borough of Camden [1966] 1 All E.R. 304, at p. 309 C - H, Diplock, J. described the proven law principle in these words:

> "There are many acts which cause loss which give no legal rights. Before one can sue in law, one must suffer an injuria as well as damnum; one must have suffered a legal wrong as well as the natural loss of money or amenity or something else".

Under s.210(1) of the Public Health (Control of Diseases) Ordinance, Cap. 253, this Court has, of course, power to modify the normal law or to rule out most local publishers. Originally, the identical power conferred on the High Court of East Africa by the provisions of Article 11 of the East African Order in Council (S.R. & O. 1909 No. 661) as amended by the East African Order in Council of 1911, in Wyatt Ltd. V Attorney-General [1956] 1 All E.R. 446 DENNING L.J. said, at p. 453:

> "The provisions may, however, make the common law to apply "subject to such qualifications as local circumstances render necessary". Those very provisions should, I think, be liberally construed. It is a question what the common

> law cannot be applied in a foreign land without considerable qualification. Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands. It is a great task. I trust that they will not fail therein".

In this country, is there any logical basis for modifying the common law rule of **locus standi?** In India the Supreme Court has widened that rule. The new approach there is described by Mr. Justice P.N. Baghwati, a former Chief Justice of that country, in his article **Fundamental Rights in their Economic, Social and Cultural Context**, published in DEVELOPING HUMAN RIGHTS JURISPRUDENCE, Vol.2 at p.83, in the following terms:

"... there was difficulty in enforcing the human rights of the poor and the disadvantaged, because they are not aware of their rights, they lack the capacity to assert those rights and they do not have the material resources to approach the courts in cases other than criminal. As a result of a large range of human rights remain unenforced. We therefore developed the strategy of public interest litigation. We held in a seminal decision that the ordinary rule of Anglo-Saxon jurisprudence is that an action can be brought only by a person to whom legal injury is caused. However, this rule must be departed from in the cases of poor and disadvantaged classes of people where legal injury is caused to a person or class of persons who, by reason of poverty or disability or socially or economically disadvantaged position, cannot approach the courts for judicial redress. Thus we held that any member of the public, or social action groups acting bona fide, can approach the court seeking judicial redress for the legal injury caused to such person or class of persons, and that in such a case the court will not insist on a regular petition being filed by the public spirited individual or social action group espousing their cause and will readily respond - even if its jurisdiction is invoked merely by means of a letter addressed to it, as can happen in the case of habeas corpus actions. This widening of the rule of locus standi introduced a new

> dimension in the judicial process and opened a new vista of a totally different kind of litigation for enforcing the basic human rights of poor and underprivileged sections of the community, and ensuring basic human rights dignity. Much of the human rights jurisprudence in India has been built up by the courts as a result of public interest litigation. The Courts have been enforcing basic human rights of the deprived and vulnerable sections of the society in cases under trial as well as convicted prisoners, women in distress, children in jails and juvenile institutions, bonded and migrant workmen, unorganised labour "untouchables" and "scheduled tubes", landless agricultural labourers who are denied minimum wages or who are victims of faulty mechanisation, slum and pavement dwellers and victims of extra-judicial executions and many more".

If I may respectfully say so, there is, I think, some justification for extending the rule of locus standi in the direction taken by the Supreme Court of India. The provisions of s.26(2) of the Constitution of the United Republic of Tanzania (the Constitution) do not seem to extend the rule to the degree done by the Supreme Court (of India). Bearing in mind the realities of our society, including the comparable educational backwardness and poverty of the majority of the people, I would respectfully agree with the following observations by Mr. Justice Kayode, a former Justice of the Supreme Court of Nigeria, made

in his article **The Role of The Judge in Advancing Human Rights** in DEVELOPING HUMAN RIGHTS JURISPRUDENCE, Vol.3, at p.100:

> "It is submitted that the greatest excuse of the advocate of restraint in **locus standi** is that there would be floodgate if everyone is given hearing in (Human Rights cases). No one would advocate floodgate in ordinary cases, but as has been submitted earlier, human rights are special rights and special rights deserve special treatment. If floodgate it entails, let there be one, once it is a matter of human rights".

An ordinary person is likely to be more conversant with his private law rights than with his public law rights. By necessity the rule of **locus standi**, in so far as it relates to human rights litigation, must be wide. I can see no warrant for making similar extension to the rule as far as private interest litigation is concerned. Since I do not think it would be right to consider the respondent's suit as falling under the purview of human rights litigation, I proceed, being guided by, among others, the cases I have cited **supra**, to consider the merits or otherwise of Mr. Uzanda's submissions.

Although in the plaint he does not expressly say so, it is as plain as a pikestaff that the respondent has purported to file the suit not only on his own behalf but also on behalf of all Tanzanians who are not members of CCM. As already indicated, Mr. Uzanda contends that the suit is incompetent in law on the ground that the provisions of Order 1, rule 8 of the Code have not been

complied with. I have no doubt that this contention is unanswerable. Rule 8 of Order 1 reads:

> "8 - (1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.
>
> (2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the court to be made a party to such suit".

This rule is almost **in pari materia** with Order 1, rule 8(1), (2) and (3) of the Civil Procedure Code of India. Commenting on the latter rule, the learned authors of Sir John Woodroffe and Ameer Ali's CODE OF CIVIL PROCEDURE, 3rd ed., Vol.II, state as follows, at p.1403:

> "The foundation of Order 1, rule 8 C.P.C. is to be found in a principle which transcends the personal or parochial nature of the combatants who are arrayed as parties to the suit. It affects the rights of other persons not present before the Court. Hence a duty

> is cast on the Court itself to follow meticulously the procedure prescribed by Order 1, rule 8. In view of the far reaching consequences of a decree passed in what is described in law as a representative suit, it is necessary that the relevant provisions must be treated as peremptory and mandatory".

And at p.1405, the learned authors state as follows:

> "A representative suit cannot be said to have been validly instituted unless and until the mandatory provisions of Order 1 rule of the Civil Procedure Code are complied with. The provision contained in Order 1, rule 8, C.P.C. .... is mandatory and not merely directory and is an essential pre-condition for the trial of the case as a representative suit. It is imperative that the two conditions provided in rule 8 of Order I, should be complied with, namely, (1) the permission of the Court should be obtained and (2) the Court should, at the expense of the plaintiffs, issue notice of the institution of the suit to all such persons either by personal service or where from the number of persons, or any other cause such service is not reasonably practicable, by public advertisement, as the Court may direct".

In my view, these two passages also accurately state our law. A person cannot seek to advance the claims of a group of persons without adopting the procedure laid down in rule 8 of Order 1 of the Code. He cannot, as the respondent in the case now before me has purported to do, institute a representative suit without

first obtaining leave of the court to bring such suit. When such suit is instituted without that leave, it must struck out for being incompetent in law. Common interest litigation can be conducted only in accordance with the provisions of Order 1, rule 8 of the Code. As already remarked, failure to comply with those mandatory provisions is fatal to any such suit or application. This is, in law, a surficient ground for striking out the respondent's purported representative suit.

As was very rightly pointed out by Mr. Uzanda in his submission, nowhere in his plaint has the respondent asserted that, as a result of the applicants' alleged misconduct, he has suffered special damage over and above other Tanzanians or millions of Tanzanians who are not members of CCM. It is a principle of the law of this country that public rights can only be asserted in a civil action by the Attorney General as the guardian of the public interest. Except where statutory provisions provide otherwise, a private person can only bring an action to restrain a threatened breach of the law if his claim is based on an allegation that the threatened breach will constitute an infringement of his private right or will inflict special damage on him. What, as far as common law is concerned, are authorities for these propositions? To answer that question, I would cite Attorney - General (on the relation of McWhirter v. Independent Broadcasting Authority [1973] 1 All E.R. 689 and Gouriet v Union of Post Office Workers and Others [1977] 3 All E.R. 70, two of the cases Mr. Uzanda referred me to in the course

of his very attractive submission. I do not consider it necessary to go into the facts of those cases. Both cases concerned the scope of the common law general principle that a private person is not entitled in law to bring an action in his own name for the purpose of preventing or seeking compensation for public wrongs. In the former case, LORD DENNING, M.R., said, at p.696:

> "If a government department or a public authority transgresses the law laid down by Parliament, or threatens to transgress it, can a member of the public come to the court and draw the matter to its attention? He may himself be injuriously affected by the breach. So may thousands of others like him. Is each and every one of them debarred from access to the courts? The law is clear that no one of them can bring an action for damages, unless he has suffered special damage over and above everyone else. That was settled in 1535 in a case in the Year Books. That rule was laid down in order to avoid multiplicity of actions. The argument was put in this way: 'If one of those injured were allowed to sue, a thousand might do so: and that was considered intolerable.' Sir William Blackstone in his commentaries said:
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> > '... it would be unreasonable to multiply suits, by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow-subjects'.

> But does this rule - which prevents anyone suing for damage - also prevent any member of the public from seeking a declaration or an injunction? (These) are discretionary remedies, to which no one has a right, but which the court can grant if it thinks fit. The usual course, no doubt, is for the member of the public who is aggrieved to go to the Attorney-General and ask him to intervene - either ex officio or by granting leave to use his name in a relator action. In all proper cases the Attorney General will, no doubt, give his leave. But it is a matter for his discretion".

The Master of the Rolls then went on to consider whether the aggrieved member of the public had any access to court if the Attorney-General unreasonably refused to give the leave sought. He answered the question in the affirmative. In the course of giving that answer, he made, if I may respectfully say so, very helpful observations on the role of the Attorney-General in this respect. He said, at p 697:

> It is settled in our constitutional law that in matters which concern the public at large the Attorney-General is the guardian of public interest. Although he is a member of the government of the day, it is his duty to represent the public interest with complete objectivity and detachment. He must act indpendently of any external pressure from whatever quarter it may come. As the guardian of the public

> interest, the Attorney-General has a special duty in regard to the enforcement of the law.
>
> His duty has been thus stated by members of this court who, each in his turn, had held the office of Attorney-General. In 1879 in Attorney-General V. Great Easter Railway Co. (1880) 11 Ch D449 at 500 Baggalay L.J. said:
>
> It is the interest of the public that the law should in all respects be respected and observed, and if the law is transgressed or threatened to be transgressed ... it is the duty of the Attorney-General to take the necessary steps to enforce it, nor does it make any difference whether he sues ex officio, at the instance of relators'.

In 1924 Sir Ernest Pollock MR repeated those very words with approval: see Attorney General V Westminster City Council [1924] All ER Rep 162 at 165. To these I would add the words of Lord Ebinger CB who had himself been Attorney - General in Deare v Attorney-General (1835) IX & C Ex 197 at 208:

> '... it has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a Court of justice, where any real point of difficulty that requires judicial decision has occurred'".

In Gouriet's case supra. LORD WILBEREFORCE analysed the common law principle at great length. In the course of his judgment,

he said, at p.80:

> "It can be properly said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney - General enforces them as an officer of the Crown, and just as the Attorney - General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out." (the emphasis is supplied)

And at p.83 b - c, his Lordship said:

> "That it is the exclusive right of the Attorney-General to represent the public interest, even where individuals might be interested in a larger view of the matter, is not technical, not procedural, not fictional. It is constitutional. I agree with Lord Westbury LC that it is also wise".

Do the provisions of s.26(2) of the Constitution entitle the respondent to bring the action now before this Court? I think not. In the first place, in his plaint the respondent has not complained of unconstitutionality or illegality. Although he is a lawyer by profession, he has not cited any provision of the Constitution or any other law which has been violated by the

applicants. This omission is, in my view, a matter of no surprise. The respondent could not have made such citations because under the Constitution and law then in force no unconstitutionality or illegality could arise in the applicants receiving from the Government the moneys they are said to have received on behalf of CCM, or in the Government making those disbursements. I will be forgiven, I hope, for stating the obvious, namely, the constitutionality or legality of yesterday's actions cannot be tested by today's constitution or law. Secondly, it is my considered view that those provisions were not intended to, and do not, abolish the application in Tanzania of the common law principle that a private person cannot assert rights belonging to the public. In my judgment, they merely reduce the scope of the rule. As far as public nuisance and public charity are concerned, two or more private persons may, under s.66 and 67 of the Code respectively, bring a relator action. But to do so, those persons must obtain the consent of the Attorney - General: see Tricumdass Mulji and An. v. Khimji Vullabhdass and Others (1892) 16 Bom. 626 and Lutifunnissa Bibi and Others v Nazirun Bibi (1885) 11 Cal 33. The provisions of those two sections are mandatory; suits to which the sections apply can only be instituted in accordance with their provisions. It cannot be denied that the instant suit has not been instituted in compliance with the provisions of s.67. It may well be - and I stress that I say no more than that - that the trustees of a political party can, in law, seek from this Court

some of the reliefs the respondent has purported to pray for in the instant case.

Lastly, I must deal with Mr. Uzande's submission concerning subventions which were being made to the applicants. I am not disposed to think that all the issues raised by the respondent in his plaint are not justiciable. Some of those issues can, in my opinion, be properly examined in courts of law provided they are raised by a party having locus standi. Whether CCM is a properly registered political party, for example, is plainly a question of law, whose answer must lie in the Constitution and the Political Parties Act. Nevertheless, I agree with the learned advocate's submission that the remedy, if any, for any wrong allegedly committed in relation to subventions received by the applicants does not lie in the judicial field. In general, the management of public funds, like the management of the economy and foreign policy of the country, is the prerogative of the executive; it is not amendable to judicial process. In the exercise of its powers in that field the executive is accountable to Parliament. It would be straining to the utmost the power of judicial innovation to say that in the exercise of its powers in that area the executive falls under judicial superintendence or scrutiny. Generally speaking, judicial process is unsuitable for determining issues arising from the exercise of those powers. I find considerable support for that proposition in the observations made by LORD DIPLOCK in Council of Civil Service Unions and Others v Minister for the Civil Service (1985) 1 A.C.

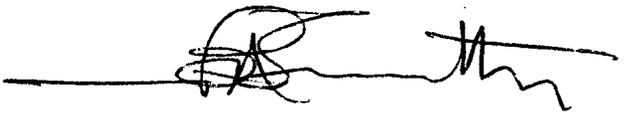
374, albeit in a somewhat different context. At p.411 his Lordship said:

> "... The reasons for the decision - maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer; by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the attention of the court competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another - a balancing exercise which judges by their upbringing and experience are ill-qualified to perform."

An assertion that the exercise of every governmental power is subject to judicial scrutiny would not be a sustainable proposition.

Judging from what he avers in his plaint, Mr. Ballonzi, Senior, feels very strongly about the weaknesses of the political system which existed in this country before the multi-party system was adopted a few years ago, but the law regards him as lacking status to maintain the proceedings he has instituted before this Court. While he may deserve commendation for his vigilance in support of democracy, the applicants have demonstrated to my satisfaction that his suit has not been properly framed and some of his causes of action are incontestably bad in law. The suit will not lie.

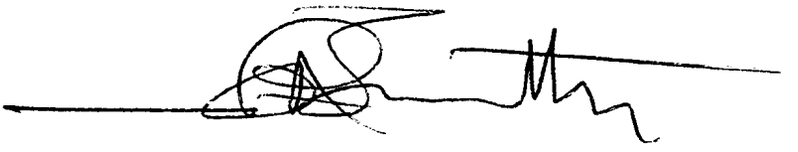
The application is granted and the suit is, under s.95 of the Civil Procedure Code, struck out. The applicants will have their costs.



B.A. Samatta

JAJI KIONGOZI.

Delivered this 9th day of May, 1995, in the presence of counsel for the applicants.



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